

# PRESSING PAUSE: TOLLING STATUTES OF LIMITATIONS FOR SEX OFFENSES WHILE RAPE KITS REMAIN UNTESTED

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## INTRODUCTION

Over the course of the last decade, a problem slowly made its way to the forefront of national consciousness. Hundreds of thousands of sexual assault evidence kits, also known as rape kits, were collected, stored, and forgotten.<sup>1</sup>

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1. See Jill E. Daly, *Gathering Dust on the Evidence Shelves of the United States – Rape Victims and Their Kits: Do Rape Victims Have Recourse Against State and Federal*

As interest in this issue grew, more media outlets turned their attention to this growing backlog.<sup>2</sup> Advocacy groups worked to educate elected officials and the general public, and solutions began to emerge on the state and federal level.<sup>3</sup> Several states passed legislation to address the existing backlog and ensure that kits will be tested more efficiently in the future.<sup>4</sup> At the federal level, Congress passed several bills targeting rape kit backlogs, although with limited success.<sup>5</sup>

Now that many jurisdictions are seeing the number of untested rape kits decrease, another problem has arisen. As a result of years-long delays in kit testing, collected evidence that can identify a suspect is sometimes unusable because the statute of limitations for prosecuting the rape or sexual assault has expired.<sup>6</sup> Statutes of limitations are an important feature of criminal law because they promote prompt prosecutions, reduce uncertainty, and allow both defendants and society to have a sense of repose about old crimes.<sup>7</sup> However, given the backlog of unprocessed rape kits and the gravity of sex crimes, legislative exceptions to statutes of limitations are appropriate.<sup>8</sup> Many states have already integrated DNA exceptions into their limitation laws, while other states have done away with statutes of limitations for sex

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*Criminal Justice Systems?*, 25 WOMEN'S RTS. L. REP. 17, 22 (2003) (asserting that in the United States, as of 2003, there were 500,000 untested rape kits).

2. See Steve Reilly, *Tens of thousands of rape kits go untested across USA*, USA TODAY (Jul. 16, 2017), <https://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/> (describing investigative efforts by journalists to obtain an accurate number of untested kits).

3. See Glenna Ellen Fucci, *No Law and No Order: Local, State, and Federal Government Responses to the United States Rape Kit Backlog Crisis*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 193, 208-09, 216-18, 221 (2015) (detailing state and federal laws introduced and passed in attempt to end the backlog).

4. See *id.* at 209-17 (reporting four main types of state-level bills: inventory bills, mandatory future testing bills, comprehensive testing bills, and survivor bills).

5. See *id.* at 217-18 (noting that while the Debbie Smith Act and SAFER Act were important steps made by Congress, the number of untested kits remains high).

6. See generally Jonathan W. Diehl, Note, *Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases*, 39 JURIMETRICS J. 431, 431, 439 (1999) (recommending DNA exceptions to statutes of limitations that balance the interests of victims with the rights of defendants).

7. See Lauren Kearns, Note, *Incorporating Tolling Provisions into Sex Crimes Statutes of Limitations*, 13 TEMP. POL. & CIV. RTS. L. REV. 325, 327 (2003) (examining the general background of statutes of limitations).

8. See *id.* at 357 (explaining, in the context of child sexual abuse, how delays in reporting and testing make tolling exceptions necessary to prosecute the widest possible amount of sex crimes).

offenses altogether.<sup>9</sup> These provisions, along with other efforts by advocates and lawmakers, have made progress in ending the rape kit backlog in many jurisdictions.<sup>10</sup>

In New York, courts have interpreted the tolling provision of the criminal statute of limitations in such a way that allows the period of limitation to toll while a defendant's whereabouts are unknown – for example, if an unknown sexual assailant cannot be identified until a rape kit is tested.<sup>11</sup> While New Hampshire's limitation statute contains a similarly-worded tolling provision, the New Hampshire courts have not interpreted the provision to include a DNA tolling exception.<sup>12</sup> This comment argues that New Hampshire should follow the reasoning laid out in New York case law that allows the statute of limitations on sexual offenses to toll until a victim's rape kit has been processed.<sup>13</sup> Part II describes the current state of tolling exceptions for sex offenses in New York and New Hampshire.<sup>14</sup> Part III argues that New Hampshire's failure to include a DNA exception to its statute of limitations for sexual assault is an incorrect interpretation of its tolling statute that hinders effective prosecution.<sup>15</sup> Part IV recommends that, in the absence of statutory language authorizing a DNA exception, New Hampshire should utilize the same common law strategy used in New York to introduce the exception.<sup>16</sup> Part V concludes by reiterating that exceptions that toll statutes

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9. See Brittany Ericksen & Ilse Knecht, *Statutes of Limitations for Sexual Assault: A State-by-State Comparison*, NAT'L CTR. FOR VICTIMS OF CRIME, <https://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2> (last updated Aug. 21, 2013) (concluding that 27 states have enacted some form of DNA exception to statutes of limitations).

10. See *State Responses*, END THE BACKLOG, <http://www.endthebacklog.org/ending-backlog/state-responses> (last visited Oct. 5, 2017) (listing various responses from state governments that have improved kit testing rates).

11. See N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2014) (tolling the statute of limitations when a defendant's whereabouts are unknown); see also *People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (creating the DNA exception in New York by concluding that a person's whereabouts include his identity).

12. See N.H. REV. STAT. ANN. § 625:8 (2014) (tolling the limitation period for felonies when the defendant's abode or workplace are unascertainable).

13. See *People v. Harrison*, 803 N.Y.S.2d 5, 6-7 (N.Y. App. Div. 2005) (holding that prosecution for rape is not time-barred when defendant's whereabouts are unknown and a DNA sample remains untested).

14. See *infra* Part II (comparing the statutes of limitations for sex offenses in New York and New Hampshire).

15. See *infra* Part III (asserting that DNA exceptions to statutes of limitations balance the victims' interests with the defendants' rights).

16. See *infra* Part IV (recommending that New Hampshire courts adopt the common law DNA exception used in New York courts).

of limitations, while DNA evidence remains untested, balance the needs of victims with the rights of defendants.<sup>17</sup>

### I. BACKGROUND

Statutes of limitations have a long and well-established place in the American legal landscape. However, despite its longevity, there are several conflicting rationales for the doctrine's existence.<sup>18</sup> The most common justifications for statutes of limitations are promoting repose, preserving fresh evidence for prompt prosecution, and protecting defendants from unfair trials.<sup>19</sup>

The concept of repose may seem counterintuitive at first, but it serves a variety of purposes for defendants, victims, and potentially interested third-parties, such as witnesses.<sup>20</sup> Even victims gain some benefit from limitations to prosecution; for example, reopening an old case may bring back traumatic memories for a victim or disturb the peace of mind the victim has gained since the offense occurred.<sup>21</sup>

Another commonly cited reason for implementing statutes of limitations is to encourage prompt prosecution while evidence is fresh.<sup>22</sup> Limiting the time in which a prosecution can be brought requires prosecutors to gather evidence before it deteriorates or is destroyed, which increases the overall accuracy of the investigation.<sup>23</sup> Some scholars suggest that this rationale serves more to convenience the court than to facilitate accurate fact-finding, while other scholars stress the need for efficient and accurate investigations

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17. See *infra* Part V (concluding that a judicially-created DNA exception is a viable way to balance the interests of victims and defendants in New Hampshire).

18. See Diehl, *supra* note 6, at 433 (noting that many of the goals statutes of limitations seek to accomplish can be achieved through other methods).

19. See Amy Dunn, Note, *Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. ARK. LITTLE ROCK L. REV. 839, 844-846 (2001) (suggesting that statute of limitations systems are policy decisions rather than strictly legal decisions).

20. See Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L. J. 453, 462 (1997) (recognizing that witnesses who do not want to testify may gain peace of mind from the presence of limitation schemes).

21. See Dunn, *supra* note 19, at 846 (arguing that statutes of limitations protect the innocent, including third parties).

22. See Ochoa & Wistrich, *supra* note 20, at 471 (explaining that avoiding deterioration of evidence serves four distinct purposes: "to ensure accuracy in fact-finding[,] . . . to prevent the assertion of fraudulent claim[.]s . . . to reduce the costs of litigation[,] . . . and . . . to preserve the integrity of the legal system").

23. See *id.* at 472, 474-75 (considering several rationales for statutes of limitations before concluding that, above all, they encourage accurate fact-finding).

to avoid false convictions.<sup>24</sup>

A case that paved the way for a DNA tolling provision in New York is *People v. Martinez*.<sup>25</sup> In that case, the court warmly embraced the use of DNA testing to identify potential defendants.<sup>26</sup> The defendant was identified in the indictment solely by his unique DNA profile.<sup>27</sup> The court held that the “John Doe” warrant was legally sufficient to indict him.<sup>28</sup> This endorsement of using DNA databanks to identify perpetrators, via John Doe warrants, also informed the court’s willingness to toll statutes of limitations for untested DNA samples in rape kits.<sup>29</sup>

In 2006, the New York state legislature amended their criminal code to abolish the statute of limitations for some sex crimes, including rape in the first degree, first degree sexual abuse, and sexual conduct against a child.<sup>30</sup> Prior to the adoption of the 2006 amendment, the New York courts created an exception that allowed the statute of limitations to toll when the identity of the defendant depended on DNA evidence.<sup>31</sup> For offenses subject to the statute of limitations, language in the New York statute allows the limitation period to toll for any length of time “during which . . . the whereabouts of the defendant were continuously unknown and continuously ascertainable

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24. *Compare id.* at 482-83 (criticizing the use of judicial convenience as a rationale for statutes of limitations) *with* *Dunn, supra* note 19, at 844 (arguing that “the imposition of statutes of limitations on certain crimes reduces the probability of errors in conviction.”).

25. *See People v. Martinez*, 855 N.Y.S.2d 522, 525 (N.Y. App. Div. 2008) (considering the validity of a “John Doe” indictment that was accompanied by a specific DNA profile).

26. *See id.* at 526 (noting that the “prevalence of DNA databanks as a criminal justice tool supports the conclusion that a defendant can be properly identified by a DNA profile”).

27. *See id.* at 523-24 (explaining that the DNA sample was generated from the rape kit collected after the 1996 rape, the John Doe warrant was issued in 2001, and the defendant’s DNA matched the sample from the John Doe indictment in 2004).

28. *See id.* at 525 (holding that the defendant’s right to notice was satisfied when he was given a copy of the indictment, which accurately identified him by his DNA sample).

29. *See People v. Guerrero*, 3 N.Y.S.3d 600, 614 (N.Y. App. Div. 2015) (stating that using a DNA warrant in a case, which also employed tolling, was proper).

30. *See* N.Y. CRIM. PROC. LAW § 30.10 (2)(a) (McKinney 2014) (listing other sexual crimes included in the list of exceptions to the statute of limitations); *see also* *People v. Burroughs*, 968 N.Y.S.2d 773, 776 (N.Y. App. Div. 2013) (applying the statutory amendment retroactively to offenses that were not yet time-barred, due to the statute of limitations, at the time of the amendment).

31. *See People v. Harrison*, 803 N.Y.S.2d 5, 6-7 (N.Y. App. Div. 2005) (holding that the first-degree rape charge was not time-barred because of the state’s inability to identify a suspect without the use of DNA evidence).

through by the exercise of reasonable diligence.”<sup>32</sup> Even with this language, the statute may only be extended for five additional years.<sup>33</sup>

The court interpreted the language from this statutory tolling provision in *People v. Burroughs*.<sup>34</sup> In that case, although the state made the same argument that was successful in *Seda* and *Bradberry*, the court rejected the state’s position.<sup>35</sup> Because the crime in question was committed before the statute of limitations was abolished in New York, the court looked at the case through the lens of the tolling provision in § 30.10 of the New York Criminal Code.<sup>36</sup> After determining the tolling provision of the statute did not apply, the court concluded that the use of reasonable diligence would likely have resulted in the identification of the defendant as a suspect in the rape because his DNA profile had been in New York’s databank since 1998.<sup>37</sup> Even after the defendant’s DNA generated a match in the databank in 2003, the police waited two more years before arresting him.<sup>38</sup> Because the police neglected to test a DNA sample which already existed in the state database, the court concluded that the defendant’s identity had not been “unknown . . . through the exercise of reasonable diligence.”<sup>39</sup> The reasoning in *Burroughs* suggests

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32. See N.Y. CRIM. PROC. LAW § 30.10(4)(a)(ii) (McKinney 2014) (providing an additional tolling exception for the period the defendant was continuously located outside of New York).

33. See *People v. Seda*, 712 N.E.2d 682, 685-86 (N.Y. 1999) (noting that the tolling statute was passed to balance the constitutional right of defendants to a speedy trial with the need of sufficient time for law enforcement to fully investigate difficult cases).

34. See *Burroughs*, 968 N.Y.S.2d at 777 (stating that once a defendant’s DNA is entered into a databank, reasonable diligence should allow investigators to discover his identity).

35. Compare *Seda*, 712 N.E.2d at 685 (holding that if investigators cannot determine a defendant’s identity with the use of reasonable diligence, the statute of limitations tolls until his identity is discovered) and *People v. Bradberry*, 891 N.Y.S.2d 850, 851-52 (N.Y. App. Div. 2009) (deciding that a defendant’s unknown identity tolls the statute of limitations until a DNA sample is tested) with *Burroughs*, 968 N.Y.S.2d at 777 (reversing part of a defendant’s rape conviction because his DNA profile was entered into a statewide database prior to his arrest, but after the statute of limitations had passed).

36. See § 30.10(4)(a) (declaring the tolling provision of the law, as amended in 2006); *Burroughs*, 968 N.Y.S.2d at 776 (noting that the statute of limitations for rape at the time of the indictment was five years, but because the charge was not yet time-barred, the 2006 amendment applied retroactively to the case).

37. See *Burroughs*, 968 N.Y.S.2d at 776-7 (explaining the relationship between the facts of the case and the procedural timeline).

38. See *id.* at 775-76 (stating that it was unclear from the record why there was a large gap in time between the DNA bank match and the indictment’s filing).

39. See *id.* at 777 (finding that the state failed to prove beyond a reasonable doubt that the tolling provision applied in this case).

that if untested evidence had prevented investigators from identifying the defendant, the state's argument may have prevailed.

The existence of a tolling exception for cases with untested DNA samples is evident in New York common law prior to the passage of the 2006 amendment to the statute of limitations.<sup>40</sup> In a collection of relatively short opinions the court repeatedly affirmed that when a previously untested DNA sample is tested and the result leads to the identification and conviction of a defendant, the statute of limitations is tolled for the time period the sample remained untested.<sup>41</sup> Although the statute of limitations for sexual offenses no longer exists in New York, if a prosecution was time-barred at the time of the amendment, the statute still applies.<sup>42</sup> Consequently, there are several post-2006 cases that deal with the DNA exception.<sup>43</sup>

Prior to the legislature's abolishing the statute of limitations for sexual offenses, the New York courts created a common-law DNA exception based largely on the idea that the defendant's identity was unknowable while DNA evidence remained untested.<sup>44</sup> One case interpreting this exception is *People v. Bradberry*.<sup>45</sup> In *Bradberry*, the victim, who was raped by a stranger in 1997, did not have her rape kit processed until 2004.<sup>46</sup> No match was found

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40. See *Seda*, 712 N.E.2d at 685 (tolling the statute of limitations for murder until police could discover the defendant's identity through DNA testing).

41. See *People v. Brown*, 918 N.E.2d 927, 932-33 (N.Y. 2009) (holding a statute of limitations defense meritless because there was no evidence that the police could have identified the defendant prior to the DNA match); see also *People v. Lloyd*, 805 N.Y.S.2d 20, 21 (N.Y. App. Div. 2005) (determining that police acted with reasonable diligence even though the defendant was unable to be identified until a DNA match led to a "cold case" hit); *People v. Grogan*, 816 N.Y.S.2d 93, 95 (N.Y. App. Div. 2006) (deciding the statute tolled for the eight-year delay between the rape and the defendant's indictment), *abrogated by* *People v. Rawlins*, 884 N.E.2d 1019 (N.Y. 2008); *People v. Sigl*, 967 N.Y.S.2d 570, 571 (N.Y. App. Div. 2013) (establishing that the defendant's identity and whereabouts were not ascertainable until his DNA profile was matched with DNA obtained from an unrelated crime).

42. See *Burroughs*, 968 N.Y.S.2d at 776 (applying the 2006 amendment retroactively only for crimes that the statute of limitations had not yet time-barred).

43. See *id.* (noting the legislature's reasoning for abolishing the statute of limitations); see also *Sigl*, 967 N.Y.S.2d at 571 (affirming the lower court's tolling of the statute of limitations for a sodomy conviction).

44. See *Sigl*, 967 N.Y.S.2d at 571-72 (explaining the connection between the knowledge of a defendant's whereabouts and the knowledge of his identity).

45. See *People v. Bradberry*, 891 N.Y.S.2d 850, 852-53 (N.Y. App. Div. 2009) (holding that the defendant's identity was unknown while the state did not possess a DNA sample from him).

46. See *id.* at 851 (detailing how a grant received by the county in 2004 to test unprocessed DNA evidence led to the testing of the victim's evidence in this case).

in the Combined DNA Index System (hereinafter “CODIS”) until 2005, when the defendant’s DNA was entered into the system for an unrelated crime.<sup>47</sup> *Bradberry* demonstrates that even when DNA evidence in a rape kit is tested, the statute may still toll if there is no ability to prosecute the perpetrator because no matches have been found in the CODIS.<sup>48</sup>

The prevailing reason for New York’s DNA exception is that the defendant’s whereabouts cannot be known without his identity being known, which in turn is unascertainable without the use of DNA evidence.<sup>49</sup> This exception is especially important in rape cases, which are likely to have an unknown attacker and recovered DNA evidence.<sup>50</sup> “John Doe” indictments and warrants, or indictments and warrants issued against specific DNA profiles under fictitious names, have been a widely-touted solution for rape cases with unknown assailants that are running out of time under statutes of limitations.<sup>51</sup> These indictments are recognized in the state of New York as valid indictments that terminate the statute of limitations when filed.<sup>52</sup> However, DNA warrants and indictments run into trouble in cases where rape kit backlogs have prevented DNA samples from being tested.<sup>53</sup> DNA exceptions fill the gap that is created when an untested DNA sample exists and the assailant is unknown to the victim.<sup>54</sup>

By contrast, the New Hampshire statute of limitations does not contain

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47. *See id.* at 852 (affirming the defendant’s conviction because the crime could not be prosecuted until a DNA sample match was found).

48. *See id.* (holding the prosecution timely given the five-year period of limitation, added to the five-year extension, under the tolling statute); *see also* *People v. Martinez*, 855 N.Y.S.2d 522, 535-36 (N.Y. App. Div. 2008) (reasoning that a John Doe warrant indicting a defendant based solely on a DNA sample was appropriate due to the certainty with which DNA can identify a person).

49. *See People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (interpreting, in the context of a murder case, the defendant’s whereabouts to include his identity because police cannot discover the former without knowing the latter).

50. *See Kearns, supra* note 7, at 346 (asserting that roughly thirty percent of rape victims do not know their attackers).

51. *See id.* at 346-47 (explaining that John Doe warrants enable investigators to continue investigations without time constraints).

52. *See Martinez*, 855 N.Y.S.2d at 524-25 (holding that because indictments may refer to a defendant in any manner sufficient to identify them, John Doe indictments give defendants sufficient notice).

53. Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1025 (2002) (arguing that the backlog of untested DNA samples hinder the issuance of John Doe warrants).

54. *See People v. Bradberry*, 891 N.Y.S.2d 850, 851 (N.Y. App. Div. 2009) (holding the DNA tolling exception appropriate where the defendant never saw her assailant’s face and her rape was not processed until years later).

any kind of DNA tolling exception.<sup>55</sup> Under New Hampshire law, the statute of limitations for the prosecution of felonies is six years.<sup>56</sup> The statutory language of the New Hampshire statute is less robust than the language in New York, but the New Hampshire statute does toll “during any time when the accused is continuously absent from the state or has no reasonably ascertainable place of abode or work within [New Hampshire].”<sup>57</sup> However, there is nothing in either the New Hampshire statute or in that state’s case law that allows the limitations period to toll while an untested rape kit prevents the discovery of a defendant’s identity.<sup>58</sup> This leaves victims of sexual assault with few legal options should the state fail to identify their attackers before the statutory period runs out. New Hampshire has put some protections in place for elderly victims and victims who are children by giving them the statutory right to a speedy trial, but adult victims are not similarly protected.<sup>59</sup> New York’s DNA exception offers protection to adult victims of sexual assault, and does not infringe on defendants’ right to a speedy trial under the Sixth Amendment.<sup>60</sup> It is therefore a model which should be followed by similarly situated jurisdictions.

## II. ANALYSIS

### *A. New Hampshire Should Follow New York’s Jurisprudence Regarding DNA Tolling Exceptions Because Tolling Sexual Assault Statutes Do Not Violate Defendants’ Due Process Rights*

The New York courts have held that tolling the statute of limitations in rape cases does not abridge the due process rights of defendants.<sup>61</sup>

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55. N.H. REV. STAT. ANN. § 625:8 (providing the circumstances under which the statute of limitations may toll).

56. *See* § 625:8(I)(c) (setting the limitation period for misdemeanors at one year).

57. *See id.* (tolling the statute of limitations if any other prosecution for the same conduct is currently pending against the defendant).

58. *See id.*

59. *See* N.H. REV. STAT. ANN. § 632-A:9 (extending the right to a speedy trial to certain victims of sexual assault or rape).

60. *See* U.S. CONST. amend. VI (extending the right to those accused of crimes). *Compare* *People v. Singer*, 376 N.E.2d 179, 186 (N.Y. 1978) (specifying that unjustified delays in commencing prosecution violate a defendant’s due process rights and require dismissal of the case) *with* *People v. Bradberry*, 891 N.Y.S.2d 850, 853 (N.Y. App. Div. 2009) (holding that a prosecutorial delay due to a lack of knowledge about the defendant’s identity was justified and did not violate the defendant’s right to a speedy trial).

61. *See Singer*, 376 N.E.2d at 186 (noting that where there has been a delay in commencing a prosecution, the state has the burden of showing good cause for the delay).

Provisions that toll the statute of limitations in other types of cases have also been held to be lawful.<sup>62</sup> Under the New York statutory tolling provision, for example, such defendants are subject to prosecution if they fled the jurisdiction for the statutory period and then returned.<sup>63</sup> Courts have held that these provisions do not interfere with defendants' due process rights because they do not affect the defendant's ability to put on a defense.<sup>64</sup> Additionally, the state has a strong interest in prosecuting perpetrators in cases where DNA evidence is discovered after the statute of limitations has expired.<sup>65</sup>

By creating a DNA tolling exception, New York's jurisprudence recognizes the importance of DNA evidence for prosecuting cases that involve stranger rape.<sup>66</sup> If the victim does not know her attacker, it is possible that DNA may be the only evidence connecting the perpetrator to the crime, which can be preserved in a rape kit.<sup>67</sup> *Harrison* illustrates that in these cases, proof consisting entirely, or almost entirely, of DNA evidence is sufficient to convict a perpetrator.<sup>68</sup> By failing to toll the statute of

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62. See *People v. Knobel*, 723 N.E.2d 550, 552 (N.Y. 1999) (finding that the statute of limitations was appropriately tolled while the defendant was located outside the state); see also *State v. Nadler*, 855 A.2d 490, 493 (N.H. 2004) (holding that the statute of limitations appropriately tolled during a thirty-six-year delay between commission of the crime and prosecution because none of the delay was attributable to the state).

63. See *Knobel*, 723 N.E.2d at 552 (deciding that a defendant's absence from the state does not need to be a single uninterrupted period of time, but rather, "all periods of a day or more that a nonresident defendant is out-of-State should be totaled and toll the Statute of Limitations").

64. See *Bradberry*, 891 N.Y.S.2d at 852 (considering five factors when determining whether a delayed prosecution has violated a defendant's right to a speedy trial: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay").

65. See *People v. Martinez*, 855 N.Y.S.2d 522, 525 (N.Y. App. Div. 2008) (praising the efficacy and accuracy of DNA analysis in identifying suspects).

66. See *id.* (concluding that the indictment of a defendant identified solely by his DNA match is appropriate due to DNA testing's high level of reliability); see also Milli Kanani Hansen, Note, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 948 (2011) (arguing that in addition to gaining widespread acceptance in nearly every court, DNA evidence is a particularly effective tool for solving sexual assault cases).

67. See Hansen, *supra* note 66, at 948 (contrasting the high efficacy of DNA evidence with the huge number of rape kits that remain untested across the country).

68. See *People v. Harrison*, 803 N.Y.S.2d 5, 6 (N.Y. App. Div. 2005) (holding that because DNA evidence established the defendant's identity beyond a reasonable doubt, the evidence was legally sufficient to convict him).

limitations while rape kits remain untested, New Hampshire is depriving its law enforcement of a powerful investigative tool.<sup>69</sup>

New Hampshire is also failing to act in accordance with the purpose of statutory limitations on prosecutions.<sup>70</sup> While statutes of limitations serve important interests, multiple circumstances exist that make tolling exceptions appropriate.<sup>71</sup> Jurisdictions have codified different rationales for tolling exceptions, but the most common rationales include: defendants fleeing the jurisdiction, defendants concealing the crime or committing the crime in secret, defendant's identity being unknown, or the crime being part of a continuing course of criminal conduct.<sup>72</sup> As interpreted by New York courts, the DNA exception is closely related to the unknown defendant exception.<sup>73</sup> The idea that “[d]efendants who are benefiting from an opportunity to avoid facing criminal charges should not be permitted to avail themselves of that advantage in order to derail an otherwise timely prosecution” is doubly relevant when dealing with crimes as notoriously difficult to prosecute as sexual assaults.<sup>74</sup> New York, by properly tolling the statute of limitations, is preventing sexual offenders from benefitting from

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69. See Hansen, *supra* note 66, at 951 (noting that by using grant money to address its rape kit backlog, the city of St. Louis was able to match twenty DNA samples from kits to people who had previously been convicted of crimes).

70. See *United States v. Marion*, 404 U.S. 307, 322 (1971) (finding that statutes of limitations create an “irrefutable presumption that a defendant’s right to a fair trial would be prejudiced”).

71. See N.Y. CRIM. PROC. LAW § 30.10(2)(a) (McKinney 2014) (explaining the circumstances under which the statute of limitations toll in New York); see also *State v. Nadler*, 855 A.2d 490, 493 (N.H. 2004) (finding tolling appropriate when the victim did not report the crime to authorities for over thirty years after being disbelieved by his parents).

72. See *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 639, 641-46 (1954) [hereinafter “*Penetrable Barrier*”] (explaining the most common reasons for both enacting and tolling statutes of limitations for various types of crimes).

73. See *People v. Sigl*, 967 N.Y.S.2d 570, 571 (N.Y. App. Div. 2013) (affirming that the police used diligent efforts, but could not determine the defendant’s identity without a DNA match); see also *People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (determining that knowledge of a defendant’s identity is a necessary prerequisite to knowing his whereabouts). *But see* *People v. Burroughs*, 968 N.Y.S.2d 773, 777 (N.Y. App. Div. 2013) (refusing to toll the statute of limitations when there was evidence that the police could have identified the defendant sooner if they had used reasonable diligence).

74. See Hansen, *supra* note 66, at 946 (arguing that rape cases are difficult to prosecute without DNA evidence because of DNA’s highly probative nature and the fact that DNA may be the only evidence that a sexual offense occurred).

such an advantage.<sup>75</sup> In contrast, New Hampshire's improper interpretation of its tolling statute illustrates a misunderstanding of the purpose of repose and allows sexual offenders, a large percentage of whom are multiple offenders, to avoid criminal charges.<sup>76</sup>

Like the tolling provisions enumerated in statutory language, New York's DNA exception does not offend defendants' due process rights.<sup>77</sup> To clarify, New York and New Hampshire both have provisions for tolling statutes of limitations in certain circumstances.<sup>78</sup> While the DNA exception is not actually enumerated in the New York statute, the courts have interpreted the "unknown whereabouts provision" in a way that incorporates the exception.<sup>79</sup> The New Hampshire statute contains similar language to the New York tolling provision.<sup>80</sup> New Hampshire should follow New York's reasoning in *Seda* and interpret the tolling provision, which already allows for tolling while a defendant's workplace or abode cannot be ascertained, to also include tolling for cases where a rape kit remained untested until the statutory period had expired.<sup>81</sup> As the New York court reasoned in *Seda*, a

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75. See *People v. Bradberry*, 891 N.Y.S.2d 850, 851-853 (N.Y. App. Div. 2009) (tolling the statute of limitations, even though the statutory period had passed, because the police could not identify the defendant); see also *People v. Brown*, 918 N.E.2d 927, 932-933 (N.Y. 2009) (finding that because police never had access to the additional description of the attacker, which the victim offered at trial, there was no possibility that the defendant's identity could have been discovered more quickly); see also Hansen, *supra* note 66, at 946 (asserting that in one study of rapists who went undetected, sixty-three percent were serial rapists).

76. See Hansen, *supra* note 66, at 946 (observing that backlogs in testing rape kits provide rapists enough time to offend repeatedly without detection).

77. See *People v. Guerrero*, 126 A.D.3d 613, 614 (N.Y. App. Div. 2015) (concluding that a thirteen-year delay in prosecuting rape and sodomy charges due to a lack of DNA evidence did not violate defendant's right to due process).

78. See N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2014) (providing limitation periods and conditions for tolling); N.H. REV. STAT. ANN. § 625:8 (2014) (providing limitation periods and conditions for tolling).

79. See *People v. Harrison*, 803 N.Y.S.2d 5, 6 (N.Y. App. Div. 2005) (holding that a defendant charged with sexual assault was unidentifiable until technology made it possible for the state to identify him through a DNA match); see also *People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (finding that if a defendant's identity cannot be ascertained, neither can his whereabouts).

80. See N.Y. CRIM. PROC. LAW § 30.10 (tolling the limitation period when the whereabouts of a defendant are unknown); see also N.H. REV. STAT. ANN. § 625:8 (tolling limitation period when the defendant's abode or workplace cannot be ascertained through reasonable diligence).

81. See N.H. REV. STAT. ANN. § 625:8 (allowing for tolling when the defendant is continuously out of state); see also *Seda*, 712 N.E.2d at 685 (connecting the difficulty of finding a suspect's location to the difficulty of finding the suspect's identity); *State v.*

defendant's whereabouts are likely unascertainable through reasonable diligence until his identity is known.<sup>82</sup> Because a defendant's place of work or abode is analogous to his whereabouts, the New Hampshire statute leaves ample room for an interpretation that would allow for a DNA tolling exception.<sup>83</sup> By failing to incorporate such a provision, the New Hampshire courts are improperly interpreting the state's own tolling statute.<sup>84</sup>

*B. A Judicially-Created DNA Tolling Exception in New Hampshire Would Provide Victims of Sexual Assault with the Possibility of Legal Recourse While Protecting the Due Process Rights of Defendants*

The New Hampshire legislature has already expressed an interest in the rights of victims.<sup>85</sup> The "speedy trial" provision of the criminal code chapter dealing with sex offenses extended the right to a speedy trial to very young and elderly victims.<sup>86</sup> While New Hampshire has no cases interpreting the statute, the language suggests that the legislature was aware of the emotional toll that participating in a rape prosecution has on victims.<sup>87</sup> It therefore

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Nadler, 855 A.2d 490, 493 (2004) (holding that even if a lengthy delay is caused by a victim, as long as the delay cannot be attributed to the state, the delay is not unreasonable or arbitrary and tolling is therefore appropriate).

82. See *Seda*, 712 N.E.2d at 684 (noting that this interpretation of the statutory language is straightforward and in line with the statute's legislative purpose).

83. See *People v. Lloyd*, 805 N.Y.S.2d 20, 21 (N.Y. App. Div. 2005) (reasoning that the defendant's whereabouts were unknown until advances in DNA technology made it possible to make a DNA match); see also Kearns, *supra* note 7, at 343 (suggesting that the residency tolling provisions are a result of the difficulty faced by law enforcement in identifying suspects who are located outside of the state).

84. See *People v. Sigl*, 967 N.Y.S.2d 570, 571 (N.Y. App. Div. 2013) (holding that the defendant's identity could not be ascertained before the state was able to match his DNA, collected after the rape, with another sample that was collected for an unrelated crime); see also *Seda*, 712 N.E.2d at 683-84 (rejecting the argument that the term 'whereabouts' only refers to a person's physical location, and instead interpreting the term as including both the defendant's location and identity). Compare N.H. REV. STAT. ANN. § 625:8 (containing a provision that tolls the statute of limitations when a person's abode or workplace cannot be ascertained) with N.Y. CRIM. PROC. LAW § 30.10(4)(a)(ii) (tolling the statute of limitations while the defendant's whereabouts remain unknown).

85. See N.H. REV. STAT. ANN. § 632-A:9 (extending the right to a speedy trial to certain victims of sexual assault or rape).

86. See *id.* (requiring the court to consider any possible adverse impact on certain victims or witnesses before granting a motion for a delay or a continuance of court proceedings).

87. See *id.* (expressing a desire to protect minors and elderly victims from "the stress involved in the proceeding").

established the right to a speedy trial for particularly vulnerable classes of victims.<sup>88</sup> While many reasons exist to afford minors and people over the age of sixty-five with special protections, the stress and possibility of trauma associated with trial are no less relevant for victims between the ages of sixteen and sixty-five.<sup>89</sup> If the right to a speedy trial is not expressly extended to the latter class of victims, a DNA exception could provide similar protection.<sup>90</sup> A victim who does not know her attacker cannot reasonably ascertain his identity until her rape kit is tested, which may not happen until after the statutory period has expired due to rape kit backlogs throughout the United States.<sup>91</sup> Accordingly, the state cannot begin prosecution until the rape kit has been tested, thus the speediest possible trial in this situation depends on the test date of the kit.<sup>92</sup> New Hampshire has already demonstrated a concern for speedy trials in certain rape cases, and a judicially-created DNA tolling exception would also provide protection for adult victims by allowing them to see their cases prosecuted as soon as possible.<sup>93</sup>

Prosecutions brought after a statute of limitations has been tolled do not violate defendants' Sixth Amendment right to a speedy trial.<sup>94</sup> The United States Supreme Court held in *United States v. Marion* that the right to a

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88. *See id.* (limiting the right to victims under the age of sixteen and over the age of sixty-five).

89. *See Daly, supra* note 1, at 20 (suggesting that the unique nature of rape, combined with the increased societal stigma surrounding rape victims, results in greater and longer-lasting emotional impacts).

90. *See id.* at 21 (explaining the important role DNA plays in identifying perpetrators of stranger rape); *see also* *People v. Guerrero*, 126 A.D.3d 613, 614 (N.Y. Ct. App. 2015) (noting that the trial could not have been commenced sooner because the defendant's identity was unknown, and therefore the delay did not violate the defendant's due process rights).

91. *See People v. Brown*, 918 N.E.2d 927, 928-29 (N.Y. 2009) (holding that the statute of limitations was properly tolled for roughly nine-years because the victim's rape kit went untested due to backlog).

92. *See id.* at 929 (recognizing that prosecution could not begin until law enforcement found a DNA match in CODIS several months after the kit was tested).

93. *See People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (commenting that using the tolling exception for cases with unknown defendants "balance[s] the general policy in favor of avoiding prosecution of stale cases against the countervailing policy of ensuring that law enforcement officers have sufficient time to bring suspected criminals to justice").

94. *See United States v. Marion*, 404 U.S. 307, 313 (1971) (holding that the defendants did not become "accused" until they were indicted, and therefore a three-year period between the commission of the offense and the indictment did not infringe on their Sixth Amendment rights).

speedy trial does not attach until a person becomes “accused.”<sup>95</sup> While a period of, potentially, many years between the commission of a sexual offense and the state’s ability to prosecute the offense may make it more difficult for the defendant to mount a defense, his rights under the Sixth Amendment cannot be infringed upon before they attach to him.<sup>96</sup> Under the Supreme Court’s ruling in *Marion*, those rights do not attach until the defendant is arrested or charged.<sup>97</sup> Sexual offenses where the defendant can only be identified after the state obtains a DNA match from a rape kit often result in a long period of delay between the commission of the offense and even the possibility of an arrest.<sup>98</sup> Through statutes of limitations, states impose their own time limit on when a prosecution may be brought; however, these limitations are state creations and have nothing to do with whether a defendant’s right to a speedy trial has attached.<sup>99</sup> Accordingly, states can, and do, create exceptions that allow prosecutions to occur outside of the statute of limitations period.<sup>100</sup> Therefore, New Hampshire can introduce an exception that tolls the statute of limitations in cases that cannot proceed without a tested rape kit without abridging the Sixth Amendment rights of defendants.<sup>101</sup>

While statutes of limitations play an important role in protecting defendants from pre-accusation delay, a DNA tolling exception does not

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95. *See id.* at 320 (noting that the purpose of the speedy trial clause is to prevent the lengthy detainment of accused defendants).

96. *See id.* (distinguishing between the possibility of prejudice and actual prejudice suffered from an inordinate delay in a defendant’s case).

97. *See id.* at 321 (explaining that prior to a defendant’s arrest, there are no constraints on a person’s liberty that require the protection of the Sixth Amendment).

98. *See People v. Bradberry*, 891 N.Y.S.2d 850, 852 (N.Y. App. Div. 2009) (finding that the inability of police to find a match to the defendant’s DNA until the defendant was convicted of another, unrelated crime was sufficient to toll the statute of limitations for five years).

99. *See Marion*, 404 U.S. at 322 (observing that statutes of limitations balance the interests of the state in prosecuting crime with the need for repose for those who may be prosecuted).

100. *See, e.g.*, N.H. REV. STAT. ANN. § 625:8(VI) (2014) (tolling the statute of limitations while the accused’s identity is unknown or while another prosecution or the same conduct is pending against the accused).

101. *See People v. Guerrero*, 3 N.Y.S. 600, 614 (N.Y. App. Div. 2015) (holding that the defendant’s right to a speedy trial had not been abridged because he was unable to show any actual prejudice); *see also* Hansen, *supra* note 66, at 960-61 (illustrating that the response to rape kit backlogs may negatively impact the rights of criminal defendants because many states extend the statute of limitations in sexual assault cases involving DNA evidence).

unfairly expose defendants to undue delay.<sup>102</sup> DNA tolling exceptions are crafted narrowly enough to address the specific problems facing prosecution delays due to rape kit backlogs.<sup>103</sup> As the New York court pointed out in *Brown*, there was little to no possibility that police would be able to identify an unknown assailant until a rape kit was tested and a DNA match was found.<sup>104</sup> That case involved a ten-year delay between the assault and prosecution, which is unquestionably a substantial period of time.<sup>105</sup> However, as the court pointed out, no evidence that the state uncovered made it more likely that the state could have discovered the defendant's identity any sooner.<sup>106</sup> This kind of delay is exactly what the tolling exception contemplates, and the exception only covers the types of situations found in *Brown*.<sup>107</sup> Such a narrowly drawn line is unlikely to lead to a slippery slope that does away with statutes of limitations altogether or allows for anyone to be accused of a sexual offense at any time.<sup>108</sup> Instead, New York's exception preserves the ultimate purpose of statutes of limitations while also preventing unavoidable delays from hindering prosecution.<sup>109</sup>

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102. See Kearns, *supra* note 7, at 358 (arguing that eliminating the statutes of limitations for sex crimes will inevitably lead to the elimination of statutes of limitations for all types of crime).

103. See *Bradberry*, 891 N.Y.S.2d at 852 (finding that despite a delay, the state commenced prosecution as soon as it was reasonably able to do so); see also *People v. Brown*, 918 N.E.2d 927, 928-29 (N.Y. 2009) (noting that the delay of nine years between the commission of the crime and the testing of the rape kit testing was due to a backlog of rape kits).

104. See *Brown*, 918 N.E.2d at 932 (considering whether an additional physical description of her attacker, given by the victim at trial, would have led to an earlier identification of the defendant).

105. See *id.* at 929 (explaining that the Office of the Chief Medical Examiner did not receive funding to address the rape kit backlog until nearly nine years after the commission of the original offense).

106. See *id.* (concluding that despite the delay in prosecution, the police used all reasonable diligence to investigate the crime); see also *People v. Sigl*, 967 N.Y.S.2d 570, 571-72 (N.Y. App. Div. 2013) (affirming that the defendant's identity could not have been reasonably ascertained by the police prior to a DNA match being found).

107. See *Brown*, 918 N.E.2d at 932-33 (applying only a limited five-year extension when tolling the statute of limitations); see also *State v. Nadler*, 855 A.2d 490, 493 (2004) (noting that the State did not delay pursuing prosecution once the victim reported the crime).

108. See Kearns, *supra* note 7, at 358 (discussing the potential dangers of repealing all statutes of limitations on sex crimes). *But see* S.B. 98, 165th Gen. Ct., Reg. Sess. (N.H. 2017) (proposing a bill that would completely eliminate statutory limitation periods for sexual assault and incest crimes).

109. See *People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (holding that, for the purposes of New York's statutory tolling provision, a defendant's whereabouts cannot

The introduction of a DNA exception in New Hampshire that is similar to the one used by New York courts would not infringe on defendants' due process rights.<sup>110</sup> The test in New Hampshire for deciding whether due process requirements were met is to determine whether the defendant has been subjected to "overly stale" charges.<sup>111</sup> For instance, while the court charged the defendant in *Ramos* within the required statutory period, the court also considered whether the defendant had been prejudiced by any delays caused by the state.<sup>112</sup> A DNA tolling exception would not infringe on defendants' due process rights because the defendants would not be prejudiced by the delay.<sup>113</sup> As the New York court noted in *Brown*, the state had no evidence to bring charges against the defendant earlier because the backlog of rape kits made it impossible to test the victim's kit sooner.<sup>114</sup> The state's actions did not cause the defendant's case turn out differently, they just caused the case to be decided later; therefore, the defendant suffered no prejudice and no due process violation occurred.<sup>115</sup>

Additionally, the second prong of New Hampshire's due process test, the reasonableness of the delay, is easily satisfied using the New York courts' reasoning.<sup>116</sup> In cases where the inability to test a rape kit has led to

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be ascertained while his identity remains unknown); *see also* *United States v. Marion*, 404 U.S. 307, 323 (1971) (observing that the purpose of statutes of limitations is to provide predictability and repose for people who may face criminal charges and to encourage the police to investigate crimes promptly).

110. *See State v. Ramos*, 553 A.2d 275, 282 (N.H. 1988) (noting that defendants must also show that they were actually prejudiced by the delay in prosecution, and the defendant in that case failed to do so).

111. *See id.* (stating that charges are presumed to be timely if it is brought within the statutory period).

112. *See id.* (balancing the prejudice against the defendant with the reasons for the state's delay).

113. *See People v. Guerrero*, 126 A.D.3d 613, 614 (N.Y. App. Div. 2015) (holding that the defendant was not prejudiced by a 13-year delay because his guilt would have been established earlier with DNA evidence).

114. *See People v. Brown*, 918 N.E.2d 927, 932 (N.Y. 2009) (rejecting the defendant's ineffective assistance of counsel claim because there was no evidence that the police could have identified the defendant before the victim's rape kit was tested, and as a result the statute of limitations defense the defendant wished to raise was meritless).

115. *See Ramos*, 553 A.2d at 282-83 (upholding the trial court's ruling that there was insufficient evidence to establish that the state's delay in arresting the defendant had caused the defendant actual prejudice); *see also State v. Hamel*, 643 A.2d 953, 956 (N.H. 1994) (finding that an extension of the statute of limitations for sexual offenses against minors did not prejudice the defendant or affect his substantive rights).

116. *See Ramos*, 553 A.2d at 279 (stating that if the defendant can establish that actual prejudice resulted from a prosecutorial delay, then the court must "balance the resulting

prosecutorial delay, the New York court has consistently held that so long as law enforcement took all reasonable investigatory steps in the meantime, the delay is reasonable.<sup>117</sup> By applying this reasoning to similarly situated cases in New Hampshire and tolling the statute of limitations until rape kits can be tested, New Hampshire can balance the needs of investigators with the needs of defendants.<sup>118</sup> In *Ramos*, the delay was negligible because the prosecution was brought well within the statutory period.<sup>119</sup> However, the court still considered whether the small delay was caused by mistakes made by the prosecutor, and ultimately found that not to be the case.<sup>120</sup> Tolling the statute of limitations for sexual crimes that can only be prosecuted with the use of backlogged DNA evidence would allow the state to bring prosecutions within the statutory period.<sup>121</sup> Because any delay caused by the backlog is not caused by the prosecutors' actions, tolling is not unreasonable, does not prejudice the defendant, and does not result in a due process violation.<sup>122</sup>

By introducing a DNA tolling provision, New Hampshire would give victims with untested kits a measure of relief that they would not receive otherwise.<sup>123</sup> Compared to defendants, victims of crimes have few

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prejudice against the reasonableness of the delay”).

117. See *People v. Sigl*, 967 N.Y.S.2d 570, 571-72 (N.Y. App. Div. 2013) (finding that a delay in prosecution for rape was reasonable when the state could not identify the defendant until it obtained a DNA match); see also *People v. Ramos*, 921 N.E.2d 598, 599 (N.Y. 2009) (tolling the statute of limitations for ten years while the defendant's DNA sample from the victim's rape kit went unmatched); *People v. Harrison*, 803 N.Y.S.2d 5, 6-7 (N.Y. App. Div. 2005) (holding that a delay in prosecution for rape due to the state's inability to test DNA evidence was reasonable).

118. See *People v. Bradberry*, 891 N.Y.S.2d 850, 851-53 (N.Y. App. Div. 2009) (applying a balancing test and concluding that although the defendant suffered a lengthy delay, his right to a speedy trial was not infringed upon).

119. *State v. Ramos*, 553 A.2d at 278 (finding that a seven-month delay between the commission of the offense and the defendant's arrest was well within the six-year statute of limitations for the offense and did not prejudice the defendant).

120. See *id.* at 279 (stating that the court must consider the reasonableness of, and reasons for, a delay in prosecution); see also *State v. Nadler*, 855 A.2d 490, 493 (N.H. 2004) (finding that so long as the delay in prosecution is not attributable to the actions of the state, the delay is not unreasonable and thus does not prejudice the defendant).

121. See *Harrison*, 803 N.Y.S.2d at 6-7 (holding that when a suspect could not be identified without DNA evidence, the statute of limitations for rape was properly tolled).

122. See *Kearns*, *supra* note 7, at 348-49 (noting that because the burden of proof to establish tolling is generally on the state, innocent defendants are protected from endless limitation periods).

123. See *Hansen*, *supra* note 66, at 960-62 (examining the effects of rape kit backlogs on statute of limitations legislation in various jurisdictions).

protections and limited access to the court system.<sup>124</sup> While the victim of a sexual assault clearly has a substantial interest in having her rape kit tested, a match found, and her assailant prosecuted, there are few, if any, legal avenues available for victims to seek relief if a defendant is not prosecuted.<sup>125</sup> While bringing a claim under Section 1983 is theoretically possible, two substantial hurdles must be cleared first: the presence of a state action and immunity doctrines.<sup>126</sup> In the absence of an adequate statutory scheme, such as a “victim bill of rights” that grants the victim a cause of action, constitutional claims by victims with untested kits are likely to fail, or at least be exceedingly difficult to litigate.<sup>127</sup> Without such a scheme in place, one way that New Hampshire can protect the interests of victims is by implementing a DNA tolling exception for sexual offense cases.<sup>128</sup>

Although some commentators have suggested that victims with untested kits can make a viable Equal Protection Clause claim against a state for not testing their kits, this claim has been widely attempted and the barriers may prove too large to overcome.<sup>129</sup> While it is true that the majority of rape kits are submitted by female victims, and therefore New Hampshire’s decision to neither test the kits nor toll the statute of limitations while the kits go untested disproportionately impacts women, it is unlikely that survivors could prove the necessary elements of an Equal Protection claim.<sup>130</sup> Gender

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124. See Daly, *supra* note 1, at 31-32 (observing that there is no federal right for a victim to prosecute or confront her attacker); see also Hansen, *supra* note 66, at 966 (explaining that there is no longer a civil remedy under federal law for victims of gender-based violence).

125. See Hansen, *supra* note 66, at 965-89 (observing that it would be extremely difficult for victims to establish liberty or property interests to raise a valid due process claim).

126. See *id.* at 969 (noting that while the collection and retention of rape kits is a state action, the failure to test these kits likely lacks the level of intentionality necessary to bring a successful §1983 claim).

127. See Daly, *supra* note 1, at 32 (suggesting that an alternative argument might exist through the Equal Protection Clause, as the majority of rape victims are female and therefore the state’s failure to test rape kits unfairly disadvantages women).

128. See Hansen, *supra* note 66, at 962 (contending that the timely prosecution of rape kits would eliminate one of the major reasons for extending statutes of limitations). *But see* Kearns, *supra* note 7, at 358 (arguing that extending or eliminating statutes of limitations for sex crimes is a slippery slope that could lead to the elimination of statutes of limitations altogether, resulting in violations of defendants’ rights and lengthy pre-accusation delays).

129. Daly, *supra* note 1, at 32 (suggesting that Justice Douglas’ *Heart of Atlanta Motel* concurrence may provide victims in this situation with a framework for successful litigation).

130. See Hansen, *supra* note 66, at 983-85 (observing that, due to recent amendments

classifications are subject only to intermediate scrutiny, and New Hampshire has no facially discriminatory law addressing the disposition of the rape kits it collects.<sup>131</sup> Additionally, given the various technological and financial reasons states provide for rape kit backlogs, proving that the state has discriminatory intent would be incredibly difficult.<sup>132</sup>

In addition to furthering victims' interests and respecting the rights of defendants, a DNA tolling exception furthers an important state interest by increasing the number of sexual offenses that can be prosecuted.<sup>133</sup> States have a strong interest in investigating and prosecuting crimes, especially in cases where DNA evidence is present.<sup>134</sup> Jurisdictions that allow untested rape kits to accumulate see a drop in victim participation, which harms the state's ability to successfully prosecute offenders.<sup>135</sup> Conversely, jurisdictions that test old rape kits see a marked increase in not only the number of prosecutions but also the number of convictions.<sup>136</sup> In the absence of any statutory or constitutional bar, New Hampshire's failure to enact a DNA tolling exception reflects a series of choices that disproportionately and negatively impact women by providing them with little legal recourse once their rape kits are processed.<sup>137</sup>

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making several state laws gender-neutral, it would be more difficult for victims to prove that the purpose of backlogs is to discriminate against women).

131. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

132. See Hansen, *supra* note 66, at 985 (concluding that it is unlikely that the only explanation for rape kit backlogs is discrimination against women by state law enforcement, so an equal protection claim is unlikely to provide relief to victims with untested kits).

133. See *People v. Brown*, 918 N.E.2d 927, n. 1 (N.Y. 2009) (noting that the New York City Police Department submitted over 14,000 rape kits for testing once it received funds). *But see* Hansen, *supra* note 66 at 950-51 (recognizing that several jurisdictions that receive federal funds to address backlogs do not use all the of the money allocated, and therefore do not receive funds the following year).

134. See *United States v. Marion*, 404 U.S. 307, 322 (1971) (examining the state's interest in comparison to the rights of the defendant); *see also* Hansen, *supra* note 66, at 960-62 (finding that extending the statute of limitations may be necessary to allow police to use all possible DNA evidence to investigate crimes).

135. See Hansen, *supra* note 66, at 959-60 (arguing that lengthy wait times between submission and testing of a kit make survivors of rape feel devalued by the justice system and consequently make them less likely to report an assault).

136. See Reilly, *supra* note 2 (stating that two years after beginning a rape kit testing initiative, Houston police had obtained 850 matches, 29 prosecutions, and 6 convictions).

137. See Hansen, *supra* note 66, at 983 (observing that the decision not to test rape kits is left to the discretion of state officials and that women are more likely to be the

## III. POLICY RECOMMENDATIONS

The most expedient way for New Hampshire to resolve the problem of rape kit backlogs interfering with rape prosecutions has already been proposed. In early 2017, two bills were introduced in the New Hampshire State Senate that would eliminate the statute of limitations for sexual offenses entirely.<sup>138</sup> These bills would not only stop the passage of time from rendering tested rape kits useless but would also enable victims to come forward at any time they felt comfortable. Survivors of sexual assault often fully comprehend their experiences only long after the assault; this may be especially true in the current cultural climate, where the #MeToo movement dominates the headlines and the public is rethinking the definition of sexual assault.<sup>139</sup> By doing away with statutes of limitations for sexual offenses, New Hampshire would be removing a barrier to justice for a potentially enormous swath of its population.

Should New Hampshire choose to retain its statute of limitations for sexual offenses, the legislature should draft an exception that allows the statute to toll when necessary evidence goes untested in a rape kit. This exception, in conjunction with ongoing efforts to eliminate the backlog of untested kits, would prevent victims of sexual assault from losing their chance at justice simply because their rape kit went untested. A legislatively-produced exception would allow the state to decide which types of cases are subject to the tolling exception and which types of cases are bound by the standard period of limitation.

However, legislative solutions are notoriously slow-moving. Before either of the above recommendations can be implemented, the New Hampshire courts will most likely be put in a position where they can carve out a DNA exception in the same manner as the New York courts have.<sup>140</sup>

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victims of rape).

138. See S.B. 98, 165th Gen. Ct., Reg. Sess. (N.H. 2017); see also *NH Senate Bills Would End Statute of Limitations for Sex Assaults*, SEACOAST ONLINE, (Jan. 31, 2017, 5:50 PM), <http://www.seacoastonline.com/news/20170131/nh-senate-bills-would-end-statute-of-limitations-for-sex-assaults>.

139. See Rebecca Traister, *We Are All Implicated In the Post-Weinstein Reckoning*, THE CUT (Nov. 12, 2017, 9:05 P.M.), <https://www.thecut.com/2017/11/rebecca-traister-on-the-post-weinstein-reckoning.html> (examining how the sexual harassment and assault allegations against movie producer Harvey Weinstein sparked a wave of women in multiple industries speaking out about the workplace harassment and assault to which they have been subjected).

140. See N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2014) (tolling the statute of limitations when a defendant's whereabouts are unknown); see also *People v. Seda*, 712 N.E.2d 682, 685 (N.Y. 1999) (creating the DNA exception in New York by concluding that a person's whereabouts include his identity).

By interpreting the state's existing tolling provision, New Hampshire courts could easily extend the same protection to adult victims that it extends to minors and the elderly: the right to the speediest trial possible. There is ample room in the existing New Hampshire tolling provision to allow for such an interpretation. The courts would also have the ability to craft the exception with precision to protect the constitutional rights of defendants while also considering the interests of victims.

#### IV. CONCLUSION

While many jurisdictions have made substantial progress in reducing the number of backlogged rape kits in their possession, the negative impacts of rape kit backlogs remain.<sup>141</sup> The confluence of backlogged kits and statutes of limitations for sexual offenses can result in a person who has been DNA-matched to a crime avoiding prosecution.<sup>142</sup> However, it is possible to craft an exception that tolls the statute of limitations during the period before vital DNA evidence is tested or matched to the defendant.<sup>143</sup> Before the state legislature abolished the statute of limitations for many sexual offenses in 2006, the New York judicial system created such an exception under the theory that while a victim's rape kit remained untested, the defendant's identity remained sufficiently unknown to allow tolling the statute of limitations.<sup>144</sup> Under its existing statutory structure, New Hampshire courts should follow New York's jurisprudence and create a similar exception.<sup>145</sup> This tolling exception would not infringe on the constitutional rights of defendants and would promote both the state's interest in prosecuting sexual offenses and the victims' interest in having their attackers prosecuted.<sup>146</sup>

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141. *See State Responses*, *supra* note 10 (comparing several state's responses to rape kit backlogs and noting varying levels of success among different jurisdictions).

142. *See Hansen*, *supra* note 66, at 960-62 (observing that even states that take steps to address their backlog problem often lack resources to do so effectively). *But see* Kearns, *supra* note 7, at 329-30 (describing the exceptions to statutes of limitations enacted in several states).

143. *See Seda*, 712 N.E.2d at 685 (holding that while a defendant's whereabouts are unknown and can only reasonably be ascertained through DNA evidence, the statute of limitations is tolled).

144. *See id.* (indicating that the New York tolling statute is not conditioned upon the victim's knowledge of the defendant's identity); *see also* N.Y. CRIM. PROC. LAW § 30.10(2)(a) (McKinney 2014) (abolishing the statute of limitations for sexual assault).

145. *See* § 30.10(4)(a)(ii).

146. *See United States v. Marion*, 404 U.S. 307, 313 (1971) (finding that a person who has not become an accused suspect, such as by arrest or indictment, does not have a Sixth Amendment right to a speedy trial); *see also State v. Ramos*, 553 A.2d 275, 279 (N.H. 1988) (determining whether a defendant's due process rights have been violated

While New Hampshire's legislature may eventually follow in New York's footsteps and do away with statutes of limitations for sex crimes, a judicially-created DNA tolling exception can serve as a stopgap in the meantime to allow victims of rape kit backlogs to see justice done.<sup>147</sup>

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by balancing the actual prejudice to the defendant by a trial delay against the reasonableness of the delay).

147. *See* S.B. 98, 165th Gen. Ct., Reg. Sess. (N.H. 2017) (proposing an elimination of the statute of limitations for sexual assault and incest cases).