

## PRESERVING VAWA’S “NONREPORT” OPTION: A CALL FOR THE PROPER STORAGE OF ANONYMOUS/UNREPORTED RAPE KITS

Gavin Keene\*

*Abstract:* The Violence Against Women Act (VAWA) requires participating states and the District of Columbia to pay for medical forensic exams for victims of rape and sexual assault, including the collection of evidence using “rape kits,” whether or not the victim chooses to pursue criminal charges. The chief statutory purpose of the requirement is to preserve evidence in the interest of justice without pressuring a traumatized victim to decide on the spot whether to activate a criminal investigation. Rape kits collected without an accompanying police report are called “anonymous rape kits,” “unreported rape kits,” or “Jane Doe rape kits.” This is because they are typically assigned an anonymous tracking number rather than the victim’s name for privacy reasons, before being sealed and stored for evidentiary integrity. Beyond requiring their subsidization, VAWA is silent on anonymous rape kit preservation, leaving methods of storage to the discretion of each state, many of which defer to local jurisdictions. In states that defer, inconsistent storage practices can lead to the loss or destruction of the kits. These outcomes undercut the statutory purpose of VAWA’s “nonreport” option and waste public funds. Using Washington State as a prototype, this Comment argues that states that do not regulate anonymous rape kit storage should remedy this problem legislatively. State legislatures should pass comprehensive statutes that assign maintenance responsibility to a relevant state agency, provide funding for costs associated with evidence collection and storage, ensure the preservation of evidence through the relevant statute of limitations, and require that victims be kept informed of their rights. Thoughtful regulation will ensure the proper preservation of critical evidence and facilitate the empowerment of sexual assault victims, and in those respects reinforce VAWA’s nonreport option.

*Typically, they go home, take a shower, call their best friend, and evidence is lost. They say, “I can handle it.” And they let time pass. And then, either the guy starts harassing them again or they see him do it to somebody else. Having that power on the first day is so important.*

—Kirsten Gillibrand, U.S. Senator (NY)<sup>1</sup>

---

\* J.D. Candidate, University of Washington School of Law, Class of 2018. Special thanks to Professor Sallie Thieme Sanford and Zosia Stanley for their invaluable feedback on earlier drafts. Thanks to the *Washington Law Review* team for their sharp thinking and thoughtful suggestions. Any errors are my own.

1. Interview by Mattie Kahn with Kirsten Gillibrand, U.S. Senator, in Washington, D.C. (Dec. 15, 2015).

## INTRODUCTION

Federal law requires all fifty states and the District of Columbia to pay for medical forensic exams for victims of rape and sexual assault, including the collection of evidence using “rape kits,” whether or not the victim chooses to pursue criminal charges.<sup>2</sup> The chief statutory purpose of the requirement is to preserve evidence in the interest of justice without pressuring a traumatized victim to decide on the spot whether to activate a criminal investigation.<sup>3</sup> The evidence is not only critical to holding the perpetrator accountable;<sup>4</sup> it has an expiration date.<sup>5</sup>

Rape kits collected without an accompanying police report are called “anonymous rape kits,” “unreported rape kits,” or “Jane Doe rape kits” because the evidence is typically assigned an anonymous tracking number, rather than the victim’s name, for privacy reasons, before being sealed and stored for evidentiary integrity.<sup>6</sup> This “nonreport” option gives victims time to process their experience and decide whether or not to report the rape or sexual assault in the future.<sup>7</sup> In that decision, they will know that there is evidence likely to support their claims.<sup>8</sup>

The statutory purpose of the nonreport option is undermined if the anonymous kit is lost or improperly stored in the interim. Aside from guaranteeing sexual assault victims the right to an anonymous rape kit, federal law delegates maintenance logistics, including storage

---

2. Violence Against Women Act, 34 U.S.C.A. § 10449 (West 2018) (formerly 42 U.S.C. § 3796gg-4(d) (2012)).

3. JOANNE ARCHAMBAULT ET AL., END VIOLENCE AGAINST WOMEN INT’L, THE EARTHQUAKE IN SEXUAL ASSAULT RESPONSE: IMPLEMENTING VAWA FORENSIC COMPLIANCE 8 (2017), <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=30> [<https://perma.cc/794K-SJX3>].

4. The prospects of holding perpetrators of sexual assault accountable are slim. Less than 1% of perpetrators are convicted. *The Criminal Justice System: Statistics, RAPE, ABUSE & INCEST* NAT’L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/Q59D-M58D>]. While DNA evidence is not dispositive in criminal cases, studies suggest that juries are thirty-three times more likely to convict when presented with DNA evidence. Heather Waltke et al., *Sexual Assault Cases: Exploring the Importance of Non-DNA Forensic Evidence*, NAT’L INST. JUST. J., Apr. 2018, at 2, <https://www.ncjrs.gov/pdffiles1/nij/250704.pdf> [<https://perma.cc/W36H-M2DG>].

5. Reliable forensic evidence can be collected only immediately after a rape or sexual assault occurs. See Teresa Magalhães et al., *Biological Evidence Management for DNA Analysis in Cases of Sexual Assault*, SCI. WORLD J., 2015, at 5.

6. *Unreported/Anonymous Sexual Assault Kits*, NAT’L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/our-programs/dna-resource-center/untested-sexual-assault-kits/unreported-sexual-assault-kits> [<https://perma.cc/7LBJ-N9C2>].

7. *Id.*

8. *See id.*

responsibilities, to the states.<sup>9</sup> More responsive states have ensured standardized storage practices, allocating storage responsibilities to medical facilities that collect the evidence, law enforcement agencies with jurisdictional responsibilities, or designated state agencies.<sup>10</sup> These states also typically specify the conditions of storage and establish a minimum retention period.<sup>11</sup> Less responsive states defer to local authorities, leading to inconsistent storage requirements not only among jurisdictions, but also from facility to facility.<sup>12</sup>

The resulting discord in less responsive states puts the integrity of the evidence at risk.<sup>13</sup> In the absence of broader regulatory guidance, medical facilities and law enforcement agencies have been disposing of anonymous kits due to a shortage of storage space, spoiling them pursuant to inconsistent minimum retention policies, or selecting spaces that do not comport with evidentiary chain of custody requirements, rendering the kits useless at trial.<sup>14</sup> Without regulatory guidance, the best interests of victims, and ultimately the public, are lost in the shuffle.<sup>15</sup>

The proper storage of anonymous rape kits is critical to enabling victims of rape and sexual assault to proceed through the justice system if they eventually choose, thus furthering the policy goals of the VAWA.<sup>16</sup> Those objectives cannot be met without ensuring that storage protocols for anonymous rape kits are standardized statewide. Just outcomes should not depend on geographic vagaries.

Many states, including Washington, do not currently regulate anonymous rape kit storage,<sup>17</sup> but they should. Legislation is the most sensible way to accomplish this. To avoid conflicts among interested stakeholders, this Comment argues that states should assign responsibility

---

9. See Jessica Glenza, *Victims' Hopes for Justice Fade as Rape Kits Are Routinely Ignored or Destroyed*, GUARDIAN (Nov. 11, 2015), <https://www.theguardian.com/society/2015/nov/10/sexual-assault-rape-kit-backlog-ignored-destroyed> [<https://perma.cc/8PKQ-Z7B3>] ("VAWA also allowed states to determine how long to keep those kits, who offers them and where they are kept.").

10. See discussion *infra* Part IV.

11. See discussion *infra* Part IV.

12. See discussion *infra* Part IV.

13. Glenza, *supra* note 9 ("One kind of kit in particular, called a 'non-reporting' or 'Jane Doe' kit, is particularly vulnerable to destruction.").

14. *Id.*

15. *Id.*

16. 34 U.S.C.A. § 10441 (West 2018) ("The purpose of this subchapter is to assist States . . . and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.").

17. See discussion *infra* section III.B.

to a health- or criminal justice-related state agency. To complement recently enacted federal law,<sup>18</sup> the legislation should include a minimum retention period that tracks the state's statute of limitations. It should provide for the financing of the designated agency and the outlays of involved medical facilities. Funding could come from either each state's discretionary budget under VAWA's STOP grant program<sup>19</sup> or the Crime Victims Compensation Fund.<sup>20</sup> This proposal would advance the best interests of victims and the public by better preserving evidence needed to prosecute rape and sexual assault cases.<sup>21</sup> Therefore, anonymous rape kit collection can expand without overburdening those assigned collection and storage responsibilities.<sup>22</sup> It would also make the best use of public funds, which is an important incentive to keeping the federal budget pipeline open.<sup>23</sup>

This Comment discusses the critical role of the nonreport option following a traumatic event, where thoughtful decision-making is often impaired.<sup>24</sup> It emphasizes the importance of proper storage practices to both the successful prosecution of rape and sexual assault cases and the realization of VAWA's statutory purpose. Part I reviews the analytical tools and statistical data necessary to meaningfully assess the anonymous rape kit storage problem. It highlights recurring terminology, outlines the

---

18. 18 U.S.C.A. § 3772 (West 2016).

19. *Grant Programs*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/grant-programs> [<https://perma.cc/X2AW-NH6F>] (“STOP Violence Against Women Formula Grant Program, awarded to states and territories, enhances the capacity of local communities to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women and to develop and strengthen victim services in cases involving violent crimes against women. Each state and territory must allocate 25 percent for law enforcement, 25 percent for prosecutors, 30 percent for victim services (of which at least 10 percent must be distributed to culturally specific community-based organizations), 5 percent to state and local courts, and 15 percent for discretionary distribution.”).

20. WASH. REV. CODE §§ 7.68.15–.340 (2016).

21. See WASH. SEXUAL ASSAULT FORENSIC EXAMINATION BEST PRACTICES TASK FORCE, ANNUAL REPORT TO THE LEGISLATURE AND GOVERNOR 9–10 (2017), <http://leg.wa.gov/JointCommittees/USAEK/Documents/USAEK-Report2017.pdf> [<https://perma.cc/8FKF-6VN5>] [hereinafter 2017 TASK FORCE].

22. *Id.*

23. See discussion *infra* section V.D.

24. See *Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/effects-sexual-violence> [<https://perma.cc/DT8F-R49B>]; *Sexual Assault Against Females*, PTSD: NAT'L CTR. FOR PTSD, U.S. DEP'T OF VETERANS AFF. (Feb. 23, 2016), [https://www.ptsd.va.gov/professional/trauma/other/sexual\\_assault\\_against\\_females.asp](https://www.ptsd.va.gov/professional/trauma/other/sexual_assault_against_females.asp) [<https://perma.cc/W2N7-RUAK>] (“Depression is a common reaction following sexual assault. Symptoms of MDD can include a depressed mood, an inability to enjoy things, difficulty sleeping, changes in patterns of sleeping and eating, problems in concentration and decision-making, feelings of guilt, hopelessness, and decreased self-esteem.”).

criminal backdrop giving rise to the storage issue, underscores the inadequacies of the current legal system, and describes current practices of relevant forensic evidence collection. Part II chronicles the history of VAWA relative to the use of anonymous rape kits and introduces the recently-enacted Sexual Assault Survivors' Rights Act. Part III raises the issue of anonymous rape kit storage. Part IV compares ways in which some states have regulated anonymous rape kit storage, emphasizing pertinent considerations. Part V argues for a legislative solution that, taking into account relevant compliance concerns and funding interests, incorporates an agency-based model of storage.

## I. A BRIEF OVERVIEW OF SEXUAL CRIMES

### A. *Rape and Sexual Assault Defined*

The rhetoric surrounding sexual crimes is plagued with terminological and definitional challenges.<sup>25</sup> Public discourse, influenced by popular culture movements and media coverage, frequently conflates distinct forms of sexual misconduct.<sup>26</sup> Legal definitions for seemingly straightforward terms like “rape” and “sexual assault” vary with location, context, and the different viewpoints of involved agencies.<sup>27</sup> Congress and the majority of state legislatures incorporate ambiguous and sometimes inconsistent definitions into their bodies of law.<sup>28</sup> That said, the term

---

25. See, e.g., Sarah L. Cook et al., *What's the Difference Between Sexual Abuse, Sexual Assault, Sexual Harassment and Rape?*, CONVERSATION (Feb. 7, 2018), <http://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218> [<https://perma.cc/V397-A8WB>] (parsing frequently conflated types of sexual misconduct); Tyler Kingkade, *Some States Throw Untested Rape Kits in the Trash. These Survivors Want to Change That.*, HUFFPOST (Feb. 23, 2016), [https://www.huffingtonpost.com/entry/untested-rape-kits-in-trash\\_us\\_56cb4e5ee4b041136f17b087](https://www.huffingtonpost.com/entry/untested-rape-kits-in-trash_us_56cb4e5ee4b041136f17b087) [<https://perma.cc/LYB5-2LQQ>] (“States and local jurisdictions decide how to prosecute sexual assaults, which is why two states next to each other may define rape in different ways and handle cases differently.”).

26. See David Bauder, *Media Face Challenges in Rush to Cover Sexual Misconduct*, CBC NEWS (Dec. 27, 2017), <http://www.cbc.ca/news/entertainment/media-coverage-sexual-misconduct-1.4465134> [<https://perma.cc/7JZP-PRZT>] (“Conflation of different forms of misbehaviour—the idea itself is controversial—is one of the issues facing media organizations” covering the #metoo movement); cf. Julie Bindel, *Juries Have No Place at Rape Trials—Victims Deserve Unprejudiced Justice*, GUARDIAN (Aug. 12, 2016), <https://www.theguardian.com/commentisfree/2016/aug/12/juries-no-place-rape-trials-victims-deserve-unprejudiced-justice-judge> [<https://perma.cc/HRX9-TTLY>] (lamenting the “deep-rooted and highly persuasive myths about rape”).

27. See *Sexual Assault/Rape*, WOMENSLAW.ORG (June 28, 2011), <https://www.womenslaw.org/about-abuse/forms-abuse/sexual-abuse-and-exploitation/sexual-assault-rape> [<https://perma.cc/U9FS-SVVN>].

28. Leslie Berkseth et al., *Rape and Sexual Assault*, 18 GEO. J. GENDER & L. 743, 744–49 nn.7–8, 12, 14, 16–19 (2017).

“rape” typically refers to the penetration of the vagina or anus with any body part or object, or oral penetration by the sex organ of another person, without consent.<sup>29</sup> “Sexual assault” typically encompasses a broader range of conduct, including rape and “any type of sexual contact or behavior that occurs without the explicit consent of the recipient.”<sup>30</sup> This Comment uses language consistent with these definitions.<sup>31</sup>

*B. Rape and Sexual Assault Are Common, Traumatic, and Underreported*

Rape and sexual assault occur in “epidemic proportions” in the United States.<sup>32</sup> On average, an American is sexually assaulted every ninety-eight seconds.<sup>33</sup> One in six American women,<sup>34</sup> one in thirty-three American men,<sup>35</sup> one in four military members,<sup>36</sup> and one in three Native American women<sup>37</sup> have been raped. One in five female college students are sexually assaulted while attending college.<sup>38</sup> These steep nationwide rates reflect a three-fold reduction over the previous two decades.<sup>39</sup> In Washington State, surveys indicate that one in three Washingtonian women has been sexually assaulted in her lifetime.<sup>40</sup>

---

29. See *An Updated Definition of Rape*, U.S. DEP’T OF JUSTICE (Jan. 6, 2012), <https://www.justice.gov/opa/blog/updated-definition-rape> [<https://perma.cc/C9V6-XW2J>].

30. *Sexual Assault*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/ovw/sexual-assault>, [<https://perma.cc/X2WZ-DWCJ>] (definition as of June 16, 2017).

31. This Comment is limited to a discussion of adult victims of rape and sexual assault. While an estimated 63,000 children are sexually abused each year, Berkseth et al., *supra* note 28, at 750, the debate about whether a teen can consent to evidence collection and whether evidence collection under the nonreport option is subject to mandatory reporting requirements is still ongoing.

32. Press Release, Nat’l Sexual Violence Res. Ctr., In Response to WaPo Fact Checker: One Rape Is Too Many (Feb. 23, 2015), [https://www.nsvrc.org/sites/default/files/2015-02/publications\\_nsvrc\\_in-response-wapo-fact-checker-one-rape-is-too-many.pdf](https://www.nsvrc.org/sites/default/files/2015-02/publications_nsvrc_in-response-wapo-fact-checker-one-rape-is-too-many.pdf) [<https://perma.cc/3R35-B2DF>].

33. *Scope of the Problem: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/scope-problem> [<https://perma.cc/RP7G-SKH2>].

34. *Id.*

35. *Id.*

36. *Taking Sexual Assault Seriously: Rape Kit Backlog and Human Rights: Hearing Before the Subcomm. on the Constitution, Subcomm. on the Judiciary*, 114th Cong. 1 (2015), <https://www.judiciary.senate.gov/imo/media/doc/05-20-15%20Madigan%20Testimony.pdf> [<https://perma.cc/7YZ8-H5XN>] (prepared statement of Lisa Madigan, Ill. Att’y Gen.).

37. *Id.*

38. *Id.*

39. *Scope of the Problem: Statistics*, *supra* note 33.

40. *Understanding Sexual Assault*, WASH. COAL. SEXUAL ASSAULT PROGRAMS, <http://www.wcsap.org/how-often-does-it-happen> [<https://perma.cc/AC4D-TLJY>].

Studies suggest that the degree of psychological harm inflicted on victims<sup>41</sup> of rape and sexual assault exceeds that of every other violent crime.<sup>42</sup> Approximately 70% of all rape and sexual assault victims report experiencing moderate to severe distress.<sup>43</sup> In rape cases, 94% of female victims report experiencing symptoms of post-traumatic stress disorder within the first two weeks of being raped; for 30% of the same, those symptoms linger nine months later.<sup>44</sup> Thirty-three percent of female rape victims report contemplating suicide; 13% attempt it.<sup>45</sup> Victims of sexual assault are over three times more likely to resort to marijuana, six times more likely to resort to cocaine, and ten times more likely to resort to other major drugs than the general public.<sup>46</sup> Victims also report stress on their relationships with family, friends, and co-workers.<sup>47</sup> Because perpetrators are less likely to wear condoms<sup>48</sup> and are probably less likely to disclose sexually transmitted diseases,<sup>49</sup> victims are at a higher risk of pregnancy and sexually transmitted infections,<sup>50</sup> which can inflict additional distinct forms of psychological trauma.

Two in three sexual assaults go unreported.<sup>51</sup> This is due in large part to the aforementioned physical and psychological trauma experienced by

---

41. This Comment uses "victims" instead of "survivors"—a term frequently used by advocates—to remain consistent with Washington State law. *See, e.g.*, WASH. REV. CODE § 7.68.020 (2016) (definition of "victim"). Throughout Washington law, "survivor" is used to refer to a family member who survives the victim. *See, e.g.*, WASH. REV. CODE § 7.69.020 (2016) (definition of "survivor").

42. *Victims of Sexual Assault: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/8CXT-NSGH>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* This is not simply a correlation. NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 8 (1992), <https://victimsofcrime.org/docs/Reports%20and%20Studies/rape-in-america.pdf?sfvrsn=0> [<https://perma.cc/GNN9-3PJH>] ("For most rape victims, the age at which the first rape occurred was younger than the age at which they first became intoxicated or began using marijuana or cocaine . . .").

47. *Id.* at 7.

48. *See* Kelly Cue Davis et al., *The Use of Alcohol and Condoms During Sexual Assault*, 2 AM. J. OF MEN'S HEALTH 281, 281 (2008), [http://journals.sagepub.com/doi/abs/10.1177/1557988308320008?url\\_ver=Z39.88-2003&rfr\\_id=ori%3Arid%3Acrossref.org&rfr\\_dat=cr\\_pub%3Dpubmed&](http://journals.sagepub.com/doi/abs/10.1177/1557988308320008?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org&rfr_dat=cr_pub%3Dpubmed&) [<https://perma.cc/PC86-LQHW>].

49. *See* Jessica E. Draughon, *Sexual Assault Injuries and Increased Risk of HIV Transmission*, 34 ADVANCED EMERGENCY NURSING J. 82 (2012).

50. *Victims of Sexual Assault: Statistics*, *supra* note 42.

51. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2015 6 (2016), <https://www.bjs.gov/content/pub/pdf/cv15.pdf> [<https://perma.cc/EPQ3-Y2EU>].

victims, including humiliation, shame, and guilt.<sup>52</sup> However, victims are also deterred by fear of retaliation, distrust of law enforcement, privacy concerns, internalized desensitization to the misconduct, or a desire to avoid incriminating the perpetrator.<sup>53</sup> Often, victims seek to avoid perpetrators altogether because 70% of rapes are committed by someone the victim knows.<sup>54</sup> There may also be other complicating factors. For example, the perpetrator may be a family member whom the victim is financially dependent on,<sup>55</sup> or the victim may have been using illicit drugs at the time of the assault.<sup>56</sup> In more ways than one, the complex dynamics surrounding sexual crimes inherently discourage reporting, underscoring the need for a painless and reliable reporting process.

C. *Medical Personnel Typically Collect Evidence of Sexual Crimes Using “Rape Kits”*

Gathering forensic evidence in rape and sexual assault cases typically occurs during sexual assault medical forensic exams performed by specially trained nurses at medical facilities.<sup>57</sup> The exam provides victims with incipient medical care, allows for the collection of forensic evidence in compliance with the chain of custody standards in criminal cases,<sup>58</sup> and connects victims to counseling and advocacy services.<sup>59</sup> Despite genuine efforts from medical personnel to comfort recently traumatized victims, the procedure is invasive and can be humiliating.<sup>60</sup> In a typical sexual

---

52. Berkseth et al., *supra* note 28, at 750.

53. *The Criminal Justice System: Statistics*, *supra* note 4.

54. *Perpetrators of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/perpetrators-sexual-violence> [<https://perma.cc/9CE4-U9XV>].

55. Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 159–60 (2006), <http://www.middlebury.edu/media/view/240971/original/sable%E2%80%9494article.pdf> [<https://perma.cc/Y5Q6-KH33>].

56. Laurie Cook Heffron et al., *Giving Sexual Assault Survivors Time to Decide: An Exploration of the Use and Effects of the Nonreport Option*, AM. J. NURSING, March 2014, at 26.

57. Int'l Ass'n of Forensic Nurses, *What Is a Sexual Assault Medical Forensic Examination?*, SAFETA.ORG, <http://www.safeta.org/?369> [<https://perma.cc/YP2M-EKYL>].

58. See Magalhães et al., *supra* note 5, at 2 (“[T]he victim’s body may be the most important part of the crime scene.”).

59. LISA NEWMARK ET AL., URBAN INST., VAWA 2005 AND SEXUAL ASSAULT MEDICAL FORENSIC EXAMS: KIT STORAGE ISSUES 1 (2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413120-VAWA-and-Sexual-Assault-Medical-Forensic-Exams-Kit-Storage-Issues.pdf> [<https://perma.cc/2G2R-35XG>].

60. See OFFICE OF VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS 101 n.221 (2d ed. 2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf> [<https://perma.cc/C72G-RNZ3>].

assault forensic exam, the victim undresses on a sheet of paper so that clothes worn during the assault can be bagged and sealed.<sup>61</sup> Then, for upwards of four hours, a stranger closely scrutinizes, swabs, and photographs the victim's naked body and genitalia.<sup>62</sup> The sealed package containing microscope slides, boxes and plastic bags for storing skin, hair follicles, blood, saliva, semen, or vaginal fluid, and photographs of the victim's injuries comprises what is typically called a "rape kit," or "sexual assault kit."<sup>63</sup>

While the criminal justice system has largely benefited from the rapid evolution of forensic evidence techniques,<sup>64</sup> sexual assault cases present unique evidentiary obstacles. First, forensic evidence in the oral, anorectal, and vaginal areas has a fleeting half-life.<sup>65</sup> Forensic science scholars agree that post-rape vaginal samples have limited probative value when collected after seventy-two hours of the rape or sexual assault.<sup>66</sup> The time period to retrieve reliable evidence from the oral and anorectal cavities is even shorter.<sup>67</sup> As a result, many jurisdictions impose a seventy-two-hour time limitation for evidence collection.<sup>68</sup> Due to advances in forensics, some jurisdictions have lengthier time limitations, but only

---

61. Megan Messerly, *Rape, Suspended in Time*, LAS VEGAS SUN (Sept. 7, 2015, 2:00 AM), <https://lasvegassun.com/news/2015/sep/07/rape-suspended-time/> [<https://perma.cc/ABZ4-KARU>].

62. *Id.*

63. NANCY RITTER, U.S. DEP'T OF JUSTICE, THE ROAD AHEAD: UNANALYZED EVIDENCE IN SEXUAL ASSAULT CASES 2 (2011), <https://www.ncjrs.gov/pdffiles1/nij/233279.pdf> [<https://perma.cc/8DDY-YZ7E>].

64. Myka Held & Juliana McLaughlin, *Rape & Sexual Assault*, 15 GEO. J. GENDER & L. 155, 161–62 (2014) (noting the exuberance with which the advent of forensic science was met by the legal community).

65. Magalhães et al., *supra* note 5, at 3.

66. Patricia Speck & Jack Ballantyne, Post-Coital DNA Recovery Study, at v (Aug. 31, 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/248682.pdf> [<https://perma.cc/9UZD-R9B6>] (unpublished grant report); see also *What is a Rape Kit?*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/articles/rape-kit> [<https://perma.cc/LSU2-T6A4>] ("In most cases, DNA evidence needs to be collected within 72 hours in order to be analyzed by a crime lab.").

67. Magalhães et al., *supra* note 5, at 3 ("Semen . . . is rarely present in oral, anorectal, and vaginal cavities 6, 24, and 72 hours after sexual contact, respectively.").

68. See, e.g., SARA G. GONSALVES, MINNESOTA MODEL POLICIES FOR FORENSIC COMPLIANCE 52 (2011), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=91> [<https://perma.cc/3EEP-CWDA>] ("In general, the practice in Minnesota has been to offer medical forensic exams to victims of sexual assault who present within 72 hours (3 days) post-assault."); *Frequently Asked Questions*, KING CTY. SEXUAL ASSAULT RES. CTR., <http://www.kcsarc.org/FAQ> [<https://perma.cc/8RQ9-SLM7>] ("You can go to the hospital emergency room within 72 hours of the assault to be checked out physically without reporting to the police."); *Quick Reference Guide for Law Enforcement*, ARK. COAL. AGAINST SEXUAL ASSAULT, <https://acasa.us/quick-reference-guide-for-law-enforcement/> [<https://perma.cc/G8S3-Z3ZQ>] ("For adults, exams must be admitted within 72 hours of the assault.").

slightly.<sup>69</sup> Considering the trauma-induced paralysis experienced by nearly all victims immediately after being raped or sexually assaulted,<sup>70</sup> these limitations regularly result in a failure to gather evidence within that short window.<sup>71</sup> While the nonreport option seeks to mitigate this problem, victims still face the invasive and arduous nature of the evidence collection process.<sup>72</sup>

Second, performing medical forensic exams, collecting and testing rape kits, and administering any referral services can be expensive. The cost of testing a rape kit alone is estimated to be anywhere from \$1,000 to \$1,500.<sup>73</sup> Historically, some law enforcement agencies subsidized these costs for victims, but only if the victims filed an accompanying police report, erring on the side of conserving public resources.<sup>74</sup> Victims too traumatized to decide to involve law enforcement had to pay out of pocket.<sup>75</sup> Those costs, along with the limited window for evidence collection, constituted high barriers to medical care and the successful prosecution of rape and sexual assault cases.<sup>76</sup>

---

69. See, e.g., Heffron et al., *supra* note 56, at 27 (describing Texas's ninety-six-hour window); *The Sexual Assault Exam and Evidence Collection Kit*, FORENSICS FOR SURVIVORS <http://www.survivorape.org/forensics/sexual-assault-forensics/rape-exam> [<https://perma.cc/39M9-V3JJ>] (describing Massachusetts' 120-hour window).

70. See discussion *supra* section I.B.

71. Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, AM. PSYCHOLOGIST, Nov. 2008, at 703, <https://russellstrand.com/wp-content/uploads/2017/12/Campbell-2008-Psychological-Impact-of-Rape-Victims-Experiences-With-the-Legal-Medical-and-Mental-Health-Systems.pdf> [<https://perma.cc/5AYR-GDFK>] (“27% to 40% [of rape victims] seek medical care and medical forensic examinations”).

72. Charlotte Alter, *Here's What Happens When You Get a Rape Kit Exam*, TIME (July 17, 2014), <http://time.com/3001467/heres-what-happens-when-you-get-a-rape-kit-exam/> [<http://perma.cc/NFJ5-JCN5>].

73. *Why the Backlog Exists*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/why-backlog-exists> [<https://perma.cc/VZ9B-T4S2>].

74. NEWMARK ET AL., *supra* note 59, at 1; OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS: ANONYMOUS REPORTING AND FORENSIC EXAMINATIONS (2008), <http://www.markwynn.com/sex-assault/faq-anonymous-reporting-and-forensic-examination-s-2008.pdf> [<https://perma.cc/YP5F-CEUZ>].

75. NEWMARK ET AL., *supra* note 59, at 1.

76. LINDA E. LEDRAY, SEXUAL ASSAULT RES. SERV., SEXUAL ASSAULT NURSE EXAMINER: DEVELOPMENT & OPERATION GUIDE 31, [https://www.ncjrs.gov/ovc\\_archives/reports/saneguide.pdf](https://www.ncjrs.gov/ovc_archives/reports/saneguide.pdf) [<https://perma.cc/V8BT-8FVA>].

D. *Numerous Institutional Obstacles Discourage Victims from Utilizing the Legal System*

While political actors and victim advocates raise awareness of the staggering statistics and deleterious effects of rape and sexual assault, the legal system fails victims in many ways. From the outset, the dearth of forensic evidence collection can preclude most legal remedies.<sup>77</sup> The private nature of sexual crimes makes it notoriously difficult to rely on traditional forms of evidence, like eye witnesses, to link the accused to the crime,<sup>78</sup> so forensic evidence is especially critical to investigatory and prosecutorial efforts. If the victim does not know the identity of the perpetrator, law enforcement investigations can stall.<sup>79</sup> Even if a suspect can be identified by other means, trials frequently devolve into “he-said, she-said” scenarios<sup>80</sup> without forensic evidence, where the high standard of proof in criminal trials<sup>81</sup> is difficult to meet.<sup>82</sup>

Second, even when forensic evidence is collected, justice is frequently delayed by the widely publicized<sup>83</sup> nationwide rape kit backlog.<sup>84</sup> The backlog refers to the accumulation of reported rape kits—connected to law enforcement investigations—that remain untested, often years past

---

77. See Magalhães et al., *supra* note 5, at 1–2 (“Biological evidence is sometimes the only way to prove the occurrence of sexual contact and to identify the perpetrator . . . . Biological evidence for DNA studies is nowadays considered the most important proof in courts of law.”).

78. Sarah Friedmann, *How the US Legal System Fails to Protect Rape Survivors*, BUSTLE (June 21, 2017), <https://www.bustle.com/p/how-the-us-legal-system-fails-to-protect-rape-survivors-65751> [<https://perma.cc/QCY5-BU38>].

79. See Karl M. McDonald, *DNA Forensic Testing and Use of DNA Rape Kits in Cases of Rape and Sexual Assault*, FORENSIC MAG. (Jan. 26, 2015, 8:21 AM), <https://www.forensicmag.com/article/2015/01/dna-forensic-testing-and-use-dna-rape-kits-cases-rape-and-sexual-assault> [<https://perma.cc/N7V5-JBC7>] (“[T]he preservation of DNA evidence is pivotal and washing away the evidence could hinder investigations, making it very difficult to have any tangible evidence an assault did take place.”).

80. William Safire, *On Language: He-Said, She-Said*, N.Y. TIMES (Apr. 12, 1998), <http://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html> [<https://perma.cc/4DQQ-TDIT>] (documenting the origins and meaning of the phrase).

81. *State v. W.R., Jr.*, 181 Wash. 2d 757, 766–67, 336 P.3d 1134, 1139 (2014) (reaffirming the burden on the prosecution to prove sexual crimes “beyond reasonable doubt”).

82. While DNA evidence is not dispositive, studies suggest that juries are generally thirty-three times more likely to convict when presented with DNA evidence. Waltke et al., *supra* note 4.

83. See, e.g., Rich McHugh & Kate Snow, *Why Haven't 70,000 Rape Kits Been Tested for DNA?*, NBC NEWS (July 20, 2015, 12:15 AM ET), <http://www.nbcnews.com/news/us-news/rape-kits-n393186> [<https://perma.cc/W45W-CWB7>] (documenting the nationwide rape kit backlog).

84. Blake M. Randol & Christina M. Sanders, *Examining the Barriers to Sexual Assault Evidence Processing in Washington State: What's the Hold Up?*, CRIMINOLOGY, CRIM. JUST., L. & SOC'Y, Aug. 2015, at 1–13.

their collection.<sup>85</sup> The backlog is caused by two distinct but related problems.<sup>86</sup> First, detectives and prosecutors may choose not to request DNA analysis because of the eccentricities of a case, limited resources, unclear policies and protocols, or personal biases.<sup>87</sup> These “un-submitted” rape kits are collected by law enforcement and booked into evidence, but remain there until law enforcement deems testing necessary or internal storage policies instruct disposal.<sup>88</sup> Second, crime laboratory facilities are often unable to test the kits that are submitted by detectives and prosecutors in a timely manner because of inadequate resources.<sup>89</sup> These “untested” rape kits languish in crime labs across the country.<sup>90</sup> Due to limited and uncoordinated tracking systems, the total number of backlogged kits cannot be known with certainty.<sup>91</sup> However, estimates from surveying done by advocacy groups and journalists consistently put the number in the hundreds of thousands.<sup>92</sup> Roughly 6,000 of those sit untested in Washington State.<sup>93</sup> While legislative actors and advocacy groups have successfully brought the backlog crisis to the public’s attention in recent years and encouraged policy responses to bring about necessary change,<sup>94</sup> the problem remains pervasive.<sup>95</sup>

---

85. *What is the Rape Kit Backlog?*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/what-rape-kit-backlog> [<https://perma.cc/4GCQ-LBJA>].

86. *Id.*

87. *Id.*; *Why the Backlog Exists*, *supra* note 73; WASH. SEXUAL ASSAULT FORENSIC EXAMINATION BEST PRACTICES TASK FORCE, ANNUAL REPORT TO THE LEGISLATURE AND GOVERNOR 4–5 (2016), <http://leg.wa.gov/JointCommittees/USAEK/Documents/USAEK-Report2016.pdf> [<https://perma.cc/TH7G-8SNN>] [hereinafter 2016 TASK FORCE] (In Washington State, “[p]rior to 2015, law enforcement agencies and prosecutors had the discretion to send [rape kits] to forensic laboratories for testing, but were not required to do so”). While they no longer have that discretion, some argue they should. *See, e.g.*, Editorial Bd., *Rape Kit Backlog Must Be Cleared*, NEWS TRIB. (Aug. 31, 2017), <http://www.thenewtribune.com/opinion/article170605362.html> [<https://perma.cc/X632-UQZA>] (“Detective Bradley Graham of the Tacoma Police Department’s Special Assault Unit is concerned the 2015 laws removed law enforcement’s discretion. He believes law enforcement officers are still the best qualified to judge whether a rape kit needs to be sent to crime labs.”).

88. *What is the Rape Kit Backlog?*, *supra* note 85.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Washington*, END THE BACKLOG, <http://www.endthebacklog.org/washington> [<https://perma.cc/HF8X-9RVH>].

94. *See Where the Backlog Exists and What’s Happening to End It*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> [<https://perma.cc/D8ZR-HGZN>].

95. *Id.*

Finally, numerous systemic barriers can discourage victims from pursuing legal remedies. Statutes of limitations on sexual crimes, ranging from several years to decades,<sup>96</sup> can procedurally preclude litigation.<sup>97</sup> Victim advocates argue these limits are too short given the numerous barriers to reporting and the fact that many victims fail to process their experience for considerable time.<sup>98</sup> Even within the statute of limitations, prosecutors, judges, and the considerable expense of litigation act as gatekeepers to the courtroom. In criminal cases, prosecutors have discretion, heavily constrained by the evidence in front of them, to bring charges and offer plea deals to perpetrators.<sup>99</sup> Similarly, judges have discretion with sentencing and have demonstrated, to some, a proclivity for sentencing leniently.<sup>100</sup> Of rapes and sexual assaults that are reported, roughly 2% result in a felony conviction and even less result in incarceration.<sup>101</sup>

## II. FEDERAL LAW GUARANTEES THE PROVISION OF ANONYMOUS RAPE KITS

### A. *The Violence Against Women Act Catalyzed and Normalized the Use of Anonymous Rape Kits*

In recognition of the severity of crimes associated with domestic violence, sexual assault, and stalking, Congress passed the Violence Against Women Act of 1994<sup>102</sup> (VAWA 1994) as part of the Violent

---

96. For a survey of state laws, see BRITTANY ERICKSEN ET AL., NAT'L CTR. FOR VICTIMS CRIME, STATUTES OF LIMITATIONS FOR SEXUAL ASSAULT: A STATE-BY-STATE COMPARISON (2013), <http://victimsofcrime.org/docs/DNA%20Resource%20Center/sol-for-sexual-assault-check-chart---final---copy.pdf?sfvrsn=2> [https://perma.cc/6ZG2-34Z7].

97. Friedmann, *supra* note 78.

98. *Id.* ("This notion was well-documented during coverage of the Cosby case, as many of the nearly 60 women who publicly alleged that Cosby assaulted them . . . could not bring their cases to court because of an expired statute of limitations."). For this reason, some states are moving toward ending statutes of limitations in rape cases. See Merrit Kennedy, *California Eliminates Statute of Limitations on Rape Cases*, NPR (Sept. 28, 2016, 9:03 PM), <https://www.npr.org/sections/thetwo-way/2016/09/28/495856974/california-eliminates-statute-of-limitations-on-rape-cases> [https://perma.cc/3UZ9-CK2B].

99. Held & McLaughlin, *supra* note 64, at 161.

100. Janette Gagnon & Emanuella Grinberg, *Mad About Brock Turner's Sentence? It's Not Uncommon*, CNN (Sept. 4, 2016, 4:28 PM), <https://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/index.html> [https://perma.cc/88E7-9VU4].

101. *The Criminal Justice System: Statistics*, *supra* note 4.

102. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of the U.S. Code).

Crime Control and Law Enforcement Act of 1994.<sup>103</sup> VAWA 1994 established new penalties for sexual crimes, created a private civil rights cause of action for victims,<sup>104</sup> provided educational and training opportunities about violence against women for certain groups, and created the STOP Violence Against Women Formula Grant Program.<sup>105</sup>

The STOP grant program encourages coordinated community responses to combat domestic violence and sexual assault by allocating funds to fifty-six states and territories to be distributed in fixed proportions among interested parties.<sup>106</sup> Pursuant thereto, law enforcement and prosecutors each receive at least 25% of the allocated funds; victim services receive at least 30%; and court entities receive at least 5%.<sup>107</sup> The remaining 15% can be used at the state's discretion.<sup>108</sup> Washington State currently uses two-thirds of its discretionary 15% to raise the portion going to prosecution and law enforcement from 25% each to 30% each.<sup>109</sup> In total, the program provided over \$150 million in federal funds in the fiscal year 2016.<sup>110</sup> Of that amount, Washington State received \$3.2 million.<sup>111</sup>

As a condition of participation in the STOP grant program, VAWA 1994 required states to cover the costs of medical forensic exams for victims of rape and sexual assault.<sup>112</sup> States are not required to use funds received under the STOP program to pay for exams, although eligibility in the program is at stake if they fail to cover the costs through some source of funding.<sup>113</sup> For the first decade following VAWA's enactment,

---

103. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in scattered sections of the U.S.C.); see also Women's Legal Def. and Educ. Fund, *History of the Violence Against Women Act*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-vawa> [<https://perma.cc/7ARF-JGUV>].

104. The private civil rights cause of action was ultimately struck down by the U.S. Supreme Court in *United States v. Morrison*, 529 U.S. 598, 617 (2000).

105. 34 U.S.C.A. § 10441 (West 2018).

106. *Grant Programs*, *supra* note 19.

107. *Id.*

108. *Id.*

109. PEARL GIPSON-COLLIER, WASH. ST. OFFICE OF CRIME VICTIMS ADVOCACY, DEP'T OF COMMERCE, STOP VIOLENCE AGAINST WOMEN FORMULA GRANT IMPLEMENTATION PLAN: FY 14-16, at 12 (2014), <http://www.commerce.wa.gov/wp-content/uploads/2016/10/ocva-stop-2014-2016-grant-plan.pdf> [<https://perma.cc/XS6H-UWK2>].

110. Office on Violence Against Women, *FY 2016 OVW Grant Awards by Program*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/awards/fy-2016-ovw-grant-awards-program#STOP> [<https://perma.cc/8AYM-F3TJ>] (last updated Oct. 26, 2017).

111. *Id.*

112. 34 U.S.C.A. § 10449 (West 2018).

113. JANINE ZWEIG ET AL., URBAN INST., WHO PAYS FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMS? 1 (2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413122-Who->

and through one reauthorization in 2000, many jurisdictions interpreted the funding requirement to apply only to exams for victims who pursued criminal charges.<sup>114</sup> As a result, many victims chose to forgo medical forensic exams because they were not ready to involve law enforcement.<sup>115</sup>

In response, the Violence Against Women and Department of Justice Reauthorization Act of 2005<sup>116</sup> (VAWA 2005) amended the funding mandate to require states to pay for forensic exams even if the victim chooses not to participate in the criminal justice system.<sup>117</sup> In that case, evidence is collected in the same manner as a reported rape kit, but the sealed package is tagged with an anonymous tracking number, rather than the victim's name, for privacy reasons.<sup>118</sup> These kits are typically called "anonymous kits," "unreported kits," or "Jane Doe kits."<sup>119</sup> VAWA 2005 required states to comply with the funding requirement by 2009.<sup>120</sup> Congress recently reaffirmed this nonreport option in the Violence Against Women Reauthorization Act of 2013.<sup>121</sup> Data on the nonreport option are sparse but studies suggest it "has had a considerable positive impact on [sexual assault nurse examiners], survivors of sexual assault, and the criminal justice system."<sup>122</sup>

#### *B. The Sexual Assault Survivors' Rights Act Strengthened Protections*

In 2016, President Obama signed the "Sexual Assault Survivors' Rights Act"<sup>123</sup> into law after its unanimous approval by both Houses of

---

Pays-for-Sexual-Assault-Medical-Forensic-Exams-It-Is-Not-the-Victim-s-Responsibility.pdf  
[<https://perma.cc/BE2M-ENEL>].

114. *Id.*; see also, e.g., WASH. REV. CODE § 7.68.170 (2016) (guaranteeing the funding of sexual assault kits only "when such examination is performed for the purposes of gathering evidence for possible prosecution").

115. Heffron et al., *supra* note 56, at 28.

116. Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of the U.S.C.).

117. 34 U.S.C.A. § 10449 (West 2018).

118. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 6.

119. *Id.*

120. NEWMARK ET AL., *supra* note 59, at 1.

121. Pub. L. No. 113-4, 127 Stat. 54 (2013) (to be codified in scattered sections of the U.S.C.); see also *Background on VAWA 2005, VAWA 2013 and Forensic Compliance*, END VIOLENCE AGAINST WOMEN INT'L <http://www.evawintl.org/PAGEID2/Forensic-Compliance/Background> [<https://perma.cc/7D4W-HXY8>].

122. Heffron et al., *supra* note 56, at 30.

123. Survivors' Bill of Rights Act of 2016, Pub. L. No. 114-236, 130 Stat. 966 (to be codified in scattered sections of the U.S. Code).

Congress.<sup>124</sup> The landmark legislation establishes critical civil rights for victims of sexual assault in federal cases,<sup>125</sup> including many of the benefits first introduced by the VAWA.<sup>126</sup> Specifically, it guarantees the right to a subsidized rape kit; the right to have the kit preserved, without charge, for the shorter of twenty years or the length of the relevant statute of limitations; the right to be informed of relevant policies governing kit collection and preservation; the right to be informed of any results of the kit's testing; the right to be warned at least sixty days before the date of the kit's intended disposal; and the right to have preservation of the kit extended upon request.<sup>127</sup> To aid compliance efforts, the law authorizes states to tap the federal Crime Victims Fund<sup>128</sup>—a depository of criminal fines, forfeited appearance bonds, penalties and other special assessments, collected by the U.S. Attorneys' Offices, federal courts, and Federal Bureau of Prisons that funds state victim compensation and assistance programs.<sup>129</sup> Though the ramifications of the Act are unclear at this time, it imposes several mandates that will overhaul the way rape kits are preserved and processed across the country. Already, several states have begun to enact state-level versions of the statute.<sup>130</sup> This groundswell underscores the timeliness for thoughtful legislation at the state level.<sup>131</sup>

---

124. John T. Bennett, *How One Victim's Fight Got Sexual Assault Bill to Obama*, ROLL CALL (Oct. 7, 2016, 5:12 PM), <http://www.rollcall.com/news/politics/president-obama-signs-sexual-assault-bill-of-rights> [https://perma.cc/7Z6T-PRK8].

125. NAT'L INST. OF JUSTICE, NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS: A MULTIDISCIPLINARY APPROACH 71 (2016).

126. Madison Pauly, *Obama Just Signed a Bill of Rights for Sexual-Assault Survivors*, MOTHER JONES (Oct. 7, 2016, 8:46 PM), <https://www.motherjones.com/politics/2016/10/obama-signs-sexual-assault-survivor-bill-rights/> [https://perma.cc/D2LX-QCUL].

127. 18 U.S.C.A. § 3772 (West 2018).

128. *Id.* § 3772(d).

129. LISA N. SACCO, CONG. RES. SERV., THE CRIME VICTIMS FUND: FEDERAL SUPPORT FOR VICTIMS OF CRIME 1 (2015).

130. Olivia Messer, *States Rush to Introduce Sexual-Assault Survivor 'Bill of Rights'*, DAILY BEAST (Jan. 26, 2018, 2:47 PM), <https://www.thedailybeast.com/states-rush-to-introduce-sexual-assault-survivor-bill-of-rights> [https://perma.cc/UMW4-42CW].

131. The Washington Sexual Assault Best Practices Task Force recommended similar legislation to the Legislature. 2017 TASK FORCE, *supra* note 21, at 10.

### III. LEAVING ANONYMOUS RAPE KIT STORAGE UNREGULATED IN STATES LIKE WASHINGTON IS IRRESPONSIBLE

#### A. *Anonymous Rape Kit Preservation Presents a Critical Logistical Problem in States Without Regulations*

Interested medical facilities and law enforcement agencies, seeking to comply with federal law and promote the best interests of victims, have expressed concern about the proper storage of anonymous rape kits.<sup>132</sup> While responsibility for administering and funding the kits is relatively straightforward, involved agencies often dispute who is responsible for storage.<sup>133</sup> Reported rape kits are connected to law enforcement investigations and therefore qualify as law enforcement evidence to be stored at law enforcement facilities.<sup>134</sup> By contrast, anonymous rape kits operate in a legal grey area.<sup>135</sup> Anonymous kits are not law enforcement evidence because they are not associated with a criminal investigation, nor are they medical information because they are not associated with a medical diagnosis or treatment.<sup>136</sup> As a result, medical facilities and law enforcement agencies—especially those with limited resources—often resist taking responsibility for their preservation.<sup>137</sup>

Federal law is unhelpful in clarifying responsibility. Aside from demanding the kits' subsidization, the Violence Against Women Act is silent on anonymous rape kits, leaving responsibility for the manner, conditions, and duration of their storage to the discretion of participating states.<sup>138</sup> While the Sexual Assault Survivors' Rights Act requires preservation for a certain period of time, it too is silent on which entity is responsible for that preservation.<sup>139</sup> In fact, when referring to a victim's

---

132. See NAT'L SEXUAL VIOLENCE RES. CTR., FORENSIC EXAM KIT STORAGE (2007), [http://www.nsvrc.org/sites/default/files/file/Projects\\_SART\\_Team\\_Kit-Storage.pdf](http://www.nsvrc.org/sites/default/files/file/Projects_SART_Team_Kit-Storage.pdf) [<https://perma.cc/4G87-935P>].

133. 2016 TASK FORCE, *supra* note 87, at 9 ("Many jurisdictions, including law enforcement agencies, hospitals, and other medical care facilities report challenges related to anonymous SAKs. Challenges include: storage location; testing; destruction; and victim notification.").

134. *Defining the Rape Kit Backlog*, END THE BACKLOG, <http://www.endthebacklog.org/backlog-what-it/defining-rape-kit-backlog> [<https://perma.cc/KN5N-DRYB>].

135. NEWMARK ET AL., *supra* note 59, at 1.

136. *See id.*

137. *Id.*

138. *See* Glenza, *supra* note 9.

139. 18 U.S.C.A. § 3772 (West 2018).

right to be notified before a kit's disposal, the Act vaguely refers to "the appropriate official with custody."<sup>140</sup>

While some states have chosen to standardize storage practices by law, most defer to the judgment of individual jurisdictions.<sup>141</sup> In states without a standard practice, jurisdictions often flounder under the lack of regulatory guidance.<sup>142</sup> The length of time that kits are preserved before facilities discard them is often determined by a specific facility's retention policy and, in some cases, by its storage capacity.<sup>143</sup> The resulting incongruity creates a hodgepodge of differing storage practices throughout states without regulations.<sup>144</sup>

### B. *Washington State's Balkanized System*

Like the majority of states, Washington does not presently regulate the storage of anonymous rape kits.<sup>145</sup> As a result, the unique policies and protocols of involved medical and law enforcement facilities often dictate how long victims have to seek medical forensic examinations as well as where the collected evidence is stored.<sup>146</sup> In most cases, medical facilities retain the kits until the victim decides to report. If the victim chooses to report, the rape kit must be forwarded to one of the Washington State Patrol's five crime laboratories for forensic testing<sup>147</sup> within thirty days of

---

140. *Id.* § 3772(a)(3)(A).

141. *See, e.g.*, N.J. STAT. ANN. § 52:4B-52(e)-(g) (West 2011) (codifying deference to counties in New Jersey).

142. NEWMARK ET AL., *supra* note 59, at 1.

143. *Id.* at 4.

144. For example, in Florida, anonymous rape kit storage and retention policies vary widely between different crisis centers. Glenza, *supra* note 9. According to data collected by the Florida Council Against Sexual Violence, anonymous kits at a Tampa Bay Area clinic were kept for as little as thirty days while anonymous kits from victims in Escambia and Santa Rosa counties were held for up to four years. *Id.* In this way, evidence is often lost or destroyed arbitrarily depending on which jurisdiction the victim seeks care in. *Id.*; *see also* Kingkade, *supra* note 25 (describing political efforts to combat inconsistent storage practices).

145. 2016 TASK FORCE, *supra* note 87, at 9 ("Washington law does not provide guidance or otherwise mandate storage or testing requirements for anonymous SAKs.").

146. *See, e.g.*, Sara Jean Green, *With New Money, State Chips Away at Daunting Backlog of Rape Evidence—But Can't Keep Up*, SEATTLE TIMES (Dec. 18, 2016, 2:21 PM), <https://www.seattletimes.com/seattle-news/crime/with-new-money-state-chips-away-at-daunting-backlog-of-rape-evidence-but-cant-keep-up/> [https://perma.cc/7GS9-AEL3] (describing Harborview's policy, allowing victims a five-day window and keeping non-report kits for six months).

147. 2016 TASK FORCE, *supra* note 87, at 8; Molly Rosback, *Justice Delayed? 6,000 Rape Kits Sit Untested in Wash. State*, KOMONEWS (Oct. 16, 2016), <http://komonews.com/news/local/justice-delayed-6000-rape-kits-sit-untested-in-wash-state> [https://perma.cc/CC4X-PGMD].

law enforcement gaining custody.<sup>148</sup> However, each kit takes weeks to process so the laboratories struggle with capacity issues, often times preventing law enforcement from complying with the new law.<sup>149</sup> All of this was problematic before the Legislature mandated the preservation of DNA evidence through the relevant statute of limitations in 2015.<sup>150</sup>

To combat these inefficiencies, Congress<sup>151</sup> and the Legislature<sup>152</sup> have increased funding for medical facilities, law enforcement agencies, and crime laboratories. In a move toward standardizing the system, the Legislature charged the Washington State Patrol with the implementation and operation of a statewide rape kit tracking system, which must be fully operational by June 2018.<sup>153</sup> While these steps are critical to combat the backlog of reported rape kits,<sup>154</sup> they fail to address unreported rape kits. As a result, storage and tracking policies continue to vary from jurisdiction to jurisdiction, even from facility to facility.<sup>155</sup>

#### IV. EXISTING STATE REGULATION OF ANONYMOUS RAPE KIT STORAGE

A minority of states have started to regulate anonymous rape kit storage through laws and regulations.<sup>156</sup> The laws are far from consistent or

---

148. WASH. REV. CODE § 5.70.010 (2016).

149. Molly Rosback, *supra* note 147.

150. WASH. REV. CODE §§ 5.70.010–.020.

151. The STOP Violence Against Women Formula Grant Program provided over \$150 million in federal funds to fifty-six states and territories in the fiscal year 2016. *Grant Programs, supra* note 19.

152. Washington State spends hundreds of thousands of dollars per year collecting anonymous rape kit evidence, mostly derived from the State's Victim Compensation Fund. *About Crime Victims Compensation*, WASH. STATE DEP'T LABOR & INDUS., <http://www.lni.wa.gov/claimsins/crimevictims/about/> [https://perma.cc/DSU6-F92R]. Of that amount, Washington State received \$3.2 million. *FY 2016 OVW Grant Awards by Program, supra* note 110.

153. 2016 TASK FORCE, *supra* note 87, at 6–7.

154. In 2015, the Washington Legislature commissioned a task force to “review best practice models for managing all aspects of sexual assault examinations and for reducing the number of untested sexual assault kits in Washington.” *Id.* at 4.

155. “There are also disparate needs across the state, with some larger jurisdictions having large numbers of unsubmitted SAKs and smaller jurisdictions having very few.” 2016 TASK FORCE, *supra* note 87, at 12.

156. As it stands, twenty-one states have done so. COLO. REV. STAT. ANN. § 18-3-407.5(3)(c) (West 2018); CONN. GEN. STAT. ANN. § 19a-112a (West 2018); GA. CODE ANN. § 17-5-71(b) (West 2018); 725 ILL. COMP. STAT. ANN. 203/30 (West 2018); IND. CODE ANN. § 16-21-8-10 (West 2018); IOWA CODE ANN. § 709.10 (West 2018); KAN. STAT. ANN. § 65-448 (West 2018); KY. REV. STAT. ANN. § 216B.400(10)(c)(2) (West 2018); LA. STAT. ANN. § 40:1216.1A(2)(b) (2018); ME. REV. STAT. ANN. tit. 25, § 3821 (2018); MICH. COMP. LAWS ANN. § 752.933 (West 2018); N.Y. PUB. HEALTH LAW § 2805-1 (McKinney 2018); N.C. GEN. STAT. ANN. § 143B-601(13) (West 2018); N.C. GEN. STAT. ANN. § 15A-268 (West 2018); OR. REV. STAT. ANN. § 147.397(5)(b) (West 2018); 35

comprehensive in both breadth and substance.<sup>157</sup> The full spectrum of features that the assortment of laws address includes which entity is responsible for storage; if necessary, which entity is responsible for transferring the evidence to the appropriate agency and how long they have to do so; baseline requirements for physical storage conditions; a minimum retention period for the evidence, after which the entity can discard unreported rape kits pursuant to internal policy; and whether the victim is owed notice of either the minimum retention period or the ultimate disposal of the anonymous kit.

*A. Assigning Responsibility for Storage*

State laws that standardize anonymous rape kit storage generally assign storage responsibilities in one of three ways. This Comment refers to them as the “medical facility” model, the “law enforcement” model, and the “agency” model. Variances exist within each model, but for the purposes of this Comment they are organized by the type of entity given responsibility. Jurisdictions in states without regulations often incorporate some variation of these models by default,<sup>158</sup> but regulated states typically formally adopt one of these models.<sup>159</sup>

Under the medical facility model, the medical facility that performs the medical forensic exam—such as a hospital or specialized victim services center—securely stores collected evidence either at the medical facility or at an alternative storage location.<sup>160</sup> Law enforcement is not involved at all.<sup>161</sup> If the victim later chooses to report, the kit is provided to the law enforcement agency with jurisdiction over the case.<sup>162</sup> As of 2018, four

---

PA. STAT. AND CONS. STAT. ANN. § 10172.3 (West 2018); S.D. CODIFIED LAWS § 23-5C-3 (2018); TENN. CODE ANN. § 39-13-519 (West 2018); TEX. GOV'T CODE ANN. § 411.053 (West 2018); VA. CODE ANN. § 19.2-11.6 (West 2018); 502 KY. ADMIN. REGS. 12:010 (2018); MD. CODE REGS. 10.12.02.03 (2018); MONT. ADMIN. R. 23.15.402(3) (2018).

157. Compare S.D. CODIFIED LAWS § 23-5C-3 (very basic), with 502 KY. ADMIN. REGS. 12:010 (very robust).

158. See DIV. OF VICTIM SERVS. & CRIM. JUSTICE PROGRAMS, OFFICE OF FLA. ATT'Y GEN., ADULT AND CHILD SEXUAL ASSAULT PROTOCOLS: INITIAL FORENSIC EXAMINATION 20 (2015), [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/\\$file/ACSP.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-77TKCT/$file/ACSP.pdf) [<https://perma.cc/G6WG-4NUG>] (“Refrigeration and long-term storage of the kit varies by county.”).

159. See, e.g., 725 ILL. COMP. STAT. ANN. 203/30 (adopting the law enforcement model).

160. See, e.g., 502 KY. ADMIN. REGS. 12:010 (designating responsibility for coordinating storage to medical facilities).

161. *Id.*

162. *Id.*

states—Kentucky, Michigan, New York, and South Dakota—have passed laws that incorporate this model.<sup>163</sup>

Under the law enforcement model, the medical facility that performs the exam securely transfers the evidence to a local, county, or state law enforcement agency with jurisdiction over a potential case.<sup>164</sup> Law enforcement either stores the evidence, awaiting a victim report, or sends the evidence to the crime lab for anonymous analysis without victim approval.<sup>165</sup> As of 2018, twelve states—Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Oregon, Pennsylvania, and Tennessee—have passed laws that incorporate this model.<sup>166</sup>

Under the agency model, the medical facility that performs the exam securely transfers the evidence to a designated administrative agency that stores and tracks all anonymous rape kits from around the state.<sup>167</sup> If the victim decides to file a report, the agency securely transfers the evidence to the appropriate law enforcement agency.<sup>168</sup> States incorporating this model typically assign responsibility to a health- or criminal justice-related agency such as the Department of Public Safety,<sup>169</sup> the state crime lab,<sup>170</sup> or the Office of Victim Services.<sup>171</sup> As of 2018, five states—Kansas, Montana, North Carolina, Texas, and Virginia—have passed laws that incorporate this model.<sup>172</sup>

---

163. KY. REV. STAT. ANN. § 216B.400(10)(c)(2) (West 2018); MICH. COMP. LAWS ANN. § 752.933 (West 2018); N.Y. PUB. HEALTH LAW § 2805-I (McKinney 2018); S.D. CODIFIED LAWS § 23-5C-3 (2018); 502 KY. ADMIN. REGS. 12:010.

164. *See, e.g.*, LA. STAT. ANN. § 40:1216.1A (2015) (assigning storage responsibility to the law enforcement agency with jurisdictional responsibilities if the case were reported).

165. *Id.*

166. COLO. REV. STAT. ANN. § 18-3-407.5(3)(c) (West 2018); CONN. GEN. STAT. ANN. § 19a-112a (West 2018); GA. CODE ANN. § 17-5-71(b) (West 2018); 725 ILL. COMP. STAT. ANN. 203/30 (West 2018); IND. CODE ANN. § 16-21-8-10 (West 2018); IOWA CODE ANN. § 709.10 (West 2018); LA. STAT. ANN. § 40:1216.1A(2)(b); ME. REV. STAT. ANN. tit. 25, § 3821 (2018); OR. REV. STAT. ANN. § 147.397(5)(b) (West 2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10172.3 (West 2018); TENN. CODE ANN. § 39-13-519 (West 2018); MD. CODE REGS. 10.12.02.03 (2018).

167. *See, e.g.*, VA. CODE ANN. § 19.2-11.6 (West 2018) (assigning storage responsibility to the Division of Consolidated Laboratory Services of the Virginia Department of General Services).

168. *Id.*

169. Heffron et al., *supra* note 56, at 27 (describing Texas's agency storage model).

170. NEWMARK ET AL., *supra* note 59, at 4.

171. MONT. ADMIN. R. 23.15.403 (2018).

172. KAN. STAT. ANN. § 65-448 (West 2018); N.C. GEN. STAT. ANN. § 143B-601(13) (West 2018); N.C. GEN. STAT. ANN. § 15A-268 (West 2018); TEX. GOV'T CODE ANN. § 411.053 (West 2018); VA. CODE ANN. § 19.2-11.6 (West 2018); MONT. ADMIN. R. 23.15.402(3) (2018).

*B. Transferring Evidence to the Appropriate Facility*

States that relieve medical facilities of storage responsibilities (i.e., the law enforcement and agency models) face the added practical hurdle of ensuring that anonymous rape kits are properly transferred to the appropriate facility.<sup>173</sup> Most state laws that assign storage responsibility to law enforcement or independent agencies neglect to assign responsibility for transferring the evidence.<sup>174</sup> States prescient enough to anticipate transfer needs—uniformly those deputizing law enforcement agencies—either require medical facilities to arrange for secure shipment of the kits or require law enforcement agencies to collect the kits from the medical facilities.<sup>175</sup> To ensure that law enforcement agencies collect the kits promptly, states incorporating the latter strategy typically include a deadline for law enforcement to collect the anonymous kits.<sup>176</sup> For example, in Indiana, law enforcement agencies have forty-eight hours to collect the kits from medical facilities;<sup>177</sup> in Pennsylvania they have seventy-two hours;<sup>178</sup> in Louisiana they have seven days;<sup>179</sup> and in Connecticut they have ten days.<sup>180</sup> Because Washington does not regulate, law enforcement is under no obligation to collect anonymous kits in a timely manner. This has the potential to overburden involved medical facilities, delay investigations, and weaken the integrity of the evidence should the victim choose to report.

---

173. See NAT'L INST. OF JUSTICE, *supra* note 125, at 35–36.

174. See, e.g., COLO. REV. STAT. ANN. § 18-3-407.5(3)(c) (West 2018) (requiring transfer without logistical details); GA. CODE ANN. § 17-5-71(b) (West 2018) (same); IOWA CODE ANN. § 709.10 (West 2018) (same); KAN. STAT. ANN. § 65-448 (West 2018) (same); ME. REV. STAT. ANN. tit. 25, § 3821 (2018) (same); N.C. GEN. STAT. ANN. § 15A-268 (West 2018) (same); OHIO REV. CODE ANN. § 2933.82(B)(2)(c) (West 2018) (same); OR. REV. STAT. ANN. § 147.397(5)(b) (West 2018) (same); TENN. CODE ANN. § 39-13-519 (West 2018) (same); TEX. GOV'T CODE ANN. § 411.053 (West 2018) (same); VA. CODE ANN. § 19.2-11.6 (West 2018) (same); MD. CODE REGS. § 10.12.02.03 (2018) (same).

175. See, e.g., 725 ILL. COMP. STAT. 203/30 (2018) (specifying law enforcement's responsibility to take custody of rape kits within five days of receiving notice).

176. See, e.g., 35 PA. STAT. AND CONS. STAT. ANN. § 10172.3 (West 2018) (specifying law enforcement's responsibility to take custody of rape kits within seventy-two hours of receiving notice).

177. IND. CODE ANN. § 16-21-8-10 (West 2018).

178. 35 PA. STAT. AND CONS. STAT. ANN. § 10172.3.

179. LA. STAT. ANN. § 40:1216.1A(2)(b) (2018).

180. CONN. GEN. STAT. ANN. § 19a-112a (West 2018).

C. *Requirements for Storage Conditions*

In recognition of the need for proper storage conditions to truly preserve all types of evidence that might be sealed in a given rape kit, some states have prudently incorporated standards concerning storage conditions, including facility security measures, into their regulations. For example, the laws of Florida, Indiana, and New York specify that anonymous rape kits must be stored in a safe and secure location.<sup>181</sup> Kentucky requires the storing entity to limit access to the storage area to the minimum number of people possible.<sup>182</sup> New York has a provision requiring that, where appropriate, items must be refrigerated and clothes and swabs must be dried, stored in paper bags, and labeled.<sup>183</sup> North Carolina's law includes a catch-all provision, requiring that evidence "be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence."<sup>184</sup>

In 2015, the Memphis Police Department constructed a facility, exclusively for storing rape kits.<sup>185</sup> The facility incorporated designs to preserve all types of forensic evidence and to defend to the greatest extent possible against any source of contamination.<sup>186</sup> Among that facility's features are climate-controlled rooms, large freezers, a drying room for pieces of evidence soaked in blood or other fluids, and large shelves sufficient for storing tens of thousands of kits.<sup>187</sup> To increase security, the facility is access-restricted by fingerprint- or password-protected entryways and is otherwise monitored by a number of security cameras.<sup>188</sup> In addition, authorities keep the location of the facility private so malicious actors cannot gain access to the evidence.<sup>189</sup> Construction costs for the facility were roughly \$1 million.<sup>190</sup> While most states do not

---

181. FLA. STAT. § 943.326(3); IND. CODE ANN. § 16-21-8-10; N.Y. PUB. HEALTH LAW § 2805-I (McKinney 2018).

182. 502 KY. ADMIN. REGS. 12:010 (2018).

183. N.Y. PUB. HEALTH LAW § 2805-I.

184. N.C. GEN. STAT. ANN § 15A-268 (West 2018).

185. Felicia Bolton, *Door Opened to New Sexual Assault Kit Storage Facility*, WMCATIONNEWS5.COM (Dec. 9, 2015, 6:00 PM), <http://www.wmcactionnews5.com/story/30710061/door-opened-to-new-sexual-assault-kit-storage-facility> [<https://perma.cc/5SWV-J76P>].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

include these special provisions, these examples demonstrate that advanced protections and better conditions are logistically and fiscally feasible.

*D. Minimum Retention Period*

Most state laws regulating the storage of anonymous rape kits incorporate a minimum retention period, after which the designated entity can destroy or dispose of kits pursuant to internal retention policies. The time periods for retention vary significantly from state to state. Some are as short as thirty days;<sup>191</sup> others are as long as ten years.<sup>192</sup> The plurality is either one or two years.<sup>193</sup> In practice, many medical facilities and law enforcement agencies retain the kits longer than the statutory minimum retention period in case the victims change their minds about reporting.<sup>194</sup>

In 2016, the Sexual Assault Survivors' Rights Act established a prolonged minimum retention period for federal cases, which would complicate most relevant state laws and jurisdictional policies. The federal law requires the preservation of rape kits "for the duration of the maximum applicable statute of limitations or 20 years, whichever is shorter."<sup>195</sup> If the victim requests, the entity with custody must continue to preserve the kit past that timeframe.<sup>196</sup> While longer preservation protects victims in important ways, the requirement has potential to overburden existing storage facilities. This is especially true for more meager facilities in states where the statute of limitations is decades long.<sup>197</sup> In Washington, for example, the statute of limitations for adult victims of sexual crimes is three years if unreported to law enforcement.<sup>198</sup> If the crime is reported within one year of commission, the statute of limitations extends to ten years.<sup>199</sup> Preserving accumulating kits for a decade or longer can be difficult for, say, a small medical facility in rural Washington. This development underscores the need for standardized storage procedures to combat the inevitable increase in rape kits.

---

191. N.Y. PUB. HEALTH LAW § 2805-I (McKinney 2018).

192. IOWA CODE ANN. § 709.10 (West 2018).

193. Georgia, Indiana, Kentucky, Louisiana, Michigan, and South Dakota have one-year minimum retention periods; Colorado, Pennsylvania, Texas, and Virginia have two-year minimum retention periods. *See supra* note 156.

194. NEWMARK ET AL., *supra* note 59, at 4.

195. 18 U.S.C.A. § 3772 (West 2018).

196. *Id.*

197. *See* discussion *supra* section I.D.

198. WASH. REV. CODE § 9A.04.080 (2016).

199. *Id.*

*E. Notice to Victims*

The majority of state laws regulating the storage of anonymous rape kits include provisions mandating certain forms of notice to victims.<sup>200</sup> For example, in Colorado and Tennessee, the entity with custody of the kits must provide victims with their anonymous tracking number.<sup>201</sup> In Louisiana, Michigan, South Dakota, Tennessee, and Virginia, a victim must receive notice of the length of the minimum retention period.<sup>202</sup> In Michigan, South Dakota, Tennessee, and Virginia, the health care facility that collects the evidence must inform the victims of how they can have the evidence released to the investigating law enforcement agency at a later date, if they so choose.<sup>203</sup> In Indiana, the responsible agency must notify the victim that the anonymous kit will be destroyed if the victim does not report the crime to law enforcement on or before a certain date.<sup>204</sup> The agency is specifically required to send such notice by first class mail to the last known address and by e-mail to the last known e-mail address at both the six-month and thirty-day mark.<sup>205</sup> New York has a similar provision, requiring notice at thirty days prior to destruction.<sup>206</sup>

The Sexual Assault Survivors' Rights Act requires certain forms of notice in federal cases.<sup>207</sup> The federal law requires the entity with custody of the kits to inform the victim in writing of relevant policies governing kit collection and preservation and, if the victim requests, to notify the victim sixty days before the entity intends to dispose of the kit.<sup>208</sup> These forms of notice are important to keep victims involved in the process and in control of their situations—key objectives of the nonreport option.

---

200. As it stands, twelve include such provisions. CAL. PENAL CODE § 680.2 (West 2018); COLO. REV. STAT. ANN. § 18-3-407.5(3)(c) (West 2018); 725 ILL. COMP. STAT. ANN. 203/25 (West 2018); IND. CODE ANN. § 16-21-8-10 (West 2018); LA. STAT. ANN. § 40:1216.1A(2)(b) (2018); MICH. COMP. LAWS ANN. § 752.933 (West 2018); N.Y. PUB. HEALTH LAW § 2805-I (McKinney 2018); 35 PA. STAT. AND CONS. STAT. ANN. § 10172.3 (West 2018); S.D. CODIFIED LAWS § 23-5C-3 (2018); TENN. CODE ANN. § 39-13-519(c)(1) (West 2018); VA. CODE ANN. § 19.2-11.6 (West 2018); 502 KY. ADMIN. REGS. 12:010 (2018).

201. COLO. REV. STAT. ANN. § 18-3-407.5(3)(c); TENN. CODE ANN. § 39-13-519.

202. LA. STAT. ANN. § 40:1216.1A(2)(b); MICH. COMP. LAWS ANN. § 752.933; S.D. CODIFIED LAWS § 23-5C-3; TENN. CODE ANN. § 39-13-519(c)(1); VA. CODE ANN. § 19.2-11.6.

203. MICH. COMP. LAWS ANN. § 752.933; S.D. CODIFIED LAWS § 23-5C-3; TENN. CODE ANN. § 39-13-519; VA. CODE ANN. § 19.2-11.6.

204. IND. CODE ANN. § 16-21-8-10.

205. *Id.*

206. N.Y. PUB. HEALTH LAW § 2805-I (McKinney 2018).

207. 18 U.S.C.A. § 3772 (West 2018).

208. *Id.*

## V. WASHINGTON STATE SHOULD REGULATE ANONYMOUS RAPE KIT STORAGE

Washington State should ensure the statewide standardization of anonymous rape kit storage. A balkanized system among various interested stakeholders is inefficient and unnecessarily opaque, giving rise to a large number of mismatched tracking systems with critical weaknesses in the chain of custody. A failure to curb these well-documented inefficiencies undermines the goals of anonymous evidence collection by undercutting victims' capacity to pursue legal remedies.<sup>209</sup> Inaction thus harms victims and the public and wastes public funds. The most feasible solution is for the Washington Legislature to enact legislation that incorporates the agency model, ensures compliance with the Sexual Assault Survivors' Rights Act, and funds compliance efforts.

### A. *Leaving the System Unregulated Unnecessarily Compromises Evidence and Risks Wasting Public Funds*

A balkanized collection and storage system unnecessarily risks the integrity of critical evidence. Predictably, in states without regulations, like Washington, evidence in some jurisdictions is not being stored as reliably or securely as evidence in other jurisdictions.<sup>210</sup> For example, a meager medical facility in a rural part of the state is less likely to possess the physical capacity, equipment, or access restriction typical of a city law enforcement storeroom, where reported rape kits are stored. Weaker security measures make the evidence more prone to misplacement or tampering.<sup>211</sup> The inability to preserve certain forms of evidence that require specialized storage methods could spoil the evidence.<sup>212</sup> Insufficient storage space causes some medical facilities to dispose of older kits to accommodate new ones.<sup>213</sup> In each case, the evidence is less likely to meet chain of custody standards, minimizing efficacy at trial.<sup>214</sup>

---

209. ARCHAMBAULT ET AL., *supra* note 3, at 9.

210. Kingkade, *supra* note 25.

211. See, e.g., Dana Ford, *Lawyer: Evidence Bag in Patrick Kane Rape Case Tampered with*, CNN (Sept. 24, 2015, 11:19 AM), <https://www.cnn.com/2015/09/23/us/patrick-kane-rape-case-evidence-bag/index.html> [https://perma.cc/XYV8-T893] (reporting a sexual assault case in which the rape kit was tampered with).

212. See Taylor Goldstein, *Officials: Expert "Wasn't Alarmed" by Rape Kits in Boxes with Mold*, AUSTIN AM.-STATESMAN (July 6, 2017, 5:29 PM), <https://www.mystatesman.com/news/local/officials-expert-wasn-alarmed-rape-kits-boxes-with-mold/zFvDrI7vGk41hJCHoOwcJ/> [https://perma.cc/Z3UF-NTB7].

213. Kingkade, *supra* note 25.

214. Glenza, *supra* note 9.

In that situation, victims in rural parts of the state are effectively being penalized for their location and their decision to not report the crime. This unequal treatment is precisely what the Violence Against Women Act and the Sexual Assault Survivors' Rights Act seek to prevent.<sup>215</sup>

Even if facilities can properly and securely store evidence, the lack of coordination between various, often numerous, interested parties gives rise to a large number of mismatched tracking systems.<sup>216</sup> If a victim decides to convert an anonymous tracking kit to a reported one, responsible agencies often struggle to coordinate the locating and transferring of the kits,<sup>217</sup> which delays justice for the victim. When anonymous rape kits are lost or destroyed in the process, the public funds used to subsidize evidence collection and kit preservation are wasted. Not only is this undesirable from a moral standpoint; it potentially risks the continued receipt of federal funds under the STOP grant program—which is conditioned on compliance with VAWA. More importantly, the process wastes the time and resources of victims, who must endure the arduous and invasive evidence collection process only to be blindsided by the loss or destruction of their entire case.

The presence of one or more of these problems undermines the purpose of gathering evidence in the first place, undermines the spirit of VAWA and the Sexual Assault Survivors' Rights Act, and flies in the face of general notions of fairness and justice. As public awareness of the availability of anonymous rape kits continues to improve and society better encourages victims to come forward, these risks will only increase.<sup>218</sup> That said, these risks are easily avoidable and should be eliminated given the irreparable harm to victims that could result.

#### *B. Washington State Should Incorporate the Agency Model*

To ensure the statewide standardization of rape kit storage, Washington's Legislature should pass legislation incorporating the agency model.<sup>219</sup> The agency model is preferable to the medical facility model and the law enforcement model for a few reasons. First, it designates a single entity responsible for coordinating storage—rather

---

215. ARCHAMBAULT ET AL., *supra* note 3, at 7.

216. NAT'L INST. OF JUSTICE, *supra* note 125, at 33–34.

217. *Id.*

218. NEWMARK ET AL., *supra* note 59, at 1.

219. This recommendation tracks the recommendation of the Washington State Sexual Assault Best Practices Task Force. 2017 TASK FORCE, *supra* note 21, at 9 (“The Task Force recommends that unreported SAKs are stored at a location other than hospitals or law enforcement settings.”).

than a class of diverse entities—which will create efficiencies and standardize heightened security for the vast majority of victims.<sup>220</sup> In this way, victims will see less loss or destruction of evidence. Second, it avoids overburdening smaller medical facilities and law enforcement precincts with additional responsibilities, which are uncompensated and arguably beyond the scope of their official duties.<sup>221</sup> By alleviating that burden, these stakeholders may be eager to support standardization efforts.<sup>222</sup> Third, it ensures that anonymous rape kits will remain anonymous and will not be submitted for testing without victim consent. Delegating control over kits and tracking systems to law enforcement compromises anonymity.<sup>223</sup> Victims using the nonreport option made a purposeful decision to remain anonymous and not involve law enforcement and that decision should be respected. Fourth, utilizing the agency model significantly reduces the prospect of finger-pointing, duplication, and the likelihood of essentials “falling between the cracks,” deficiencies common to poorly-organized bureaucracies. Finally, the state has a moral responsibility to uphold the spirit of these federal laws. It should not be permitted to delegate that responsibility to private medical facilities and local law enforcement.

Practically speaking, the most feasible options are for the Washington Legislature to assign storage responsibility to the Department of Health, or the Washington State Patrol and its subordinate agency, the Bureau of Forensic Laboratory Services, which is already responsible for the statewide tracking system for reported rape kits.<sup>224</sup> If necessary and appropriate, the Legislature can delegate rulemaking authority. While the agency model has some logistical and fiscal shortcomings,<sup>225</sup> they pale in comparison to the countervailing improvements in security and access to justice for victims. The SAK Task Force recommended that “the state reassess whether the state’s vacant data hall or some other state-funded centralized or regional locations could be used.”<sup>226</sup>

---

220. *See id.*

221. *See* discussion *supra* section III.A.

222. In fact, it has already been recommended by stakeholders. 2017 TASK FORCE, *supra* note 21, at 9.

223. *See* OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT KIT TESTING INITIATIVES AND NON-INVESTIGATIVE KITS 5–6 (2017).

224. WASH. REV. CODE § 43.43.546 (2016); *id.* § 43.43.545.

225. *See* discussion *infra* section V.D.

226. 2017 TASK FORCE, *supra* note 21, at 9.

C. *Washington's Legislation Should Ensure Compliance with the Sexual Assault Survivors' Rights Act*

To ensure longevity, the proposed legislation should ensure that the designated state agency is operating in concert with the Sexual Assault Survivors' Rights Act. This includes codifying under state law a minimum retention period tracking the relevant statute of limitations.<sup>227</sup> In Washington, the statute of limitations is either three or ten years for adult victims, depending on the time the crime is reported.<sup>228</sup> A comparable retention period should provide sufficient time for victims to process their experience and meaningfully deliberate whether to report the crime, but also not overburden the designated agency should capacity issues arise. This also includes the provision of certain forms of notice to victims. To comply with the Sexual Assault Survivors' Rights Act, the law should ensure that the designated agency informs the victim in writing of relevant policies governing kit collection and preservation and, if the victim requests, to notify the victim sixty days before the entity intends to dispose of the kit.<sup>229</sup> In addition, the law should specify that victims be given the anonymous tracking number at the time of collection and details as to next steps to convert the anonymous kit to a reported kit.

D. *Washington's Legislation Should Incorporate a Funding Provision*

Washington's legislation should incorporate a funding provision to address the fiscal and logistical concerns with the agency model. By introducing an intermediary agency into the equation, the agency model invariably increases shipping costs. Instead of retaining anonymous rape kits at the medical facility that collects the evidence or shipping the kits once to the law enforcement precinct with jurisdiction, the kits would need to be shipped to the designated agency for storage before potentially being shipped again to law enforcement for processing. Additionally, depending on the agency chosen, the agency model may require the construction of a new facility or modification of an existing one. Ideally, the facility would be equipped to preserve all kinds of evidence securely for decades. Depending on the agency chosen, this also may require hiring new personnel.

---

227. This is already ensured by Wash. Rev. Code section 5.70.010 but should nonetheless be included in the proposed legislation.

228. WASH. REV. CODE § 9A.04.080.

229. 18 U.S.C.A. § 3772 (West 2018).

Concerns over increased costs could be assuaged if the legislation ensures reimbursement for secure shipping costs and any other operational expenses incurred as a result of carrying out the statute.<sup>230</sup> This would include funds to ensure the designated agency has adequate storage capabilities, including the capacity and equipment to reliably preserve all forms of evidence for the length of the statute of limitations. It would also include funding for heightened security measures for the storeroom, including access restriction and facility surveillance equipment. If a facility with these conditions already exists, the designated agency could repurpose part of it or augment it to accommodate anonymous rape kit storage. Otherwise, the agency may need to build a new facility like the Memphis Police Department chose to do.<sup>231</sup>

Each state's discretionary budget under the STOP grant program could be a source of funding. VAWA permits up to 15% of a state's STOP grant funds to be used for discretionary purposes.<sup>232</sup> Washington State currently uses two-thirds of its discretionary 15% to raise the portion going to prosecution and law enforcement from 25% each to 30% each.<sup>233</sup> Instead, the state could redirect all or some of those discretionary funds to anonymous rape kit storage. Prosecutors and law enforcement agencies should be receptive to the re-appropriation of funds due to the resulting decrease in their responsibility for storage and the increase in evidentiary integrity, aiding prosecutorial efforts to combat sexual crimes.

Legislation in line with the Sexual Assault Survivors' Rights Act that incorporates the agency model and includes a funding provision marks a fair compromise among the interests of victims, the medical community, law enforcement agencies, the state, and the public at large. Importantly, the underlying problems appear resolvable and many options are available.<sup>234</sup> Accordingly, there is reason for optimism provided a legislative leader or the Governor takes hold of the issue. Given the clear benefits and minimal drawbacks of this proposal, it is hard to understand why that has not already happened.

## CONCLUSION

States that fail to ensure the secure storage of anonymous rape kits undermine the statutory purpose of VAWA's nonreport option. By delegating maintenance responsibilities to localities, states without

---

230. Montana includes such a provision. MONT. ADMIN. R. 23.15.402(3) (2018).

231. See BOLTON, *supra* note 185.

232. See discussion *supra* section II.A.

233. GIPSON-COLLIER, *supra* note 109, at 12–13.

234. See discussion *supra* Part IV.

regulations tacitly tolerate the loss or destruction of anonymous rape kits, diminishing the integrity of the evidence and undermining the utility of gathering it in the first place. Washington State does not currently regulate anonymous rape kit storage, but it should follow the example of states that have standardized practices through legislation. This Comment proposes that the most efficient and effective forms of legislation assign storage responsibility to an independent state agency, mandate preservation for at least as long as the relevant statute of limitations, ensure adequate storage conditions, and require notice to victims prior to any destruction or disposal of evidence. The State can finance this policy shift with discretionary funds provided under VAWA. If it does this, Washington State can expect to see improvements in evidentiary integrity, prosecutorial success in sexual assault cases, economic and bureaucratic efficiency, and victim empowerment.