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Justice Delayed Is Not Justice Denied: Considerations and Concerns for Addressing the National Sexual Assault Kit Backlog

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JUSTICE DELAYED IS NOT JUSTICE DENIED: CONSIDERATIONS
AND CONCERNS FOR ADDRESSING THE NATIONAL SEXUAL
ASSAULT KIT BACKLOG

*Bryan Schwartz**

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INTRODUCTION

On April 24, 1999, M.L.’s¹ life would dramatically change forever. She was sexually assaulted by a man she had met earlier that night.² He dragged her into a room and threw her on the bed.³ When she tried to flee, he slammed her against the wall and pushed her back onto the bed.⁴ She pleaded with him to stop, but he ignored her pleas.⁵ She continued

1. This article uses the victim’s initials to protect her privacy rights. See NEV. REV. STAT. § 200.3772 (allows the use of initials for victims of sexual offenses in court filings); see also Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471 (2008) (explaining the importance of not using a victim’s name throughout court opinions).

2. See Transcript of Hearing: Jury Trial – Day 2 at 240-47, *State of Nevada v. Ramon Muril Dorado*, No. C-17-323098-1 (Nev. Dist. Ct. 2019).

3. *Id.* at 240.

4. *Id.* at 242.

5. *Id.* at 245.

to fight, but he overpowered her.⁶ In the end, he raped⁷ her—forcing his fingers, tongue, and penis inside her vagina.⁸

She reported the sexual assault to the police the next day.⁹ Since she had just met him, she did not know his full name.¹⁰ She did not know who he was.¹¹ After speaking with the police, she went to the hospital and met with a sexual assault nurse examiner.¹² The nurse conducted a sexual assault exam and collected a sexual assault kit from M.L.¹³ The police investigated her claims, but ultimately closed the case, unable to identify the suspect.¹⁴

For the next twenty years, M.L. tried her best to move on.¹⁵ She tried her best to forget.¹⁶ She tried her best to not let this life-changing event dictate and define her future life.¹⁷ After nearly twenty years, she believed that he had simply gotten away with it.¹⁸ However, in 2016, her life would forever change again, when she received a phone call from a Cold Case Sexual Assault Detective.¹⁹

This Article focuses on the national issue of backlogged sexual assault kits and the process that Nevada used to successfully clear its backlog of kits dating back to the 1990s. For background purposes, this Article briefly addresses what a sexual assault kit is, the process to obtain a sexual assault kit, and what happens to each kit after collection. Further, it explores some of the main reasons for the national sexual assault kit backlog and the variety of ways that other states, organizations, and federal agencies have addressed this problem. It concludes by discussing how states should consider Nevada's approach, such as obtaining grants

6. *Id.* at 245-48.

7. This article will primarily use the term “sexual assault” moving forward, to remain consistent with Nevada’s law. NEV. REV. STAT § 200.366 (defining the crime of “sexual assault” as “subject[ing] another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another . . . against the will of the victim . . .”); *see generally* NEV. REV. STAT § 200 (does not use the term “rape” anywhere in Chapter 200 of the Nevada Revised Statutes); *see also* Myka Held and Juliana McLaughlin, *Rape & Sexual Assault*, 15 GEO J. GENDER & RACE 155, 157-61 (2014) (discussing how the terms “sexual assault” and “rape” are used throughout the common law and within states’ current statutes).

8. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 247-50.

9. *Id.* at 253.

10. *Id.* at 224.

11. *Id.*

12. *Id.* at 254-55.

13. *Id.* at 255.

14. Transcript of Hearing: Jury Trial – Day 3 at 152-53, *State of Nevada v. Ramon Muril Dorado*, No. C-17-323098-1 (Nev. Dist. Ct. 2019).

15. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 265.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

and implementing legislation, when addressing their own backlog. Lastly, using Nevada's example, it addresses considerations, concerns, and recommendations for states and specifically argues that they structure legislation to maintain reoccurring funding to avoid a future backlog of sexual assault cases. Thus, this Article will provide guidance for other states seeking to address similar concerns to Nevada. Within this discussion, the Article incorporates a case study using *State of Nevada v. Ramon Muril Dorado*,²⁰ which was the first jury trial in Nevada that relied on evidence from a backlogged sexual assault kit.

I. SEXUAL ASSAULT EXAMS AND THE KIT

Sadly, in the United States, a person is sexually assaulted every 73 seconds.²¹ A victim²² of sexual assault has the option to get an examination at a hospital, which will generate a sexual assault kit.²³ Essentially, a sexual assault kit preserves various items of evidence.²⁴ Later, a forensic laboratory will conduct tests on these items to see if they contain the DNA of the assaulter.²⁵ These kits have the potential to be an “invaluable investigative tool” because they can “identify an unknown assailant, reveal serial offenders, and exonerate the wrongfully convicted.”²⁶ Unfortunately, for decades, hundreds of thousands of untested sexual assault kits sat on the shelves of various police and

20. Prior to beginning as a Visiting Associate Professor, I worked as a Chief Deputy District Attorney for the Clark County District Attorney's Office. My colleague, Genevieve Craggs, and I prosecuted this case in 2019. This experience inspired my research on sexual assault kits. Any views, opinions, or arguments set forth in this article are mine alone, and should not be considered the views, opinions, or arguments of the Clark County District Attorney's Office as a whole.

21. END THE BACKLOG, *Why Test All Kits?*, <http://www.endthebacklog.org/backlog-why-rape-kit-testing-important/why-testing-every-kit-matters> (last visited Oct 21, 2021).

22. This article refers to survivors of sexual assault as “victims” to remain consistent with the language used in the Nevada Revised Statute's sexual assault section. *See e.g.* NEV. REV. STAT. § 200.364(11)(providing a definition for “victim” as “a person who is a victim of a sexual offense . . .”); NEV. REV. STAT. 200.366 (uses victim when defining the various elements and punishments of sexual assault); NEV. REV. STAT. § 217.280 (defines “victim of sexual assault” in the section pertaining to the various methods of assistance provided to them); NEV. REV. STAT. § 200.377 – 200.3774. Likewise, the article will use the term survivor when the statute employs that terminology. *See* NEV. REV. STAT. § 178A.140 (2019) (defining “survivor”); NEV. REV. STAT. § 178A.280(1) (2019) (noting different rights that a survivor has).

23. END THE BACKLOG, *Why Test All Kits?*, *supra* note 21.

24. *Id.* As discussed later, it typically contains swabs, test tubes, microscopic slides, and evidence envelopes. Las Vegas Metropolitan Police Department, *Sexual Assault Cold Case Unit*, <https://www.lvmpd.com/en-us/Pages/SexualAssaultColdCase.aspx> (last visited Oct 21, 2021).

25. END THE BACKLOG, *Why Test All Kits?*, *supra* note 21.

26. *Id.*; *see also* NATIONAL INSTITUTE OF JUSTICE, *Sexual Assault Kits: Using Science to Find Solutions*, at 4, <https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/unsubmitted-kits.pdf> [hereinafter NIJ – *Using Science to Find Solutions*].

forensic agencies across the United States, forgotten.²⁷

When a victim is sexually assaulted, they have several options on how to proceed: (1) report it to the police or a rape crisis center, (2) seek medical help, or (3) choose not to report it.²⁸ The first two options will lead a victim to the optional sexual assault exam, which produces the sexual assault kit.²⁹ A sexual assault exam is lengthy and invasive, but it generates a kit that could provide very important evidence for the sexual assault investigation.³⁰ However, each year, more than 75% of sexual assaults go unreported.³¹ If a victim does not report the assault to the police or the hospital, then a sexual assault kit is not generated.³²

Hours after being raped, M.L. reported the attack to the police and went to the hospital for a sexual assault exam.³³ The nurse took photographs of her injuries, including scratches on her chest, bruises on her arms and body, and her fingernails, which had broken when she tried to fight the suspect off.³⁴ The nurse also swabbed her vagina in hopes of collecting the assaulter's DNA.³⁵ These swabs were then sealed in the sexual assault kit.³⁶ For the next 20 years, M.L.'s sexual assault kit sat untouched.³⁷

A. What Does the Sexual Assault Exam Entail?

The sexual assault exam will generally take several hours and is very invasive.³⁸ Typically, this exam is only conducted by a trained medical professional, often titled a Sexual Assault Nurse Examiner or a Sexual

27. END THE BACKLOG, *Where the Backlog Exists and What's Happening to End it*, <http://www.endthebacklog.org/backlog/where-backlog-exists-and-whats-happening-end-it> (last visited Oct 21, 2021).

28. *Sexual Assault Services*, OPTIONS DOMESTIC AND SEXUAL VIOLENCE SERVICES, <https://help4abuse.org/sexual-assault-services> (last visited Oct 21, 2021).

29. END THE BACKLOG, *What is the Rape Kit Backlog?*, <http://www.endthebacklog.org/backlog/what-rape-kit-backlog> (last visited Oct 21, 2021).

30. See generally Rebecca Campbell et al., *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report* at 1 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf#page=85>.

31. *The Criminal Justice System: Statistics, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN)*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct 21, 2021). However, "[i]t is often found that victims will seek assistance when responders work together to ensure that victims are informed of their options for assistance, encouraged to address their needs, have their spiritual and psychological needs respected, and are aided in obtaining the help they want." U.S. DEPARTMENT OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS at 12 (2013).

32. *The Detroit Sexual Assault Kit (SAK) Action Research Project (ARP), Final Report*, *supra* note 30 at 1.

33. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 252-55.

34. *Id.* at 255-61.

35. *Id.* at 255.

36. *Id.*

37. See Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 39, 138.

38. NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

Assault Forensic Examiner.³⁹ The examiners have specific training in forensic examinations of sexual assault victims and undergo extensive training in how to properly collect evidence, “injury detection methods, chain-of-custody requirements, methods to avoid re-traumatizing a victim during an examination, and other topics related to both prosecutions and meeting the needs of sexual assault victims.”⁴⁰

Regarding the actual exam, there are three general steps that typically occur. First, the medical examiner will have the victim explain what happened in his or her own words.⁴¹ Second, the examiner will conduct a head to toe visual examination of the victim, looking for any injuries or possible biological evidence—such as saliva, semen, hair, and/or blood—pertaining to the sexual assault.⁴² During the “head to toe” portion, the medical examiner will take photographs of the victim and collect the victim’s clothing, along with any other physical evidence that may be needed for further testing, such as bedding.⁴³ Lastly, the examiner will use a cotton swab to collect samples from areas that, based on the examiner’s training and experience as well as the victim’s statement regarding the assault, would likely contain biological evidence of the assaulter.⁴⁴ This part of the exam is extremely intrusive because it often requires the medical examiner to collect swabs from the specific genital areas where the sexual assault occurred.⁴⁵ At the conclusion of the exam, the medical examiner will have created and preserved a sexual assault kit.⁴⁶

B. What is Contained in a Sexual Assault Kit?

A sexual assault kit, often referred to as “SAK,” is a collection of different samples of possible biological evidence that were collected

39. *Id.*; NATIONAL INSTITUTE OF JUSTICE, *National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach*, at 15, <https://nij.ojp.gov/topics/articles/national-best-practices-sexual-assault-kits-multidisciplinary-approach> (last visited Oct. 21, 2021) [hereinafter NIJ – *National Best Practices*]; Nevada Office of the Attorney General: Sexual Assault Initiative, *The Backlog*, http://endnevadasbacklog.ag.nv.gov/backlog/Backlog_Home/ (last visited Oct. 21, 2021) [hereinafter Nevada AG – *The Backlog*].

40. NIJ – *National Best Practices*, *supra* note 39, at 15, *see also* Nevada AG – *The Backlog*, *supra* note 39; NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

41. *See* NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

42. Las Vegas Metropolitan Police Department, *Sexual Assault Cold Case Unit*, *supra* note 24; Nevada Office of the Attorney General: Sexual Assault Initiative, *Get Help*, http://endnevadasbacklog.ag.nv.gov/gethelp/Get_Help_Home/ (last visited Oct. 21, 2021) [hereinafter Nevada AG – *Get Help*].

43. NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

44. *Id.*

45. *Id.*; NIJ – *National Best Practices*, *supra* note 39, at 20-23; Nevada AG – *Get Help*, *supra* note 43.

46. NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

during the sexual assault exam and preserved for further testing.⁴⁷ It typically contains swabs, test tubes, microscopic slides, and evidence envelopes.⁴⁸ The medical examiner must take every step to avoid any type of contamination while collecting this evidence and secure the kit to preserve its contents.⁴⁹ Ideally, after securing the contents, the medical examiner then provides the kit to law enforcement, who will submit the kit to a forensic laboratory for forensic testing.⁵⁰

C. Why are Sexual Assault Kits Important?

Many legal scholars have researched and discussed the important benefits that sexual assault kits can provide to a sexual assault investigation. First, the sexual assault kit can be used to identify an unknown assaulter.⁵¹ When a victim of sexual assault does not know the person who attacked them and is unable to identify them for police to locate, the DNA can be used to identify the suspect.⁵² As discussed in more detail below, M.L. was unable to identify the assaulter by anything other than a nickname.⁵³ Based on this information, police investigators were unable to identify her assaulter and closed the case.⁵⁴ However, once her sexual assault kit was examined 20 years later, police investigators were able to identify her assaulter based on his DNA obtained from the kit.⁵⁵

Additionally, the sexual assault kit can prove whether there was sexual contact.⁵⁶ In some cases, such as a sexual assault involving a minor, any

47. NIJ – *National Best Practices*, *supra* note 39, at 1; Nevada AG – *Get Help*, *supra* note 42; *see also* NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

48. Las Vegas Metropolitan Police Department, *Sexual Assault Cold Case Unit*, *supra* note 24.

49. NIJ – *National Best Practices*, *supra* note 39, at 27; *see also* NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4 (discussing the benefits of trained sexual assault nurse examiners).

50. NIJ – *Using Science to Find Solutions*, *supra* note 26, at 4.

51. Seth Fallik & William Wells, *Testing Previously Unsubmitted Sexual Assault Kits: What Are the Investigative Results*, 26 CRIM. JUST. POL'Y REV. 598, 600 (2015); Campbell et al., *supra* note 30 at 6. *see also* Rebecca Campbell & Giannina Fehler-Cabral, *Why Police Couldn't or Wouldn't Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, 52 LAW & SOC'Y REV. 73 (2018); Nancy Ritter, *Untested Evidence in Sexual Assault Cases: Using Research to Guide Policy and Practice*, Vol. 16 N. 3 Sexual Assault Report, at 34 (Jan/Feb 2013). Likewise, the DNA could also be used to show that a suspect's DNA was not present, which could possibly assist in showing that a particular suspect was not the assaulter. Rebecca Campbell et al., *Should Rape Kit Testing Be Prioritized by Victim-Offender Relationship: Empirical Comparison of Forensic Testing Outcomes for Stranger and Nonstranger Sexual Assaults*, 15 CRIMINOLOGY & PUB. POL'Y 555, 558 (2016).

52. Fallik, *supra* note 51, at 600; Campbell et al., *supra* note 30 at 6.

53. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 224.

54. Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 152-53.

55. *Id.* at 153.

56. Fallik, *supra* note 51, at 599.

sexual contact can be evidence of a crime.⁵⁷ Similarly, when the assaulter incapacitates a victim, the DNA evidence will be presented as evidence of the sexual contact.⁵⁸ Alternatively, evidence of sexual contact can prevent the suspect from denying that sexual contact occurred,⁵⁹ which was the case with M.L.'s assaulter—his attorney had to acknowledge that they at least had sexual contact.⁶⁰ It effectively limited their defense to whether that contact was consensual.⁶¹

Lastly, the results of a sexual assault kit can be important for a victim's confidence in the investigation and level of cooperation.⁶² Often, without a sexual assault kit, the evidence that the sexual assault occurred will rest on the victim's testimony.⁶³ This can cause a victim to discontinue the criminal process out of fear for not being believed.

II. HOW THE UNITED STATES FOUND ITSELF WITH A SEXUAL ASSAULT KIT BACKLOG

Approximately ten years ago, it became apparent that the United States had a problem.⁶⁴ While each jurisdiction had been collecting sexual assault kits from rape victims over the years, these kits were never tested.⁶⁵ Ultimately, hundreds of thousands of untested kits sat on shelves across the country.⁶⁶ As discussed below, many jurisdictions took proactive steps to identify the extent of untested kits.⁶⁷ Additionally, many of these jurisdictions tested the kits and cured their backlog

57. *Id.*; Campbell et al., *supra* note 51, at 558.

58. Fallik, *supra* note 51, at 599; Campbell et al., *supra* note 51, at 558.

59. Fallik, *supra* note 51, at 599; Campbell et al., *supra* note 51, at 558.

60. *See* Transcript of Hearing: Jury Trial – Day 4, at 46-61, State of Nevada v. Ramon Muril Dorado, No. C-17-323098-1 (Nev. Dist. Ct. 2019).

61. *See id.* A consent defense is further impacted if the victim had numerous injuries, which would be inconsistent with a consensual sexual encounter.

62. Fallik, *supra* note 51, at 599.

63. Typically, sexual assaults do not occur in situations or places where there will be witnesses or surveillance video. Thus, without DNA evidence, the prosecution's case very often revolves solely around the victim's testimony.

64. END THE BACKLOG, *Our Approach*, <http://www.endthebacklog.org/ending-backlog/our-approach> (last visited Oct. 21, 2021) (discussing how the Joyful Heart Foundation began focusing on eliminating the backlog in 2010); U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE SPECIAL REPORT: DOWN THE ROAD: TESTING EVIDENCE IN SEXUAL ASSAULTS, at 10 (June 2016) (explaining how DNA testing and databases were not readily used until the late 1990s/early 2000s) [hereinafter *NIJ Special Report*].

65. END THE BACKLOG, *What is the Rape Kit Backlog?*, *supra* note 29.

66. *Id.*; According to the Joyful Heart Foundation, more than 225,000 untested sexual assault kits existed throughout the United States. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, at 3 (Jan. 2020), <http://www.endthebacklog.org/sites/default/files/JHF%20Legislative%20Handbook%20-%20January%202020%20-%20v2010-01-12.pdf>.

67. END THE BACKLOG, *Our Approach*, *supra* note 64.

problem.⁶⁸ However, some jurisdictions have not completed testing of their backlogged kits, and some jurisdictions have even refused to provide information about the extent of their backlogs or begin addressing their backlogs altogether.⁶⁹

As such, one question that remains unanswered in the United States is exactly how many sexual assault kits currently make up the nationwide backlog. As of the completion of this Article, the United States had identified approximately 40,000 untested sexual assault kits.⁷⁰ Specifically, Nevada located 7,855 untested backlogged kits—6,683 in southern Nevada and 1,172 in northern Nevada.⁷¹

Given that these kits can be extremely valuable in a sexual assault investigation, how is it possible that so many sexual assault kits were not tested for so long? While each jurisdiction will have different unique issues that contributed to their backlog, the general reasons included: (1) the early technological limitations on DNA testing,⁷² (2) the lack of resources and funding for testing sexual assault kits,⁷³ (3) no clear guidelines on submitting and testing sexual assault kits,⁷⁴ and (4) law enforcement choosing not to test kits when they did not believe the victim.⁷⁵ Each issue is assessed in turn.

68. END THE BACKLOG, *Where the Backlog Exists and What's Happening to End It*, *supra* note 27. As detailed below, these jurisdictions primarily incorporated most of the six pillars of sexual assault kit reform, suggested by the Joyful Heart Foundation, including (1) annual statewide inventory of untested sexual assault kits, (2) mandatory testing of backlogged kits, (3) mandatory testing of new kits, (4) a tracking system for sexual assault kits, (5) notice requirements for victims of sexual assault, and (6) obtain federal and state funding for these issues. See END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66.

69. END THE BACKLOG, *The Accountability Project*, <http://www.endthebacklog.org/backlog-where-it/accountability-project> (last visited Oct. 21, 2021).

While 7 states have already successfully completed testing on all their backlogged kits, there are 12 states where the statistics on how many backlogged kits exists is still unknown. END THE BACKLOG, *Why the Backlog Exists*, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited Oct. 21, 2021). The majority of states have at least taken steps to create some type of reform to address this issue. *Id.* However, 7 states have done nothing to address their backlog and future backlog. *Id.* These states include North Dakota, Nebraska, Mississippi, Alabama, South Carolina, Maine, Rhode Island. *Id.* South Carolina alone has 1800 untested kits. *Id.*

70. *Id.*; *but cf.* NIJ Special Report, *supra* note 64, at 11 (concluding, as of 2016, that “there is no official *current* estimate of the number of untested SAKs in the custody of law enforcement agencies nationwide”).

71. Nevada AG, *The Backlog*, *supra* note 39; Nevada Office of the Attorney General: Sexual Assault Initiative, <http://endnevadasbacklog.ag.nv.gov/Home/Home/> (last visited Oct. 21, 2021) [hereinafter Nevada AG – *Home*].

72. NIJ Special Report, *supra* note 64, at 10.

73. END THE BACKLOG, *Why Backlog Exists*, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited Oct. 21, 2021); NIJ Special Report, *supra* note 61, at 10.

74. END THE BACKLOG, *Why Backlog Exists*, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited Oct. 21, 2021); NIJ Special Report, *supra* note 61, at 10.

75. END THE BACKLOG, *Why Backlog Exists*, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited Oct. 21, 2021); NIJ Special Report, *supra* note 61, at 10.

A. *The Evolution of DNA Testing*

The slow-paced evolution of DNA and DNA testing was one of the major contributing factors to the sexual assault kit backlog.⁷⁶ In 1987, prosecutors in California obtained the first DNA-based criminal conviction, which happened to be a rape case.⁷⁷ They were able to match the assaulter's DNA to the semen found in the victim.⁷⁸ However, it was not until the mid to late 1990s that forensic DNA testing became more widely available and used.⁷⁹ Even then, it was not until the early 2000s that courts began consistently ruling that DNA evidence could be admissible in the criminal justice system.⁸⁰ Many of the early challenges to DNA evidence involved the testing laboratory's methodology and whether it was consistent with "scientific standards and produced reliable results for jury consideration."⁸¹

However, the most important advancement for DNA testing and sexual assault kits was the creation of local and national DNA databases.⁸² Prior to this, DNA "had limited utility for suspect identification . . ."⁸³ During the 1990s, each state began maintaining their own DNA database, which typically included the DNA of individuals convicted of felonies within their state.⁸⁴ However, in 1998, the federal government created a national DNA database known as Combined DNA Index System, commonly referred to as "CODIS."⁸⁵ Simply put, CODIS became a nationwide

76. NIJ Special Report, *supra* note 64, at 10.

77. Lisa Calandra et al., *Evolution of DNA Evidence for Crime Solving – A Judicial and Legislative History*, FORENSIC MAGAZINE (Jan. 6, 2005).

78. *Id.*

79. NIJ Special Report, *supra* note 64, at 10; *see also* Calandra et al., *supra* note 77 (discussing the many different hurdles that DNA evidence faced pertaining to admissibility and reliability).

80. Calandra et al., *supra* note 77.

81. *Id.*; Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791 (1991) (discussing some of the concerns with DNA evidence reliability, lab certification standards, and admissibility standards); *see generally* Dawn Collins Freeman, *The Admissibility of Scientific Evidence: The Problem with DNA Analysis in California*, 24 W. ST. U. L. REV. 115 (1996) (focusing on DNA admissibility in California in the 1990s).

82. Calandra et al., *supra* note 77; *see also* NIJ Special Report, *supra* note 64, at 10; *see* Campbell et al., *supra* note 30, at 75.

83. Rebecca Campbell & Giannina Fehler-Cabral, *Why Police Couldn't or Wouldn't Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, 52 LAW & SOC'Y REV. 73, 76 (2018).

84. *Id.* The databases served a very important tool for sexual assault kit testing, especially when the assaulter's identity was unknown. For instance, the forensic DNA analysis of the kit alone only has the potential to provide a DNA profile. The next step is to either compare the profile to the assaulter's DNA profile to see if it matches or place the DNA profile into a database to see if there are any matches. Without the database, one would be left to only compare the DNA profile to a known person's DNA profile. Thus, the stranger sexual assaults would not benefit from this testing until the databases were developed. Campbell et al., *supra* note 30, at 73-74.

85. Jessica McDonald & Donald C. Lehman, *Forensic DNA Analysis*, 25 CLINICAL LABORATORY SCIENCE 109, 112 (2012), <http://clsjournal.ascls.org/content/ascls/25/2/109.full.pdf>.

library of known DNA profiles. Thus, a national database made it possible for “forensic scientists to enter unmatched DNA evidence found at crime scenes into a computerized system to make DNA matches.”⁸⁶ This was extremely important for sexual assault investigations because many of the cases were closed when detectives were unable to determine the identity of the assaulter, even after checking their local DNA databases.⁸⁷ But, with the availability of a nationwide DNA database, the forensic examiners can now check for matches between the preserved DNA samples from the sexual assault kits and the samples in the national database.

The advances in DNA technology, as well as the creation of DNA databases, “brought about a profound change in the criminal justice system.”⁸⁸ In fact, the advancements available today allow DNA analysts to identify much more information on the sexual assault kits than if they had tested the kits previously.⁸⁹ Moreover, DNA evidence has been used to re-address the validity of previously convicted individuals, whose conviction may have occurred before the widespread use of DNA evidence.⁹⁰ Thus, even though the technological limitations on DNA testing initially contributed to the creation of a backlog, the delay may in fact allow for a more productive and effective DNA comparison today.

B. A Lack of Resources

Another major reason for the backlog of sexual assault kits was money. The jurisdictions simply did not have enough money to test the kits.⁹¹ To start, it costs approximately \$1,000 to \$1,500 to test one kit.⁹² Incorporating the previous statistic where someone is sexually assaulted every 73 seconds means that in one week there are over 6,500 victims of sexual assault in the United States. Further, assuming that only 25% of those victims went to the hospital and received an examination, it would still cost over \$1.5 million dollars to test those kits—from a single week. Unfortunately, the police and crime lab facilities did not have enough resources to fund the testing.⁹³ Additionally, law enforcement agencies lacked the necessary resources to transport and ship the tests to testing

86. *Id.*

87. *See* Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 153.

88. NIJ Special Report, *supra* note 64, at 10 (quoting Gerald LaPorte, Director of NIJ’s Office of Investigative and Forensic Sciences).

89. *Id.*; Campbell et al., *supra* note 30, at 73-78.

90. Calandra et al., *supra* note 77. As of 2005, DNA testing was able to exonerate more than 150 previously convicted individuals. *Id.*

91. END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73.

92. *Id.*

93. *Id.*

facilities.⁹⁴ Finally, even if they had the money to *test* each kit, there was still a shortage in the number of personnel needed to collect, distribute, and physically test each kit.⁹⁵ As discussed below, although these issues are still present today, one of the most important ways that jurisdictions were able to combat the backlog was from federal grants.⁹⁶

C. No Policy for Submitting and Testing Sexual Assault Kits

Another reason for the nationwide backlog was that many jurisdictions did not have any clear guidelines or policies for testing sexual assault kits.⁹⁷ The decision whether to submit a kit for testing was often left up to the law enforcement officers involved in investigating and prosecuting the case.⁹⁸ Prior to the development of a DNA database, for example, in Detroit, the police would only submit sexual assault kits when the identity of the assaulter was known.⁹⁹ Additionally, the forensic labs did not have requirements for testing these kits in a certain amount of time.¹⁰⁰ Thus, without a clear policy for when to test and submit kits, many kits ended up sitting on the shelves of various investigative agencies.¹⁰¹

D. Investigating Officers Did Not Believe Victims

Unfortunately, many sexual assault kits were never submitted for testing because the law enforcement personnel investigating the sexual assault chose not to. The research indicates that some law enforcement agencies exhibited negative stereotyping and victim-blaming beliefs when handling sexual assault cases, which caused them not to follow up on the sexual assault kits.¹⁰² Another offered explanation, at least in

94. *Id.*

95. NATIONAL INSTITUTE OF JUSTICE, *Untested Evidence in Sexual Assault Cases*, (March 17, 2016), <https://nij.ojp.gov/topics/articles/untested-evidence-sexual-assault-cases>; NIJ Special Report, *supra* note 64, at 10; *see also* Campbell et al., *supra* note 31, at 81-82 (discussing the impact of budget cuts on sexual assault investigations in Detroit during the 1990s – early 2000s).

96. *See infra* Section IV.

97. END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73.

98. *Id.*

99. Campbell et al., *supra* note 30, 82-83.

100. END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73. Other reasons that contributed to the backlog included jurisdictions only testing kits when the assaulter was unknown to the victim, and outdated testing requirements in forensic labs. *Id.*

101. *Id.*

102. END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73; NIJ Special Report, *supra* note 64, at 10; NIJ, *Untested Evidence in Sexual Assault Cases*, *supra* note 95; *see Why Police Couldn't or Wouldn't Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, *supra* note 83 at 77 (extensive discussion of the different reasons and factors that a police officer will determine a sexual assault victim's credibility).

Detroit, revolved around frequently changing leadership.¹⁰³ From 1980 to 2009, Detroit had ten different police chiefs, which made it challenging to start and sustain new initiatives, such as addressing the backlog.¹⁰⁴

E. What Happened to M.L.'s Sexual Assault Kit?

M.L.'s sexual assault kit was likely not tested for a combination of the above reasons. First, the case was initially closed when the police were unable to identify her assaulter based on the information available to them.¹⁰⁵ The police attempted to locate "Ray," the name M.L. knew him by, at his work and at the apartment complex where he raped M.L.¹⁰⁶ However, when they were unable to identify him and all other leads were exhausted, they closed the case.¹⁰⁷

At that time, DNA technology was continuing to evolve and the funding for testing was extremely limited.¹⁰⁸ In fact, Clark County, Nevada did not receive funding to begin testing sexual assault kits until 2009.¹⁰⁹ Further, it was not until 2015 when Clark County created a detective unit to investigate these previously unsolved sexual assaults.¹¹⁰ Thus, in 2016, M.L.'s kit was tested, and her attacker was identified and subsequently charged with sexual assault.¹¹¹

III. THE MODEL SOLUTIONS

So, how do we fix this problem? This Article focuses on two important sources for an overview of model solutions regarding how to clear the sexual assault kit backlog—the Joyful Heart Foundation and the National Institute of Justice's guidelines in response to the Sexual Assault Forensic Evidence Reporting Act.¹¹²

To start, the Joyful Heart Foundation was created in 2004 by Mariska Hargitay, the actress who plays Olivia Benson on *Law & Order: Special Victims' Unit*.¹¹³ Since 2010, it has become one of the biggest proponents

103. Campbell et al., *supra* note 30, at 81.

104. *Id.* Detroit also suffered from several cuts to their sexual assault unit, diminishing the number of sexual assault unit investigators and staff by 50% in 2002, and again by 50% in 2008. *Id.*

105. Transcripts of Trial – Day 3, *supra* note 14, at 152-53.

106. *Id.* at 153.

107. *Id.*

108. *Id.* at 139.

109. *Id.* at 138.

110. *Id.*

111. *Id.* at 153-54.

112. Sexual Assault Forensic Evidence Reporting (SAFER) Act of 2013, 113 Stat. 80 (codified at 42 U.S.C. § 14135).

113. JOYFUL HEART FOUNDATION, *Our Story*, <http://www.joyfulheartfoundation.org/about-us/our-story>

for solving the backlog and testing all untested sexual assault kits.¹¹⁴ Second, in 2013, Congress passed the Sexual Assault Forensic Evidence Reporting Act, which in part tasked the National Institute of Justice to create model guidelines for investigating a sexual assault case with DNA evidence.¹¹⁵

After considering these two sources for model solutions, this Article will consider how New York City addressed its sexual assault kit backlog, making it the first major city to clear its backlog.

A. The Joyful Heart Foundation and “The Six Pillars of Legislative Rape Kit Reform”

Mariska Hargitay’s role on Law & Order: Special Victims’ Unit opened her eyes to countless victims of sexual assault.¹¹⁶ Victims frequently reached out to her to disclose their abuse.¹¹⁷ When reading their letters and hearing their experiences, she recognized some common themes in each of them—pain, isolation, and courage.¹¹⁸ In response, she created the Joyful Heart Foundation, which has become “a leading national organization with a mission to transform society’s response to sexual assault, domestic violence and child abuse, support survivors’ healing, and end this violence forever.”¹¹⁹

In 2010, Joyful Heart focused its efforts on eliminating the backlog of sexual assault kits.¹²⁰ It created the “first and only online hub” for (1) sharing information about the backlog, (2) tracking each state’s progress in addressing the backlog and sexual assault investigation reform, (3) providing information on the best practices for reform, and (4) providing resources and information tailored toward victims of sexual assault.¹²¹ Joyful Heart also joined with government officials, non-profit organizations, law enforcement agencies, advocates, and survivors to improve how sexual assaults are handled in the criminal justice system.¹²² They are “at the forefront of identifying backlogs of untested rape kit

story (last visited Oct. 21, 2021).

114. *Id.* It is worth noting that this article will not address the debate over whether it is appropriate to test all the backlogged kits, including those that cannot be prosecuted based on statute of limitations etc.

115. The Sexual Assault Forensic Evidence Reporting (SAFER) Act of 2013, P.L. 113-4 § 1002; see NIJ – *National Best Practices*, *supra* note 39, at iii.

116. JOYFUL HEART FOUNDATION, *Our Story*, *supra* note 113.

117. *Id.*

118. JOYFUL HEART FOUNDATION, *Founders Corner*, <http://www.joyfulheartfoundation.org/about-us/founders-corner> (last visited Oct. 21, 2021).

119. JOYFUL HEART FOUNDATION, *Our Story*, *supra* note 113.

120. *Id.*

121. *Id.* (which can be found at <http://www.endthebacklog.org/>).

122. *Id.*

evidence in cities across the country[,] . . . advocating for funding to test backlogged kits and investigate cases,” testifying and lobbying for laws and policies to improve sexual assault kit testing to prevent a future backlog, and promoting a victim-centered approach to reform.¹²³ It is worth noting that numerous other law review articles and agencies rely on Joyful Heart’s research and data.¹²⁴

Throughout this process, Joyful Heart advocated that in order to properly address the sexual assault kit backlog, two steps must be taken: first, each state must enact laws to address sexual assault kit reform, and second, all backlogged kits must be tested.¹²⁵ In 2016, they developed a national campaign to assist in passing comprehensive rape kit reform legislation in all 50 states.¹²⁶ This was based on what they refer to as the “six essential pillars for reform,” which are: (1) annual statewide inventory of untested kits, (2) mandatory testing of backlogged sexual assault kits, (3) mandatory testing of new sexual assault kits, (4) a statewide tracking system of sexual assault kits, (5) rights to victims regarding information about their sexual assault kit and the testing status; and (6) funding for additional reform.¹²⁷ As discussed in Sections IV and VI, Nevada has implemented all six pillars.¹²⁸

Pillar #1: Annual Statewide Inventory of Untested Kits

The first pillar requires each state to determine how many backlogged

123. *Id.*

124. See e.g. 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, 197–98 (2015); Stephanie Fulton, *The Rape Kit Backlog: The Continuous Hampering of Society’s Protection and Liberty Interests*, 40 WOMEN’S RTS. L. REP. 43 (2018); Taylor Gamble, *Thinking Outside the Box: Limiting the Collection of Rape Kit Evidence in Acquaintance Rape Trials*, 20 CARDOZO J.L. & GENDER 743, n. 131, 134–35 (2014); Gaby Lion, *Bringing Untested Rape Kits Out of Storage and into the Courtroom: Encouraging the Creation of Public-Private Partnerships to Eliminate the Rape Kit Backlog*, 69 HASTINGS L.J. 1009, n. 13, 34, 85, 186 (2018); Cyrus R. Vance, Jr., *Results from the Manhattan District Attorney’s Office’s Sexual Assault Kit Backlog Elimination Grant Program*, at 16, <https://www.manhattanda.org/wp-content/uploads/2019/03/Test-Every-Kit-Results-from-the-Manhattan-District-Attorneys-Offices-Sexual-Assault-Kit-Backlog-Elimination-Grant-Program.pdf> (last visited Oct. 21, 2021); Campbell et al., *supra* note 30 at 7 (stating that the Detroit multidisciplinary team included representatives from the Joyful Heart Foundation).

125. JOYFUL HEART FOUNDATION, *Our Story*, *supra* note 113.

126. *Id.*

127. *Id.*; END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66; It is important to note that these pillars “align with federal best practices as outlined in the National Institute of Justice’s report, National Best Practices for Sexual Assault Kits: a Multidisciplinary Approach, and have been reviewed by survivors, law enforcement, crime lab personnel, victim advocates, medical professionals, DNA experts, prosecutors and victims’ rights experts.” *Id.* at 7.

128. END THE BACKLOG, *Where the Backlog Exists and What’s Happening to End it*, *supra* note 27. While Nevada did properly satisfy Pillar #6 by obtaining funding to test its backlog of sexual assault cases, it failed to set up reoccurring funding for testing future kits, as discussed below.

kits they have by conducting an inventory of the untested rape kits in their possession.¹²⁹ The total number of untested kits allows legislators, as well as law enforcement and forensic laboratories, to realistically determine how much additional resources are necessary and the best way to allocate those resources in order to clear the backlog of kits.¹³⁰ In addition to utilizing federal grants to assist in funding this process, Joyful Heart also proposes suggestions for enacting legislation to accomplish this pillar, such as setting a specified amount of time for the jurisdiction to complete the inventory.¹³¹

As of the publication of this Article, forty-two states and Washington D.C. have laws requiring some type of inventory of untested sexual assault kits.¹³² Ideally, the statutes, as demonstrated by Joyful Heart's model legislation, will require states to conduct at least yearly inventories of sexual assault kits.¹³³ Nevada, as discussed below, enacted legislation that requires biannual reporting and inventorying of Nevada's sexual assault kits.¹³⁴ However, other jurisdictions, such as Tennessee, enacted statutes that appear to only require a one time inventory of sexual assault kits.¹³⁵

Pillar #2: Mandatory Testing of Backlogged Sexual Assault Kits

The second pillar recommends that states enact legislation to require

129. END THE BACKLOG, *State Responses*, www.endthebacklog.org/ending-backlog/state-responses (last visited Oct. 21, 2021).

130. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 9.

131. *Id.*

132. END THE BACKLOG, *Pillar: Inventory Untested Rape Kits*, <http://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-inventory-untested> (last visited Oct. 21, 2021).

133. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 9; END THE BACKLOG, *Pillar: Inventory Untested Rape Kits*, *supra* note 131 (arguing that annual inventories “can strengthen accountability, monitor progress toward eliminating the backlog, and send a message to survivors that they matter).

134. Nev. Rev. Stat. § 200.3788(3); *see also* S.C. Code Ann. § 23-3-1300 (2020) (South Carolina's statute similarly requires a report detailing the sexual assault kits every six months). It is worth noting that while the Joyful Heart's Legislative Handbook and END THE BACKLOG website indicate that Nevada has only established a one time inventory of untested sexual assault kits, NRS 200.3788 clearly indicates that the biannual report must indicate (a) how many kits are in each county; (b) how many kits tested within the six month period in each county; (c) the number of new kits added during the six month period in each county; (d) the number of kits where testing was requested, but not completed in each county; (e) the average time it took for the kit to be transported from the hospital to the lab over the six month period; (f) the average time it took for the lab to test a kit once received from the hospital over the six month period; and (g) how many kits in each county have been waiting for more than a year and 6 months for testing.

135. Tenn. Code Ann. § 36-6-123(3) (2014).

testing of all backlogged sexual assault kits.¹³⁶ Similar to the deadline in Pillar #1, Joyful Heart recommends that new legislation impose a deadline for law enforcement to submit all untested backlogged kits for testing as well as forensic laboratories to complete the testing.¹³⁷ Additionally, it suggests that crime labs outsource the testing to other laboratories if they are unable to complete the testing by the deadline.¹³⁸ As of the publication of this Article, only ten states have laws that require mandatory submission and testing of backlogged kits: Colorado,¹³⁹ Georgia,¹⁴⁰ Illinois,¹⁴¹ Massachusetts, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, and Texas.¹⁴² However, twenty-two additional states, including Nevada, have accomplished this pillar through non-legislative reform.¹⁴³

Pillar #3: Mandatory Testing of Newly Collected Kits

To prevent a future backlog, the next pillar recommends that states enact legislation requiring law enforcement to submit future rape kits to labs for testing within certain time frames.¹⁴⁴ Similarly, forensic laboratories should also have deadlines to complete testing.¹⁴⁵ This may not only prevent future backlogs but also provide peace of mind for victims, because sexual assault kits would be promptly analyzed.¹⁴⁶ As of the publication of this Article, thirty-three states and Washington D.C. have enacted laws establishing time restraints on submitting and testing newly collected sexual assault kits.¹⁴⁷

136. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 9; END THE BACKLOG, *State Responses*, *supra* note 129.

137. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 9; END THE BACKLOG, *State Responses*, *supra* note 129.

138. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 9; END THE BACKLOG, *State Responses*, *supra* note 129.

139. COLO. REV. STAT. ANN. § 24-33.5-113(2014).

140. GA. CODE ANN. § 35-1-2 (2017).

141. 725 ILL. COMP. STAT. § 202/20 (2010).

142. END THE BACKLOG, *PILLAR: Mandate Testing of Previously Untested Kits*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-mandate-testing> (last visited Oct. 21, 2021).

143. *Id.*

144. END THE BACKLOG, *State Responses*, *supra* note 129; END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 13.

145. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 13.

146. *See id.*

147. END THE BACKLOG, *PILLAR: Mandate Testing of Newly Collected Kits*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-mandate-testing-newly> (last visited Oct. 21, 2021).

Pillar #4: Sexual Assault Kit Tracking Systems

The fourth pillar suggests that states create a sexual assault kit tracking system, which would track a sexual assault kit through the entire investigative process: from the hospital, to the law enforcement agency, to the forensic laboratory, and the final results.¹⁴⁸ Joyful Heart also recommends that the legislation provide that victims be able to access the system.¹⁴⁹ As of the publication of this Article, thirty-four states and Washington D.C. have enacted laws that mandate the creation of a sexual assault tracking system.¹⁵⁰

Pillar #5: Survivors' Right to Notice

The fifth pillar recommends that victims be given the right to obtain information on their sexual assault kit and the investigation, often referred to as “notice rights.”¹⁵¹ This promotes one of Joyful Hearts’ primary objectives—to develop victim-centered legislation to assist in victims’ recovery and healing.¹⁵² As of the publication of this Article, thirty states and Washington D.C. have passed laws granting notice rights to victims.¹⁵³

Pillar #6: Funding

The final pillar, and arguably the most important one, recommends that states begin taking the necessary legislative steps to ensure that there is adequate funding to clear their current sexual assault kit backlogs.¹⁵⁴ But even further, it recommends that legislation provide for funding to prevent any future backlog of sexual assault kits.¹⁵⁵ As of the publication of this article, twenty-nine states have appropriated funds for sexual assault kit

148. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66 at 15; END THE BACKLOG, *State Responses*, *supra* note 129.

149. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 15.

150. END THE BACKLOG, *PILLAR: Create a Rape Kit Tracking System*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-create-rape-kit> (last visited Oct. 21, 2021).

151. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 17.

152. JOYFUL HEART FOUNDATION, *Founders Corner*, *supra* note 118.

153. END THE BACKLOG, *PILLAR: Establish a Victim's Right to Know the Status of Their Kit*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-establish-victims> (last visited Oct. 21, 2021).

154. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 19.

155. *Id.*

reform.¹⁵⁶ However, it is worth noting that eleven of those states only established a one-time appropriation of funds—this could prove problematic for future testing if funding does not continue, as discussed in Section VI.¹⁵⁷

B. The National Institute of Justice's Best Practices

In 2013, Congress passed the Sexual Assault Forensic Evidence Reporting Act (“SAFER Act”), which mainly sought to develop practices for “accurate, timely, and effective collection and processing of DNA evidence, including protocols and practices specific to sexual assault cases, which shall address appropriate steps in the investigation of cases that might involve DNA evidence.”¹⁵⁸ In response, the National Institute of Justice, which is the Department of Justice’s research, development and evaluation agency, created a working group to develop procedures to address the SAFER Act’s concerns.¹⁵⁹ The agency developed thirty-five recommendations to represent the ideal approach while “understanding that communities may be limited in funding, infrastructure, or existing legislation in implementing this guidance in total.”¹⁶⁰ Consequently, the National Institute of Justice acknowledged that each jurisdiction may not be able to implement all of these recommendations.¹⁶¹ Instead, the working group intended that the list provide the best practices available, which would allow each jurisdiction to evaluate its individual needs, funding, infrastructure and legislation to determine which practices to adopt.¹⁶²

Similar to the Joyful Heart’s six pillars, the National Institute of Justice divided their recommendations into six categories, or “chapters.”¹⁶³ The first chapter’s recommendation suggests that multiple agencies work together in creating a victim-centered approach for handling sexual assault cases.¹⁶⁴ The second recommendation refers to the sexual assault

156. END THE BACKLOG, *PILLAR: Appropriate Funding for Reform*, <https://www.endthebacklog.org/ending-backlog-our-approach-campaign-end-backlog-2020-end-backlog-goals/pillar-appropriate-funding> (last visited Oct. 21, 2021).

157. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 66, at 19.

158. SAFER Act of 2013, *supra* note 112. While Congress did previously enact other legislation, such as the DNA Analysis Backlog Elimination Act of 2000, this Article will only focus on the SAFER Act.

159. NIJ – *National Best Practices*, *supra* note 39, at iii.

160. *Id.* at ix-xii.

161. *Id.* at 3-5.

162. *Id.*

163. *Id.* at ix-xii.

164. *Id.* at ix. This Chapter highlights how a multidisciplinary approach will improve communication and effectiveness among the various agencies involved in reform. *Id.* at 7-8. Further,

exam and sexual assault kit.¹⁶⁵ It recommends that certain standards be created for the exam and the kit, including who conducts the exam, and how the kit is maintained and preserved.¹⁶⁶ The third category of recommendations are consistent with pillars one, three, and four, suggesting that states create a sexual assault kit tracking system, conduct a comprehensive inventory of their backlogged kits, conduct annual audits of their backlogged kits, and create submission deadlines for collecting and testing sexual assault kits.¹⁶⁷ The fourth recommendation focuses on law enforcement and suggests that law enforcement agencies submit all sexual assault kits to the forensic laboratory for analysis.¹⁶⁸ It also recommends that law enforcement agencies set up a system for prompt follow-up on CODIS hits, receive specialized training for interviewing sexual assault victims, and incorporate an electronic records management system for their investigations.¹⁶⁹ The fifth recommendation focuses on forensic laboratories and provides several suggestions to make DNA analysis more efficient and effective.¹⁷⁰ The sixth and final

implementing a trauma-informed victim-centered approach “leads to more timely submission of evidence to forensic laboratories, enhances communications and investigative procedures, promotes better informed prosecutorial decision-making, and ultimately may reduce re-traumatization of victims by the criminal justice system.” *Id.* at 9. To further assist with this approach, the Chapter emphasizes the importance of victim advocates, who inform victims about their options, explain the criminal justice process, and provide support throughout. *Id.* at 9-11. Lastly, this Chapter encourages jurisdictions to involved representatives from all parts of their community, specifically “underserved and vulnerable populations in the community’s response to sexual assault cases.” *Id.* at 11-12.

165. *Id.* at ix-x.

166. *Id.* Further, this Chapter explains the importance of having a trained Sexual Assault Nurse Examiner conduct the examinations because it ensures a consistent examination and improves the quality of the forensic evidence. *Id.* at 15. Moreover, victims will benefit because SANE nurses receive training in “methods to avoid re-traumatizing a victim during an examination.” *Id.* This Chapter further discusses the important and necessary precautions to take in order to prevent contamination. *Id.* at 27-28. Lastly, this Chapter also provides specific considerations regarding (1) the timing of an exam, (2) best practices for obtaining evidence from every different part of the body, (3) encouraging examinations even if the victim wants to remain anonymous or does not wish to report the sexual assault, (4) post-mortem examinations, (5) sample collection from a suspect. *Id.* at 17-26.

167. *Id.* at x. This Chapter shows how these various procedures will ensure that sexual assault kits are submitted, analyzed, and stored in a timely and efficient manner. *Id.* at 33-43.

168. *Id.* at xi. This Chapter lists a variety of beneficial reasons for this recommendation, including giving the victim confidence in the criminal justice system and possibly identifying a serial offender by connecting that suspect’s DNA to other cases nationwide. *Id.* at 46. It further advocates for testing sexual assault kits even when the statute of limitations has expired because, in part, it can provide closure to a victim and reveal relevant information for parole board hearings. *Id.* at 47.

169. *Id.*

170. *Id.* This Chapter suggests creating a system to prioritize which samples within a sexual assault kit would most likely reveal results. *Id.* at 54. Similarly, a “direct to DNA” approach can be to “maximize the chances of obtaining CODIS-eligible profiles.” *Id.* at 58. Notably, the Clark County’s laboratory has implemented these procedures to improve the lab’s testing efficiency. Further, another recommendation that Clark County’s lab is beginning to incorporate is the use of automation and robotics, which “allow multiple tasks to be performed and the same time . . . and maximize the use of the laboratory personnel.” *Id.* at 59.

recommendation suggests that jurisdictions adopt a victim notification protocol, retain sexual assault kits for at least as long as the statute of limitations for sexual assault cases, and consider eliminating the statute of limitations for sexual assault cases altogether.¹⁷¹

C. New York City – the “Forklift Approach”

In 2003, New York City became one of the first major cities to clear its backlog of untested sexual assault kits.¹⁷² From 1999 to 2003, it tested approximately 17,000 rape kits.¹⁷³ New York City also became the first city to create a specialized unit comprised of prosecutors and detectives to investigate and prosecute cold case sexual assaults based on the previously untested sexual assault kits.¹⁷⁴

The first issue New York City needed to address was how to test 17,000 backlogged sexual assault kits. In doing so, they developed the “forklift approach,” which consisted of “test[ing] all backlogged kits—regardless of the status, age, or facts of the case.”¹⁷⁵ Typically, New York City law enforcement and prosecutors would utilize the Office of the Chief Medical Examiner to test their kits.¹⁷⁶ However, in order to overcome the backlog, New York City obtained approximately \$12 million in funding and contracted with three private forensic laboratories to test approximately 200 kits each month.¹⁷⁷ Ultimately, this approach led to 2,000 DNA matches and allowed the Manhattan District Attorney’s office to file forty-nine indictments for previously unsolved sexual assaults.¹⁷⁸

New York City, like other jurisdictions, was able to learn a variety of important lessons from the forklift approach.¹⁷⁹ First, while New York City tested every untested kit, it only had a ten year statute of limitations

171. *Id.* at xi-xii. This Chapter continues to emphasize the trauma-informed victim-centered approach as it relates to notifying the victim about the status of the sexual assault kit. *Id.* at 67-68. It highlights the important role that victim advocates should play in this part of the process, which can often “trigger painful and emotional memories or be an unwelcome intrusion, especially in cases where the assault took place many years ago, there has been no communication between the victim and law enforcement and the notification is unexpected, or when notification may compromise the victim’s privacy.” *Id.* at 68.

172. See Cyrus R. Vance, Jr., *Results from the Manhattan District Attorney’s Office’s Sexual Assault Kit Backlog Elimination Grant Program*, *supra* note 124, at 1.

173. *Id.*

174. *Id.* at 8. It also discusses the importance of CODIS, the national DNA database, which allowed the Manhattan District Attorney’s office to upload thousands of samples into one “centralized, nationwide database.” *Id.* at 7.

175. *Id.* at 7.

176. *Id.*

177. *Id.*

178. *Id.* at 9.

179. *Id.* at 7-10.

on sexual assault charges.¹⁸⁰ Thus, even though testing may have led to a DNA match, if the statute of limitations had passed, then the New York City prosecutors were unable to pursue the case.¹⁸¹ Further, New York City lacked a consistent and modern storage system for the sexual assault kits, which prevented the law enforcement, the district attorney's office, the forensic analysts, and even the victims from tracking the status of each kit.¹⁸² Finally, the forklift approach "also highlighted the power of DNA to exonerate the innocent."¹⁸³ In fact, if the city had chosen not to test kits that already had been adjudicated, then some previously convicted offenders would never have been exonerated.¹⁸⁴

In response to New York City's successful clearing of their backlogged cases, the state passed legislation: (1) eliminating the statute of limitations on first degree sexual assaults, and (2) creating a notification and tracking system to allow all parties involved to keep up to date on new DNA matches.¹⁸⁵

In 2009, inspired from New York City's success, Detroit sought to implement the forklift approach and ultimately cleared its backlog ten years later in 2019.¹⁸⁶ Detroit tested over 11,000 untested sexual assault kits, which resulted in 2,616 DNA matches, identifying 824 serial sex offenders, ultimately securing 214 convictions.¹⁸⁷

IV. NEVADA'S APPROACH TO CLEARING ITS SEXUAL ASSAULT KIT BACKLOG

Nevada began actively addressing its sexual assault backlog in 2015.

180. *Id.* at 8.

181. *Id.*; However, prosecutors in New York had the option to pre-empt this issue by using a "John Doe" indictment when available. *Id.* For example, so long as a DNA profile is obtained within the statute of limitations, even if there is no match or testing to verify the assaulter's identity, the DA's could file an Indictment against the specific DNA profile, also known as "John Doe." *Id.* As long as this was filed before the statute of limitations expired, then the case could be pursued once they determined the identity of the DNA profile. *Id.* All jurisdictions do not allow for this type of indictment – at this time Nevada does not allow for it. However, the "John Doe" indictments typically do not matter in Nevada because there is no statute of limitations on sexual assault.

182. Cyrus R. Vance, Jr., *Results from the Manhattan District Attorney's Office's Sexual Assault Kit Backlog Elimination Grant Program*, *supra* note 124, at 8.

183. *Id.* at 9; see Calandra et al., *supra* note 77 (discussing how DNA has also been used to exonerate individuals charged with crimes); END THE BACKLOG, *Why Test All Kits?*, *supra* note 21 (noting that DNA testing is a "powerful tool" that can not only solve crimes, but also "exonerate the wrongfully convicted").

184. *Id.* After being convicted of sexual assault and serving 12 years on a 20-40 years sentence, New York City District Attorney's office exonerated Michael Mercer when a different person's DNA was located in the sexual assault kit – a convicted serial rapist Arthur Brown. *Id.*

185. *Id.*

186. *Id.* at 9-10.

187. END THE BACKLOG, *Michigan*, <http://www.endthebacklog.org/Michigan> (Last visited Oct. 21, 2021).

Adam Laxalt, shortly after being elected Nevada's Attorney General (hereinafter "AG"), created the Sexual Assault Kit Backlog Working Group.¹⁸⁸ This group consisted of representatives from local and state law enforcement, the forensic lab, prosecutor's offices, state and local legislators, victim advocates, researchers, and sexual assault nurse examiners.¹⁸⁹ One of the first assignments for the working group was to determine how many untested kits were in Nevada.¹⁹⁰ Ultimately, they determined that there was a backlog of 7,855 untested sexual assault kits: 6,683 in southern Nevada and 1,172 in northern Nevada.¹⁹¹ Some of these kits dated back to the early 1980s.¹⁹² Similar to other jurisdictions, Nevada's backlog of sexual assault kits formed because of "financial and human resource constraints, the advent of and improvements to DNA technology, and the way sexual assault cases were investigated and tracked in the past."¹⁹³

As of the end of 2020, Nevada successfully tested all of its backlogged kits.¹⁹⁴ Nevada has been able to accomplish this by (1) using federal and state grants, (2) passing legislative changes addressing many of the issues that caused the backlog, and (3) developing a tracking program to follow each kit through the system.

A. Grant Money and Other Funding Provided the Necessary Resources to Begin Addressing the Backlog

It quickly became clear that Nevada, consistent with the majority of other states, was able to attack the backlog of untested sexual assault kits through the aid of grant money. Since 2015, Nevada received grants from the federal government, the Manhattan District Attorney's Office, and the Sexual Assault Kit Initiative (hereinafter "SAKI"). Each grant was directed at accomplishing specific goals, all of which ultimately aimed to

188. Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, Nevada Office of the Attorney General, at 2 (2018).

189. *Id.*

190. *Id.*

191. Nevada AG – *Home*, *supra* note 72. This number tends to change depending on the source's date.

Interestingly, as of 2021, the Las Vegas Metropolitan Police Department Forensic Laboratory identified 113 additional backlogged sexual assault kits. *2020 Legislative Council Bureau Sexual Assault Kit Status Report*, NEVADA LEGISLATURE, (Jan 27, 2021). These kits were located in the following areas: (1) other states, but based on criminal jurisdiction, were returned to Las Vegas for prosecution, (2) the Henderson Police Department and North Las Vegas Police Department, who had failed to identify the kits previously, and (3) the Las Vegas Metropolitan Police Department Forensic Laboratory, who had incorrectly labeled the kits as tested. *Id.*

192. Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 189, at 3.

193. Nevada AG – *The Backlog*, *supra* note 39.

194. Nevada AG – *Home*, *supra* note 72.

clear the backlog. Moreover, Nevada passed legislation that allocated additional money to address the backlog. Lastly, the Nevada AG's office was also able to obtain additional funding through settlement agreements from pending civil litigation.

To start, on May 5, 2015, the Nevada AG's office applied for a federal SAKI grant from the Bureau of Justice Assistance.¹⁹⁵ On September 10, 2015, the Bureau of Justice Assistance awarded the Nevada AG's office a SAKI grant for \$1,983,533.¹⁹⁶ This grant was issued to "inventory and test backlogged sexual assault kits, arrange victim services for the necessary notifications and psychological needs for those victims and to investigate the results of any Combined DNA Index System (CODIS) hits from those tested kits."¹⁹⁷ Thus, the Nevada AG's office used this money to begin testing the nearly 7,000 backlogged kits in southern Nevada.¹⁹⁸ In order to accomplish the testing, the Nevada AG's office began outsourcing the task to private DNA laboratories.¹⁹⁹ Moreover, it used the funds to notify victims, investigate CODIS hits, track the progress of the kits, research victim-centered approaches and policies for the future, and employ additional victim advocates to assist with providing resources to sexual assault victims.²⁰⁰ A few months after receiving this grant, the Las Vegas Metropolitan Police Department received a grant from the Manhattan District Attorney's Office for \$1,995,874.²⁰¹ The Nevada AG's office also used this money to assist in testing the backlogged kits.²⁰²

Moreover, on July 8, 2015, the Nevada AG reached a settlement agreement with Chase Bank resolving pending litigation.²⁰³ This settlement allowed the Nevada AG to add approximately \$1.69 million to the sexual assault initiative.²⁰⁴ Ultimately, the Nevada Legislature's Interim Financial Committee allocated this settlement money to both

195. NEVADA ATTORNEY GENERAL, *Grants*, <http://ag.nv.gov/Grants/Grants/> (last visited Oct. 21, 2021) [hereinafter Nevada AG – *Grants*]; Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 189, at 3.

196. Nevada AG – *Grants*, *supra* note 195; Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 3.

197. Nevada AG – *Grants*, *supra* note 195; Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 3. It is worth noting, that at this time, this project only focused on Clark and Douglas counties in Nevada.

198. U.S. Department of Justice, BUREAU OF JUSTICE ASSISTANCE, *Nevada 2015 SAKI Grant*, (2015), <https://bja.ojp.gov/funding/awards/2015-ak-bx-k005>.

199. *Id.*

200. *Id.*

201. Cyrus R. Vance, Jr., *Results from the Manhattan District Attorney's Office's Sexual Assault Kit Backlog Elimination Grant Program*, *supra* note 124.

202. *Id.* at 10-14.

203. Adam Paul Laxalt, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 3.

204. *Id.*

Washoe and Clark County's forensic laboratories to outsource the testing of backlogged sexual assault kits to other laboratories.²⁰⁵

The following year, on April 26, 2016, the Nevada AG's office again applied to the Bureau of Justice Assistance for a SAKI grant.²⁰⁶ On September 26, 2016, the Bureau of Justice Assistance awarded the AG's office a grant for \$1,962,414.²⁰⁷ These funds were allocated to resolve CODIS hits, provide a statewide assessment of current policies, and increase resources for training, prosecution, and investigation.²⁰⁸ The prior grant from the Bureau was directed at southern Nevada's backlog. Thus, this grant allowed Nevada to expand its approach to the backlog issue and begin implementing policies and practices state-wide.²⁰⁹ This included developing a victim-centered approach to sexual assault, providing training to implement the new policies and practices, and hiring additional positions in law enforcement agencies to assist in performing the above tasks.²¹⁰

On May 31, 2016, the Nevada AG's office applied for a Sexual Assault Forensic Evidence—Inventory, Tracking and Reporting grant from the National Institute of Justice.²¹¹ Ultimately, a \$523,268 grant was awarded.²¹² After seeking approval, the Nevada AG allocated this grant to fund a sexual assault tracking system.²¹³ Additionally, this grant was sufficient to fund the testing of all sexual assault kits that had been obtained by law enforcement on or before December 31, 2014.²¹⁴

In 2017, as discussed further below, the Nevada legislature enacted numerous funding-related laws to assist in curing the state's backlog of sexual assault kits.²¹⁵ In particular, the legislature appropriated \$3 million for the Nevada AG's office from Nevada's general fund "to form interlocal agreements with public entities for the purpose of making payments to forensic laboratories toward reducing the backlog of sexual assault kits that have not been tested in the state."²¹⁶ Subsequently, the

205. *Id.*

206. *Id.* at 4.

207. NEVADA OFFICE OF THE ATTORNEY GENERAL, Sexual Assault Kit Initiative, *Grantees*, <https://www.sakitta.org/nevada/> (last visited Oct. 21, 2021) [hereinafter Nevada AG – *Grantees*]; *Id.*

208. Nevada AG – *Grantees*, *supra* note 207.

209. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Nevada State Sexual Assault Kit Initiative Project*, (2016) <https://bja.ojp.gov/funding/awards/2016-ak-bx-k004>.

210. *Id.*

211. OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 4.

212. Nevada AG – *Grantees*, *supra* note 207; *id.*

213. Nevada AG – *Grantees*, *supra* note 207; Nevada AG – *Grants*, *supra* note 195.

214. OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 4.

215. *See id.* at 4-5.

216. *Id.* at 4-5.

Nevada AG's Sexual Assault Kit Backlog Working Group determined that testing the untested kits, collected since January 1, 2015 would cost \$2,709,288 in Clark County and \$1,641,617 in Washoe County.²¹⁷ Fortunately, the Nevada AG's office was able to get approval to use non-taxpayer settlement money to cover the additional \$1,350,905.²¹⁸ As a result, this funding allowed Nevada to test all sexual assault kits obtained on or after January 1, 2015.²¹⁹

Further, Nevada again received the SAKI Grant from the Bureau of Justice Assistance in 2017, which provided an additional \$933,656.²²⁰ This money was allocated to develop consistent procedures regarding DNA collection.²²¹ This project involved working in collaboration with the Nevada Department of Corrections.²²² Specifically, the Nevada AG's office used this money to "implement the national response model to enable the appropriate authorities to plan and coordinate DNA collections of lawfully owed DNA samples, testing of these samples, and CODIS uploads of DNA profiles for the purpose of resolving cold sexual assault cases associated with previously unsubmitted sexual assault kits."²²³

The following years, in 2018 and 2019, Nevada received \$1,000,000 and \$2,000,000 again from the Bureau of Justice Assistance's SAKI Grant.²²⁴ These funds were directed toward supporting the Clark County District Attorney's Office in prosecuting the sexual assault cases generated from testing the backlogged kits.²²⁵ Further, the Nevada AG's office created a team of investigators to assist in investigating the cases.²²⁶

Most recently, in 2020, Nevada received \$523,198²²⁷ from the SAKI Grant.²²⁸ Based on Nevada's progress from the prior grants, the Bureau

217. *Id.* at 5.

218. *Id.*

219. *Id.* However, as discussed below, Nevada did not continue to receive reoccurring funding to test kits collected after 2015.

220. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Nevada State 2017 Sexual Assault Kit Initiative Project*, (2017) <https://bja.ojp.gov/funding/awards/2017-ak-bx-0017>.

221. Nevada AG – *Grantees*, *supra* note 208.

222. Nevada AG – *Grants*, *supra* note 195.

223. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Nevada State 2017 Sexual Assault Kit Initiative Project*, *supra* note 220.

224. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Southern Nevada Sexual Assault Kit Initiative*, (2018) <https://bja.ojp.gov/funding/awards/2018-ak-bx-0005>; U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Nevada Statewide Investigation and Prosecution Support*, (2019) <https://bja.ojp.gov/funding/awards/2019-ak-bx-0007>.

225. Nevada AG – *Grantees*, *supra* note 207.

226. *Id.*

227. It appears that Nevada received \$261,599 for the 2020 fiscal year, however the total funding to date indicates that Nevada possibly received another \$261,599 under this grant. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Southern Nevada SAKI Task Force Development*, (2021) <https://bja.ojp.gov/funding/awards/2020-ak-bx-0037-0>

228. *Id.*

of Justice Assistance granted this additional money to support the continued investigation and prosecution of additional sexual assault cases that have resulted from the backlog of sexual assault kits.²²⁹ In fact, the language of the grant actually shows that Nevada has been moving in the right direction with its sexual assault kit reform: “This funding is intended as enhancement funds for applicants that have clearly demonstrated their jurisdictions have previously addressed, or are currently effectively addressing, the major issues associated with unsubmitted [sexual assault kits].”²³⁰

Thus, the first main step for Nevada in clearing the backlog of sexual assault kits was securing millions of dollars in grant money to fund the project. However, with the money in place to address the current backlog, Nevada needed to implement legislation to create policies for sexual assault investigation and testing to prevent future backlogs.

B. Nevada Made Significant Legislative Changes to Address the Sexual Assault Kit Backlog and Attempt to Prevent a Future Backlog

While funding allowed Nevada to begin testing the backlogged kits, Nevada also wanted to make significant legislative changes to prevent any future backlogs and improve its sexual assault investigation process. The legislation included testing timelines, a process for tracking sexual assault kits and overall statistics, and additional survivor rights. The Nevada AG’s office also created a website to further assist victims of sexual assault.

1. Legislation Focused on Sexual Assault Kit Testing and Tracking

In 2017, the Nevada legislature enacted NRS 200.3786, which outlines a sexual assault kit timeline for law enforcement agencies and forensic laboratories. To start, it requires that a law enforcement agency submit a sexual assault kit to the applicable forensic laboratory within 30 days of receiving the kit.²³¹ Further, the forensic laboratory must complete its testing within 120 days after receiving the kit from the law enforcement agency.²³² It also imposes a requirement that the laboratory input the DNA profile from the sexual assault kit into the Nevada DNA Database, as well as CODIS.²³³

229. *Id.*

230. *Id.*

231. NEV. REV. STAT. § 200.3786(1) (2017). However, this subsection does not apply to sexual assault kits where the victim has chosen to remain anonymous.

232. *Id.* at § 200.3786(2).

233. *Id.*

As discussed previously, one major problem with addressing the nationwide backlog was the difficulty in first determining the number of untested kits. Nevada addressed this problem with NRS 200.3786, which requires forensic laboratories to generate a yearly report stating the number of sexual assault kits that were tested and how many remain untested.²³⁴ The report is then sent to the Director of the Legislative Counsel Bureau.²³⁵

Nevada also used the 2017 legislative session to implement a statute directing a sexual assault kit tracking system. NRS 200.3788, which did not take effect until January 1, 2021, seeks to improve Nevada's tracking of sexual assault kits. It requires the Attorney General to establish a statewide program for tracking the kits.²³⁶ The statute outlines what should be included in the program, requiring the following: (1) tracking the location and status of all sexual assault kits; (2) making this information available to medical professionals, law enforcement, prosecutors, and the forensic laboratory; and (3) allowing a victim to anonymously track their kit through the collection and testing process.²³⁷ Lastly, law enforcement, prosecutors, forensics analysts, and medical professionals are expected to participate in the tracking program.²³⁸ As discussed subsequently, Nevada successfully implemented a statewide sexual assault tracking program in 2019, which allows victims to track the sexual assault kit through the system, as well as receive updates on the status of the prosecution of the case.²³⁹

Two years later, during the 2019 legislative session, Nevada again passed numerous laws to address the sexual assault kit investigation process. Nevada added additional timeline requirements to ensure that the kits continued moving through the process.²⁴⁰ Specifically, NRS 200.3786 requires medical examiners to notify law enforcement within 72 hours of conducting a sexual assault examination.²⁴¹ Moreover, within those 72 hours, the law enforcement agency must take possession of the sexual assault kit from the medical examiner.²⁴² Consistent with the 2017

234. *Id.* at § 200.3786(3)(a-b)

235. *Id.* at § 200.3786(3). As will be discussed more below, the legislature later removed this section from this statute and passed a new statute that seeks to better address this issue of tracking the kits.

236. NEV. REV. STAT. § 200.3788(1) (2017).

237. *Id.* at § 200.3788(2)(a-c).

238. *Id.* at § 200.3788(4). Also, subsection (5) grants civil liability immunity to any agency or person who acts in "good faith and without gross negligence" pursuant to this statute. *Id.* at § 200.3788(5).

239. NEVADA OFFICE OF THE ATTORNEY GENERAL, *Attorney General Ford Announces Completion of Statewide Sexual Assault Kit Testing Initiative*, https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Announces_Completion_of_Statewide__Sexual_Assault_Kit_Testing_Initiative/ (last visited Oct. 20, 2021).

240. NEV. REV. STAT. § 200.3786(1) (2019).

241. *Id.*

242. *Id.*

version of this statute, the 2019 statute also required the law enforcement agency to provide the sexual assault kit to the forensic laboratory within 30 days.²⁴³

Nevada also amended the process for keeping track of the total number of sexual assault kits.²⁴⁴ To start, because the Nevada AG's office was tasked with creating the tracking program, the legislators decided to also task them with reporting the numbers starting on January 1, 2021, instead of the forensic laboratory as previously required by NRS 200.3786.²⁴⁵ Additionally, instead of a yearly report, the Attorney General must provide a bi-annual report that includes the number of sexual assault kits in the program in each county, the number of sexual assault kits where the DNA analysis was completed in each county during the six-month period, the number of new sexual assault kits added to the program within the last six months, and the number of sexual assault kits where DNA testing has been requested but not completed for each county, among other figures.²⁴⁶

2. Legislation Focused on a Victim-Centered Approach and Survivor Rights

As discussed above, the Joyful Heart Foundation and the National Institute of Justice strongly focus their recommendations and pillars on a trauma-informed, victim-centered approach. Thus, they encourage states to focus their sexual assault investigation reform and legislation around this goal, which Nevada has successfully done.

In 2017, Nevada implemented legislation that promoted a victim-centered approach for sexual assault investigation. The previously mentioned statute, NRS 200.3786, also required the law enforcement agency to "immediately" notify the victim after the sexual assault kit was submitted for testing.²⁴⁷ Also, a victim now has the right to defer the

243. *Id.* at § 200.3786(3). However, this subsection does not apply to sexual assault kits where the victim has chosen to remain anonymous. Also, NEV. REV. STAT. § 178A.240, which was added in 2019 as part of the Sexual Assault Survivors' Bill of Rights, states that even if one of the various individuals involved fails to meet this timeline, they are still required to follow through with the requirements. Moreover, failure to follow the prescribed timeline does not give the accused or convicted a standing to challenge the conviction, the conviction, or the forensic evidence for failing to follow the law. *Id.* at § 178A.250.

244. *Id.* at § 200.3788.

245. *Id.* at § 200.3788(3).

246. *Id.* at § 200.3788(3)(a-g).

247. NEV. REV. STAT. § 200.3786(5). It is worth noting that this legislation also imposes the following duties on law enforcement agencies: (1) if the law enforcement determines that it does not have jurisdiction over the sexual assault alleged, then it must transfer the sexual assault kit to the agency retaining jurisdiction over the crime within 5 days after receiving the kit from the medical professional; and (2) the agency must assign a criminal complaint number to sexual assault kit within 5 days after

testing of their sexual assault kit.²⁴⁸ Further, to protect the privacy of the victim, NRS 200.3772 allows the victim of sexual assault to use a pseudonym on all court records, investigative reports, and media releases.²⁴⁹

Nevada also improved the victim notification process for all criminal cases, as outlined in NRS 200.3784.²⁵⁰ Previously, the law required the prosecuting attorney to inform the victim only about the final disposition of the case.²⁵¹ However, this statute expands the information that a prosecuting attorney must provide to the victim.²⁵² This now includes “any pretrial disposition of the case” and particular information about the offender.²⁵³ Lastly, the victim of sexual assault is also entitled to all reports from the law enforcement agency within one month of request.²⁵⁴

Additionally, the legislature created an Advisory Committee on Rights of Survivors²⁵⁵ of Sexual Assault.²⁵⁶ This committee consists of the Attorney General, the Director of the Department of Corrections, a law enforcement official appointed by the Nevada Sheriffs’ and Chiefs’ Association, an attorney appointed by the State Bar of Nevada, and several other members appointed by the Attorney General.²⁵⁷ The Committee must meet at least once per year and make recommendations regarding the following three considerations: (1) whether additional

receiving notice of the kit.

248. *Id.* at § 200.3786(6); *see also id.* at § 178A.220.

249. NEV. REV. STAT. § 200.3772 (2017). This right also pertains to victims of sex trafficking or offenses involving a pupil or child.

250. NEV. REV. STAT. § 200.3784 (2019).

251. NEV. REV. STAT. § 200.3784 (1) (2009).

252. *Id.* at § 200.3784(1) (a-c) (2019). NEV. REV. STAT. § 179D.151 lays out the offender information that shall be provided to the victim upon request.

253. *Id.* at 200.3784(1) (a-c). NEV. REV. STAT. § 179D.151 lays out the offender information that shall be provided to the victim upon request.

254. NEV. REV. STAT. § 178A.280(1) (2019).

255. This article will use “survivor” throughout this section to remain consistent with the word choice in Nevada’s legislation. *See* NEV. REV. STAT. § 178A.140 (2019) (defining “survivor”); NEV. REV. STAT. § 178A.280(1) (2019) (noting different rights that a survivor has); *but see* NEV. REV. STAT. § 178A.150 (2019) (findings from the legislature regarding “victims” of sexual assault).

256. NEV. REV. STAT. § 178A.310(1) (2019).

257. *Id.* at § 178A.310(2). The other members include (1) “a survivor and a citizen or lawful resident of this State,” (2) “a representative of an organization supporting the rights of survivors,” (3) “a representative of a center of support for victims of sexual assault,” (4) “a representative of a forensic laboratory,” (5) “a representative of a university, state college or community college within the Nevada System of Higher Education whose duties of his or her occupation include direct services to victims of sexual assault and whose employer is not under investigation by the United States Department of Education for an alleged violation of 20 U.S.C. § 1092 or Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681 et seq.,” (6) “a representative of an organization that provides services, education or outreach to minority communities,” (7) “a representative of an organization that provides services, education or outreach to lesbian, gay, bisexual, transgender and questioning persons,” and (8) “a nurse examiner who specializes in forensic medical examinations for sexual assault.”

sexual assault advocates are needed, (2) whether the right of a survivor to have an advocate present at the forensic exam and interviews should be expanded to other parts of the process, and (3) whether the rights of survivors are being properly implemented and applied.²⁵⁸ The Committee will then provide a yearly report on its findings.²⁵⁹

In 2019, the legislature passed a series of laws relating to the Sexual Assault Survivors' Bill of Rights.²⁶⁰ To start, the legislature made some acknowledgements explaining the importance of these amendments, including:

1. Victims of sexual assault have a strong interest in the investigation and prosecution of their cases.
2. Law enforcement agencies have an obligation to victims of sexual assault to be responsive to the victims concerning the developments of forensic testing and the investigation of their cases.
3. The growth of the State DNA Database and CODIS makes it possible for many perpetrators of sexual assault to be identified after their first offense.²⁶¹

Survivor rights apply to any "person who is a victim of sexual assault."²⁶² Moreover, if a victim is now deceased, incompetent, or a minor, then the survivor rights extend to the parent, guardian, spouse, or legal representative.²⁶³ A survivor is entitled to Bill of Rights protections once they undergo either a forensic medical exam or an interview conducted by law enforcement or a prosecutor.²⁶⁴ These rights apply even if the survivor refuses to participate in the medical exam, the interview, or even the criminal justice system in general.²⁶⁵

Another important protection in the Bill of Rights is the right to support during the process. A survivor has the right to consult a sexual assault advocate during forensic medical exams and during any interview conducted by law enforcement or prosecutors.²⁶⁶ Further, a survivor has the right to designate a person to provide support during both of the above

258. *Id.* at § 178A.310(7); NEV. REV. STAT. § 178A.320(1)(a-c) (2019). The legislation further explains how the Committee should seek to accomplish these tasks.

259. *Id.* at § 178A.320(2-4); *see also* NEV. REV. STAT. § 178A.330 (2019) (special funding for the Committee).

260. NEV. REV. STAT. § 178A.010 (2019). The entire Chapter 178A contains the Sexual Assault Survivors' Bill of Rights.

261. NEV. REV. STAT. § 178A.150 (2019).

262. NEV. REV. STAT. § 178A.140 (2019).

263. *Id.* (also extends to other person related to the victim within the second degree of consanguinity or affinity). It is important to note that the survivor rights do not extend to one of the above-mentioned individuals if that individual is one accused or convicted of the sexual assault.

264. NEV. REV. STAT. § 178A.160(1) (2019).

265. *Id.* at § 178A.160(2).

266. NEV. REV. STAT. § 178A.170(1) (2019).

processes.²⁶⁷

Additionally, the sexual assault exam, as detailed above, can be a very traumatic experience for the sexual assault victim. In response to this concern, Nevada included several provisions in its Bill of Rights regarding the exam specifically.²⁶⁸ To start, the medical professional must, prior to starting the exam, advise the survivor of his or her rights pursuant to the Bill of Rights.²⁶⁹ Further, a survivor may request to speak with an advocate or have an attendant present; the medical professional must summon them prior to the exam if requested.²⁷⁰ These exams can be costly, but Nevada requires the hospital to cover the expense for the sexual assault exam.²⁷¹ The survivor also has the right to use a shower at the hospital, if one is available.²⁷²

Moreover, there is unfortunate evidence indicating that law enforcement officials or prosecutors are often judgmental and discouraging toward survivors of sexual assault.²⁷³ Nevada sought to address this, in part, by NRS 178A.200(4), wherein it states that “[a] law enforcement official or prosecutor shall not discourage a survivor from receiving a forensic medical examination.”²⁷⁴

During the various stages of the investigation, survivors have to relive the traumatic experience of being sexually assaulted. Nevada included specific provisions granting survivors rights to ease the process as much as possible.²⁷⁵ For example, a survivor has the right to select the gender

267. *Id.* at § 178A.170(2) (referring to such person as an “attendant”). However, NEV. REV. STAT. § 178A.170(3)(a-b) provides an exception to the survivors’ right to an attendant when it comes to the interview, provided that the survivor is a minor. A law enforcement official or prosecutor may exclude the attendant from the interview if that official or prosecutor (1) has specialized training in interviewing minor survivors, and (2) determines that the presence of the attendant would be detrimental to the purpose of the interview.)

268. *See* NEV. REV. STAT. § 178A.190 (2019).

269. *Id.* at § 178A.190(5). After being advised, the survivor will also be asked to sign a document acknowledging that they have been informed of their rights. This document will then be placed with the survivors’ file. *Id.* at § 178A.190(6). The legislature laid out guidelines for this document and its contents in NEV. REV. STAT. § 178A.270.

270. *Id.* at § 178A.190(1). However, if one is not readily available, the medical professional “shall inform the survivor of the ramifications of delaying the forensic medical examination.” *Id.* at § 178A.190(2).

271. *Id.* at § 178A.190(3). NEV. REV. STAT. § 217.300 also provides that the county will also pay for any costs to treat medical care for any physical injuries resulting from the sexual assault within the first 72 hours of the survivors’ arrival.

272. *Id.* at § 178A.190(4).

273. *See* END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73; NIJ Special Report, *supra* note 64, at 10; NATIONAL INSTITUTE OF JUSTICE, *Untested Evidence in Sexual Assault Cases*, *supra* note 95; *Why Police Couldn’t or Wouldn’t Submit Sexual Assault Kits for Forensic DNA Testing: A Focal Concerns Theory Analysis of Untested Rape Kits*, *supra* note 83 at 77 (extensive discussion of the different reasons and factors that a police officer will determine a sexual assault victim’s credibility).

274. NEV. REV. STAT. § 178A.200(4).

275. *See* NEV. REV. STAT. § 178A.200 (2019).

of the person interviewing them.²⁷⁶ As required with the medical exam, law enforcement officials or prosecutors also must inform the survivor of his or her rights under the Bill of Rights.²⁷⁷ Survivors may feel more comfortable speaking with a lawyer, who can explain to them their legal rights. Nevada therefore granted survivors the right to have counsel present during any forensic medical exam or interview.²⁷⁸ Further, law enforcement, prosecutors, and medical professionals shall not alter a survivor's treatment if he or she wishes to assert the right to have counsel present.²⁷⁹

Nevada also granted rights to the survivor as it pertains to the testing of the sexual assault kit.²⁸⁰ To start, the survivor has the right to information regarding the timeline of testing the kit.²⁸¹ If survivors request testing of the sexual assault kit, then the lab must test within 120 days.²⁸² Moreover, the survivor has the right to defer testing of the kit at any time prior to the analysis.²⁸³ Moreover, the kit must be retained for at least 50 years if it is associated with an uncharged or unsolved sexual assault or at least 20 years if it is associated with an unreported or anonymous sexual assault.²⁸⁴ If the testing of a kit is deferred by request of the survivor, the kit must either be retained until the survivor requests that it be tested or for the above applicable retention period.²⁸⁵

Lastly, Nevada granted survivors rights to help prevent re-victimizations and allow as much input from survivors as possible. For example, survivors have the right: (1) "to be reasonably protected from the defendant and persons acting on behalf of the defendant," (2) "to be free from intimidation, harassment and abuse," and (3) "to be treated with fairness and respect from his or her privacy and dignity."²⁸⁶ Importantly, survivors also have the right to provide a statement to the judge during

276. *Id.* at § 178A.200(3).

277. *Id.* at § 178A.200(5).

278. NEV. REV. STAT. § 178A.210(1) (2019).

279. *Id.* at § 178A.210(2).

280. NEV. REV. STAT. § 178A.220 (2019); Also, Nevada also sought to protect survivors from criminal liability in conjunction with a sexual assault examination. Any forensic evidence from a sexual assault is not allowed to be used to prosecute a survivor for any misdemeanors or offenses related to controlled substances. NEV. REV. STAT. § 178A.260 (2019).

281. NEV. REV. STAT. § 178A.220(5); *see also id.* at § 200.3788(2). Moreover, § 178A.230 denotes specific information that the survivor has a right to be informed of, including the resulted of the DNA testing, whether a DNA profile was found, and whether the DNA profile obtained matched to the accused's profile or a person already in CODIS.

282. NEV. REV. STAT. § 178A.220(1) (2019) (citing NRS 200.3786).

283. *Id.* at § 178A.220(2).

284. *Id.* at § 178A.220(3)(a-b).

285. *Id.* at § 178A.220(4).

286. NEV. REV. STAT. § 178A.290(1)(a-c) (2019).

various legal proceedings.²⁸⁷

Ultimately, the importance of victim-centered legislation aligns with one of the most important reasons for clearing the sexual assault kit backlog, which is to ensure that victims feel supported and confident in the criminal justice system.²⁸⁸ Nevada took it a step further and created a website to keep victims of sexual assault as informed as possible.

3. The Attorney General's Website for Victims of Sexual Assault

On May 10, 2018, the Nevada AG's office launched a website to "ensure survivors of sexual crimes are provided with a website housing information and resources tailored to their needs."²⁸⁹ The website provides monthly statistics regarding the number of kits inventoried, the number of kits sent for testing, and the number of kits that have been tested.²⁹⁰ It also includes information regarding the number of DNA matches identified with the kits as well as arrests made based on those DNA matches.²⁹¹

In order to further assist victims from the beginning of the process, the website provides links for information on various options for reporting a sexual assault as well as defining sexual assault and the applicable statute of limitations.²⁹² Moreover, there is contact information available for each law enforcement agency in Nevada as well as links to other state and national organizations for victims and survivors.²⁹³

Further, the website informs survivors of their federal and state rights and assures a victim-centered approach for the process.²⁹⁴ It also promotes several different tips for self-care for survivors to begin the healing process.²⁹⁵ Moreover, the website contains a 24-hour crisis hotline for survivors to speak with victim advocates as well as information on how

287. *Id.* at § 178A.290(1)(d); *see also* NEV. REV. STAT. § 176.015(3) (2020) (granting victims of any crime the right to appear at a defendant's sentencing hearing and "reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution").

288. *See* END THE BACKLOG, *Why Test All Kits?*, *supra* note 21; *see also* NIJ – National Best Practices, *supra* note 39, at 36.

289. OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 6.

290. Nevada AG – Home, *supra* note 72.

291. *Id.*

292. Nevada AG – Get Help, *supra* note 43; NEVADA OFFICE OF THE ATTORNEY GENERAL: SEXUAL ASSAULT INITIATIVE, *For Survivors*, http://endnevadasbacklog.ag.nv.gov/forsurvivors/For_Survivors_Home/ (last visited Oct. 21, 2021) [hereinafter Nevada AG – *Survivors*].

293. NEVADA OFFICE OF THE ATTORNEY GENERAL: SEXUAL ASSAULT INITIATIVE, *Resources*, http://endnevadasbacklog.ag.nv.gov/resources/Resources_Home/ (last visited Oct. 21, 2021).

294. Nevada AG – *Survivors*, *supra* note 292.

295. *Id.*

to seek an advocate for traveling through the airport.²⁹⁶ With the safety of the survivor in mind, the website also contains an “escape site” button, which immediately takes them to a weather website.²⁹⁷

Another important function of the AG’s website is the extensive information regarding the medical forensic exam.²⁹⁸ It explains the purpose of the exam and the important evidentiary items that can be obtained from these exams.²⁹⁹ It also explains the optimal timeline for when an exam should occur, and the condition one should try to maintain if they plan to go in for an exam.³⁰⁰ It also explains that a survivor will neither be required to file a report to obtain an exam nor pay for the exam.³⁰¹ It also provides a list of places to get an exam in each county in Nevada.³⁰²

C. Nevada’s Sexual Assault Kit Tracking System

As noted above, in 2017, the AG’s office received a grant from the National Institute of Justice to develop a sexual assault kit tracking system.³⁰³ That same year, the Nevada legislature passed NRS 200.3788, which required Nevada to establish a “statewide program to track sexual assault forensic kits” by 2021.³⁰⁴ Thus, the AG’s office used the grant for developing a statewide tracking program for both the Washoe County Sheriff’s Office Forensic Laboratory and the Las Vegas Metropolitan Police Department Forensic Laboratory.³⁰⁵

Nevada, along with numerous other states, contracted with STACS DNA to use its tracking system known as “Track-Kit.”³⁰⁶ STACS DNA is a software company originally created by Anjura Technology Corporation.³⁰⁷ Since 2000, STACS DNA primarily worked with

296. Nevada AG – *Get Help*, *supra* note 43.

297. OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 6-7. In situations where a survivor may still be in contact with their abuser, the escape feature allows the survivor to immediately leave the site if the abuser or someone else walks into the room or returns home. Thus, it protects the survivor from “getting caught” looking at this website by their abuser, which could result in further abuse.

298. Nevada AG – *Get Help*, *supra* note 43.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 4.

304. *Id.* at § 200.3788.

305. See OFFICE OF THE ATTORNEY GENERAL, *Semiannual Sexual Assault Kit Initiative Report*, *supra* note 188, at 7-9 (discussing the step by step process for selecting a tracking program).

306. STACS DNA, *Customers*, <https://www.stacsdna.com/customers/> (last visited Oct. 21, 2021).

307. STACS DNA, *Products and Services*, <https://www.stacsdna.com/products-services/track-kit/track-kit-for-sexual-assault-kits/> (Last visited Oct. 21, 2021).

forensic laboratories to track DNA evidence in its crime labs.³⁰⁸ In 2014, in response to many state's legislation requiring a state-wide sexual assault kit tracking system, STACS DNA developed "Track-Kit."³⁰⁹ This program contains a variety of functions outlined in the following advertisement:

- Secure, web-based SAK tracking system that is easily accessible to all users statewide.
- Start-to-finish sexual assault kit and inventory tracking in order to deliver accountability, transparency and information-sharing among all stakeholders.
- Secure portal for each user – medical facility, law enforcement agency, laboratory, outsourcing/private laboratory, prosecutor, compliance oversight team, policy (admin) center, kit distributor, and, most importantly, the survivor.
- Highly configurable to meet diverse state requirements so that it can be deployed quickly.
- Turn-key solution, not just software – it includes scaling, training, and supporting thousands or tens of thousands of users.
- We deliver the services you need to make Track-Kit work for your program and all your users across the state.³¹⁰

Importantly, Track-Kit provides a program that allows everyone involved to track the status of the sexual assault kit, including the medical facilities, the law enforcement agencies, the forensic laboratories, the prosecuting attorneys, the kit distributors, and survivors. This prevents the kits from being forgotten or lost.

The Track-Kit process begins when the sexual assault nurse scans the kit into the system.³¹¹ Then, the program notifies law enforcement that the kit is ready for pickup.³¹² The program then records when the kit is picked up by law enforcement and also when it is delivered to the forensic lab.³¹³ The program notifies the lab when the kit is in transit to their facility and will also notify the lab if the delivery is late or does not arrive.³¹⁴ Additionally, prosecuting attorneys will be able to review the

308. *Id.*; see also Madeleine Carlisle, *A New System to Ensure Sexual-Assault Cases Aren't Forgotten: More states are adopting software that allows sexual-assault survivors to track their evidence kits*, THE ATLANTIC, (April 7, 2019) <https://www.theatlantic.com/politics/archive/2019/04/many-states-are-adopting-rape-kit-tracking-systems/586531/>.

309. STACS DNA, *Products and Services*, *supra* note 307. In 2015, Wayne County in Michigan partnered with STACS DNA to pilot one of the first tracking systems for sexual assault kits. *Id.* This led to the development of "Track-Kit," which is now also used in Texas, Arizona, and Washington. *Id.*

310. *Id.*

311. STACS DNA, *Tracking Sexual Assault Kits: Giving Survivors Control*, YOUTUBE (Mar. 29, 2018), https://www.youtube.com/watch?v=L-pWfHSISrw&feature=emb_logo.

312. *Id.*

313. *Id.*

314. *Id.*

status of the kits in their jurisdiction.³¹⁵ Importantly, survivors have the option to receive emails and/or texts about the status of their sexual assault kit and are provided with resources for survivor assistance.³¹⁶

Therefore, any victim of sexual assault in Nevada can track their sexual assault kit through the collection and testing process. Track-Kit simply provides one more check in place to ensure that no sexual assault kit is left behind. Additionally, it again reaffirms one of the goals of clearing the nationwide backlog—showing victims that the criminal justice system supports them, will not forget about them, and will do its best to provide whatever justice is possible. It is one more implementation to ensure that future victims need not go through the 20-year delay and struggles faced by M.L.

V. CASE STUDY OF NEVADA'S FIRST UNTESTED SEXUAL ASSAULT KIT JURY TRIAL – *STATE OF NEVADA V. RAMON DORADO*

In 2016, after nearly twenty years, sexual assault detectives contacted M.L.³¹⁷ Her sexual assault kit had finally been tested.³¹⁸ They identified his DNA in her sexual assault kit.³¹⁹ She now knew the name of the man who had raped her so many years ago: Ramon Dorado.³²⁰

Since sexually assaulting M.L. in April of 1999, Ramon Dorado committed numerous other violent crimes. In July 2003, he was convicted of Assault with Use of a Deadly Weapon.³²¹ In September 2003, he was convicted of Attempted Child Endangerment.³²² In April 2007, he was convicted of Theft.³²³ In December 2008, he was convicted of Conspiracy to Commit Theft.³²⁴ In January 2012, he was convicted of Burglary and Grand Larceny.³²⁵ In December 2012, he was convicted of Burglary and Possession of a Stolen Vehicle.³²⁶ Fortunately, when Dorado was arrested on these numerous offenses, his DNA was obtained and put into CODIS. Thus, once Nevada began clearing the backlog of sexual assault kits a few years ago, his DNA was in the system and matched the DNA obtained

315. *Id.*

316. *Id.*

317. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 265.

318. Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 145-46.

319. *Id.* at 153.

320. *Id.* at 154.

321. Judgment of Conviction, *State v. Dorado*, No. C190731 (Nev. Dist. Ct.).

322. Judgment of Conviction, *State v. Dorado*, No. C191031 (Nev. Dist. Ct.).

323. Judgment of Conviction, *State v. Dorado*, No. C230426 (Nev. Dist. Ct.).

324. Judgment of Conviction, *State v. Dorado*, No. C249117 (Nev. Dist. Ct.).

325. Judgment of Conviction, *State v. Dorado*, No. C277434-1 (Nev. Dist. Ct.).

326. Judgment of Conviction, *State v. Dorado*, No. C233004-1 (Nev. Dist. Ct.); Judgment of Conviction, *State v. Dorado*, No. C83074-1 (Nev. Dist. Ct.).

from M.L.'s sexual assault kit.³²⁷ Notably, if the kit had been tested in April of 1999, it appears that the DNA would not have matched anyone because Dorado's DNA would not have been in the system at that time.³²⁸

Once the case was re-opened, M.L. told the sexual assault detectives that she would like to assist in the prosecution of Dorado.³²⁹ Thus, the Clark County District Attorney's office charged Dorado with three counts of sexual assault.³³⁰ Ultimately, in July 2019, after another two years of waiting, M.L. finally testified at the jury trial for Ramon Dorado.³³¹ In fact, this was the first jury trial in Nevada based on a backlogged sexual assault kit.

While M.L. finally got her day in court, this type of case posed several questions for the prosecutors who handled the case as well as the detectives and forensic analysts now dedicated to clearing the backlog and finally delivering justice. What would the jury think about convicting someone for a crime that happened so long ago? Would the jury have concerns about relying on evidence that had been left untouched for nearly two decades? Would they have concerns about why it took so long to finally test the sexual assault kit?

Genevieve Craggs, one of the members of the Clark County District Attorney's Sexual Assault Kit Initiative Unit, and I conducted the jury trial. Our case revolved around two main pieces of evidence: (1) M.L.'s testimony and (2) the DNA evidence. We called M.L. as our first witness because we wanted her to be the first person that the jury heard.³³² She testified about her plans for the night of April 23, 1999, when she and her friends went to the Silver Saddle where she met Ramon Dorado, or "Ray."³³³ He had been one of the members of the band that performed that evening.³³⁴ She recalled him being nice and polite, so she offered to drive him to the next bar that the group was going to that evening.³³⁵ On the way, Dorado requested that they stop at his apartment so that he could call into work.³³⁶ When they arrived there, he invited her in, saying it might take a minute and didn't want her sitting in the parking lot alone.³³⁷

327. Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 112.

328. Similarly, the NIJ note that if sexual assault kits had been submitted previously, the results would not have been nearly as informative because of the advancements in technology. NIJ Special Report, *supra* note 64, at 10.

329. Transcript of Hearing: Jury Trial – Day 2, *supra* note 2, at 265.

330. *See* Transcript of Hearing: Jury Trial – Day 4, *supra* note 60, at 79.

331. *Id.*

332. *Id.*

333. *Id.* at 214-25. Her friend Maria, who was present at the Silver Saddle, also testified at trial.

334. *Id.* at 224.

335. *Id.* at 226-29.

336. *Id.* at 230.

337. *Id.* at 232.

Once inside, Dorado began making advances on her and trying to get her to dance with him.³³⁸ However, when she refused, he grabbed her, picked her up, took her to the bedroom, and threw her on the bed, where he climbed on top of her.³³⁹ She pleaded with him to stop, pushed him away, and tried to get to the door.³⁴⁰ However, he slammed her up against the wall and threw her back onto the bed, where he then began trying to take off her pants and shirt.³⁴¹ She struggled, but he overpowered her.³⁴² She could not catch her breath and was in shock.³⁴³ She kept fighting—trying to shove clothes into his mouth, trying to choke him, trying to stab him with a safety pin.³⁴⁴ Unfortunately, she lost—he sexually assaulted her using his tongue, fingers, and penis.³⁴⁵

After M.L.’s powerful testimony, we presented the DNA evidence to the jury.³⁴⁶ A DNA analyst testified and explained the process of obtaining the DNA sample from the sexual assault kit.³⁴⁷ Once obtaining a sample from the kit, the analyst compared it to CODIS, the national DNA database. She explained that in M.L.’s case, the DNA obtained from the sexual assault kit matched Ramon Dorado’s DNA.³⁴⁸ She also informed the jury about why there had been a backlog in the DNA testing and how Nevada recently received funding to test these kits.³⁴⁹

The above evidence illustrates how important sexual assault kits can be for the prosecution of a sexual assault case. To start, we were able to use evidence other than M.L.’s testimony to definitively show that there was sexual contact between the two of them. This bolstered her testimony and added credibility to her explanation of what happened. Also, in terms of trial strategy, it drastically limited the possible options for Dorado’s defense. With sexual assault cases in general, there is often no DNA evidence, so the defense will almost always claim that the defendant never had any type of sexual contact with the victim and certainly never sexually assaulted the victim. If there is no prior relationship between the two, then the case often turns on the victim’s word against the accused’s word regarding sexual contact. Given that the prosecution has the burden to prove the defendant’s guilt beyond a reasonable doubt, this often makes

338. *Id.* at 239.

339. *Id.* at 239-41.

340. *Id.* at 241-42.

341. *Id.*

342. *Id.* at 242-43.

343. *Id.* at 244.

344. *Id.* at 244-45.

345. *Id.* at 246-50.

346. *See* Transcript of Hearing: Jury Trial – Day 3, *supra* note 14, at 111-26.

347. *Id.* at 117-19.

348. *Id.*

349. *Id.* at 117-18.

it difficult to meet that burden. However, given that Dorado's DNA was found on M.L.'s vaginal swabs, the defense was forced into only one option for a defense—to argue that the DNA was found there because they had consensual sexual contact.³⁵⁰

Ultimately, the jury found Ramon Dorado guilty on three counts of sexual assault.³⁵¹ The Court sentenced him to 20-years-to-life in prison.³⁵² Importantly, M.L. finally had justice. M.L. acknowledged that she had tried her best to block out this part of her life but struggled to move on, saying³⁵³ “It’s been a rough battle....³⁵⁴ I’d just felt dirty for the longest time...”³⁵⁵ Ultimately, she received the closure that she was missing for nearly 20 years.³⁵⁶

VI. CONSIDERATIONS AND RECOMMENDATIONS

Nevada made great efforts to successfully eliminate its backlog of sexual assault cases and develop procedures to prevent a future backlog. However, without consistent funding, Nevada and other similarly situated states run the risk of falling behind on testing present and future sexual assault kits, which would create another backlog. Through M.L.'s experience, one can see the importance of our nation doing everything possible to prevent future backlogs.

350. See Transcript of Hearing: Jury Trial – Day 4, *supra* note 60, at 46-61. It is hard to say exactly why this defense did not prevail. In consent defense cases, the victim's credibility is typically a very important factor for the jury. Further, if a victim has injuries that are inconsistent with a consensual sexual encounter, then that will also make it more difficult to prevail on a consent defense. Additionally, it can depend on how the consent defense is presented to the jury. In fact, Ms. Craggs argued in her rebuttal argument this point: “Ladies and gentlemen . . . no means no. And it meant no in 1999 and it means no in 2019. And while the Defense said they agreed with that, what I heard throughout the closing argument was “no means no but.” Or “no means no, except for this.” Specifically I heard, between the opening and closing arguments, “It’s not like he clubbed her over the head.” . . . She gave him a ride. She was nice to him. And . . . [the Defense] said was, “Gee, what do you think might have happened?” So are we to take from that, then, that when a woman is nice to a man, gives him a ride home because she thinks that he’s a nice, normal individual . . . that she should just know what’s gonna happen and that she deserved it.” So no means no, except for when you give somebody a ride to their house . . . Because you’re a woman, apparently, dressed in a bolero jacket and pantyhose and jeans, so you should know that that’s what you’re in for.” *Id.* at 62-63.

351. *Id.* at 78-81.

352. Judgment of Conviction, *State v. Dorado*, No. C-17-323098-1 (Nev. Dist. Ct.).

353. Kelsey Thomas, *Justice comes 20 years later after newly-tested rape kit leads to conviction*, 3 NEWS, (July 11, 2019), <https://news3lv.com/news/special-reports/justice-comes-20-years-later-after-newly-tested-rape-kit-leads-to-conviction>.

354. *Id.*

355. *Id.*

356. *Id.*

*A. States Looking to Address Their Backlogs Should Consider Nevada's
"Recipe for Success"*

Overall, Nevada succeeded at addressing its sexual assault kit backlog. To start, it accomplished the main goal of clearing the backlog. Moreover, Nevada smartly enacted legislation, developed an interactive website for victims, and developed a tracking system to prevent a future backlog and improve the overall sexual assault investigation process. Nevada's "recipe for success" consisted of the following ingredients: (1) quickly identifying the scope of the backlog, (2) acquiring the necessary funding to address the backlog, (3) efficiently using the funding to clear the backlog within a few years and enacting legislation to prevent a future backlog, and (4) enacting legislation and other mechanisms to improve the sexual assault investigation process. Further, Nevada's efforts checked off all six of the pillars set forth by the Joyful Heart Foundation and incorporated numerous recommendations from the National Institute of Justice's Best Practices. Thus, any state that is still seeking to address the backlog or improve their sexual assault kit process should begin by considering Nevada's recipe for success as guidance.

To start, a state with a backlog needs to determine how many kits make up the backlog. In 2015, Nevada identified the number of backlogged sexual assault kits. This was a very important first step because it revealed how extensive Nevada's backlog was. Once a state has identified how substantial the backlog is, it can then begin to formulate a plan for attack. For Nevada, it was extremely important to accurately identify the extent of the backlog because it determined how much funding was necessary to address and ultimately clear the backlog. Further, the longer a state waits to address the problem, the larger the problem will likely grow, considering a sexual assault occurs almost every minute.³⁵⁷ Thus, Nevada was smart to immediately accomplish this task, which many jurisdictions have inexplicably failed to do.³⁵⁸ Therefore, these jurisdictions need to follow suit and start with the first pillar, which Nevada successfully accomplished.

Next, other states should plan to test all the backlogged sexual assault kits. Of course, testing sexual assault kits is expensive; states must therefore seek funding, either locally or federally, to afford to clear their backlogs. Fortunately for Nevada, the federal government, as well as other contributors, provided substantial funding to begin and continue testing of its backlogged sexual assault kits. As mentioned previously, each sexual assault kit test costs between \$1,000 and \$1,500. Not only did Nevada need money to test its 7,855 kits, but it also needed funding

357. END THE BACKLOG, *Why Test All Kits?*, *supra* note 21.

358. END THE BACKLOG, *Why the Backlog Exists*, *supra* note 73.

to improve its sexual assault investigation procedures and attempt to prevent any future backlog from occurring. Nevada began by using the money to test the backlogged kits. Nevada can now add its name to the list of success stories for jurisdictions using the “forklift” approach. Nevada tested all of the backlogged kits, and per the Nevada AG’s website, they have obtained over 1,000 DNA matches.³⁵⁹

Additionally, Nevada allocated some of these funds, among other items, for the following: (1) notifying victims regarding sexual assault investigations, (2) providing training toward the investigation of sexual assaults, and (3) a sexual assault kit tracking system. Consequently, it is also important for other states to allocate funds for more than testing because, while eliminating the problem is an important first step, it is equally important to prevent future backlogs. Moreover, improving the overall sexual assault investigation process provides benefits for victims, law enforcement, prosecutors, and the community as a whole.

Thus, in order to accomplish the second and sixth pillars like Nevada, other states need to not only test the backlogged kits but also allocate funding to improve the overall process for victims and prevent a future backlog. As discussed below, states must ensure that funding is available to test present and future sexual assault kits. As evidenced by Nevada, a lack of continued funding will inevitably create a second backlog.

Moreover, in addition to funding, states should also consider enacting legislation aimed at preventing future backlogs and improving the sexual assault investigation process. In the 2017 and 2019 legislative sessions, Nevada made great strides in improving its sexual assault investigation process. In doing so, Nevada enacted numerous time constraints on law enforcement and forensic laboratories to prevent a future backlog of sexual assault kits. Similarly, the legislature enacted requirements to track the sexual assault kits and avoid instances where law enforcement and forensic labs forgot or lost kits.

Nevada also showed support for the nationwide “victim-centered” approach by enacting legislation that gave victims additional rights regarding the investigation. This legislation seeks to inform the victim of their sexual assault kit status and/or the investigation and court proceedings surrounding the victim’s case.

Finally, Nevada used funding as well as new legislation to promote and begin implementing software for a sexual assault kit tracking system. Again, Nevada has taken every step to try to prevent any future backlog and prevent victims from feeling lost or forgotten during the investigation. Nevada has therefore made considerable strides to ensure victims feel comfortable and informed regarding what was likely the worst situation

359. Nevada AG – *Home*, *supra* note 72.

of their life.

While other states should enact legislation consistent with Nevada's, thereby accomplishing the remaining third, fourth, and fifth pillars, they must also appropriate continuous funding to ensure that these new laws are followed and enforced. As discussed in more detail below, Nevada created testing timelines to prevent a future backlog, but the legislature failed to appropriate continued funding to ensure that the laboratory could keep up with those timelines. Moving forward, states must consider whether future funding is available to support important sexual assault reform legislation.

Additionally, states preparing to address their backlog or improve their sexual assault investigation procedures should consult the extensive list of recommendations from the National Institute of Justice. While these recommendations coincide with the above Pillars from the Joyful Heart Foundation, the Institutes' recommendations include more details regarding each area of improvement. As such, the National Institute of Justice even acknowledges that it does not expect every state to be able to implement all of the recommendations but rather that the recommendations provide an "ideal approach" of the "best practices to improve the response to sexual assault."³⁶⁰ Nevada can proudly claim that it has incorporated nearly all of these recommendations in its new and improved approach to sexual assault investigations, as discussed throughout this article.

However, while the National Institute of Justice recognizes that each state's funding will govern the extent to which a state is able to implement the recommendations,³⁶¹ the Institute's best practices do not provide any recommendations regarding how a state should ensure that sufficient funding exists to address the following issues: (1) the backlog, (2) reforming sexual assault investigations, and (3) preventing a future backlog. Thus, while it is a helpful start for Nevada and other jurisdictions to use the Institute's recommendations to address the backlog and sexual assault reform, they must also ensure that future funding exists to prevent a future backlog.

B. Reoccurring Future Funding is a Must

The main concern for every state addressing their sexual assault kit backlog is money. On paper, Nevada made all the right decisions to clear its backlog and implement sexual assault reform. It followed the leading experts' recommendations and implemented nearly every resource

360. NIJ – National Best Practices, *supra* note 39, at 3-5.

361. *Id.* at 5, 34.

possible. However, Nevada, as well as any state seeking to implement the above recommendations, should be concerned with the future funding and their ability to prevent a future backlog of sexual assault kits.

First, states must set up consistent future funding for testing, especially if they have enacted mandatory testing timelines, as suggested by the National Institute of Justice and the Joyful Heart Foundation. As discussed above, Nevada enacted a mandatory testing timeline in order to prevent a backlog of cases—the laboratory is required to test each new sexual assault kit within 120 days of receiving the kit.³⁶² However, instead of appropriating reoccurring funding to facilitate its testing, Nevada only appropriated one-time funding³⁶³ to pay for additional staffing necessary to test sexual assault kits within the 120-day time period.³⁶⁴

Thus, moving forward, if Nevada and other states do not appropriate reoccurring funding to support the additional staffing requirements to test sexual assault kits within a mandatory number of days, the nation will quickly find itself in a second sexual assault backlog.³⁶⁵ In fact, as of January 2021, southern Nevada³⁶⁶ had 533 new sexual assault kits that had not been tested.³⁶⁷ Further, without the appropriate funding, the turnaround time for the lab to complete testing on new sexual assault kits was 299 days, well exceeding the 120-day timeline.³⁶⁸ Based on these

362. NEV. REV. STAT. § 200.3786(6). It is worth noting that while a mandatory testing timeline for sexual assault kits is important to avoid a future backlog, the legislatures across the country must also balance the number of non-sexual assault DNA examinations that are also being requested by law enforcement in other violent crimes, such as homicides, robberies, and any other weapon-related offense – none of which have mandatory testing timelines.

363. BDR 15-538, AB 97, *Local Government Fiscal Note* (Feb. 20, 2017). Specifically, in 2017, the Nevada legislature appropriated \$1,950,000 for Clark County, \$35,000 for Douglas County, \$1,641,020 for Washoe County, and \$90,405 for Douglas County to comply with NRS 200.3786. *Id.* This legislature only projected this money for a two-year period – 2017-2018 and 2018-2019. *Id.* Further, at the following legislative session, the Nevada legislature did not appropriate any money for Clark County but did appropriate \$680,408 for Washoe County to hire 3 additional laboratory employees. BDR 14-87, AB 176, *Local Government Fiscal Note* (Mar. 15, 2019).

364. See Yvonne Gonzalez, *Rape kit backlog decreasing as funding remains uncertain*, LAS VEGAS SUN (April 17, 2018), <https://lasvegassun.com/news/2018/apr/17/rape-kit-backlog-decreasing-as-funding-remains-unc/> (last visited Oct. 21, 2021) (stating that “[o]fficials say they had good intentions but failed to provide for long-term funding for kit testing”).

365. *Id.* (noting that “[e]xperts agreed that progress is being made, but that resources are needed to ensure the backlog doesn’t increase again”).

366. The Las Vegas Metropolitan Police Department Forensic Laboratory provides DNA services to southern Nevada, including Clark County, Lincoln Country, Nye County, and Esmeralda County.

367. *2020 Legislative Council Bureau Sexual Assault Kit Status Report*, NEVADA LEGISLATURE, (Jan 27, 2021). My reference to “new” sexual assault kits refers to kits that have been collected on or after January 1, 2015. Thus, while the original backlog of sexual assault kits have been tested, there is a new backlog of sexual assault kits accumulating.

368. *Id.* It is important to note that this is actually an improvement from 2019, where the average turnaround time was 456 days. *2019 Legislative Council Bureau Sexual Assault Kit Status Report*, NEVADA LEGISLATURE, (Jan 9, 2020).

statistics, it should be abundantly clear to other states that while mandatory testing timelines are important, establishing reoccurring funding to avoid future backlogs is crucial.

C. States Must Consider Important Current Issues and the Effects on Funding

At present, the United States faces numerous issues in addition to the sexual assault kit backlog. Thus, states must keep in mind that funding for future sexual assault kit testing may not be presently available.

First, the effects of the coronavirus pose a huge concern for any state's ability to obtain, or even maintain, funding to meet testing timelines or prevent future backlogs.³⁶⁹ As the country continues to recover from the pandemic, it is concerning whether there will be enough funding for testing sexual assault kits, especially considering the other issues states will need to address.³⁷⁰

Additionally, while it would be obvious to suggest that states should seek out federal grants, because grants helped Nevada and many other states cure the initial backlog, the federal government has spent \$1.47 trillion in response to COVID-19.³⁷¹ Thus, it is uncertain whether the federal grant money will still be available in the coming months and years to assist the country in preventing a future backlog in states like Nevada. Even more, it should pose a major concern for states who still have a backlog of sexual assault kits and were hoping to take advantage of federal grants to cure their backlog.³⁷² Thus, the pandemic's effects on the nation's economy and budget may limit the funding each state desperately needs to maintain its sexual assault kit testing.

Another important consideration for future state funding is the recent discussion about defunding police departments.³⁷³ As of now, for most

369. See Shea Johnson, *Coronavirus upends Clark County budget; estimated \$1B revenue loss*, REVIEW JOURNAL (April 21, 2020) <https://www.reviewjournal.com/news/politics-and-government/clark-county/coronavirus-upends-clark-county-budget-estimated-1b-revenue-loss-2011150/> (reporting that Clark County, Nevada, which alone is suffering over \$1 billion in losses as a result of the COVID-19 pandemic).

370. For instance, Nevada, like many states, faces historic unemployment, which is the highest in the nation among cities with at least 1 million people. Ed Komenda, *Las Vegas has highest unemployment rate among largest metro areas*, RENO GAZETTE JOURNAL (Jan. 7, 2021) <https://www.rgj.com/story/news/2021/01/05/las-vegas-nevada-unemployment-rate-jobs-clark-washoe-county-covid/4143392001/>.

371. *COVID-19 Spending Data*, USASPENDING.GOV (last visited Oct. 21, 2021) <https://www.usaspending.gov/>.

372. As of the publication of this article, there were still 31 states with a sexual assault kit backlog. END THE BACKLOG, *Where the Backlog Exists and What's Happening to End it*, *supra* note 27. This does not include the 11 states who have either not begun addressing this issue or refuse to provide any information to reporting agencies regarding their statistics. *Id.*

373. This Article in no way seeks to address the issue of defunding the police department. I further

states, without specific details on whether police departments will be defunded and where police funding will be reallocated, it is impossible to determine the effects on funding for future sexual assault kit testing and maintaining mandatory timelines.³⁷⁴ However, any defunding of forensic laboratories could potentially cause problems for maintaining testing timelines.³⁷⁵

D. Possible Solutions to a Lack of Funding

As discussed, first and foremost, states must implement reoccurring funding for future sexual assault kit testing. However, in the event that the legislature chooses not to allocate reoccurring funding, there are other options available.

First, state legislatures should consider the specific language used in the testing timeline statutes. Many states, like Nevada, denote a specific deadline by which a laboratory must test a sexual assault kit. However, without the appropriate reoccurring funding, specific testing timelines will set up states for failure.³⁷⁶ Instead of a one-size-fits-all deadline, Nevada and other states³⁷⁷ should consider requiring testing “as soon as possible,”³⁷⁸ or within a specific number of days—so long as sufficient funding is available.³⁷⁹ This way, if sufficient funding is unavailable, the

acknowledge the variety of meanings and scopes that could be associated with the phrase “defund the police.” This Article uses the phrase “defund the police” to represent the idea of reallocating some resources from the police department and using those resources to make changes in a community. Balsamo, Michael, REVIEW JOURNAL, *Q&A: When protesters cry ‘defund the police’, what does it mean?*, (last visited Oct. 21, 2021), <https://www.reviewjournal.com/news/politics-and-government/qa-when-protesters-cry-defund-the-police-what-does-it-mean-2048355/>. Instead, this Article merely notes how any defunding could affect the possible resources available to sexual assault kit testing.

374. However, some form of defunding does seem likely in Clark County. In fact, the Clark County Sheriff Joe Lombardo approves of the idea of defunding the police “in some aspects.” KNPR News Staff, KNPR, *Sheriff Lombardo Approves Of Defunding Police ‘In Some Aspects,’* (June 25, 2020) www.knpr.org/headline/2020-06/sheriff-lombardo-approves-defunding-police-in-some-aspects. (last visited Oct. 21, 2021).

375. Karina Zaiets et al., *Cities and states across the US announce police reform following demands for change*, USA TODAY (last visited Oct. 21, 2021), <https://www.usatoday.com/in-depth/news/2020/06/18/2020-protests-impact-city-and-state-changes-policing/5337751002/> (noting that many cities have pledged to reallocate police funding, including (1) in Los Angeles, reallocating \$150 million from the LAPD to “boost funding for health care, jobs and ‘peace centers;” (2) in Boston, reallocating \$15 million from its police department; (3) cutting 17% of New York City’s police budget; and (4) cutting \$15 million from Portland’s police budget).

376. As shown previously, Nevada has been unable to test new sexual assault kits within the mandatory 120-day timeline because of insufficient funding.

377. For example, California, Connecticut, Washington D.C., Florida, Idaho, and Kentucky have implemented specific mandatory testing timelines.

378. Ohio and Texas have enacted statutes with this language. OHIO REV. CODE ANN. § 2933.82(B)(2)(d)(i) (2016) (requiring the laboratory to complete the DNA analysis on sexual assault kits “as soon as possible” after receipt); TEX. GOV’T CODE ANN. § 420.042(c) (2019).

379. Several states have enacted this type of statutes including Colorado, Michigan, Illinois, and

state would not find itself in violation of the mandatory testing timeline.

Alternatively, states should consider adding language to statutes that clarifies what the forensic laboratory should do if it is unable to meet deadlines because of a lack of funding. For example, as suggested by the Joyful Heart Foundation, the language could read, “if the forensic laboratory is unable to meet the deadline specified . . . untested kits shall be outsourced to an accredited private crime laboratory.”³⁸⁰ These various suggested amendments are important because they would clarify the responsibilities of the laboratory and acknowledge that compliance with mandatory testing timelines may not always be possible if funding and resources are not available.³⁸¹

Second, with the amount of federal money that is available for combatting sexual assault, states must continue seeking out and applying for federal grants. As discussed above, these grants provided most of Nevada’s and other states’ funding to begin implementing their sexual assault investigation reforms and clearing their backlogs. Thus, it will be important for Nevada³⁸² and other states to continue seeking out these

Texas.

380. END THE BACKLOG, *Comprehensive Rape Kit Reform: A Legislative Handbook*, *supra* note 63, at 14.

Many states have included a similar provision in their testing timeline statutes. For example, Texas specifically notes that in order to “ensure expeditious completion of analyses,” the laboratory “may contract with private accredited crime laboratories . . .” TEX. GOV’T CODE ANN. § 420.042 (2019). Likewise, Washington specifies that “[t]he analysis may be conducted by the Washington state patrol laboratory or an accredited laboratory . . .” WASH. REV. CODE ANN. § 5.70.050 (2019); *see also* CAL. PENAL CODE § 680.3 (2020).

381. Many states also include language in their sexual assault kit statutes that addresses the admissibility of the testing results if the timelines and procedure are not followed. For example, New York’s statute broadly states that any failure to comply with the testing timelines does not “constitute a basis for a motion to suppress evidence.” N.Y. EXEC. LAW ANN. § 838-a(1)(f) (2019). Similarly, Michigan prevents any admissibility challenge for failing to comply with the testing timelines, and further specifically states that a defendant “has no standing to object to any failure to comply with the [testing] requirements . . . and the failure to comply with the [testing] requirements . . . is not grounds for setting aside the conviction or sentence.” MICH. COMP. LAWS ANN. § 752.934(8)-(10) (2015); *see also* OHIO REV. CODE ANN. § 2933.82(B)(2)(e) (2016) (failure to comply does not create “any basis or right to appeal, claim for or right to postconviction relief, or claim for or right to a new trial or any other claim or right to relief by any person”); WASH. REV. CODE ANN. § 5.70.050 (4) – (6) (2020) (similar language to Michigan’s statute); TEX. GOV’T CODE ANN. § 420.042(f) (2019) (stating that failure to comply with the testing procedure “does not affect the admissibility of the evidence in a trial of the offense”).

Another possible mode of legislative clarification could include guidance on priority. States, including Nevada, could identify which sexual assault investigations should take priority, such as Washington’s statute, which states that the laboratory “must give priority to . . . (a) Active investigations and cases with impending court dates; (b) Active investigations where public safety is an immediate concern; (c) Violent crime investigations, including active sexual assault investigations; (d) Postconviction cases; and (e) Other crimes’ investigations and nonactive investigations, such as previously submitted older sexual assault kits or recently collected sexual assault kits that the submitting agency has determined to be lower priority based on their initial investigation.” WASH. REV. CODE ANN. § 5.70.040(2) (2020).

382. Specifically, in 2021, Nevada needs to apply for the BJA’s National Sexual Assault Kit

grants when available.

Third, Attorney General's offices across the country should look for opportunities to allocate portions of civil settlements to sexual assault reform funding.³⁸³ For example, the Nevada AG was able to secure \$1.69 million in 2015 to outsource many backlogged kits from both northern and southern Nevada for testing.³⁸⁴ Thus, when opportunities arise to use settlement funds, states should try to allocate those funds to sexual assault testing and reform.

Lastly, states should consider implementing more creative solutions to fund sexual assault reform. For example, one article suggested providing every patient admitted to a hospital the option to donate to sexual assault

Initiative grant, which Nevada has received each year from 2015 through 2020. Additionally, the only current available grant that could be applicable to Nevada's sexual assault reform efforts is the BJA's 2021 Smart Prosecution grant. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Smart Prosecution – Innovative Prosecution Solutions*, (2021), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/O-BJA-2021-55002.pdf>.

383. To be clear, the author is not suggesting to that the people who were victimized as part of these civil lawsuits should not receive everything that they are entitled to from the settlement. Instead, as the Nevada AG did in 2015, it should continue to seek out settlement opportunities where a portion of the funds can be allocated to Nevada's sexual assault reform.

384. In 2020 alone, the Nevada AG reached numerous civil settlements: (1) in July, the Nevada AG settled a fraud cases against Universal Health Services, Inc. for \$442,331.56; (2) in August, the Nevada AG settled a lawsuit against Honda for concealing safety defects for \$1,238,738.80; (3) in September, the Nevada AG settled a student loan lawsuit against PEAKS Trust's for \$6,198,820.30; (4) also in September, the Nevada AG settled lawsuit against C.R. Bard for deceptive marketing of surgical mesh devices for \$803,620; (5) also in September, the Nevada AG settled a data breach case against Anthem for \$397,306.77; (6) in October, the Nevada AG another data breach cases against Community Health Systems for \$51,096.64; (7) in November, the Nevada AG settled with Apple for concealing battery issues for \$1,577,469.41; (8) also in November, the Nevada AG settled a data breach case against Home Depot for \$150,712.30; (9) in December, the Nevada AG settled a lawsuit against Nationstar Mortgage for violating consumer protection laws for \$1,233,963.41; and (10) also in December, the Nevada AG settled a data breach lawsuit against Sabre Hospitality Solutions for \$47,321.87. See https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Settles_Whistleblower_Lawsuit_Involving_Behavioral_Health_Care_Facilities/; [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_announces_more_than_\\$85_million_multistate_settlement_with_Honda/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_announces_more_than_$85_million_multistate_settlement_with_Honda/); [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Announces_Former_ITT_Students_to_Receive_\\$330_Million_in_Debt_Relief_in_Settlement/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Announces_Former_ITT_Students_to_Receive_$330_Million_in_Debt_Relief_in_Settlement/); [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_48_States_Announce_\\$60_Million_Settlement_With_C_R_Bard_for_Deceptive_Marketing_of_Surgical_Mesh_Devices/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_48_States_Announce_$60_Million_Settlement_With_C_R_Bard_for_Deceptive_Marketing_of_Surgical_Mesh_Devices/); [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_42_States_Reach_\\$39.5_Million_Settlement_for_2014_Anthem_Data_Breach/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_42_States_Reach_$39.5_Million_Settlement_for_2014_Anthem_Data_Breach/); https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Joins_28-State_Settlement_Resolving_Community_Health_Systems_Data_Breach_Investigation/; [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Announces_\\$113_Million_Settlement_with_Apple_Over_iPhone_Throttling/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Announces_$113_Million_Settlement_with_Apple_Over_iPhone_Throttling/); [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_46_States_Settle_With_Home_Depot_for_\\$17.5_Million_Over_2014_Data_Breach/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_46_States_Settle_With_Home_Depot_for_$17.5_Million_Over_2014_Data_Breach/); [https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_51_Attorneys_General_reach_\\$86.3_Million_Settlement_with_Mortgage_Servicer_Nationstar/](https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_51_Attorneys_General_reach_$86.3_Million_Settlement_with_Mortgage_Servicer_Nationstar/); https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Joins_27_States_in_Settlement_Resolving_Investigation_of_Sabre_Hospitality_Solutions/ (all last visited Oct 21, 2021).

reform efforts.³⁸⁵ It further suggested that this type of donation system could occur “in any public place, such as at the Department of Motor Vehicles or restaurant countertops.”³⁸⁶ Consistent with this suggestion, Nevada should consider a similar donation option for every guest checking into a Nevada hotel. According to the Las Vegas Convention and Visitors Authority, Las Vegas had over 42 million visitors in 2019.³⁸⁷ Thus, even if only a small percentage of guests opted to donate, this would still provide sufficient funding to continue implementing and improving Nevada’s sexual assault reform—importantly, it could prevent a future backlog of sexual assault kits.

It appears clear that, in the near future, funding for sexual assault kit testing may not be first on the list of budget issues in most states. But each state should continue to seek out different, creative funding opportunities in order to prevent a future backlog.

CONCLUSION

States seeking to clear their sexual assault kit backlog should consider Nevada’s successful approach. However, states must ensure that sufficient funding is available to support sexual assault reform legislation, particularly the mandatory testing timelines. Without reoccurring funding, the nation faces a future sexual assault kit backlog.

M.L.’s twenty-year experience shows just how important it is to not only clear the current backlog of sexual assault cases but also prevent a future victim from having to endure a future backlog. Fortunately, despite the delay, Nevada was finally able to provide M.L. with life-changing justice, by identifying and punishing her assaulter, Ramon Dorado.³⁸⁸ While justice may have been delayed, it was not denied. Though she had to wait twenty years, the system provided her with closure. However, no victim should have to wait that long for closure, and with a system in place to eradicate and prevent sexual assault kit backlogs, closure can be available for all victims.

385. Stephanie Fulton, *The Rape Kit Backlog: The Continuous Hampering of Society’s Protection and Liberty Interests*, 40 WOMEN’S RTS. L. REP. 43, 69 (2018).

386. *Id.*

387. LAS VEGAS CONVENTION AND VISITORS AUTHORITY, *Visitor Statistics*, <https://www.lvcva.com/research/visitor-statistics/> (last visited Oct 21, 2021) (year-end summary for 2019).

388. In fact, as of the publication of this article, Nevada has been able to arrest 64 individuals as a result of clearing its backlog. NEVADA OFFICE OF THE ATTORNEY GENERAL: SEXUAL ASSAULT INITIATIVE, *supra* 292.