USING STATE CONSTITUTIONS AND INTERNATIONAL HUMAN RIGHTS LAW TO COMPEL LAW ENFORCEMENT TO TEST RAPE KITS†

Penny M. Venetis††

Introduction 1968

I. Rape Allegations are not Taken Seriously by Law Enforcement Because of Deep-Seated Gender Bias 1972

A. The "Exceptional Clearance" Scam 1975

B. Law Enforcement Makes an Affirmative Decision to Exceptionally Clear Rape Cases Rather Than Testing Rape Kit DNA Evidence 1979

C. The Federal Government is Not Doing Enough to Ensure Rape Kit Testing 1980

II. Federal Courts' Dismissal of Rape Kit Lawsuits 1984

A. The Comparator Test 1985

B. Rape-Kit Lawsuits Statute of Limitations Dismissals 1989

C. Law Enforcement Exhibited Clear Gender Bias Towards the Plaintiffs in the Dismissed Federal Cases 1991

D. The U.S. Supreme Court Has Refused to Hear the Rape Kit Appeals 1992

III. Federal Court Decisions Stand in Stark Contrast to Decisions Issued by Human Right Tribunals 1993

† This Article is dedicated to the wickedly funny, unflinchingly loyal, fearless, brilliant Sherry Colb (1966–2022). It is also dedicated to the thousands of women who are still waiting for law enforcement to test their rape kits. I hope that this Article helps them find justice.

†† Distinguished Clinical Professor of Law, Associate Professor of Law, Judge Dickinson R. Debevoise Scholar, Director of the International Human Rights Clinic, Rutgers Law School. Many thanks to my dear friends Michael Dorf and John Leubsdorf for their insightful comments on drafts of this Article. I would also like to thank my tireless research assistants: Katie Ann Insinga, Nicholl Simmonds, Kathryn McLamb, and Lindsey Susson, for all their help.

A. The Inter-American Court of Human Rights..... 1994
B. The European Court of Human Rights............ 1997
IV. State Courts May Provide Justice That Rape Victims Deserve.. 2001
A. State Constitutions Offer Broader Rights......... 2001
B. International Human Rights Law Can Be Used to Support State Constitutional Law Claims 2005
Conclusion.. 2009

Introduction

There are 25,000 untested rape kits sitting in storage, around the United States, that are purposely not being tested by law enforcement, even though they contain DNA evidence that can easily help solve rapes. Law enforcement is deliberately not testing evidence that can solve violent sex crimes committed almost exclusively against girls and women. The two sentences you just read are not hyperbole.

Rape kits are repositories for DNA evidence taken from people who have been raped.[1] Rape victims submit to humiliating examinations where their bodies are treated as evidence, literally objectified, for the sole purpose of collecting DNA evidence so that law enforcement can catch their rapists.

Rape victims stand naked on a large sheet of paper while their bodies are poked and prodded by "forensic examiners," complete and total strangers to victims.[2] The forensic examiners scrape victims' skin and comb their pubic hair to collect any DNA left on or in the victim's body by the rapist.[3] Examiners also take blood samples from wounds.[4] They perform intrusive pelvic and anal examinations to gather rapists' semen, urine, and/or saliva, and to check for internal damage.[5] They ask detailed questions about the violent sexual assault, and take

---

[1] Rape kits are administered by professionals who are trained to gather and preserve evidence for trial. These professionals gather evidence such as semen, saliva, blood, urine, skin cells, and hair. These professionals maintain the chain of custody to ensure that the evidence that they have gathered is not corrupted. For a very detailed description of how rape kit tests are administered, *see What is a Rape Kit and Forensic Medical Examination?*, End The Backlog, https://www.endthebacklog.org/what-is-the-backlog/what-is-a-rape-kit-and-rape-kit-exam/ [https://perma.cc/CM5L-4FWC] (last visited Aug. 5, 2024).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

down narratives of how the rape occurred.[6] They also photograph victims' naked bodies to capture pictures of bruises and other forms of physical abuse.[7]

This grueling test takes four to six hours,[8] and is often administered while the rape victim is in deep shock from having just been violated. The rape victim is left naked, as her clothing itself becomes part of the evidence included in the rape kit.[9]

Rape victims submit to these humiliating examinations because they want their rapists to be arrested and prosecuted. They want justice. Their expectations are eminently reasonable. DNA evidence is essentially foolproof—considered over 99% accurate.[10] And in cases of rape, DNA evidence can really solve crimes, as studies have shown that people who rape are usually serial rapists.[11]

DNA taken from rape victims is supposed to be tested and entered into a federal database, called CODIS, which is accessible to all law enforcement.[12] Comparing DNA from a fresh rape kit with DNA in the database readily informs law enforcement whether they are dealing with a serial rapist, even if they do not know the rapist's identity.[13] DNA matches can help law enforcement identify patterns in the way serial rapists commit crimes.[14]

When the city of Memphis began testing its rape kit backlog in 2013, sixteen out of twenty-five suspects identified were serial rapists who raped women *after* their DNA had been

---

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] C.R. Div., U.S. Dep't of Just., The Civil Rights Division's Pattern and Practice Police Reform Work: 1994–Present 5 (2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/V7YT-UT4X]; Ken LaMance & Travis Peeler, *Forensic Evidence: The Reliability of DNA Testing*, LegalMatch, https://www.legalmatch.com/law-library/article/forensic-evidence-the-reliability-of-dna-testing.html [https://perma.cc/ZQ2E-N3UU] (last visited Mar. 5, 2024).

[11] *See, e.g.*, David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence & Victims 73, 78 (2002) (63% of people who rape are serial rapists); Kevin M. Swartout et al., *Trajectory Analysis of the Campus Sexual Rapist Assumption*, 169 JAMA 1148, 1148 (2015) (of self-identified student rapists on college campuses, around 25% are serial rapists).

[12] *See generally*, *Frequently Asked Questions on CODIS and NDIS*, FBI, https://www.fbi.gov/how-we-can-help-you/dna-fingerprint-act-of-2005-expungement-policy/codis-and-ndis-fact-sheet [https://perma.cc/CM42-NXWW] (last visited Aug. 5, 2024).

[13] *Id.*

[14] *Id.*

collected in a rape kit and entered into the CODIS database.[15] Similarly, in 2015, Rebecca Campbell, of Michigan State University, analyzed over 1,500 untested rape kits that had been warehoused in Detroit, and found that eight percent of the rape kits showed evidence of serial rape.[16] And when the City of Cleveland examined its backlogged rape kits in 2015, 207 serial rapists were identified and tied to nearly 600 rapes.[17]

There has been a public outcry over untested rape kits for nearly 20 years. News article after news article has pointed out the unconscionable rape kit backlog. And yet, tens of thousands of rape kits are not tested, and hundreds of thousands of tests that have been shelved for decades can never be tested because they have expired. Given that many rapists are serial rapists, this means that people who rape are free to rape, and rape and rape some more, while victims are denied justice and cannot reach closure.

There should not be a rape kit testing backlog. Since the Violence Against Women Act was passed in 1991, the U.S. government has spent billions of dollars in grants to law enforcement to end violent crimes against women, including rape. The federal government awards hundreds of millions of dollars in grants annually to police departments around the country to investigate sex crimes and other crimes committed primarily against women and girls. As just two examples, the U.S. Office of Violence Against Women issued over $1.1 billion in STOP grants to police departments between 2019 and 2023.[18] Similarly, under the federal government's 2022 Omnibus Appropriations package, $120 million in grants were authorized under the Debbie Smith Act to combat sex crimes.[19]

---

15 Associated Press, *Memphis Police ID 16 Suspects While Clearing Rape Kit Backlog*, AL JAZEERA AM. (Mar. 10, 2015), http://america.aljazeera.com/articles/2015/3/10/memphis-cops-id-16-suspects-while-clearing-rape-kit—backlog.html [https://perma.cc/4KM9-NZ3A]. This Article makes clear that out of thousands of rape kits that had been warehoused for decades, many were unusable as the DNA samples had expired and could not be tested.

16 *See* REBECCA CAMPBELL ET AL., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP) vi (2015).

17 Rachel Dissell, *Serial Rapists Responsible for at Least 600 Attacks Linked to Untested Evidence, Authorities Believe (Graphic)*, CLEVELAND.COM (Mar. 21, 2015), https://www.cleveland.com/rape-kits/2015/03/authorities_believe_serial_rap.html [https://perma.cc/B5XC-VFBD].

18 LISA N. SACCO, CONG. RSCH. SERV., R47570, THE 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 5 (2023).

19 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 STAT. 126.

Why do thousands of rape kits remain untested? As Professor Tuerkheimer wrote in 2016 in *Underenforcement as Unequal Protection*,

> Unremedied injuries suffered by women, in particular, have historically been the norm, just as gender bias has long been an intractable feature of our criminal justice landscape. Across the spectrum of violence—domestic and sexual—substantive law reform has not readily translated into law enforcement.[20]

Since billions of dollars of federal grants and exposé after exposé about the rape kit backlog have not ended the backlog, rape victims have tried to take matters into their own hands through constitutional litigation in federal courts. This paper will discuss those Equal Protection cases and how they failed. It will also propose solutions for how rape victims can get judicial relief in state courts using a combination of state constitutional law and international human rights law. Judicial relief is necessary because the rape kit backlog still exists. Efforts by the Justice Department to end the backlog, while well-meaning, have been limited, ostensibly because of a lack of resources to investigate all gender and other forms of bias in policing.[21] Moreover, the federal government continues to fund law enforcement without making future grants contingent on ending the rape kit backlog.[22]

Part I of this Article discusses the endemic gender discrimination in policing. It focuses primarily on findings by the United States Department of Justice (DOJ) that discrimination against girls and women in policing manifests in the failure to investigate rapes, with the failure to test rape kits. Part II discusses the dismissal by federal courts of rape victims' Equal Protection Clause lawsuits, despite the DOJ's finding that failing to test rape kits is gender discrimination.

Part III of this Article demonstrates how federal courts' dismissal of rape kit lawsuits is at odds with international law. Finally, Part IV discusses how rape victims can seek judicial intervention mandating that law enforcement test rape kits in state courts. State courts, using state constitutional law, and

---

20 Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. Rev. 1287, 1290–91 (2016).

21 C.R. Div., U.S. Dep't of Just., *supra* note 10, at 5.

22 I plan to discuss the problems with the federal government's continuing to fund law enforcement agencies with backlogs in a separate Article.

referencing international human rights decisions, can provide justice to rape victims.

I
Rape Allegations are not Taken Seriously by Law Enforcement Because of Deep-Seated Gender Bias

Generally speaking, government loves law enforcement. With the exception of blips in time (like after the murder by Minneapolis police officers of George Floyd), politicians and governmental agencies are loathe to criticize the police. It is extremely significant then that the DOJ has repeatedly found that there is pervasive gender bias in policing, which manifests in law enforcement's failure to investigate violent crimes against women, including rape. Black women, Native American women, and other women of color are disproportionately impacted by this gender bias.[23]

The gender bias fueling the failure to investigate rape is so endemic and obvious that in 2015, the DOJ issued its first "guidance document" to law enforcement agencies to reduce gender bias in policing, and to urge them "to reduce sexual assault and domestic violence, and to administer justice when these crimes occur."[24] Clearly, that guidance did not work, because seven years later, in 2022, the DOJ issued a second guidance addressing the exact same topic. [25]

The DOJ's 2022 Guidance noted that "[t]oo often and for too long, gender bias within the justice system has thwarted investigations, caused further harm to victims, and allowed perpetrators to evade accountability and continue to commit

---

[23] For example, in the analysis of Detroit's backlog of roughly 11,000 rape kits in 2015, 80% of the rape kits were taken from Black women. Cassandra Spratling, *Black Women Raise Money and Awareness for Rape Kits*, Detroit Free Press (Oct. 4, 2015), https://www.freep.com/story/life/2015/10/04/black-women-rape-kits-490/73210134/ [https://perma.cc/8C8S-J5WU]. The Centers for Disease Control and Prevention's National Intimate Partner's Survey reported that women of color are more likely to be victims of sexual violence. Over 25% of women who identify as Native American or Alaskan have reported being raped at some point in their lives. Nat'l Ctr. for Inj. Prevention & Control, Ctrs. for Disease Control & Prevention, Intimate Partner Violence in the United States—2010 27 (2014).

[24] U.S. Dep't of Just., Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence 3 (2015), https://www.justice.gov/opa/file/799476/download/ [https://perma.cc/R9M9-58WT].

[25] U.S. Dep't of Just., Improving Law Enforcement Response to Sexual Assault and Domestic Violence by Identifying and Preventing Gender Bias 1–2 (2022) [hereinafter "2022 Guidance"].

crimes."[26] The 2022 Guidance also states that "[a]cting on stereotypes about why people are sexually assaulted, or about how a victim should look or behave, can constitute unlawful discrimination and profoundly undermine an effective response to these crimes."[27] The DOJ warns that police officers can exhibit unconscious gender bias if they relate more to the assailant than to sexual assault victims.[28] The 2022 Guidance uses incredibly simple and direct language. It is an easily-digested teaching manual in parts. Every police officer should be able to understand that asking sexual assault victims the following questions is engaging in gender stereotyping:

- Why didn't you push him off you and leave?[29]
- What did you think was going to happen after you went to his room alone?[30]
- How can you remember any details given how much you had to drink?[31]
- Is the reason you waited so long to report this rape because you now regret having sex?[32]
- Have you thought about how this is going to affect the alleged assailant's scholarship/career/reputation/etc.?[33]
- How often do you drink excessively?[34] or
- What were you wearing that night?[35]

While these points might seem obvious, sadly, they are not. As the National Institute of Justice stated in commenting about thousands of untested rape kits in Detroit: law enforcement personnel regularly expressed negative, stereotyping beliefs about sexual assault victims. Victims who were assumed to be prostitutes were considered to be at fault for what happened to them. Adolescents were often assumed to be lying, trying to avoid getting into trouble with their families by concocting a false story about being raped. Friends/acquaintances (i.e.

---

26 *Id.* at 1.

27 *Id.* at 6.

28 *Id.*

29 U.S. DEP'T OF JUST., *supra* note 24, at 12.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 U.S. DEP'T OF JUST., *supra* note 25, at 9.

35 *Id.*

victims who knew their rapists) had got-what-they-got because they had chosen to associate with their perpetrator. The fact that all of these victims had endured a lengthy, invasive medical forensic exam seemed to carry little to no weight.[36]

Because ninety percent of adult rape victims are female, victim-blaming demonstrates insidious gender bias against women and girls. Professor Sherry Colb has written extensively about blaming rape victims. She has pointed out that rape is the only crime where law enforcement officials (both police and prosecutors) are openly hostile to victims and question their veracity. It is the only crime where law enforcement links a victim's truthfulness with gender. She demonstrates how invidious this victim blaming is by comparing rape victims with robbery victims. Law enforcement believes robbery victims and bends over backward to make them feel comfortable with the criminal legal system. The opposite is true with rape victims, where police "treat evidence of crime—an eye-witness's first-hand account of what the perpetrator did to her—as though it is actually evidence of the victim's mendacity, of *her* crime."[37]

Colb posits that victim-blaming is steeped in denial that rape even occurs. This is particularly true in situations where a "normal" seeming perpetrator (usually a successful, otherwise productive member of various communities, like former Hollywood power-broker Harvey Weinstein) is accused of rape.

> We do not feel comfortable enough with the behavior to say that grabbing women's genitals or raping them is acceptable, so we instead say that women are lying and that it didn't happen. We can then purport to reject the very conduct that we have in fact been tolerating. . . . By calling the accusers liars . . . by refusing to believe them, society could continue to permit [this predatory behavior] while pretending to oppose it. 'Oh yes,' one could say, 'I think rape is a terrible thing, but we have no reason to believe this particular accuser . . . [.]'[38]

As her example demonstrates, rape-denial allows us to state unequivocally that we oppose rape, while simultaneously perpetuating male predatory behavior, by calling victims

---

36 CAMPBELL ET AL., *supra* note 16, at 135.

37 Sherry F. Colb, *The Difference Between Presuming Innocence and Presuming Victim Perjury in Acquaintance Rape Trials*, DORF ON LAW (July 16, 2018), https://www.dorfonlaw.org/2018/07/the-difference-between-presuming.html [https://perma.cc/377S-W7FY].

38 Sherry F. Colb, *Why "Believing Women" Has Been a Challenging Task*, VERDICT JUSTIA (Dec. 6, 2017), https://verdict.justia.com/2017/12/06/believing-women-challenging-task [https://perma.cc/WQ7A-YBXE].

liars.[39] Rape denial twists facts on their head. It allows deniers to sanctimoniously say: "We respect women. In fact, we respect women so much that we do not rape them." And anyone who questions deniers' unflinching, sanctimonious respect for women by making rape allegations is surely lying.

Yet, Colb points out, this rape denial is not about respecting women. Rape denial stems from misogyny and devaluation of women. "People deny that something is happening . . . . Then, with that denial in place, they are able to devalue the one whose experience they have successfully denied, without owning up to the devaluation. The process is such that it can appear logical and objective."[40]

Colb's analysis makes clear that what is needed for police to investigate rape is a complete reframing of the dynamic between the rapist and the raped person.[41] The need for this reframing is obvious because police departments go to great lengths NOT to examine evidence that could lead to the arrest of rapists. As the section below discusses, law enforcement agencies have even devised a system that makes it seem as if they are solving rape, when they are actually closing rape cases without even investigating them.

A. The "Exceptional Clearance" Scam

Gender bias and rape denial in policing is embodied in the rampant law enforcement custom of "exceptional clearance." Rather than investigating rapes and working towards ending sex discrimination in their ranks, many law enforcement agencies knowingly perpetuate it by using clever administrative tricks.

Nearly fifteen years ago, Arizona State University Professor Cassia Spohn began pointing out that by giving uninvestigated rape cases an "exceptional clearance" designation, law

---

39 *Id.*

40 Sherry F. Colb, *How Denial Can Be Step One in Facilitating Harm*, DORF ON LAW (Apr. 24, 2018), https://www.dorfonlaw.org/2018/04/how-denial-can-be-step-one-in.html [https://perma.cc/YCZ6-9UYG].

41 Professor Colb brilliantly recommends that if rape victims were thought of as witnesses, it would be less likely that they would be considered liars. Sherry F. Colb, *What Does #BelieveWomen Mean?*, VERDICT JUSTIA (Nov. 7, 2018), https://verdict.justia.com/2018/11/07/what-does-believewomen-mean [https://perma.cc/C53X-BWSB]. If they were treated the same as other eyewitnesses to crimes, rape victims would get more respect from police and the community. Rape victims seem as witnesses would have enhanced status, as pillars of the community, who are helping to solve crimes. *Id.* The wisdom of this theory will be explored in a future paper.

enforcement actually closes those cases, but gives the public the impression that those rape cases have been solved (not discarded). Truly Orwellian.

For purposes of record-keeping, all police departments treat "exceptionally cleared" cases as arrests.[42] In analyzing statistics from 2007, Spohn states, "[o]f rapes and attempted rapes reported to the LAPD, 12.2% were cleared by arrest and 33.5% were cleared by exceptional means. . . . Combining exceptional clearances with cases cleared by arrest . . . substantially inflates the [overall case clearance] rates[.]"[43]

This widespread policy is legally improper. Indeed, law enforcement should apply the "exceptional clearance" designation *only in rare cases*,[44] and only when four conditions are met:

- law enforcement has enough evidence to make an arrest;
- law enforcement knows the suspect's identity;
- law enforcement knows the suspect's exact whereabouts, so he can be arrested; and
- law enforcement has a reason "outside of its control" that prevents making an arrest (such as death of the perpetrator; incarceration of the perpetrator in another jurisdiction; or denial of extradition).[45]

Law enforcement admittedly close cases that do not meet the exceptional clearance criteria so they can make it seem like they are solving rape cases. This deceptive practice is so widespread that former sex crimes investigators have reported

42 *See generally* Cassia Spohn & Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379 (2010); *see also* Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of* Miranda *on the Police*, 32 RUTGERS L.J. 1 (2000) (discussing the history of the "exceptional clearance" doctrine, and instances when it was appropriate to use, starting in the 1920s).

43 Spohn & Tellis, *supra* note 42, at 1394, 1416.

44 FED. BUREAU OF INVESTIG., U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final.pdf [https://perma.cc/5BZN-GCUT].

45 *Id.* at 1–2; *see also* Spohn & Tellis, *supra* note 42, at 1383. While a victim's unwillingness to cooperate can be grounds for "exceptional clearance," that reason alone does not justify clearing a case. Law enforcement should keep an investigation open for as long as possible if they have an uncooperative witness, and search for other evidence to justify an arrest. *Id.*

feeling pressure to use the designation to close out cases rather than devote resources to investigate rapes.[46]

Police departments "exceptionally clear" cases they can solve, including cases of child rape. For example, in 2017 (approximately a decade after Spohn first published her findings), Wisconsin police arrested a man for having sex with a minor. They found child pornography during the arrest, including nude pictures of a girl from Maryland.[47] When they notified the Baltimore Police Department (BPD), to their surprise, they learned that the BPD had a thick investigative file on the man, which included strong proof that he had sex with a thirteen-year-old.[48] Yet, the BPD never arrested this child rapist. Rather, they used the "exceptional clearance" designation to close his case.

Baltimore openly continued to "exceptionally clear" cases even though the Baltimore Sun had exposed, in 2010, that the Baltimore Police Department had improperly classified and closed over half of its rape cases,[49] and even though a DOJ order mandated that the BPD investigate rape cases and test rape kits (as will be discussed more fully below). Despite the DOJ mandate, the BPD "exceptionally cleared" the man of rape just one month before the man was arrested in Wisconsin.[50] Had Baltimore not exceptionally cleared the case, the man would never have been able to travel to Wisconsin to rape another young teenage girl.

The exceptional clearance scam is not a secret. In 2018, the media outlets ProPublica, Newsy, and the Center for Investigative Reporting released their findings of a study of over 70,000 rape cases around the U.S. The data they studied were from 2016.[51] As the authors stated, "[n]early half of the law

---

46 Bernice Yeung, Mark Greenblatt, Mark Fahey & Emily Harris, *When it Comes to Rape, Just Because a Case is Cleared Doesn't Mean It's Solved*, ProPublica (Nov. 15, 2018), https://www.propublica.org/article/when-it-comes-to-rape-just-because-a-case-is-cleared-does-not-mean-solved [https://perma.cc/U5VY-R2RJ].

47 *Id.*

48 *Id.*

49 Catherine Rentz, *Case Cleared? In Rape Cases in Baltimore County and Elsewhere it Often Doesn't Mean an Arrest*, Balt. Sun (Nov. 23, 2018), https://www.baltimoresun.com/news/investigations/bs-md-exceptionally-cleared-rape-20181120-story.html [https://perma.cc/7EY4-5DJG]; *see also* Justin Fenton, *Half of Discarded City Rape Claims Were Misclassified*, Balt. Sun (Dec. 1, 2010) https://www.baltimoresun.com/2010/12/01/half-of-discarded-city-rape-claims-were-misclassified/ [https://perma.cc/HQ4U-PMQJ].

50 Rentz, *supra* note 49.

51 Yeung, Greenblatt, Fahey & Harris, *supra* note 46.

enforcement agencies that provided records cleared more rapes through exceptional [clearance] means than by actually arresting a suspect[.]"[52] For example:

- The Oakland, California Police Department reported that it cleared sixty percent of rape cases. Yet, for every actual rape arrest, they designated three cases as "exceptionally cleared," giving the impression that those cases had also been solved.[53]
- In Hillsborough County, Florida, home to Tampa, the police cleared twelve percent of rapes by arrest and closed more than three times that amount using the "exceptionally cleared" designation.[54]
- In Austin, Texas, two out of every three rape cases were closed using the "exceptionally clear" designation.[55]
- The Baltimore Police Department told the public that it had cleared seventy percent of its rape cases, roughly twice the national average, giving the impression that it was vigorous in solving rape crimes. But only 30% of its clearances were actual arrests; the rest of the rape cases were closed without being solved, using the "administrative clearance" designation.[56]

The ProPublica findings were reported widely in 2018 and 2019, including by NPR and CBS news.[57] Despite these exposés, the practice of improperly administratively clearing rape cases persists. Proof of this is an internal audit conducted by the Austin, Texas Police Department and published in 2019, which found that out of ninety-five "exceptionally cleared" rape cases, thirty did not meet the FBI's criteria for that designation; five of the thirty cases did not satisfy even one of the criteria.[58]

---

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *See, e.g.*, Mary Louise Kelly & Mark Greenblatt, *Investigation Shows How Police Departments Clear Rape Cases Without Making an Arrest*, NPR (Feb. 7, 2019), https://www.npr.org/2019/02/07/692466435/investigation-shows-how-police-departments-clear-rape-cases-without-making-an-ar [https://perma.cc/HPA4-DYKU]; Nikki Battiste, *Police Accused of Misusing "Exceptional Clearance" to Close Rape Cases*, CBS News (Oct. 24, 2019), https://www.cbsnews.com/news/police-accused-of-misusing-exceptional-clearance-to-close-rape-cases-2019-10-24/ [https://perma.cc/2AK7-7FCH].

58 Mark Greenblatt, Mark Fahey, Bernice Yeung, & Emily Harris, *Austin Police Department Orders Deeper Investigation After Audit Finds It Misclassified*

Similarly, in 2023, the Georgia news channel, 11Alive, reported that the Dallas, Georgia Police Department admitted that all of its exceptionally cleared cases were erroneously misclassified.[59]

B. Law Enforcement Makes an Affirmative Decision to Exceptionally Clear Rape Cases Rather Than Testing Rape Kit DNA Evidence

Using only the cities discussed in ProPublica's 2018 article, by way of example, when law enforcement was exceptionally clearing cases in Austin, Oakland, Baltimore, and Tampa, Austin had a rape kit backlog of 3,000,[60] Oakland had a rape kit backlog of over 1,000,[61] Baltimore had a rape kit backlog of 900,[62] and Tampa had a rape kit backlog of several hundred.[63]

That means that rather than testing DNA evidence *already in their possession*, that is over 99% accurate, and that would most likely identify rapists, law enforcement made a conscious choice to not even try to solve those crimes. This is not an act of laziness, being overworked, or incompetence. It is not too complicated a task to send rape kits to a lab for testing. Indeed, the federal government gives law enforcement millions of dollars in grants every year to solve rapes and test rape kits.

Cleared Rape Cases, ProPublica (Jan. 18, 2019), https://www.propublica.org/article/austin-police-department-misclassified-cleared-rape-cases-orders-deeper-investigation-after-audit [https://perma.cc/2L4K-HPUF].

59 Kristin Crowley, Meredith Sheldon, Ciara Bri'd Frisbie, Erin Peterson & Mike Nicolas, *An Exceptional Problem: How Police Are Clearing Rape Cases Without Making Arrests*, 11Alive (Feb. 23, 2023), https://www.11alive.com/article/news/special-reports/an-exceptional-problem/an-exceptional-problem-rape-cases-cleared-no-arrests/85-acf44b1d-7ead-44be-a2a6-440cee8a2cc4 [https://perma.cc/48TV-6LC5].

60 Christopher Neely, *Austin Police Department Intends to Clear Rape Kit Backlog in 6 Months*, Cmty. Impact (Dec. 6, 2016), https://communityimpact.com/austin/central-austin/city-county/2016/12/05/austin-police-department-intends-to-clear-rape-kit-back-log-cleared-in-6-months/ [https://perma.cc/EFV3-SN2H].

61 *See* Megan Cassidy, *Oakland Police Have 1,200 Untested Rape Kits, Second Most in California, Audit Finds*, S.F. Chron. (May 14, 2020), https://www.sfchronicle.com/crime/article/Audit-finds-Oakland-police-have-1-200-untested-15271265.php [https://perma.cc/R3QY-LJK8]

62 *More Than 3,500 Rape Kits Left Untested in Maryland*, CBS News Balt. (Oct. 27, 2016), https://www.cbsnews.com/baltimore/news/more-than-3500-rape-kits-left-untested-in-maryland/ [https://perma.cc/UEU3-YD9F].

63 Jeremy Wallace, *Backlog of Untested Rape Kits in Florida Far Worse Than Earlier Estimates*, Tampa Bay Times (Jan. 4, 2016), https://www.tampabay.com/news/politics/stateroundup/backlog-of-untested-rape-kits-in-florida-far-worse-than-earlier-estimates/2259973/ [https://perma.cc/32JF-AMVY].

Rape is not investigated and rape kits are not tested as an affirmative act of devaluing women. The 2022 DOJ Guidance echoes these sentiments. It states clearly that gender bias can manifest in practices such as "misclassifying cases as unfounded or wrongly clearing them by exceptional means," or failing to test rape kits.[64] Such action is "discrimination" that results in reduced protection to victims on the basis of gender.[65]

C. The Federal Government is Not Doing Enough to Ensure Rape Kit Testing

The 2022 Guidance states unequivocally that gender bias, including the failure to test rape kits, violates the Fourteenth Amendment.[66] As such, the DOJ launched five investigations of cities for their gender bias in policing, using the 1994 Violent Crime Control and Law Enforcement Act.[67] The investigation in New York City has just begun. Two of those investigations specifically found that the failure to test rape kits was a form of gender discrimination.

After its 2015 investigation into the BPD, the DOJ had serious concerns that gender bias may be compromising the effectiveness of BPD's sexual assault investigations.[68] The DOJ found "systemic deficiencies" in how BDP treated rape victims, including failures to collect and analyze data, a lack of

---

64 U.S. DEP'T OF JUST., *supra* note 25, at 2.

65 *Id.* at 3.

66 *Id.* at 27.

67 The DOJ conducted its investigations under the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. § 12601 (previously 42 U.S.C. § 14141, before recent recodification):

> a) UNLAWFUL CONDUCT.—It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
>
> b) CIVIL ACTION BY ATTORNEY GENERAL.—Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

68 C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 122–127 (2016), https://civilrights.baltimorecity.gov/sites/default/files/20160810_DOJ%20BPD%20Report-FINAL.pdf [https://perma.cc/28F6-TKZE].

oversight, and a failure to hold its officers accountable for misconduct.[69] In January 2017, the year that the BPD exceptionally cleared issues related to the child rapists discussed above, the DOJ and the City of Baltimore entered into a 227 page consent decree,[70] which discusses the BPD's systemic failures to test rape kits and requires it to end the backlog. As part of the requirements for the "Handling of Reports of Sexual Assault,"[71] BPD is required to:

> "[c]onsult with forensic examiners to obtain and discuss the results of medical/forensic examinations";[72]
>
> "ensure that officers transport victims to the designated medical facility for a forensic exam in all instances in which a forensic exam is warranted and the victim consents to the transport";[73]
>
> "establish and implement measures to ensure supervision and internal oversight of sexual assault investigations";[74] and
>
> collect and analyze "data about the processing of forensic medical exams (often referred to as "rape kits"), including: (1) date of reported incident; (2) date of SAFE exam; (3) date detectives request lab analysis of SAFE exam; (4) date detectives receive lab analysis results."[75]

These explicit and detailed mandates say that Baltimore must test its rape kits. In 2020, however, BPD reported to the DOJ that while it had "completed policy revisions" for its sexual assault investigations, "BPD remains in the training phase of reform."[76] Based on the most recent data from 2021, the median processing time of rape kits was 211 days,[77] which was

---

69 *Id.*

70 Consent Decree, United States v. Police Dep't of Balt. City, Civil Action No. 1:17-cv-00099-JKB (D. Md. filed Jan. 12, 2017), https://www.justice.gov/crt/case-document/file/925036/download [https://perma.cc/N3VE-C4U8].

71 *See id.* at 87–93.

72 *Id.* at 90.

73 *Id.*

74 *Id.* at 91.

75 *Id.* at 92.

76 Submission of Monitoring Team's First Comprehensive Re-Assessment, *Police Dep't of Balt. City*, https://www.justice.gov/crt/case-document/file/1495746/download [https://perma.cc/XY6V-6WZR]; *see* Consent Decree at 82, *Police Dep't of Balt. City*.

77 BALT. POLICE DEP'T, 2021 SEXUAL ASSAULT DATA REPORT 4 (2022), https://www.baltimorepolice.org/sites/default/files/2022-11/2021%20DRAFT%20Sexual%20Assault%20Report_FINAL.pdf [https://perma.cc/U3L4-XRCT].

99 days longer than in 2019.[78] In 2022, the total number of untested rape kits in Maryland was 3,599.[79]

The DOJ's investigation into the New Orleans Police Department (NOPD), which began in 2010, was met with similar indifference to testing rape kits. In 2012, the DOJ reached a settlement with the NOPD.[80] The Department agreed to "develop and implement clear policies and procedures governing its response to reports of sexual assault," including detailed guidelines for "collecting evidence" and establishing "protocols for forensic examinations of both victims and suspects, as well as evidence preservation" in collaboration with New Orleans SART (sexual assault response team) and pursuant to the National Protocol for Sexual Assault Medical Forensic Examination.[81]

It is unclear whether New Orleans has eliminated its backlog. As of 2022, however, Louisiana had 830 untested kits (119 untested kits were located in sheriff and police agencies' possession, while the remaining 711 were in state crime laboratories).[82] This means that states are treating DOJ mandates as applying specifically to the locales of the DOJ's investigations and not to the whole state.

Unfortunately, the DOJ has not followed up on enforcing its consent order and settlement agreement with New Orleans or Baltimore. The DOJ claims that it does not have the resources to investigate all police departments over which it receives credible claims of bias in policing. That statement in itself is an indictment of law enforcement. The DOJ's Civil

---

78 *Police Dep't of Balt. City*, at 84, https://www.justice.gov/crt/case-document/file/925036/download [https://perma.cc/N3VE-C4U8]; BALT. POLICE DEP'T, 2019 SEXUAL ASSAULT INVESTIGATIONS REPORT 14 (2019), https://www.baltimorepolice.org/sites/default/files/2019%20Sexual%20Assault%20Report.pdf [https://perma.cc/8LSR-RXK4].

79 *How Many Rape Kits are Awaiting Testing in the US? See the Data by State.*, USAFACTS (July 3, 2023), https://usafacts.org/articles/how-many-rape-kits-are-awaiting-testing-in-the-us-see-the-data-by-state/ [https://perma.cc/XY9R-YESW].

80 Consent Decree Regarding the New Orleans Police Department at 54–55, United States v. City of New Orleans, No. 2:12-cv-01924-SM-JCW (E.D. La. filed Jan. 11, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/01/11/nopd_agreement_1-11-13.pdf [https://perma.cc/6KZA-8TD4]. The investigation focused primarily on the use of excessive force and illegal stops, searches, and arrests, and also included a finding of gender bias. *Id.*

81 *Id.* at 54–55.

82 Louisiana, END THE BACKLOG, https://www.endthebacklog.org/state/louisiana/#state_timeline_list [https://perma.cc/L5JK-YSMN] (last visited Aug 5, 2023).

Rights Division is overwhelmed and has expressly stated it is "not a complaint-driven agency."[83] But there are FBI offices and U.S. Attorney offices with civil rights bureaus in every state. Those offices can surely hold law enforcement's feet to the fire to investigate rapes and test rape kits.

The DOJ opened only twenty-three case matters investigating bias in policing between 2009 and 2016, and only four of those focused on gender discrimination. [84] In 2017, in the most recent DOJ statement on the matter, the DOJ reported that only sixty-nine formal investigations had been opened since the Violent Crime Control Law Enforcement Act was enacted in 1994.[85] The DOJ reported that its civil rights investigations usually take several years (two years is the goal) before the cases usually end with court-ordered consent decrees.[86]

In sum, while the DOJ should be applauded for stating definitively that failing to test rape kits and to investigate rape is gender discrimination, the agency has not flexed its muscle enough to ensure that law enforcement implements its guidances. While the DOJ has taken some important steps in trying to end gender discrimination against rape victims, by its own admission, it has barely scraped the surface. It has made clear that it lacks the resources to pursue more investigations than it already has, even though many complaints from the public keep pouring into its offices. Sadly, the DOJ has chosen not to follow through in holding cities that violate consent decrees accountable for not remedying their rape kit backlog.

Meanwhile, the federal government continues to pump money into all states to fix the rape kit backlog, despite states' failure to test rape kits. Although it is most certainly within its power to do so, the federal government has never explicitly made renewal of lucrative grants to law enforcement contingent on ending the rape kit backlog. That makes absolutely no sense.

At the writing of this Article, as the map below demonstrates, while nineteen states have taken action to test rape kits, twenty-four most certainly have not, and another seven do not report their rape kit status. Eight states have rape

---

83 C.R. DIV., U.S. DEP'T OF JUST., *supra* note 10, at 5.

84 *Id.* at 3. As discussed above, the DOJ opened an investigation into New York City in 2022 to investigate gender discrimination in sexual assault investigations. That investigation is not included in the DOJ statistics. I have not been able to find documentation of any post-2017 investigations into gender bias.

85 *Id.*

86 APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10494, REFORMING PATTERNS OF UNCONSTITUTIONAL POLICING: ENFORCEMENT OF 34 U.S.C. § 12601 (20203).

kit backlogs exceeding 5,000, with California in the lead with 13,939 untested rape kits. Texas and Indiana have over 6,000. Maryland is not far behind with 5,815 untested rape kits.

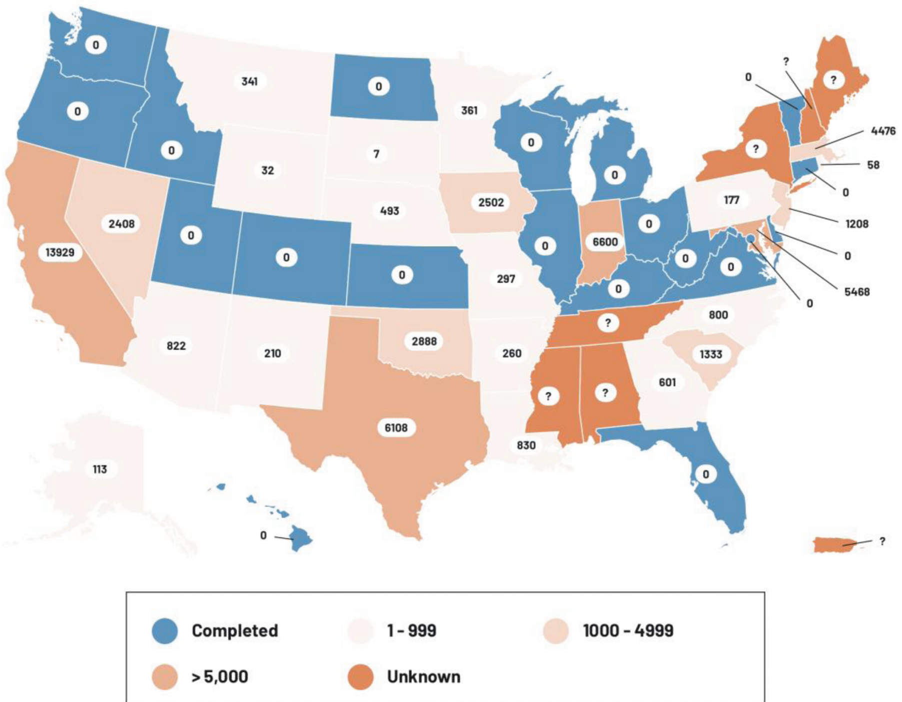

FIGURE: Explore the Backlog Map, https://www.endthebacklog.org/

Massachusetts has over 5,000 untested rape kits. Eight states have between 1,000 and 5,000 untested rape kits, and ten states have between 1-999 untested rape kits.

II
FEDERAL COURTS' DISMISSAL OF RAPE KIT LAWSUITS

As discussed in Part I, in both 2015 and 2022, the DOJ issued "Guidances," in an effort to compel law enforcement to investigate sex crimes committed against girls and women. In those Guidances, the DOJ stated definitively that failure to test DNA in rape kits violates, among other statutes and provisions, the Fourteenth Amendment's Equal Protection Clause.[87]

87 U.S. DEP'T OF JUST., *supra* note 24, at 3, 23; U.S. DEP'T OF JUST., *supra* note 25, at 2, 27.

Federal courts do not agree. All equal protection lawsuits filed by rape victims against municipalities, alleging systemic gender discrimination in law enforcement's deliberate failure to test DNA in rape kits, were dismissed quickly, before any discovery was taken, on statute of limitations grounds, and failure to state a claim for which relief can be granted.[88]

A. The Comparator Test

Federal courts have dismissed rape-kit-related equal protection lawsuits by finding that the plaintiffs in those lawsuits did not identify proper "comparators."[89] "Comparators" originated in employment discrimination cases; federal courts imported this analysis into equal protection constitutional cases to "establish intent to discriminate."[90]

What groups are used as comparators impact whether a lawsuit succeeds or fails. A case from the Ninth Circuit demonstrates this well. In 2019, the Ninth Circuit affirmed the dismissal of a lawsuit against the City of San Francisco, which had a backlog of several thousand rape kits.[91] The rape victim alleged that gender bias was the reason that her rape kit was not tested. Her complaint described her persistent efforts (spanning years) to find out her rape kit test results, after she had been told by law enforcement that her rape kit would be tested.[92]

The plaintiff argued that appropriate comparators for her equal protection claims were victims of other serious violent crimes, where law enforcement examined all evidence in a timely manner, including DNA evidence, to solve those crimes.[93] She argued that her rape kit DNA was not examined because the San Francisco Police Department did not consider rape a serious

---

88 *See* Smith v. City of Austin, No. A:18-CV-00505-LY, 2020 WL 13094079 (W.D. Tex. Feb. 10, 2020); Matthews v. City of Memphis, No. 2:14-cv-02094-JFT-cgc, 2014 WL 3049906 (W.D. Tenn. July 3, 2014); Doe v. City of Memphis, 928 F.3d 481 (6th Cir. 2019); Beckwith v. City of Houston, 790 F. App'x 568 (5th Cir. 2019); Marlowe v. City & County of S.F., 753 F. App'x 479 (9th Cir. 2019) (Mem.); Harrison v. Woolridge, No. 3:18-CV-00388-GNS-LLK, 2020 WL 3798877 (W.D. Ky. July 7, 2020); Complaint, Doe v. Village of Robbins, No. 1:17-cv-00353, 2017 WL 227799 (N.D. Ill. Jan. 17, 2017); Lefebure v. Boeker, No. 17-01791-BAJ-EWD, 2023 WL 3069125 (M.D. La. Mar. 31, 2023).

89 *See generally* Emily Jones, *Untested and Neglected: Clarifying the Comparator Requirement in Equal Protection Claims Based on Untested Rape Kits*, 115 Nw. L. Rev. 1781, 1801 (2021).

90 *Id.* at 1799.

91 *Marlowe*, 753 F. App'x at 479.

92 Complaint, *Marlowe*, 753 F. App'x 479, No. 3:16-cv-00076.

93 Petition for a Writ of Certiorari at 21, *Marlowe*, 2019 WL 3338162 (U.S. July 22, 2019) (No. 19-116).

enough crime worth investigating, because of deep-seated gender discrimination.[94] This accusation was not conjectural. Her complaint's allegations, which the court was supposed to presume as being true under Rule 12(b)(6), actually discussed in detail that she was told by law enforcement that the processing of her rape kit could take "substantially more time" as the lab had a backlog of "more important" crimes.[95]

The City of San Francisco proposed different comparators. It argued that the appropriate comparators were male rape victims. The City argued that in order to show an equal protection violation, the plaintiff had to show that she was treated differently than male rape victims, and had to demonstrate that the City was testing rape kits from men, while warehousing rape kits from women.[96] The district court sided with the City of San Francisco. The district court held that the victim did not propose comparators of rape victims who were "similarly situated" to her.[97]

The Ninth Circuit seemed to have trepidation over its chosen comparator test, because it affirmed that holding in the most cowardly way.[98] The decision is a flimsy one and a half page opinion that, interestingly, states clearly that it has no precedential value, and cannot be cited for anything other than the specific facts of the case.[99] Washing its hands of its decision indicates that the Ninth Circuit recognized that it could have used a different comparator test if it wanted to do so.

Federal courts have great flexibility in choosing comparators. The choice to use the female v. male rape kit comparator

---

[94] *Id.* at 10.

[95] Complaint at 5, *Marlowe*, 753 F. App'x. 479, No. 3:16-cv-00076.

[96] Defendants' Notice of Motion & Motion to Dismiss Plaintiff's Complaint at 6, Marlowe v. City & County of S.F., 2017 WL 5973505 (N.D. Cal. filed July 14, 2016) (No. 16-cv-00076-MMC), 2016 WL 11636958, at 5.

[97] *Marlowe*, No. 16-cv-00076-MMC, 2017 WL 5973505 at 2, citing Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995).

[98] While the Ninth Circuit's analysis is legally defensible under *Geduldig v. Aiello*, 417 U.S. 484 (1974), Professor Colb recently pointed out the absurdity of that decision in the context of the *Dobbs* decision. "Just imagine an insurer that provides coverage for all cancer patients with the one exception of those patients suffering from testicular cancer. Under *Geduldig*, if applied with integrity, such a program would not constitute sex discrimination against men." Sherry F. Colb, *All Hail Justice Coathanger*, DORF ON Law (May 5, 2022), https://www.dorfonlaw.org/2022/05/all-hail-justice-coathanger.html [https://perma.cc/6HET-NF7W].

[99] The Ninth Circuit seems to have been trying to have it both ways, by both affirming the dismissal and simultaneously not wanting its fingerprints on the future perpetuation of gender discrimination by law enforcement that would undoubtedly result from its affirming the dismissal.

is just another example of rape denial and gender discrimination. The comparator test used to dismiss the case against San Francisco deems it constitutionally irrelevant that ninety percent of rape victims are women and girls,[100] that there is gross underreporting of rapes to the police; and male rape victims rarely report rapes.[101] It fails to recognize that there is no indication that different types of rape kits are administered to men.

The impact of this legally expedient Ninth Circuit decision impacts millions of women, who are left without recourse. The Ninth Circuit covers more states and judicial districts than any other circuit court in the United States.[102] Its jurisdiction covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.[103] Cities like Las Vegas,[104] Los Angeles,[105]

---

[100] There are no accurate, up-to-date numbers for how many rapes are committed against women as opposed to men; however, according to reliable sources such as the Rape, Abuse & Incest National Network (RAINN), 90% of rape victims are female. *See Scope of the Problem: Statistics*, RAINN, https://www.rainn.org/statistics/scope-problem [https://perma.cc/NR2K-PN3B] (last visited July 9, 2023).

[101] Patrizia Riccardi, *Male Rape: The Silent Victim and the Gender of the Listener*, PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY (2010).

[102] *FAQs: Court Information*, UNITED STATES COURTS, https://www.uscourts.gov/faqs-court-information [https://perma.cc/JST2-HU8T] (last visited July 28, 2023).

[103] *U.S. Federal Appellate Courts: Records and Briefs*, LIBRARY OF CONGRESS https://guides.loc.gov/federal-appellate-court-records-briefs/ninth-circuit [https://perma.cc/WAV9-5CYC] (last visited July 28, 2023).

[104] In 2021, Clark County (where Las Vegas is located), rape accounted for 12.6% of violent crimes committed. *Violent Crime 2021: Clark County*, NEVADA CRIME STATISTICS (2021), https://nevadacrimestats.nv.gov/tops/report/violent-crimes/clark-county/2021 [https://perma.cc/QH8N-57LD].

[105] In 2022, there were 3,869 reports of forcible rape in Los Angeles; *Reported Crime Numbers & Crime Rates Los Angeles County 1985–2022*, L.A. ALMANAC (2022), https://www.laalmanac.com/crime/cr01.php [https://perma.cc/7NEZ-LBZY].

San Francisco,[106] Oakland,[107] Honolulu,[108] and Phoenix,[109] with high rape rates, are all within the Ninth Circuit's ambit. Given that men rarely report rapes, there will never be a legally cognizable comparator. Therefore, there is no legal incentive to get rid of the 13,929 rape-kit backlog in California,[110] or the rape kit backlog in the other cities and states in the Ninth Circuit.

There is some saving grace in the Ninth Circuit's stating that its opinion has no precedential value, but not much. The district court opinion has persuasive precedential value, and it is hard to believe that district court judges will not place importance on the Ninth Circuit's affirming the district court's decision.

The Sixth Circuit demonstrated that federal courts have broad leeway in articulating comparators in rape-kit constitutional challenges. It reached a different result than the Ninth Circuit. While its holding did not ultimately change the outcome of the case, which was dismissed, the Sixth Circuit recognized that a case alleging gender bias in failing to process rape kits should not be dismissed out of hand. In *Jane Doe v. City of Memphis*, plaintiffs alleged the City of Memphis violated their equal protection rights for failing to submit 15,000 rape kits for DNA testing.[111] In reversing the district court's dismissal, the Sixth Circuit stated:

> additional discovery might establish a genuine issue of material fact as to sex discrimination . . . by showing that Defendant had a pattern or practice of not taking sexual assault crimes as seriously as other violent crimes . . . additional discovery might also allow Plaintiffs to identify and certify a class.[112]

---

106 As of July 23, 2023, San Francisco had 138 incidents of rape for 2023. *San Francisco Police Department Crime Data*, S.F. POLICE DEP'T (2023), https://www.sanfranciscopolice.org/stay-safe/crime-data/crime-dashboard [https://perma.cc/YBQ6-MKLW].

107 In 2021, Oakland had 158 reports of rape. *End of Year Crime Report—Citywide*, OAKLAND POLICE DEP'T (2021), https://cityofoakland2.app.box.com/s/sjiq7usfy27gy9dfe51hp8arz5l1ixad/file/903152951382 [https://perma.cc/G6UZ-P2R3].

108 In 2019, Honolulu had 340 reported rape offenses. *2019 Crime in the United States*, Table 8, FBI (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-8/table-8-state-cuts/hawaii.xls [https://perma.cc/7GLG-HSJP].

109 In 2022, Phoenix had 1,105 reported rapes. *Monthly Count of Actual Offenses Known to Police*, CITY OF PHOENIX (2022), https://www.phoenix.gov/policesite/Documents/Crime%20Stats%20and%20Maps/2022_UCR_monthly.pdf [https://perma.cc/2U5U-VVRQ].

110 *California*, END THE BACKLOG, https://www.endthebacklog.org/state/california/ [https://perma.cc/EH6T-SSL7] (last visited July 26, 2023).

111 Doe v. City of Memphis, 928 F.3d 481, 485 (6th Cir. 2019).

112 *Id.* at 496.

No other court has allowed discovery before dismissing a case on comparator grounds. The Sixth Circuit's willingness to entertain the concept that gender discrimination enters into law enforcement's failure to process DNA evidence related to rapes stands alone, creating a circuit court split.[113] Notably, on remand, the case was dismissed for failure to meet class certification requirements.[114]

B. Rape-Kit Lawsuits Statute of Limitations Dismissals

Federal courts have also dismissed rape-kit-related lawsuits on statute of limitations grounds. Advocates have argued that the statute of limitations does not start to run until rape victims learn (or reasonably should have known) that their rape kits were not tested, particularly because the rape victims who have sued were strung along by the police for years.

In *Marlowe*, the Ninth Circuit affirmed the district court's finding that the statute of limitations period started running when the rape occurred, even though the San Francisco Police Department lied to the rape victim, telling her that her rape kit would be tested within sixty days.[115] The victim repeatedly followed up on the status of her rape kit for two years after it was administered, until she finally learned that her case was considered "inactive;" when she asked the police to reopen it, they told her to follow up again in another six months.[116] As a result, there was no way she could have filed a claim within the two-year statute of limitations period that the Ninth Circuit applied.

This also happened in the Fifth Circuit, in 2019, in *Beckwith v. City of Houston.*[117] The plaintiff rape victims filed suit against the City of Houston for its failure to test 4,220 rape kits (including theirs) over a thirty-year period.[118] The Fifth Circuit

---

[113] One other Equal Protection case brought in the U.S. District Court for the Northern District of Illinois survived and was ultimately settled. Complaint, Jane Doe v. Village of Robbins, No. 1:17-cv-00353, 2017 WL 227799 (N.D. Ill. Jan. 17, 2017). No judicial opinion appears to have been issued in this case, so it is unclear if the issues discussed in this Article describe what happened in that lawsuit.

[114] Order Granting Defendant's Motion to Strike Class Allegations at 3, Doe v. City of Memphis, No. 2:13-cv-03002 JTF-cgc, 2022 WL 1785499 (W.D. Tenn. Jan. 3, 2022).

[115] Complaint at 3, Marlowe v. City & County of S.F., 753 F. App'x 479 (9th Cir. 2019).

[116] *Id.* at 4–5.

[117] Beckwith v. City of Houston, 790 F. App'x 568 (5th Cir. 2019).

[118] Similarly, in Borkowski v. Baltimore County, the U.S. District Court for the District of Maryland stated that "[p]roof of . . . discriminatory intent or

affirmed the district court's dismissal on statute of limitation grounds, claiming that plaintiffs should have known that their rape kits had not been tested, even though they had been told by law enforcement that their rape kits were being sent to labs for testing.

Part of the basis of the Fifth Circuit's reasoning was that in 2013 the City of Houston publicized the rape kit backlog and set up a hotline related to the backlog.[119] The plaintiffs should have known, or at least investigated whether their rape kits were part of the backlog.[120] The court's finding ignored that both plaintiffs were raped in 2011, two years *before* the alleged public service campaign began.[121] I use the term "alleged" because, as the plaintiffs pointed out in their appeal papers, Houston never presented any evidence about the nature of the public service announcements, and whether they reached the plaintiffs or members of their communities.[122]

The Fifth Circuit held that the statute of limitations starts to run when the harm occurred.[123] Here the Fifth Circuit held that the harm occurred at the time the rape kit was administered, and in one instance, three months after that (as a police officer told the rape victim that her kit would be processed in three months).[124] The Fifth Circuit held that even though the plaintiff rape victims had been told that their rape kits would be tested, they should have known that law enforcement was lying to them, and that their rape kits would not be tested, and consequently, should have been prepared to file their lawsuit within two years of their rapes.[125]

The Fifth Circuit also stated that a Houston municipal law, which requires all rape kits to be tested in thirty days, actually worked against the plaintiffs' statute of limitations arguments.[126] That law, in and of itself, demonstrated that plaintiffs'

---

purpose . . . 'is required to show a violation of the Equal Protection Clause.'" 414 F. Supp. 3d 788, 809 (Sept. 30, 2019). The district court dismissed the complaint, which argued that failure to investigate rape cases violated the Equal Protection Clause. *Id.* at 810. The plaintiffs focused more broadly on the failure to investigate rape, rather than focusing exclusively on failure to examine rape kits.

119 *Beckwith*, 790 F. App'x at 573.

120 *Id.*

121 *Id.* at 570, 572.

122 Petition for Writ of Certiorari at 14, *Beckwith*, 2020 WL 374386 (U.S. filed Jan. 14, 2020) (No. 19-907).

123 *Beckwith*, 790 F. App'x at 575.

124 *Id.* at 574–75.

125 *Id.*

126 *Id.*

cause of action actually began to accrue on the thirty-first day after they were raped, when they were not given their rape kit results.[127] Plaintiffs were harmed, the court reasoned, on the day after Houston violated its statutory obligation to test their rape kits, and should have prepared to file lawsuits at that time.

As the citation for this case signals, the Fifth Circuit stated that it did not want its opinion in this case published, and that the holding would not have precedential value beyond the holding of the facts of its opinion.[128] Unlike the Ninth Circuit's flimsy opinion, the Fifth Circuit's opinion is quite substantial. It is hard to imagine that it would not be viewed as precedent by other federal courts.[129]

C. Law Enforcement Exhibited Clear Gender Bias Against the Plaintiffs in the Dismissed Federal Cases

Law enforcement exhibited textbook gender bias against rape victims in the federal cases discussed above. Indeed, they asked the victims the exact questions that the DOJ identified as discriminatory in its 2015 and 2022 Guidances, discussed in Part I.[130] In the Ninth Circuit case, *Marlowe v. City and County of San Francisco*, the victim was drugged, kidnapped, and raped during a city-wide celebration, where thousands of people were present.[131] After evidence was collected in a rape kit, the victim met several times with a member of the San Francisco Police Department. The officer "strongly discouraged" her "from further pursuing her case, indicating that it was too much work for the SFPD to investigate and prosecute a rape in which alcohol was involved."[132] A few months later, when the victim again tried to follow up on the status of her rape kit, she was told that,

> due to the passage of time, her case was considered 'inactive' and was placed in a storage facility. SFPD also told Marlowe that because she was 'a woman,' 'weighs less than men,' and

---

[127] *Id.*

[128] *Id.*

[129] The plaintiffs asked the U.S. Supreme Court to reverse the Fifth Circuit's findings. The Supreme Court denied *certiorari*, even though, among other things, as the petitioners pointed out, the Fifth Circuit never addressed whether the dismissal of their equal protection claims was proper. *Beckwith*, 140 S. Ct. 1127 (2020) (Mem.); Petition for Writ of Certiorari at 28, *Beckwith*, 2020 WL 374386.

[130] *See generally*, Part I of this Article.

[131] Complaint at 2–3, Marlowe v. City & County of S.F., 753 F. App'x 479 (9th Cir. 2019).

[132] *Id.* at 4.

> has her 'menstruations,' that Marlowe should not have been out partying with the rest of the city on the day she was drugged, kidnapped, and forcibly raped.[133]

She was also told that the police department had "more important" cases to investigate than rape cases.[134]

Similarly, in *Beckwith v. City of Houston*, from the Fifth Circuit, the Houston Police Department lied, falsely telling the rape victims that their rape kits would be tested in a short period of time. A detective implied multiple times that one of the plaintiffs was a prostitute,[135] that the "rape was her fault[,] and discouraged her from filing a report as it was unlikely the suspect would be caught and that 'these things happen to these types of women.'"[136] Five years later when Plaintiff's sexual assault kit was finally tested, Plaintiff was notified that the DNA in her rape kit matched a man who had "had a long history of sexually assaulting women, including a minor child," and whose DNA was on file with the state for over 20 years, since 1991.[137]

Another plaintiff in the Fifth Circuit case was treated with similar disdain. The Houston Police department would not believe that she was raped by an intruder who broke into her house. The police kept insisting that the victim's boyfriend had entered the home and had sex with her. They also discouraged her from filing a police report of the rape.[138]

D. The U.S. Supreme Court Has Refused to Hear the Rape Kit Appeals

The U.S. Supreme Court has twice refused *certiorari* to resolve issues related to the failure to process rape kits.[139] As such, police departments have no incentive to test DNA evidence that could easily lead them to rapists, and that could prevent more rapes, because they cannot be sued for failing to do so. Indeed, the logical conclusion of the Supreme Court's silence is that the longer law enforcement stonewalls victims,

---

133 *Id.* at 5.

134 *Id.*

135 *Beckwith*, No. 4:17-CV-02859, 2018 WL 4298345, at 18a (S.D. Tex. Aug. 1, 2018).

136 *Id.* at 18a–19a.

137 *Id.* at 3a.

138 *Id.* at 20a. As Professor Colb has written, when law enforcement investigating rapes ask victims if they have a boyfriend, "they believe—without apparent foundation—that young women routinely invent rape accusations as a means of explaining why they cheated on their boyfriends." Colb, *supra* note 37.

139 *Marlowe*, 140 S. Ct. 244 (2019) (Mem.); *Beckwith*, 140 S. Ct. 1127.

and even lies to them, the more law enforcement is protected. We can assume that most rape victims do not read federal appellate court decisions on rape. Rape victims therefore have no idea that, as they are recovering from trauma, they have to start planning on suing the very agencies and people that they are relying on for help. Rape victims are not aware of federal court findings that they should not believe when law enforcement tells them that their rape kits are being tested. The reality is that if a rape victim is told that her rape kit is being tested, she believes it. And that hurts her, as the statute of limitations clock for her to sue is already ticking.

III
Federal Court Decisions Stand in Stark Contrast to Decisions Issued by Human Right Tribunals

In direct contrast to federal court holdings, there is well-developed case law in both the Inter-American and the European human rights systems that holds that failure to investigate and prosecute rape violates rape victims' human rights. Those rights have been extrapolated from broad positive rights articulated in various international human rights treaties that deal with the dignity of persons, such as "the right to respect . . . private and family life."[140] As such, the failure of governments to investigate rape, a violent sex crime, infringes on the very essence of personhood and individual autonomy.

Additionally, as will be discussed in detail below, international courts have found that law enforcement's failure to investigate and prosecute rape cases rises to the level of "torture or inhuman or degrading treatment or punishment." According to international tribunals, the obligation by countries to investigate sex crimes is so great that failing to do so is also "inhuman" and "degrading" and akin to torture, one of the most heinous human rights violations. This is a far cry from the way federal courts have summarily dismissed rape victims' requests that law enforcement test the DNA evidence that was already collected by forensic examiners. Federal courts have shown no empathy for rape victims and have not expressed

140 *See, e.g.*, Airey v. Ireland, App. No. 6289/73, Eur. Ct. H.R. at 14 (1979). *Airey* is an interesting decision because it shows the wide-ranging reach of the right to privacy. *Airey* dealt with a woman's inability to divorce her abusive husband because she could not afford to pay a lawyer. The European Court held that Ireland's failure to provide free divorce proceedings violated the woman's right to privacy. *Id.* *Airey* has been expanded to include protection for victims of rape, mandating that their claims be thoroughly investigated.

any words of reprimand to law enforcement related to rape kit backlogs, or even lying about rape kits being processed. They also, as discussed above, do not in any way reprimand law enforcement officials who have lied to rape victims by telling them that their rape kits were processed.

Although the international cases discussed in this section do not mention testing rape kits, they do not need to do so. That is because they state unequivocally, and without any conflicting authority, that failure to investigate and evaluate evidence of rape within a reasonable amount of time violates rape victims' human rights.[141] Failing to test DNA in rape kits is a failure to evaluate evidence, and thus most certainly falls within the ambit of these international rulings.

A. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights has issued multiple opinions that unequivocally hold that a State's[142] failure to investigate and prosecute rape violates the Inter-American Convention on Human Rights. Interpreting that treaty, the Court has held that rape is a form of torture. The Court found, in the 2001 case Ana, Beatriz, and Celia González Pérez,[143] that Mexico violated Articles 8 and 25 of the American Convention on Human Rights.[144]

Rape produces physical and mental suffering for the victim. In addition to the violence suffered at the time that it is perpetrated, victims usually sustain injuries and in some instances become pregnant. Being the object of this kind of abuse also produces psychological trauma resulting from their humiliation on the one hand and victimization on the other, and from the condemnation of members of their community if they report the mistreatment to which they were subjected.[145]

The Court concluded that "the State has failed to fulfill its obligation to investigate the deprivation of liberty, rape, and torture of victims and to prosecute the perpetrators in accordance with the provisions of Articles 8(1) and 25 of the

---

141 *See, e.g.*, Y. v. Slovenia, App. No. 41107/10, Eur. Ct. H.R. at 31 (2015).

142 In this Article, the word "State," with a capital S, refers to a country. I use this language because that is the term that international human rights tribunals use for countries. Later in this Article, when I refer to "states," with a lower-case s, I refer to individual states within the United States.

143 Ana, Beatriz, & Celia Gonzalez Perez v. Mexico, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01 (2001).

144 *Id.* ¶ 90.

145 *Id.* ¶ 47.

American Convention."[146] Article 25 of the American Convention guarantees victims access to courts and judicial proceedings, and states:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[147]

Article 8 of the American Convention on Human Rights states:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.[148]

Upon first glance, it seems that Article 8 protects the rights of people who have been accused of crimes. But the Inter-American Court interprets that provision much more broadly. It has held that Article 8 also protects the rights of crime victims, including rape victims, to seek and receive justice. As the Court stated in *VPC v. Nicaragua,*[149] where a child was raped by her father,

> The Court recalls that the 'due guarantees' of Article 8(1) of the Convention protect the right to due process of the accused and, in cases such as this one, they also safeguard the right of access to justice of the victim of an offense or their next of kin, and the right to know the truth of the family.[150]

Notably, the Inter-American Court's finding that failure to give rape victims their day in court is a human rights violation demonstrates the Court's understanding of the impact that rape has on rape victims. It also recognizes that having the "system" recognize that rape is a serious crime is critical to

---

[146] *Id.* ¶ 90.

[147] *Id.* ¶ 73.

[148] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 147.

[149] V.R.P., V.P.C v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am Ct. H.R. (ser. C) (Mar. 8, 2018).

[150] *Id.* ¶ 218.

healing from that crime. The American Convention on Human Rights requires that law enforcement gather physical evidence to support a rape claim, and also to give psychological support to the rape victim.[151] This access to justice requirement for rape victims is a far cry from the federal court decisions discussed above that were dismissed summarily, in ways that seem to defy logic, at the earliest states of litigation.

The Inter-American Court's analysis of law enforcement's failure to investigate rape does not stop with its finding that rape victims should have access to justice through judicial proceedings. The court has stated clearly that failure to investigate and prosecute rape promptly is a form of gender discrimination, in violation of Article 24 of the American Convention. Article 24 states: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."[152]

The Inter-American Court's equality analysis is best exemplified by the 2013 case *Paloma Angélica Escobar Ledezma v. Mexico*,[153] where the Court found that Mexico violated the American Convention's Articles 8 and 25 for not promptly investigating rape allegations.[154] The Court held that a State has a heightened duty to investigate crimes under the equal protection provision of Article 24 if a certain crime, like rape, is typically committed against women.

The Inter-American Court, for its part, has noted that in cases of violence against women, the duty to effectively investigate takes on additional meaning. Also, to effectively conduct an investigation, the states should investigate with a gender perspective.[155]

Similarly, in 2014, in *Case of Veliz Franco v. Guatemala,*[156] the Court found that Guatemala violated Articles 8, 24, and 25 of the American Convention. Guatemala breached Article 8 by prolonged delays in a rape investigations. It violated Article 24's equality guarantees, because "the attitudes of the State officials . . . are evidence of stereotyping and would have

[151] *Ana, Beatriz, & Celia Gonzalez Perez.*

[152] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, 151.

[153] Paloma Angélica Escobar Ledezma v. Mexico, Case 12.551, Inter-Am Comm'n H.R., Report No. 51/13 (2013).

[154] *Id.* ¶ 114.

[155] *Id.* ¶ 80.

[156] Veliz Franco v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) (May 19, 2014).

contributed to the lack of due diligence in the investigation."[157] As the Court stated:

> State authorities should open a genuine, impartial and effective investigation *ex officio* as soon as they are made aware of acts that constitute violence against women, including sexual violence. Thus, in the case of an act of violence against a woman, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's duty to reject violence against women and the State's obligation to eradicate this and to ensure that victims have confidence in the State institutions established to protect them.[158]

Even though the Inter-American Court has not specifically addressed the issue of whether failure to process rape kits violates a victim's human rights, all of the Court's holdings related to rape investigations make clear that investigating rape allegations requires the prompt collecting and examining of all evidence. That, of course, would include DNA evidence already collected in a rape kit. As the Court has stated:

> In a criminal investigation into sexual violence, the investigative procedures must be coordinated and documented, and the evidence handled diligently, taking sufficient samples, performing tests to determine the possible authors of the act, obtaining other evidence such as the victim's clothes, the immediate inspection of the crime scene, and ensuring the correct chain of custody.[159]

B. The European Court of Human Rights

The European Court of Human Rights also considers a State's failure to investigate and prosecute rape as a human rights violation, anathema to various provisions of the European Convention on Human Rights ("European Convention"), including those that guarantee the right to privacy, access to justice, and the right to be free from torture or cruel, inhuman, or degrading treatment.

Between 2003 and 2019, the European Court of Human Rights considered seven cases dealing with States' failures to

---

[157] *Id.* ¶ 162.
[158] *Id.* ¶ 185.
[159] *Id.* ¶ 188.

investigate rapes.[160] Those cases were analyzed primarily under Articles 3, 13, and 8 of the European Convention on Human Rights.

Article 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[161] The European Court has read into Article 3 an obligation to investigate and prosecute human rights abuses in a timely fashion:

> 113. Where an individual raises an arguable claim that she or he has suffered treatment infringing Article 3 at the hands of State agents, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention', requires by implication that there should be an effective official investigation. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[162]

The European Court's opinions make clear that suffering Article 3 violations at the hands of State agents does *not* require (or mean) that State actors themselves actually committed acts of violence—like rape. Rather, suffering violations at the hands of the State includes situations where public officials do not investigate allegations of rape in a timely fashion. So, even though Slovenia convicted and sentenced an individual for being part of a gang rape, Slovenia violated Article 3 of the European Convention because it took over 20 years to prosecute the case.[163] As such, the failure to investigate a rape allegation within the statute of limitations period violates Article 3.[164]

---

160 Those seven cases were all from Eastern Europe: three cases were from Slovenia, two from Bulgaria, one case was from Moldova, and one case was from Slovakia. Y. v. Slovenia, App. No. 41107/10, Eur. Ct. H.R. (2015); W. v. Slovenia, App. No. 24125/06, Eur. Ct. H.R. (2014); M.A. v. Slovenia, App. No. 3400/07, Eur. Ct. H.R. (2015); P.M. v. Bulgaria, App. No. 49669/07, Eur. Ct. H.R. (2012); M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. (2003); I.G. v. Moldova, App. No. 53519/07, Eur. Ct. H.R. (2012); MMB v. Slovakia, App. No. 6318/17, Eur. Ct. H.R. (2019).

161 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Nov. 4, 1950, No. 2889, 213 U.N.T.S. 221, 224.

162 EUR. CT. OF HUM. RTS., GUIDE ON ARTICLE 3 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf [https://perma.cc/SB2L-E3C2] (internal citations omitted).

163 *M.A. v. Slovenia*.

164 *P.M. v. Bulgaria*, ¶ 66–67.

> The Court finds . . . that rape is for its victims an offence of manifestly debasing character and thus emphasizes the State's procedural obligation arising in this context . . . . The minimum standards as to effectiveness defined by the Court's case-law also include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness.[165]

The European Court, like the Inter-American Court, has also held that failure to prosecute rapes denies rape victims access to justice, in violation of Article 13 of the European Convention.[166] Article 13 states:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[167]

As such, Turkey violated Article 13 when it failed to take seriously the kidnap, rape, and torture of a victim, when the prosecutor did not conduct a full investigation, and when the doctor who was called in to investigate the rape failed to take swabs from the victim (ostensibly to test for DNA evidence) and was more concerned about the victim's virginity than the abuse.[168] The inadequate investigation was a violation of the right to an effective remedy under Article 13.[169]

Failure to investigate and prosecute rape also violates Article 8(1) of the European Convention, which guarantees the right to privacy: "Everyone has the right to respect for his private and family life, his home and his correspondence."[170] Notably, Article 8(2) makes clear that this right to privacy *must* be guarded at all costs, unless there is a public emergency. Article 8(2) states:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests

---

165 Maslova & Nalbandov v. Russia, App. No. 839/02, Eur. Ct. H.R. at 12–13 (2008) (internal citations omitted).

166 Aydin v. Turkey, 57/1996/676/866, Eur. Ct. H.R. (1997).

167 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Apr. 11, 1950, No. 2889, 213 U.N.T.S. 221, 232.

168 *Aydin v. Turkey*, ¶¶ 24–25.

169 *Id.* at ¶¶ 103–09.

170 Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Nov. 4, 1950, No. 2889, 213 U.N.T.S. 221, 230.

> of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[171]

The European Court has held that rape investigations must respect a victim's personal integrity and privacy. This right to privacy is strongest for child victims of sexual abuse.[172] As such, Slovenia violated Article 8 when it did not handle the investigation of the repeated rape of a teenager by her coach in a way that respected the victim. Investigators met with the victim, outside of her parents' presence, and took evidence from the victim in a disrespectful manner.[173]

The international tribunals' findings that failing to investigate and prosecute rape is a violation of one's right to respect and privacy, and a form of torture, inhuman, or degrading treatment[174] are bold and unparalleled in U.S. law. What is most powerful about these international decisions is that the courts recognize that rape is a serious offense that can cause irreparable harm to victims. Both the European Court and the Inter-American Court recognize that rape causes serious harm to rape victims' psyches and harms their very personhood. The failure to believe the victim, investigate her allegations, and prosecute offenders exacerbates the human rights violation of rape, and because of that, becomes a human rights violation in itself.

These human rights decisions are a far cry from U.S. courts' treatment of rape victims who sought judicial relief to have their rape kits processed. There is a fundamental difference between the international tribunals' recognition of the serious harm caused by rape and the U.S. courts' dismissal of rape kit lawsuits before even getting to the merits of the case. International tribunals have recognized that States have an obligation to minimize harm caused by rape by investigating and prosecuting rapes. U.S. courts, on the other hand, have found that law enforcement has no obligation to investigate

---

171 *Id.*

172 A & B v. Croatia, App. No. 7144/15, Eur. Ct. H.R. ¶¶ 106–111 (2019); MMB v. Slovakia, App. No. 6318/17, Eur. Ct. H.R. at ¶ 61 (2019).

173 Y. v. Slovenia, App. No. 41107/10, Eur. Ct. H.R. at ¶ 103 (2015).

174 M.C. v. Bulgaria, App. No. 39272/98, Eur. Ct. H.R. (2003); *Aydin v. Turkey*; *MMB v. Slovakia*; *Y. v. Slovenia*; W. v. Slovenia, App. No. 24125/06, Eur. Ct. H.R. (2014); I.G. v. Moldova, App. No. 53519/07, Eur. Ct. H.R. (2012); M.A. v. Slovenia, App. No. 3400/07, Eur. Ct. H.R. (2015); P.M. v. Bulgaria, App. No. 49669/07, Eur. Ct. H.R. (2012).

any crime,[175] including when orders of protection exist.[176] U.S. courts' dismissal of rape kit cases also send a clear message that there are no legal repercussions for law enforcement that exhibits textbook signs of gender discrimination, and that lies to rape victims about their rape kits.

IV
State Courts May Provide Justice That Rape Victims Deserve

State courts are more likely to provide relief to rape survivors who want their rape kits tested than federal courts. State courts have historically read their state constitutions broadly to recognize rights not recognized by the federal constitution. Those rights have included marriage equality, and more recently, the right to abortion. Additionally, advocates can make a strong argument that state courts consider international human rights law as persuasive precedent in interpreting state constitutions.

A. State Constitutions Offer Broader Rights

Using state constitutional law to advance rights that have been denied by federal courts is not a new concept. Justice William Brennan, stalwart civil rights guardian of the Warren Court, urged advocates not to rely solely on federal courts. He acknowledged the limitations of his own court (and all federal courts) in offering adequate remedies, particularly for civil rights violations. In a 1977 Harvard Law Review article, he encouraged advocates to file civil rights suits in state courts for broader protection.[177] Marriage equality demonstrates state courts' broad powers in interpreting state constitutions. In 2003, the Massachusetts Supreme Judicial Court ("MA SJC") was the first court in the U.S. to recognize marriage equality based on the Massachusetts Constitution's guarantee of equality.[178] The MA SJC's decision started a domino effect, opening

[175] *See generally* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[176] *See generally* Town of Castle Rock v. Gonzalez, 545 U.S. 748 (2005).

[177] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[178] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). *See also* Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 Vt. L. Rev. 49 (1988).

the door for other state courts, state legislatures, and eventually the U.S. Supreme Court to recognize marriage equality.[179]

We are experiencing a similar moment of state court muscle-flexing at this point in time. For example, in 2023, the Montana District Court, citing the state constitution's requirement to "maintain and improve a clean and healthful environment," held that the state must consider environmental impacts, including greenhouse gas emissions, when issuing permits for fossil fuel development.[180] In the area of women's rights, since the summer of 2022, when the U.S. Supreme Court reversed *Roe v. Wade*[181] in *Dobbs v. Jackson Women's Health Organization*,[182] state courts, citing their own constitutions, have invalidated statutes that limit or prohibit abortions. By doing so, state courts are asserting themselves as counterweights to both the U.S. Supreme Court and conservative state legislatures that are trying to limit women's rights by restricting abortions. Notably, it is not only state supreme courts that are overturning anti-abortion statutes. Lower courts are also interpreting state constitutions broadly. While lower state courts could defer to their state supreme courts to decide one of the most hot-button issues of our time, they are not doing so.

Several of the decisions striking down abortion restrictions are based on the state constitutional right to privacy. Courts at all levels are finding the right to privacy protects access to abortions.

<u>South Carolina</u>: In 2023, in *Planned Parenthood South Atlantic v. South Carolina*, the South Carolina Supreme Court held that South Carolina's express constitutional right to privacy protected a woman's right to abortion.[183] After the state passed additional laws banning most abortions after six weeks, a judge in the South Carolina State Circuit Court blocked

---

179 *See* Obergefell v. Hodges, 576 U.S. 644 (2015); *see, e.g.*, Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013); Martinez v. Cnty. of Monroe, 850 N.Y.S.2d 740 (App. Div. 2008). The 2011 Marriage Equality Act passed in New York State and signed by Governor Cuomo was the first state statutory provision recognizing marriage equality.

180 Held v. Montana, No. CDV-2020-307, 85, 100 (D. Mont. Aug. 14, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf [https://perma.cc/HRK8-WLRT].

181 Roe v. Wade, 410 U.S. 113 (1973) (*overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)).

182 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

183 Planned Parenthood S. Atl. v. South Carolina, 882 S.E.2d 770, 774 (S.C. 2023).

enforcement of those new laws on the same grounds as *Planned Parenthood South Atlantic.*[184]

Montana: A Helena District Court judge cited the state constitution's right to privacy in issuing a preliminary injunction in May 2023, blocking a statutory ban on dilation and evacuation abortions (performed after fifteen weeks of pregnancy).[185] That decision was the second time that Montana state courts turned to the state constitution to uphold abortion rights post *Dobbs.* In 2022, citing the Montana Constitution's rights to privacy and equal protection, Montana's Supreme Court also blocked three 2021 state laws that restricted abortion services and banned abortions after 20 weeks of pregnancy.[186]

Ohio: The Hamilton County Court of Common Pleas issued a preliminary injunction, in 2022, against a six-week abortion ban, citing privacy, safety, and healthcare rights in Ohio's Constitution.[187]

The Ohio lower court's protection of abortion rights is noteworthy. The court could easily have relied solely on the right to privacy to strike down abortion restrictions. This would have been in keeping with what other state courts have done. The Ohio court went beyond that. It used multiple constitutional provisions to recognize the right to choose, echoing the "penumbra of rights" theory used in *Roe* (rejected fifty years later by the U.S. Supreme Court in *Dobbs*).[188] It found that a combination of constitutional provisions (privacy, healthcare, and safety) guaranteed abortion access. This demonstrates not only the breadth of state courts' powers to recognize rights not explicitly mentioned in state constitutions, but also their

---

184 Planned Parenthood S. Atl. v. South Carolina, No. 2023-CP-40-002745 (S.C. 5th Cir. Ct. C.P. Richland Cnty. May 26, 2023) (order granting preliminary injunction).

185 Planned Parenthood of Montana v. Montana, No. ADV-2023-231 (Mt. 1st Jud. Dis. Ct. May 18, 2023), https://bloximages.chicago2.vip.townnews.com/helenair.com/content/tncms/assets/v3/editorial/2/77/2771020c-f592-11ed-9c2b-ab628f134519/646646beb78a7.pdf.pdf [https://perma.cc/9XKF-BEHM]. *See also* Armstrong v. State, 989 P.2d 364, 384 (Mont. 1999) (discussing the state constitution's right to privacy).

186 Planned Parenthood of Montana v. State, 515 P.3d 301, 307–08 (Mont. 2022).

187 Preterm-Cleveland v. Yost, No. A2203203 (C.P. Hamilton Cnty., Ohio Sept. 14, 2022), https://www.aclu.org/cases/preterm-cleveland-v-david-yost#legal-documents [https://perma.cc/TY42-AMQY]. The injunction is in effect while litigation works its way through the appeals process. *Preterm-Cleveland*, 169 Ohio St. 3d 1457 (2023), https://www.aclu.org/cases/preterm-cleveland-v-david-yost [https://perma.cc/TY42-AMQY].

188 Roe v. Wade, 410 U.S. 113, 152 (1973) (*overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022)).

willingness to do so in one of the most politically divisive issues of our time.

This Ohio decision is not unique. A Wyoming court has read the state constitutional right to healthcare as guaranteeing access to abortions.[189] An Iowa Polk County judge temporarily blocked a law that banned abortions after six weeks, finding that it likely violates the Iowa Constitution's due process clause.[190] The Court used the "undue burden" test articulated in *Planned Parenthood v. Casey* as authority,[191] even though the U.S. Supreme Court overturned *Casey* in *Dobbs*. Alaska, Florida, and Kansas state court decisions that predate *Dobbs* also found that the right to an abortion is protected by state constitutional provisions.[192]

These decisions overturning abortion restrictions demonstrate that state courts are not afraid to use state constitutions to protect women's rights. Rape survivors can seize this moment and use these decisions to argue that state constitutions require law enforcement to test rape kits. They can cite the handful of cases discussed above to demonstrate that state constitutional provisions that recognize the right to equal protection, and the right to privacy, have already been read broadly to protect women's rights, including in ways that have been recently rejected by the U.S. Supreme Court.[193]

---

189 Johnson v. Wyoming, No. 18853 (Dist. Ct. Teton Cnty. Wyo. 9th Jud. Dist. Apr. 17, 2023).

190 Planned Parenthood of the Heartland v. Reynolds *ex rel.* State of Iowa and Iowa Bd. of Medicine, No. EQCE089066, at 3 (D. Ct. Iowa July 17, 2023).

191 Planned Parenthood of the Heartland v. Kim Reynolds *ex rel.* State of Iowa and Iowa Board of Med., No. EQCE089066, 1, 6 (D. Ct. Polk Cnty. Iowa July 17, 2023), https://www.aclu-ia.org/sites/default/files/05771_eqce089066_orot_12220552.pdf [https://perma.cc/2NZT-EB7V]. *See also* Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

192 *See* Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 965 (Alaska 1997) (holding that the Alaska State Constitution's right to privacy includes reproductive rights, including abortion, and the Valley Hospital Association's policy limiting abortion unconstitutionally restricted the right to abortion); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1245–1247 (Fla. 2017) (reiterating that the Florida State Constitution's express right of privacy protects a woman's right to choose, and finding that a law imposing a twenty-four hour waiting period on women who seek abortion is subject to strict scrutiny and is likely unconstitutional); Hodes & Nauser, M.D.s, P.A. v. Schmidt, 440 P.3d 461, 486 (Kan. 2019) (holding that the Kansas Constitution's Bill of Rights includes the right to abortion, and that Kansas cannot restrict that right without a compelling interest which is narrowly tailored).

193 They can also cite to the rights to healthcare and safety contained in various state constitutions and recently cited by the Ohio and Wyoming Supreme Courts to demonstrate that state constitutional rights should be read broadly

As additional support for their arguments, rape survivors can also invoke the international human rights decisions discussed in Section III, guaranteeing the right to equality and privacy. Those provisions, in many instances, have similar wording to state constitutional provisions guaranteeing those same rights. And international courts have interpreted those provisions to require that rapes be taken seriously by law enforcement and investigated in a reasonable amount of time.

B. International Human Rights Law Can Be Used to Support State Constitutional Law Claims

State courts, much more so than federal courts, are well suited to incorporate human rights law into their own jurisprudence, and to use international human rights law to interpret state constitutional provisions. Professor Martha Davis pioneered this theory and has written extensively about it. In her article *The Spirit of Our Times: State Constitutions and International Human Rights*,[194] Davis compares various international human rights instruments with several state constitutions. She shows that some state constitutions either borrow language from international human rights instruments or closely track those instruments—like the Universal Declaration of Human Rights.[195] Some "state constitutional provisions and the laws that implement them are direct analogues to international law approaches that encourage or mandate affirmative attention to areas of economic and social well-being."[196]

Because of this, Davis posits, state courts *should* look to international law to interpret state constitutional provisions in the same way that they look to other states court decisions.[197] "[D]omestic sources should be tested against, and harmonized

to protect rape victims. They can argue that the mental health of rape victims should be included in the right to healthcare (if it has not been recognized already), and the right to safety most certainly should protect rape victims, as data, discussed in Part I, show that most rapists are serial rapists. The international human rights provisions that match these constitutional rights most certainly exist. They are beyond the scope of this Article, however, and will not be discussed herein.

194 Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006); *see also* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21–27 (2004).

195 Davis, *supra* note 194 at 371.

196 *Id.* at 373. Davis discusses the rights to welfare, health, education, and the right to work.

197 *Id.* at 365.

with, relevant developments in international law that reflect the implementation of legal provisions similar to those in state constitutions."[198]

That is the case here. There are very close similarities between provisions in the human rights instruments discussed in detail in Part III and state constitutional provisions related to the right to privacy and equal protection/equal rights.

At least eight state constitutions contain explicit rights to privacy.[199] Other state supreme courts have read the right to privacy into their constitutions when the right is not explicitly there.[200] Those rights of privacy mirror the right to privacy in the European Convention on Human Rights. As discussed in Part III, within a ten-year span, the European Court of Human Rights has interpreted Article 8 of the European Convention at least seven times to find that countries that do not investigate and prosecute rape violate the right to privacy.

Similarly, while not all state constitutions contain explicit equal protection clauses, state supreme courts in some states, like New Jersey, have read equal protection clauses into their constitutions.[201] Those equal protection clauses have been used to promote gender equality, much in the same way that international tribunals have read gender equality into broad equal protection provisions.

Additionally, eighteen states have explicit equal rights amendments based on gender in their constitutions.[202] Those equal rights provisions either closely mirror or are identical to the equality provision in the Inter-American Convention on

---

198 *Id.* at 409.

199 Including Alaska, Arizona, Florida, Hawaii, Illinois, Mississippi, Montana, New Hampshire, and Rhode Island. *See* Quinn Yeargain, *What All State Constitutions Say About Abortion, and Why It Matters*, BOLTS MAG. (June 30, 2022), https://boltsmag.org/state-constitutions-and-abortion/ [https://perma.cc/LA84-FL58].

200 Including Arkansas, California, Connecticut, Georgia, Idaho, Kentucky, Minnesota, New Jersey, and Washington. *See, e.g.*, *id.*; Larry W. Thomas, *Legal Issues Concerning Transit Agency Use of Electronic Customer Data*, TRANSIT COOP. RSCH. PROGRAM 1, (36) 2017, https://nap.nationalacademies.org/read/24730/chapter/12 [https://perma.cc/Y7AQ-9EDA].

201 *See* Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

202 Many states have an express Equal Rights Amendment in their State Constitution, including Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Montana, New Hampshire, Nevada, Oregon, Pennsylvania, Texas, Virginia, and Wyoming. *State-Level Equal Rights Amendments*, BRENNAN CTR. FOR JUST. (Dec. 6, 2022), https://www.brennancenter.org/our-work/research-reports/state-level-equal-rights-amendments [https://perma.cc/C5W5-QQPT]; *see also Ratification Info State by State*, EQUAL RTS. AMEND., https://www.equalrightsamendment.org/era-ratification-map [https://perma.cc/5X3G-5YBQ] (last visited July 28, 2023).

Human Rights. As discussed in Part III, the Inter-American Court has invoked Article 24, which guarantees equality, many times in finding that countries that did not investigate rape violated rape victims' human rights.

No conflict exists between international law or domestic law for interpreting either the right to privacy or equal rights provisions that might give state judges pause in consulting or adopting international tribunal jurisprudence into their constitutional analyses. First, there are no state constitutional law decisions that have found that rape victims cannot compel rape kit testing using state constitutions. Nobody has brought such a lawsuit. Second, to the extent state courts look to federal courts for guidance, no federal law or court decision conflicts in any way with using the right to privacy or equal rights to compel rape kit testing. That is because state constitutional provisions explicitly guaranteeing the right to privacy and gender equality have no exact counterpart in the federal constitution, as interpreted by the U.S. Supreme Court.

The U.S. Supreme Court wrote the right of privacy out of the U.S. Constitution in *Dobbs*. Additionally, there is no gender-specific equal rights amendment in the federal constitution (despite efforts over the past century to amend the Constitution to include one). So, state courts have textual grounds for going further to protect women's rights than federal courts have been willing to do. State courts can also rely on the multiple findings by the DOJ that failure to test rape kits and investigate rape is a form of gender bias and violates rape victims' equal protection rights. That means state courts have absolutely no limitations in borrowing from the Inter-American Court in interpreting their state constitutions' equal rights provisions.

The federal cases discussed in Part II, finding that the U.S. Constitution's Equal Protection clause does not compel law enforcement to test rape kits, do not pose impediments for state courts either. Those cases never actually addressed the gender-based equal protection claims substantively. So, there is no negative federal judicial precedent that would influence state courts to dismiss claims. While some danger exists that state courts might borrow the "comparator" analysis used by federal courts to dismiss lawsuits, there are strong arguments against doing so. The Ninth Circuit and Fifth Circuit made clear that their decisions have no precedential value. And while federal courts would most likely still consider those holdings in some capacity, state courts can more readily disregard those decisions because of the disclaimers.

That means that the only appellate court decision on the matter would be the Sixth Circuit's *Doe v. City of Memphis.* That decision actually recognizes that gender discrimination can indeed exist in unfair police practices in the way rape claims are treated. It also held that it is worth examining, through discovery, whether gender discrimination was responsible for law enforcement's decisions to not test thousands of rape kits.

Additionally, advocates can use a combination of state constitutional access to justice provisions, as well as the access to justice provisions in the Inter-American Convention on Human Rights (Articles 8 and 25), and the European Convention on Human Rights (Articles 8 and 13), discussed in Part III, to argue that the statute of limitations was tolled when rape victims were told by law enforcement that their rape kits would be evaluated.

That means that in interpreting their state constitutional provisions guaranteeing privacy, equal protection, and equal rights, state courts can look freely to international human rights decisions that interpret almost identical rights provisions in human rights treaties.[203] Indeed, there is ample support from the U.S. Supreme Court for looking to international and transnational law to interpret domestic constitutional law.

In 2002, in *Atkins v. Virginia*, and in 2005, in *Roper v. Simmons*, the Supreme Court used international law to interpret the Eighth Amendment, finding that international consensus prohibited the death penalty for persons with certain mental disabilities[204] as well as for individuals who were convicted of crimes when they were children.[205] The Supreme Court also

---

[203] *Medellin v. Texas*, 552 U.S. 491, 504–505 (2008), makes clear that the international decisions discussed in Part III are not binding law on the U.S. *Medellin* made it clear that the federal government, states, and state courts are not bound by holdings of international tribunals (even those specifically directed at the United States), unless Congress specifically directs those governmental bodies to follow an international tribunal's holdings. Nonetheless, state courts may *choose* to incorporate human rights decisions into their jurisprudence, and according to Professor Davis, they should. As Davis points out, some state supreme court justices have made very clear that state courts have an obligation to consider international and transnational law. The late Judge Judith S. Kaye, who was the Chief Judge of the New York Court of Appeals (New York State's highest court) from 1993 to 2008; Penny White, a former Justice of the Tennessee Supreme Court, from 1994 to 1996; and Margaret Marshall, the former Chief Justice of the Massachusetts Supreme Judicial Court, from 1999 to 2010 all encouraged litigants to use international law in state court. *See, e.g.*, Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights Law*, 30 N.Y.U. Rev. L. & Soc. Change 359 (2006).

[204] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[205] Roper v. Simmons, 543 U.S. 551, 578 (2005).

overturned its 1986 decision *Bowers v. Hardwick*[206] in 2003, in *Lawrence v. Texas*, finding that it was a violation of the Due Process Clause to criminalize private and consensual homosexual conduct.[207] Looking to international and comparative law, the Court stated that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct," and that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[208] These U.S. Supreme Court decisions demonstrate that state courts have ample legal support for looking to international law to interpret important constitutional issues.

CONCLUSION

Rape survivors would be on strong footing if they filed actions in state court challenging the rape kit backlog, using a combination of state constitutional law and international human rights law to support their claims. Now is the time to take action, as state courts have become emboldened to uphold abortion rights in the wake of the *Dobbs* decision. Defying conservative state legislatures, state courts at every level are reading state constitutional provisions broadly to protect access to abortions. They are holding that state constitutional provisions guaranteeing privacy, equal protection, due process, and even healthcare, protect abortion access.

Rape survivors should tap into that momentum and ask state courts to continue to read state constitutional provisions guaranteeing equality, equal protection, and privacy broadly to protect women and girls. Although many (if not most) rapes are not reported, 90% of all reported rapes are committed against girls and women. These advocates can cite multiple findings by the DOJ that gender stereotyping of victims and overt gender discrimination lead law enforcement to not investigate rape and not test rape kits. They can also use their own interactions with law enforcement where they have been

---

[206] Bowers v. Hardwick, 478 U.S. 186 (1986) (*overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)).

[207] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[208] *Id.* at 576–77. Although several justices who are still on the Court (Thomas and Alito) spoke strongly in their dissents against looking to international law to interpret the U.S. Constitution, these cases are still good law. For example, in *Atkins*, 536 U.S. 304 at 321, Justice Thomas joined a dissenting opinion that stated that the opinions on the death penalty of the global community were irrelevant.

belittled, accused, and not believed as evidence of gender bias in rape investigations.

If state courts tackle the rape kit backlog debacle, they will be responding to a serious problem, which has left rape victims in the cold, unable to reach closure. We know that at least 25,000 rape kits containing vital DNA evidence that can solve crimes and prevent future rapes are still being warehoused. Hundreds of thousands of rape kits, spanning decades, can no longer be tested because DNA samples have expired.

Law enforcement should not be allowed to continue to belittle rape victims and consciously refuse to test rape-kit DNA evidence that can help solve crimes. Rape survivors now have a roadmap on how to get the justice they deserve, and for which they have waited all too long.