

Promoting Justice for Survivors Through Improved Notification and Re-engagement

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Over the past decade, jurisdictions across the United States began addressing the nationwide issue of untested sexual assault kits. After years of waiting, many survivors of sexual assault will finally receive the answers they deserved years prior. In order to encourage survivor reengagement, however, jurisdictions must develop victim-centered, trauma-informed notification protocols. With improved notification protocols, jurisdictions will be more likely to reengage survivors. This Article first concludes that this reengagement will provide survivors with the best opportunity for their desired form of justice through either the criminal justice system or restorative justice. This opportunity for closure is essential for a survivor’s healing process. Lastly, this Article briefly considers whether jurisdictions should use restorative justice for sexual assault cases involving backlogged kits—an issue that scholars in this field have yet to address.

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INTRODUCTION

As each minute passes in the United States, a person is sexually assaulted.¹ The statistics are staggering—“[one] in [three] women and [one] in [six] men have experienced [or will experience] sexual violence in their lives.”² Further, only a fraction of the hundreds of

¹ See *Why Test All Kits?*, END THE BACKLOG, <https://www.endthebacklog.org/what-is-the-backlog/why-test-all-kits> (last visited Feb. 2, 2023) (“Every 68 seconds, someone is sexually assaulted in the United States.”); *About Sexual Assault*, RAINN, <http://www.rainn.org/about-sexual-assault> (last visited Feb. 2, 2023) (“Every 68 [s]econds, an American is [s]exually [a]ssaulted.”).

² *Know the Facts*, NO MORE, <https://nomore.org/learn/resources> (last visited Feb. 2, 2023); *but see Statistics*, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/statistics> (last visited Feb. 2, 2023) (finding that “[o]ne in five women in the United

thousands of sexual assaults that occur each year are reported to the police.³

When a victim⁴ goes to the hospital or contacts law enforcement regarding a sexual assault, they have the option to receive a sexual

States experienced completed or attempted rape during their lifetime” and 24.8 percent “of men in the [United States] have experienced some form of contact sexual violence in their lifetime”).

³ *Statistics, supra* note 2 (revealing that approximately 25 percent of sexual assaults were reported to the police in 2018); *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Feb. 2, 2023) (noting that about two-thirds of sexual assaults are not reported based on reports from the Department of Justice and the Federal Bureau of Investigation).

⁴ When not using the term “victim notification,” the research tends to use the terms “victim” and “survivor” interchangeably. See Rebecca Campbell et al., *Creating a Victim Notification Protocol for Untested Sexual Assault Kits: An Empirically Supported Planning Framework*, 13 J. FORENSIC NURSING 3, 3 n.2 (2017) [hereinafter *Creating a Victim Notification Protocol*] (using “victim” primarily throughout but noting that it will use both terms because “these terms are more commonly used in multidisciplinary discussions on strategies for resolving large numbers of untested SAKs”); Rebecca Campbell et al., *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol for Untested Sexual Assault Kits (SAKs)*, 24 VIOLENCE AGAINST WOMEN 379, 397 n.1 (2018) [hereinafter *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*] (noting that it will use the terms “interchangeably to reflect that sexual assault is a violent crime that takes tremendous strength and courage to survive”); Caitlin Sulley et al., “At Least They’re Workin’ on My Case?” *Victim Notification in Sexual Assault “Cold” Cases*, 36 J. INTERPERSONAL VIOLENCE 4360, 4360–61, 4365 (2021); COURTNEY E. AHRENS ET AL., COMPREHENSIVE TECHNICAL REPORT OF THE JOYFUL HEART FOUNDATION VICTIM NOTIFICATION PROJECT 2 (2016), https://home.csulb.edu/~000110264/JHF_Technical_Report_FINAL.pdf. But see NOËL BUSCH-ARMENDARIZ ET AL., UNIV. OF TEX. AT AUSTIN INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, KEY COMPONENTS OF BUILDING A SUCCESSFUL VICTIM NOTIFICATION PROTOCOL 3 n.3 (2015), https://sites.utexas.edu/idvsa/files/2019/03/IDVSA-Report_Successful-Notification_Final.pdf (choosing to use “victim” “because this project is grounded in the criminal justice system and the usage acknowledges that a crime has been reported to a law enforcement agency”); NOËL BUSCH-ARMENDARIZ ET AL., UNIV. OF TEX. AT AUSTIN INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE: INSIGHT AND RECOMMENDATIONS FROM VICTIMS AND PROFESSIONALS 4 n.3 (2015) [hereinafter HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE], https://repositories.lib.utexas.edu/bitstream/handle/2152/77476/IDVSA-Report_Victim-Notification_Final.pdf; NOËL BUSCH-ARMENDARIZ ET AL., UNIV. OF TEX. AT AUSTIN INST. ON DOMESTIC VIOLENCE & SEXUAL ASSAULT, SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT 5 n.3 (2015), https://repositories.lib.utexas.edu/bitstream/handle/2152/77504/IDVSA-Report_Notification-CODIS_Final.pdf. To remain consistent with this research, this Article will use the terms “victim” and “survivor” interchangeably. It is important, however, to note that each individual will have their own preference on which term they would like to be referred to, whether “victim,” “survivor,” or something else. SEXUAL ASSAULT KIT INITIATIVE, VICTIM NOTIFICATION: WHY, WHEN, AND HOW—A GUIDE FOR

assault exam.⁵ This exam generates a sexual assault kit, often referred to as “SAK,” which can later be tested for the assaulter’s DNA.⁶ Most jurisdictions across the United States neglected these kits for years, which created a backlog of thousands of kits in each state.⁷ Fortunately, with the help of grant funding and new legislation, most states are in the process of testing these backlogged kits in an effort to solve thousands of previously unsolved sexual assaults.⁸ Additionally, the majority of states have even created mandatory testing timelines to attempt to prevent a future backlog.⁹

Although the United States is making great strides to address the sexual assault backlog, a new issue has arisen that must be addressed to promote healing for survivors—contacting the survivors. It has taken law enforcement years, even decades, to test sexual assault kits.

MULTIDISCIPLINARY TEAMS 1 (2019) [hereinafter VICTIM NOTIFICATION: WHY, WHEN, AND HOW], <https://www.sakitta.org/toolkit/docs/Victim-Notification-Why-When-and-How-A-Guide-for-Multidisciplinary-Teams.pdf>. It is important to be respectful to this and inquire which term they prefer. *Id.*

⁵ *Why Test All Kits?*, *supra* note 1.

⁶ *Id.*

⁷ See *What Is the Backlog?*, END THE BACKLOG, <https://www.endthebacklog.org/what-is-the-backlog> (last visited Feb. 2, 2023); *Explore the Backlog: Untested Kits*, END THE BACKLOG, https://www.endthebacklog.org/#explore_backlog_map/untested-kits (last visited Feb 2., 2023). The exact number of untested sexual assault kits is currently unknown. *Why Accountability*, END THE BACKLOG, <https://www.endthebacklog.org/accountability/why-accountability> (last visited Feb. 2, 2023); *Accountability*, END THE BACKLOG, <https://www.endthebacklog.org/accountability> (last visited Feb. 2, 2023); Sulley et al., *supra* note 4, at 4361; AHRENS ET AL., *supra* note 4, at 13; NANCY RITTER, U.S. DEP’T OF JUST., NAT’L INST. OF JUST., DOWN THE ROAD: TESTING EVIDENCE IN SEXUAL ASSAULTS 11 (2016) [hereinafter DOWN THE ROAD], <https://www.ojp.gov/pdffiles1/nij/249805.pdf>. Several jurisdictions have either not reported the number of untested kits in their possession or have refused to provide this information. See, e.g., Vanessa Nason, *Biloxi Wants to Charge \$5,000 for Records on Their Rape Kit Backlog*, MUCKROCK (May 31, 2017), <https://www.muckrock.com/news/archives/2017/may/31/biloxi-rape-kit-fee> (detailing that a police department in Mississippi requested an unnecessarily high fee of \$5,000 to provide this information); *Mississippi*, END THE BACKLOG, <https://www.endthebacklog.org/state/mississippi> (last visited Feb. 26, 2023); *Maine*, END THE BACKLOG, <https://www.endthebacklog.org/state/maine> (last visited Mar. 16, 2023). Unfortunately, “[e]ach untested kit represents a missed opportunity to bring justice and healing to a survivor, and increased safety to a community.” *Why Accountability*, *supra* note 7.

⁸ For a more detailed discussion about the sexual assault kit backlog and the steps that many states have taken in order to address their backlogs, see Bryan Schwartz, *Justice Delayed Is Not Justice Denied: Considerations and Concerns for Addressing the National Sexual Assault Kit Backlog*, 90 U. CIN. L. REV. 148, 168–70, 190–92 (2021).

⁹ See *Pillar: Test New Kits*, END THE BACKLOG, <https://www.endthebacklog.org/the-six-pillars/pillar-test-new-kits> (last visited Feb. 2, 2023).

After so many years, law enforcement must now contact the victims to let them know that their kits have finally been tested. The way the victim is notified can have a drastic effect on what happens moving forward for both the victim and the prosecution. Ideally, the right form of notification will encourage the victim to reengage with law enforcement and to consider the different options that lay ahead.

This Article focuses on the importance of improving notification protocols for survivors with a backlogged kit to promote survivor reengagement.¹⁰ For background purposes, this Article briefly addresses the sexual assault kit and the process for obtaining, impounding, and testing the kit. It will further explore the importance of these kits for prosecuting sexual assault cases. This Article will then provide an overview of the existing research surrounding the best practices guidelines for developing a notification protocol, relying on input from survivors and criminal justice professionals. Similarly, this Article will discuss two additional ways for jurisdictions to improve the notification and communication process with survivors—through tracking systems and “right to notice” laws. Finally, this Article will argue that improved survivor notification that leads to reengagement will provide survivors with the best opportunity for closure, which is essential for the healing process, through either the criminal justice system or restorative justice. The next Part will begin the discussion of whether restorative justice is appropriate for sexual assault cases involving backlogged kits.

¹⁰ When referring to notification surrounding a backlogged sexual assault kit, the majority of the research refers to it as “victim notification.” See SEXUAL ASSAULT KIT INITIATIVE, *supra* note 4; U.S. DEP’T OF JUST., NAT’L INST. OF JUST., SEXUAL ASSAULT KITS: USING SCIENCE TO FIND SOLUTIONS 17 (2015) [hereinafter USING SCIENCE TO FIND SOLUTIONS], <https://nij.ojp.gov/sites/g/files/xycguh171/files/media/document/unsubmitted-kits.pdf>; *Victim Notification, END THE BACKLOG*, <https://www.endthebacklog.org/victim-notification> (last visited Feb. 2, 2023); U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE 2–3 (2016), <https://www.ojp.gov/pdffiles1/nij/249153.pdf>; DOWN THE ROAD, *supra* note 7, at 22–23; *Victim Notification Recommended Protocol*, UTAH SEXUAL ASSAULT KIT INITIATIVE (SAKI) 1 (2018) [hereinafter UTAH NOTIFICATION PROTOCOL], <https://publicsafety.utah.gov/wp-content/uploads/sites/27/2018/05/SAKI-Victim-Notification-Protocol-5.2018.docx.pdf>. But see THE STATE OF MD. SEXUAL ASSAULT KIT INITIATIVE, SURVIVOR NOTIFICATION PROTOCOL 3 (2021) [hereinafter MARYLAND NOTIFICATION PROTOCOL], https://mcase.org/assets/files/Maryland_SAKI_Notification_Protocol_-_Oct_2021_final.pdf; OFF. OF THE MO. ATT’Y GEN., SURVIVOR NOTIFICATION RECOMMENDATIONS 1 (2020) [hereinafter MISSOURI NOTIFICATION PROTOCOL], <https://ago.mo.gov/docs/default-source/reports/survivornotificationrecommendations.pdf>.

I. THE BACKLOG AND THE SEXUAL ASSAULT KIT

Even though sexual assault kits are a critical component of a sexual assault investigation, as discussed *infra* Part II, the United States has found itself with a massive backlog of untested sexual assault kits.¹¹ Starting in 1999, investigations revealed that jurisdictions had failed to test hundreds of thousands of sexual assault kits, some dating back as early as 1982.¹² These untested kits simply sat on storage shelves for years.¹³ While each jurisdiction had unique issues that contributed to the backlog, widespread reasons included (1) the early technological limitations on DNA testing,¹⁴ (2) the lack of resources and funding for testing sexual assault kits,¹⁵ (3) the absence of clear guidelines on submitting and testing sexual assault kits,¹⁶ and (4) the tendency of law enforcement to decide not to test kits when they did not believe the victim.¹⁷

¹¹ *What Is the Backlog?*, *supra* note 7.

¹² See REBECCA CAMPBELL ET AL., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP) FINAL REPORT 3 (rev. Dec. 2015) [hereinafter DETROIT SAK PROJECT], <https://www.ojp.gov/pdffiles1/nij/grants/248680.pdf>.

¹³ *Id.*

¹⁴ DOWN THE ROAD, *supra* note 7, at 10 (explaining how DNA technology combined with the unavailability of DNA databases contributed to a backlog in DNA testing). Interestingly, the delays in testing and the subsequent prosecutions have resulted in future convictions. For example, a stranger attacked and raped an individual in her home in Alabama in 1994. Christian Jennings, *REALITY CHECK: 81-Year-Old Rape Survivor Finally Gets Justice After Rape Kit Is Tested*, UTV44 (Jan. 25, 2018) <https://utv44.com/news/local/a-monster-free-for-years>. After the attack, the victim went directly to the hospital and had a sexual assault exam. *Id.* At the time, the only available DNA testing would have required comparing the swabs from the victim to a sample of DNA from the offender. *Id.* Since the offender was a stranger, however, law enforcement did not know who it was and had no way of obtaining a sample of his DNA. *Id.* But, twenty years later, once the Combined DNA Index System (CODIS) was developed, the DNA profiles from the victim's swab matched to the offender, whose DNA was in CODIS. *Id.* In 2018, a jury found the offender guilty of sexual assault. *Id.*

¹⁵ *Why the Backlog Exists*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/why-backlog-exists> (last visited Feb. 2, 2023); DOWN THE ROAD, *supra* note 7, at 10.

¹⁶ *Why the Backlog Exists*, *supra* note 15; DOWN THE ROAD, *supra* note 7, at 10.

¹⁷ *Why the Backlog Exists*, *supra* note 15; DOWN THE ROAD, *supra* note 7, at 10. Studies focusing on Detroit revealed that one major cause of its backlog was “[v]ictim-blaming beliefs and behaviors.” *Id.* Unfortunately, this included law enforcement responses such as “[s]he’s not acting like a real victim” and “[t]his is a ‘he-said, she-said’ situation.” *Id.*

Many states began addressing their sexual assault kit backlogs approximately ten years ago.¹⁸ At present, the majority of the states have started addressing their sexual assault kit backlogs.¹⁹ In fact, nineteen states and Washington D.C. have successfully cleared their backlogs and completed testing all of their previously untested backlogged kits.²⁰ On the other hand, some states have not even begun to address their backlogged kits.²¹ While progress varies by state, sexual assault investigation reform is certainly going in the right direction, with most states clearing their backlogs and beginning to implement legislation to improve the investigation and testing process.²²

Although this is a major step forward in addressing many unsolved sexual assault cases, it also gives rise to new issues, such as victim notification.²³ While this Article will primarily focus on the notification issue, this Part aims to provide helpful background information on the sexual assault kit itself, including what a sexual assault kit is and the importance of these kits in sexual assault investigations.

A. *What Are Sexual Assault Kits?*

A sexual assault kit is simply a package containing evidence from a sexual assault exam.²⁴ When reporting a sexual assault either to law enforcement or a hospital, the victim is given the option to have a sexual assault exam.²⁵ The exam is typically conducted by a specially

¹⁸ See generally *The Six Pillars*, END THE BACKLOG, <https://www.endthebacklog.org/the-six-pillars> (last visited Feb. 2, 2023).

¹⁹ *Explore the Backlog: Reform Status*, END THE BACKLOG, https://www.endthebacklog.org/#explore_backlog_map/reform-status (last visited Feb. 2, 2023).

²⁰ *Pillar: Test Backlogged Kits*, END THE BACKLOG, <https://www.endthebacklog.org/the-six-pillars/pillar-test-backlogged-kits> (last visited Feb. 2, 2023).

²¹ See *Explore the Backlog: Reform Status*, *supra* note 19. Specifically, according to the Joyful Heart Foundation, Mississippi and Maine have failed to begin any type of reform to address their sexual assault backlogs. *Id.* Additionally, jurisdictions within Mississippi, Tennessee, New York, North Dakota, New Hampshire, Maine, New Jersey, and Puerto Rico have failed to report how many backlogged sexual assault kits exist. *Explore the Backlog: Untested Kits*, *supra* note 7.

²² See *Explore the Backlog: Reform Status*, *supra* note 19.

²³ See *Victim Notification*, *supra* note 10.

²⁴ *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> (last visited Feb. 2, 2023).

²⁵ *Id.* It is important to note that the sexual assault exam is completely voluntary. *What Is a Sexual Assault Forensic Exam?*, RAINN, <https://www.rainn.org/articles/rape-kit> (last visited Feb. 2, 2023). The victim has the option to refuse the exam in its

trained sexual assault nurse.²⁶ The exams are several hours long and are extremely invasive.²⁷ If the victim declines to have a sexual assault exam, a sexual assault kit will not be generated.²⁸

When a victim does elect to have a sexual assault exam, the exam typically includes an examination of the victim's body and clothing.²⁹ During this portion, the sexual assault nurse documents and photographs any injuries and other relevant evidence pertaining to the sexual assault.³⁰ Additionally, the exam will conclude with an invasive physical examination of the victim's body.³¹ Depending on what happened, the nurse will examine the vaginal and anal openings of the victim, taking swabs of those areas.³² The nurse then secures the swabs in a sealed package along with any clothing or other items of evidence that the nurse determines should be preserved as part of the

entirety or choose which parts of the exam they are comfortable completing. *Id.*; see also *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24; SEXUAL ASSAULT EVIDENCE KIT (SAEK) INSTRUCTIONS 1–2 (2005), <http://www.ncdsv.org/images/SexAssaultEvidenceKitInstructions.pdf>. The victim has the option to end the exam at any point. *What Is a Sexual Assault Forensic Exam?*, *supra*.

²⁶ See *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24; Sulley et al., *supra* note 4, at 4363. While it is not required that a specially trained sexual assault nurse conduct the exam, the “[r]esearch suggests that jurisdictions that use Sexual Assault Nurse Examiners (SANEs) or Sexual Assault Forensic Examiners (SAFEs) to conduct forensic examinations of sexual assault victims contribute to higher prosecution and convictions rates.” U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS: A MULTIDISCIPLINARY APPROACH 15 (2017) [hereinafter NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS], <https://www.ojp.gov/pdffiles1/nij/250384.pdf>. In a study conducted on six SANE programs, the data showed that cases were “80 percent more likely to be successfully prosecuted,” compared to non-SANE programs. USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 5. These nurses will typically receive training in how to best collect and secure evidence from a sexual assault. NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS, *supra*. Ideally, they will also receive training on how to collect the evidence and communicate using a victim-centered, trauma-informed approach, discussed *infra*. See *id.* at 8; *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24.

²⁷ *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24 (noting that the exam could take four to six hours); USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 4; Sulley et al., *supra* note 4, at 4362–63.

²⁸ See USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 4.

²⁹ See *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24.

³⁰ USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 4.

³¹ *Id.*

³² See *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24. The nurse will also swab other areas on the body if they determine, based on what happened, that there is a possibility of obtaining the offender's DNA from those areas. See *id.*

investigation.³³ This final package is referred to as the sexual assault kit.³⁴

Once the sexual assault kit is collected, the nurse will seal it to avoid contamination and preserve the collected evidence.³⁵ The sexual assault kit is then stored at the hospital until it is picked up by law enforcement.³⁶ Once a law enforcement agent collects the kit, they typically will transport it to the forensic laboratory where forensic examiners will process the kit to see if they can obtain any of the offender's DNA and other biological data from the swabs.³⁷ Once the

³³ *Id.* Additional items found within the sexual assault kit could include documentation and instructions, blood or urine samples, and fingernail scrapings. See *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24; *What Is a Sexual Assault Forensic Exam?*, *supra* note 25.

³⁴ USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 4. For the sake of uniformity and consistency, this Article will use the term “sexual assault kit.” Depending on the source, however, there are several different titles and acronyms used to refer to this sexual assault kit, including SAK (“sexual assault kit”), SAEK (“sexual assault evidence kit”), and rape kit. See *id.*; *Sexual Assault Evidence Kit (SAEK) Instructions*, *supra* note 25, at 1; *What Is a Sexual Assault Forensic Exam?*, *supra* note 25; *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24.

³⁵ *Sexual Assault Evidence Kit (SAEK) Instructions*, *supra* note 25, at 7–8; see NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS, *supra* note 26, at 27–28; *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24. In fact, the best practices indicate that as the DNA testing technology continues to improve and become more sensitive, it is even more important to “stay current on additional measures to avoid contaminating specimens.” NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS, *supra* note 26, at 28 (quoting U.S. DEP’T OF JUST., A NATIONAL PROTOCOL FOR SEXUAL ABUSE MEDICAL FORENSIC EXAMINATIONS—PEDIATRIC 150 (2016)). As states have attempted to quickly address their backlogs, some have in fact experienced contamination in the testing labs, creating more delays in the testing process. See, e.g., Matthew Glowicki, *Lab Contamination Slows Progress on Kentucky’s Rape Kit Backlog*, COURIER J. (Dec. 20, 2018, 10:27 AM), <https://www.courier-journal.com/story/news/crime/2018/12/20/contamination-triggers-delay-kentucky-rape-kits-backlog/2310035002>; *Ohio Health Officials Say Some Rape Kits Contaminated*, WLWT5 (Feb. 28, 2013, 12:49 PM), <https://www.wlwt.com/article/ohio-health-officials-say-some-rape-kits-contaminated/3529313#>.

³⁶ See NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS, *supra* note 26, at 28–29, 35 (detailing the documentation process for sexual assault kits is essential for providing care for the victim, investigating the crime, and processing the evidence).

³⁷ *Id.* at 40, 53–66. If any DNA is recovered from the sexual assault kit swabs, this DNA “profile” will be uploaded to the FBI’s CODIS, which is a “national criminal DNA database” created by Congress in 1994 “to assist in providing investigative leads for law enforcement.” USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 10, 14. By uploading the DNA to CODIS, the profile will essentially be compared to all profiles in CODIS to determine if there is a potential match to a known person’s DNA already in CODIS. See *id.* at 14. If a match occurs, the laboratory will take specific measures to verify that the two profiles do in fact match. *Id.*

testing is completed, the laboratory will notify law enforcement of the results.³⁸

The testing process discussed above does not occur for hundreds of thousands of sexual assault kits.³⁹ As part of the efforts to address this backlog in the United States, many states have recently enacted laws that govern the collection and testing process.⁴⁰ These laws lay out the timelines for each step, including (1) how long a law enforcement agent has to pick up the sexual assault kit from the nurse, (2) how long a law enforcement agent has to deliver the kit to the forensic laboratory, and (3) how long a forensic laboratory has to conduct its testing on the kit.⁴¹ Ideally, these mandatory timelines seek to prevent a future backlog of unaccounted for and untested sexual assault kits.⁴²

B. *The Importance of Sexual Assault Kits*

Sexual assault kits are an extremely important part of the sexual assault investigation.⁴³ To start, the kits can identify an unknown assaulter through DNA evidence.⁴⁴ Importantly, sexual assault kits also

³⁸ See NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS, *supra* note 26, at 48.

³⁹ See USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 3.

⁴⁰ See *Pillar: Victim's Right to Know*, END THE BACKLOG, <https://www.endthebacklog.org/the-six-pillars/pillar-victims-right-to-know> (last visited Mar. 8, 2023); *The Six Pillars*, *supra* note 18; *Pillar: Test Backlogged Kits*, *supra* note 20; *Pillar: Test New Kits*, *supra* note 9.

⁴¹ See generally *Pillar: Test Backlogged Kits*, *supra* note 20; *Pillar: Test New Kits*, *supra* note 9. The specific deadlines vary by jurisdiction, but the model legislation suggested by the Joyful Heart Foundation states: (1) hospitals must notify law enforcement within twenty-four hours of collecting a new sexual assault kit; (2) law enforcement has three days to retrieve the kit from the hospital; (3) the kit must be delivered to the lab within seven days of pick up; and (4) the lab must test the kit within thirty days. END THE BACKLOG, COMPREHENSIVE RAPE KIT REFORM: A LEGISLATIVE HANDBOOK 13–14 (2020) [hereinafter COMPREHENSIVE RAPE KIT REFORM], https://www.endthebacklog.org/wp-content/uploads/2022/02/ETB_Legislative-Handbook_January-2020.pdf.

⁴² *The Six Pillars*, *supra* note 18. Unfortunately, some jurisdictions, like Nevada, failed to allocate reoccurring funding for sexual assault kit testing. See Schwartz, *supra* note 8, at 190–92; see also COMPREHENSIVE RAPE KIT REFORM, *supra* note 41, at 19. As such, Nevada was unable to maintain the testing timelines that its legislation enacted in 2021. Schwartz, *supra* note 8, at 190–92.

⁴³ See *What Is a Sexual Assault Forensic Exam?*, *supra* note 25.

⁴⁴ USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 13–14.

have the essential role of exonerating innocent individuals in both current investigations and previous convictions.⁴⁵

Additionally, sexual assault kits assist in the prosecution of sexual assault offenders.⁴⁶ The kit evidence allows the prosecutor to show the judge and jury that the offender's DNA was located on the victim's body.⁴⁷ This evidence is typically extremely persuasive because it is scientific proof that the offender made contact with the victim.⁴⁸ Thus, if the offender's DNA is present, it limits the possible defenses to the crime.⁴⁹

⁴⁵ *Id.* at 3; OFF. OF MANHATTAN DIST. ATT'Y, RESULTS FROM THE MANHATTAN DISTRICT ATTORNEY'S OFFICE'S: SEXUAL ASSAULT KIT BACKLOG ELIMINATION GRANT PROGRAM 9 (2019), <https://www.manhattanda.org/wp-content/uploads/2019/03/Test-Every-Kit-Results-from-the-Manhattan-District-Attorneys-Offices-Sexual-Assault-Kit-Backlog-Elimination-Grant-Program.pdf> (detailing how the New York City District Attorney's office exonerated a man who had served twelve years in prison, while also identifying a convicted serial rapist as the true offender); *see also* Lisa Calandra et al., *Evolution of DNA Evidence for Crime Solving—A Judicial and Legislative History*, 2 FORENSIC MAG., 13–15 (Jan. 6, 2005).

⁴⁶ *What Is a Sexual Assault Forensic Exam?*, *supra* note 25; *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 24 (stating that “the rape kit can be one very powerful tool to bring a perpetrator to justice”).

⁴⁷ *See Why Test All Kits?*, *supra* note 1; *What Is a Sexual Assault Forensic Exam?*, *supra* note 25.

⁴⁸ *What Is a Sexual Assault Forensic Exam?*, *supra* note 25. Often times in sexual assault cases the prosecution only has the victim's testimony to present to the jury as proof that this crime occurred. This is an inherent issue based on the type of crime sexual assault is. There is rarely a witness or a video surveillance that captures the crime. Thus, aside from DNA, the case often surrounds the victim's testimony about what happened. If there is DNA evidence that a jury can look at to show them that the defendant's DNA was found on the victim, however, that bolsters the victim's testimony immensely. It will certainly be relevant, for example, where the defendant's DNA was found on the victim's vaginal swabs versus somewhere less conclusive of sexual contact. In fact, in a study of over 600 sexual assault cases, 77 percent of the cases that ended with a defendant pleading guilty involved forensic evidence, such as DNA from a sexual assault kit. Sulley et al., *supra* note 4, at 4363.

⁴⁹ For example, if DNA is found, the defendant can no longer claim that they do not know the victim or have never seen her before. Further, if the DNA is found in an area that indicates sexual contact, the defense also cannot argue that they did not have sex. Instead, the defense is now limited to whether it was consensual. Further, while the majority of prosecutions do not result in a jury trial, the sexual assault kit results would also be beneficial for prosecutors when an offender pleads guilty and a judge is considering what type of punishment to impose. For example, at sentencing, offenders often claim: I pled guilty to avoid a potentially harsher punishment if I lost at trial, but I'm not actually guilty. *See North Carolina v. Alford*, 400 U.S. 25, 37–39 (1970) (creating “Alford” pleas, wherein a defendant can plead guilty but maintain his innocence). With sexual assault kit evidence, however, a prosecutor will at least be

Finally, and of particular importance to this article, sexual assault kits can play an important role in the victim's healing process. The kit results provide much needed answers to a victim of sexual assault by not only identifying the offender for the law enforcement investigation, but for the victim as well.⁵⁰ Oftentimes, the results can provide much needed closure to the victim about the sexual assault.⁵¹ Similarly, to the extent that the victim felt they were not believed when they reported the assault, the results of the sexual assault kit can often provide "proof" that corroborates what they previously said happened.⁵²

In my experience as a criminal prosecutor, I often saw the impact that sexual assault kit evidence had on the investigations, prosecutions, and victims involved. This evidence drastically changed our ability to prove beyond a reasonable doubt who was or was not involved. Sexual assault cases without DNA evidence often rely solely on the victim's credibility to convince the jury that sexual contact occurred and that it was sexual assault. But, with DNA evidence, it proved the first issue of whether sexual contact occurred and narrowed the issue to whether that contact constituted sexual assault.

Since the kits can have a particularly important impact on the victim, it is essential that victims are notified in a way that encourages them to reengage with the notifiers. As discussed in the following Section, jurisdictions consider different factors when developing a process for notification known as notification protocols.

able to explain to the judge that there was sexual contact based on the DNA evidence. See *What Is a Sexual Assault Forensic Exam?*, *supra* note 25.

⁵⁰ See *Why Test All Kits?*, *supra* note 1; *Victim Notification*, *supra* note 10; *What Is a Sexual Assault Forensic Exam?*, *supra* note 25.

⁵¹ *Creating a Victim Notification Protocol*, *supra* note 4, at 5; AHRENS ET AL., *supra* note 4, at 44.

⁵² HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 8 ("Victims discussed that having their kits tested would provide hard evidence that the rapes they had endured had truly happened. It seemed that this was an important validation for many of the victims interviewed who felt blamed or whose story was not believed by family members, friends, or criminal justice professionals."). It is important to note that lack of DNA evidence does not prove that the crime did not occur or that the victim was being untruthful. There are a variety of factors that could contribute to a swab not containing DNA, such as the victim showering before the exam. See *What Is a Sexual Assault Forensic Exam?*, *supra* note 25. Further, as testified to in a prior sexual assault trial I was involved in, there are actually many different factors that could affect whether DNA could be obtained, including the amount of time between the assault and the test, as well as clothing rubbing against the skin. Transcript of Proceeding at 99–100, *Nevada v. Sampson* (Nev. Dist. Ct. 2017) (No. C182432).

II. NOTIFYING AND RE-ENGAGING SURVIVORS WITH BACKLOGGED SEXUAL ASSAULT KITS

As state jurisdictions continue addressing the massive concern of backlogged sexual assault kits, they should ensure that they are notifying victims in the best way possible.⁵³ Thus, the first goal for notifying victims is to do so in a way that will encourage them to reengage with the notifiers. Once this is accomplished, as argued *infra* Part IV, the victim will have the best opportunity for justice and closure, which will be instrumental in their healing process.

Many victims, however, have not heard anything about their sexual assault kit since going through the invasive exam years or decades ago. Some will have moved on from this experience. Some will have lived every day in fear. Others will be mad that the criminal justice system forgot about them. Thus, as discussed below, there are many aspects of notifying the victim that jurisdictions must consider.⁵⁴

To start, the way law enforcement and other members of the criminal justice system contact the victims should promote reengagement and seek to avoid retraumatization.⁵⁵ Ideally, it should encourage the victim to participate with law enforcement, evaluate their options, and benefit from the various support options that will promote their healing.⁵⁶ As different multidisciplinary teams began to work on how best to notify victims whose kits were untested for years, it became clear that they needed to develop an approach that was “victim-centered and trauma-informed.”⁵⁷

As explained by the National Institute of Justice (NIJ), a “[v]ictim-centered [approach] means that the victim is at the center of all decisions regarding recovery and any involvement with the criminal justice system; the victim’s choice, safety and well-being is the focus;

⁵³ *Victim Notification*, *supra* note 10.

⁵⁴ Interestingly, in some larger jurisdictions, victim notification is generally conducted using an automated system. Sulley et al., *supra* note 4, at 4364. These systems allow victims to register for the notification and control their preferred method of contact. *Id.*

⁵⁵ *Victim Notification*, *supra* note 10.

⁵⁶ *Id.*

⁵⁷ *Id.*; DOWN THE ROAD, *supra* note 7, at 21–22; USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 17; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 13; *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 381–84; *see, e.g.*, UTAH NOTIFICATION PROTOCOL, *supra* note 10, at 1; MISSOURI NOTIFICATION PROTOCOL, *supra* note 10, at 1–2; MARYLAND NOTIFICATION PROTOCOL, *supra* note 10, at 4.

and the needs of the victim are everyone's—not just victim advocates'—concern."⁵⁸

Working alongside a “victim-centered” approach, the NIJ defines a “trauma-informed” approach as “attending to the victim’s emotional and physical safety; using resources, services and support to increase the victim’s capacity to recover; and educating victims, service providers and the general community about the impact of sexual-assault trauma on the health and well-being of the victim.”⁵⁹ These definitions provide the backdrop for how law enforcement should notify victims that their sexual assault kit has finally been tested. Ideally, this approach will generate protocols that focus on what the survivor wants in a way that appreciates and understands the trauma that the survivor experienced.⁶⁰ Lastly, this approach will reengage the victim, improve the healing process, and limit the amount of additional trauma that a survivor will experience.⁶¹

Utilizing this approach, this Part will consider the best practices for jurisdictions creating notification protocols and what the studies involving survivors and criminal justice professionals⁶² can teach jurisdictions about notification.

⁵⁸ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DOWN THE ROAD, *supra* note 7, at 24; *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 381; *see, e.g.*, UTAH NOTIFICATION PROTOCOL, *supra* note 10, at 1; MISSOURI NOTIFICATION PROTOCOL, *supra* note 10, at 1–2 (using the phrase “survivor-centered”); MARYLAND NOTIFICATION PROTOCOL, *supra* note 10, at 4.

⁵⁹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2.

⁶⁰ *Id.* at 7–12; USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 17; DOWN THE ROAD, *supra* note 7, at 22 (noting the Houston and Detroit teams utilized a “victim-centered, trauma-informed” notification protocol for contacting survivors with backlogged sexual assault kits); *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 381–84; *see, e.g.*, UTAH NOTIFICATION PROTOCOL, *supra* note 10, at 1; MISSOURI NOTIFICATION PROTOCOL, *supra* note 10, at 1–2; MARYLAND NOTIFICATION PROTOCOL, *supra* note 10, at 4.

⁶¹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 1 (“Notifying victims can trigger memories and feelings regarding the assault, and this re-traumatization can cause flashbacks and other symptoms, exacerbate post-traumatic stress disorder and other mental health issues, and affect substance use or abuse.”); *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 381–84; *see, e.g.*, UTAH NOTIFICATION PROTOCOL, *supra* note 10, at 1; MISSOURI NOTIFICATION PROTOCOL, *supra* note 10, at 1–2; MARYLAND NOTIFICATION PROTOCOL, *supra* note 10, at 4.

⁶² This Article uses the term “criminal justice professionals” to refer to the non-survivor participants in the various studies. In general, this includes victim advocates, SANE nurses and directors, police officers, prosecutors, clinicians, and researchers.

A. *Developing Notification Protocols*

When a jurisdiction begins addressing this important notification issue, it will likely start by creating a multidisciplinary team, or an “MDT.” As discussed below, the MDT will be tasked with creating the protocols, which will cover the logistics of the notification itself, as well as training for those involved in the notification process.

1. Creating an MDT

The MDT should consist of a variety of people who are involved in the sexual assault investigation process, including police officers, prosecutors, advocates, survivors, and sexual assault nurse examiners (typically referred to as “SANE nurses”).⁶³ This structure allows the collaboration of a variety of perspectives, including “varying skills,” prior to decision making.

Additionally, it is important to identify each person’s role throughout the process.⁶⁴ Given that disagreement is inevitable, the MDT must also establish which persons have decision-making authority.⁶⁵ Even once the protocols are established, there will be cases that happen to fall outside of the established protocols. Thus, the MDT will need to be able to address these situations.⁶⁶

2. Victim-Centered Trauma-Informed Training

In order to determine the best way to notify a victim whose kit was backlogged for years, it is important to consider what a victim goes through after the sexual assault, which, for most professionals, is where training will be essential. Sexual assault, in many ways, is the most violative crime that can occur for a victim.⁶⁷ As such, survivors often

SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 7; AHRENS ET AL., *supra* note 4, at 16.

⁶³ VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 1; AHRENS ET AL., *supra* note 4, at 82.

⁶⁴ VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 2.

⁶⁵ See NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 5.

⁶⁶ See VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 1 (noting that this could involve a case review by the MDT before notification occurs).

⁶⁷ See NAT’L SEXUAL VIOLENCE RES. CTR., THE IMPACT OF SEXUAL VIOLENCE 1 (2010) [hereinafter NSVRC FACT SHEET], https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Factsheet_Impact-of-sexual-violence_0.pdf.

carry the effects of the crime with them for the rest of their lives.⁶⁸ While many studies provide a variety of possible mental, physical, emotional, and other effects that a survivor may experience, it appears that these studies truly only agree on one thing: each survivor's experience is unique and will likely depend not only on their personality, culture, and life experiences, but also on the specific nature of the sexual assault that occurred.⁶⁹ Even more, the effects of the sexual assault may change as time passes.⁷⁰

As such, those involved in the MDT and the notification process should receive victim-centered, trauma-informed training.⁷¹ One study

⁶⁸ *Id.*; Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20 J. INTERPERSONAL VIOLENCE 127, 128 (2005).

⁶⁹ *Effects of Sexual Assault and Rape*, JOYFUL HEART FOUND. [hereinafter JHF, *Effects of Sexual Assault and Rape*], <https://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape> (last visited Feb. 5, 2023); *The Effects of Sexual Assault*, WASH. COAL. OF SEXUAL ASSAULT PROGRAMS [hereinafter WCSAP, *The Effects of Sexual Assault*], <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault> (last visited Feb. 5, 2023).

⁷⁰ WCSAP, *The Effects of Sexual Assault*, *supra* note 69. In addition to the effect of delayed resolution on survivors with a backlogged sexual assault kit, the crime of sexual assault results in a wide array of mental, emotional, and physical effects, including: (1) post-traumatic stress disorder, consisting of flashbacks, nightmares, and anxiety; (2) depression and hopelessness that could manifest in unexplained crying, weight loss, or weight gain; (3) anger, shock, or disbelief that the assault occurred; (4) fear that it could happen again; (5) shame for "allowing" it to happen; (6) loss of faith and trust in others; (7) physical injuries that may or may not heal over time, such as bruising, bleeding, and broken bones; (8) sexually transmitted diseases; and (9) pregnancy. *Id.*; JHF, *Effects of Sexual Assault and Rape*, *supra* note 69; NSVRC FACT SHEET, *supra* note 67; *Effects of Sexual Violence*, RAINN [hereinafter RAINN, *Effects of Sexual Violence*], <https://www.rainn.org/effects-sexual-violence> (last visited Feb. 3, 2023); CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING SEXUAL VIOLENCE (2022), <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html>. In addition to the myriad of mental, emotional, and physical effects, many survivors experience further effects, such as significant changes in eating or sleeping patterns and substance abuse addiction. NSVRC FACT SHEET, *supra* note 67; RAINN, *Effects of Sexual Violence*, *supra*.

⁷¹ For those who have not practiced in criminal prosecution, victim-centered trauma-informed training may seem like an obvious step that jurisdictions should implement. In my experience, however, prosecutors did not readily receive this type of training, at least not in a formal setting. I found that advocates and law enforcement received much more training on this than I did. Oftentimes, I learned a lot from simply talking to my advocates about many of the above topics. In hindsight, I should have sought out additional training to put myself in a better position to help the victims with whom I interacted. Fortunately for the victims, we always met with them alongside an advocate.

indicates that survivors recommend that notifiers be trained to understand the survivors' perspective.⁷² This could include specific, firsthand accounts from survivors.⁷³ Further, the training should address the "impact of trauma on survivors' thoughts, feeling, and behaviors" and the wide range of reactions that a survivor may exhibit.⁷⁴

Notably, this should include training on how sexual trauma can affect the way the brain controls memories, cognitive functions, and emotions.⁷⁵ For instance, "[v]ictims may experience 'flat affect,' show little emotion, or have emotional responses that seem unusual given the circumstances, such as laughing or smiling while being questioned, often leading investigators to not believe them."⁷⁶ Training on how the brain of a sexual assault victim may work is crucial in helping law enforcement communicate with victims and understand them and their reactions.⁷⁷

For example, victims with backlogged sexual assault kits have spent years not knowing what happened to their kit, case, or assaulter.⁷⁸ They will likely be angry and annoyed that it took so long to test their kit.⁷⁹ For some, this passage of time will impair their memory of what happened and their ability to identify the assaulter.⁸⁰ Others will have "moved on" and will not be interested in being involved.⁸¹ Alternatively, some will be "in a better place to deal with the issues and feelings that arose."⁸²

Notifiers should also be cognizant that many survivors experienced very negative interactions with law enforcement when they initially reported their sexual assault.⁸³ Survivors have reported feeling "judged and not believed" and described the officers as "rude

⁷² AHRENS ET AL., *supra* note 4, at 114.

⁷³ *Id.* at 116.

⁷⁴ *Id.* at 108–09.

⁷⁵ USING SCIENCE TO FIND SOLUTIONS, *supra* note 10, at 18.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 4.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 8.

and not caring.”⁸⁴ In fact, many felt that their experience with officers was a “secondary victimization.”⁸⁵

Finally, it is important to simply be aware of what this notification will mean to survivors after years of waiting. In cases where the assaulter’s DNA was identified, many victims felt like their reports of what happened were validated after years of being blamed or not believed.⁸⁶ They felt they finally had the “hard evidence” proving that they were actually sexually assaulted.⁸⁷ Further, some felt that the notification caused them to feel heard and cared about.⁸⁸ They finally felt closure and a sense of relief from many of the emotional and psychological effects of not having a resolution.⁸⁹

Since each victim is unique and will handle the notification differently, it is extremely important that notifiers receive victim-centered, trauma-informed training so that they are adequately prepared to respond in a sensitive and patient manner. This will put the victim in the best place possible for reengaging with the notifiers.

B. *Tips for Notification from Survivors and Criminal Justice Professionals*⁹⁰

There is not a “one-size-fits-all” approach for jurisdictions when deciding how best to notify sexual assault victims about their

⁸⁴ SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 8 (“[This] was especially true if [the] victims had been using drugs or alcohol at the time of the assault.”).

⁸⁵ *Id.* One victim stated that her interaction with law enforcement made her feel “like garbage, like trash, no good.” *Id.* Another stated that the officer told her, “If you weren’t doing what you were doing, this wouldn’t have happened to you.” *Id.*

⁸⁶ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 8.

⁸⁷ *Id.*

⁸⁸ *Id.* at 9.

⁸⁹ *See id.* at 8–9.

⁹⁰ This Article relies on a variety of studies and best practice guidelines for backlogged sexual assault kit survivor notification. Among these studies, there are only a few that interview adult survivors of sexual assault with a backlogged sexual assault kit. First, many studies revolved around Houston and Detroit. In 2011, the NIJ conducted a study regarding forty-two survivors in Houston—some of whom were sexually assaulted in the early 1980s—as well as twenty-seven criminal justice professionals. *See* DOWN THE ROAD, *supra* note 7, at 8, 21–26; *see generally* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 2–3. Also in 2011, the NIJ conducted a study in Detroit involving thirty-one survivors. DOWN THE ROAD, *supra* note 7, at 21–26. Subsequently, researchers in Houston conducted a follow-up study on seven additional survivors who had been contacted by Houston police department after notification protocols had been established. *See* SEXUAL ASSAULT

backlogged sexual assault kit.⁹¹ Each victim is unique and will deal with the effects of being sexually assaulted differently.⁹² I want to emphasize this idea of how each victim is unique. There really is no perfect way to notify a victim, especially after the delay. My experience is consistent with the research wherein some methods worked amazingly for one group while another group preferred something different. While I definitely agree that the MDT should establish notification protocols, it is important to be flexible and to have a plan for when the preferred method is ineffective.

As a starting place, this section will address the following main considerations: (1) *when* to notify a victim, (2) *how* to notify a victim, (3) *who* should notify the victim, and (4) *what* information the victim should be given.⁹³ Evaluating these factors will allow each state to identify the specific procedure that must be put in place to improve the notification process.⁹⁴ Ultimately, each factor focuses on a victim-centered, trauma-informed approach.⁹⁵

VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 3. Similarly, the NIJ conducted a related study of twenty-three victims in Houston, focusing on written notification using hypothetical letters. Sulley et al., *supra* note 4, at 4366–67. It also funded another study in Detroit that questioned investigators who were involved in notifying survivors and analyzed data from thirty-one cases where victims with backlogged sexual assault kits had been contacted. See *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 389. Second, published in 2016, the Joyful Heart Foundation conducted a study involving nineteen survivors and seventy-nine professionals including legal, medical, clinical and advocacy professionals. See AHRENS ET AL., *supra* note 4, at 16–19. Lastly, this Article relies on additional NIJ-funded research aimed at providing a guideline to jurisdictions on how to begin developing victim notification protocols. See *Creating a Victim Notification Protocol*, *supra* note 4, at 3; VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4. This Article also incorporates three states' survivor notification recommendations that were created by multidisciplinary groups in Utah, Maryland, and Missouri. See UTAH NOTIFICATION PROTOCOL, *supra* note 10; MARYLAND NOTIFICATION PROTOCOL, *supra* note 10; MISSOURI NOTIFICATION PROTOCOL, *supra* note 10. Regarding the availability of data at this time, given the invasive nature and potential for re-traumatization, many studies are hesitant to seek interviews and participation from a wide array of survivors and instead decide to rely on those who willingly volunteer. See AHRENS ET AL., *supra* note 4, at 17–18.

⁹¹ VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 2; NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 6 (noting that “there is no right way to do victim notification”).

⁹² See VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 1–4.

⁹³ See *id.*; AHRENS ET AL., *supra* note 4, at 28.

⁹⁴ See AHRENS ET AL., *supra* note 4, at 13–14.

⁹⁵ See *id.* at 134.

1. When to Notify

The first question jurisdictions must address is which victims they will notify regarding their backlogged sexual assault case. Should they only notify the victim when DNA from the sexual assault kit enabled them to identify the offender?⁹⁶ What if they finally test the kit but are unable to match the DNA to anyone? Unfortunately, notifying a victim under either scenario is going to greatly affect the victim.⁹⁷

Given the potential damaging effects of retraumatization, many professionals suggested that notification only occur if the “potential benefits were seen as outweighing the potential costs”⁹⁸ This group of professionals further concluded that the benefit only outweighed the risk of retraumatization when there was “good news or when contact is necessary for case progression.”⁹⁹

The majority of victim responses, however, leaned toward a “notify all” approach, which would notify all victims with backlogged sexual assault kits.¹⁰⁰ In one study, all victims stated that they wanted to be

⁹⁶ The multidisciplinary teams in Detroit and Houston decided to only notify victims whose kit testing resulted in a CODIS match. *See DOWN THE ROAD*, *supra* note 7, at 22. For the Detroit team, and likely the same in Houston, the amount of resources available for notifying victims impacted this decision. *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 382. In fact, given the high number of CODIS matches, Detroit was already in a challenging place to notify those victims. *See id.*

⁹⁷ AHRENS ET AL., *supra* note 4, at 40; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 9–10. Another suggestion utilized the victim’s feelings at the time they reported the sexual assault. SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 14. This suggestion, from criminal justice professionals, “discussed the importance of reviewing case files in order to understand whether the victim had wanted to move forward with the filing charges initially and to really determine if that decision was what the victim wanted or if it had been influenced by other factors.” HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 19.

⁹⁸ AHRENS ET AL., *supra* note 4, at 40. This recommendation, however, was from professionals in the field versus victims of sexual assault with a backlogged kit. *See id.*

⁹⁹ *Id.* In fact, this study revealed that survivors believed those who wanted to only notify some survivors, while claiming they wanted to protect against re-traumatization, were misguided. *See id.* at 43. One advocate stated:

The fact that they have been heard will give them closure. It will retraumatize them to not hear anything else. You must give them resources and therapy because you will reopen old wounds. The majority of our victims would want to know. They need to know. It’s their lives There is an emotional aspect to it, but that’s where the advocate comes into play. Just be careful with the delivery.

Id. at 44.

¹⁰⁰ *See id.* at 41–43.

notified if the results meant the case could proceed forward.¹⁰¹ Others, however, “expressed mixed feelings and divergent opinions about what to do if testing of the kits did not yield evidence that could move their cases forward.”¹⁰² In other studies, most victims responded that they would like to be notified, even if the notification was to let them know that their case would not be moving forward.¹⁰³ Those victims indicated that only notifying certain victims was “unacceptable.”¹⁰⁴ They stated that failing to notify some survivors “harmed survivors by making them think that nobody cared and nothing was being done”¹⁰⁵ Considering the totality of responses, the most preferred option for survivors was “widespread notification that then puts decisions about further notification into the hands of survivors themselves”¹⁰⁶ This is consistent with my experience as well. Victims consistently opted for more information rather than less. They did not want us to make the decision for them as to whether they should receive the information.

While it is often important in the healing process for victims to receive information and finality regarding their sexual assault kit, such information could have a more damaging than beneficial effect, especially when the case will not be moving forward.¹⁰⁷ Each MDT will

¹⁰¹ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 8.

¹⁰² *Id.* at 10. Ultimately, this group of victims agreed that the “criminal justice system should not assume that a victim did or did not want to be notified.” *Id.*; *see also* AHRENS ET AL., *supra* note 4, at 36 (acknowledging that “it is virtually impossible to know what individual survivors will want”). It was important that the system provided an avenue for all victims to be notified if they wanted to be. HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 10.

¹⁰³ *See* AHRENS ET AL., *supra* note 4, 41–43; Sulley et al., *supra* note 4, at 4376. Other victims, however, indicated that they only wanted to be notified if there was something to report. For example, some victims did not believe that they should be notified simply to let them know that their kit had not been tested yet. Instead, the notification should occur once there was news to report. *See* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 9.

¹⁰⁴ *See* AHRENS ET AL., *supra* note 4, at 43; *see also* Sulley et al., *supra* note 4, at 4376. While interviewed victims appeared to agree that all victims should be notified, they also acknowledged that some victims may not want to be notified. HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 9. They noted that some victims may have moved on in an effort to forget what happened, some may not have told their families or partners, and notification could damage the healing progress they have made since the sexual assault. *See id.*

¹⁰⁵ AHRENS ET AL., *supra* note 4, at 43.

¹⁰⁶ *Id.* at 44.

¹⁰⁷ A case may not proceed forward for various reasons. For example, given the delay in these cases, some jurisdictions may have a statute of limitations issue to

need to grapple with this issue when determining what will work best for their community of survivors.

2. How to Notify

As will be fairly consistent throughout these sections, the studies yielded varying results for how best to notify a survivor about their backlogged sexual assault kit. The different options include (1) an unexpected in-person meeting, (2) a phone call possibly followed by a planned in-person meeting, (3) a letter, and (4) an email.¹⁰⁸ Ideally, the initial contact should consider what will provide the safest, most empathetic, and most sensitive response to the situation.¹⁰⁹

The first contact, as well as the contact moving forward, will be essential to building rapport with the victim and promoting reengagement.¹¹⁰ After many years without contact from law enforcement, this contact needs to affirm that law enforcement cares about the victim, their feelings, and their well-being.¹¹¹ While there was disagreement on the best way to make initial contact, the majority of participants did agree that the victim's preferences should govern how they are contacted moving forward.¹¹²

i. In-Person

When synthesizing the various results, it appeared that there was a majority of responses that favored in-person notification as part of a multi-stage notification process.¹¹³ The participants felt in-person showed more respect for them and what they went through compared to a letter or a call.¹¹⁴ Moreover, it appears that a major factor contributing to this positive experience was that many of the meetings

overcome. Additionally, the DNA testing may not reveal any DNA to identify an unidentified assaulter.

¹⁰⁸ See *id.* at 44–64.

¹⁰⁹ See *id.* at 45, 54, 55.

¹¹⁰ *Id.* at 56.

¹¹¹ *Id.*

¹¹² AHRENS ET AL., *supra* note 4, at 55.

¹¹³ *Id.* at 60; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11; Sulley et al., *supra* note 4, at 4370–71 (indicating that a “face to face” notification would show respect for the victim). Additionally, victims from one study indicated that it was “imperative” that the victims be notified in person, with a trained advocate. HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11. Similarly, criminal justice professionals from that study also determined that victims deserved the dignity and respect of being told in person. *Id.* at 20.

¹¹⁴ See Sulley et al., *supra* note 4, at 4370–71.

involved a victim advocate.¹¹⁵ The victim advocate made many of the victims feel supported, validated, informed, and safe.¹¹⁶ Additionally, the in-person meeting allowed the advocates to immediately consult the victim, if interested, about possible support services.¹¹⁷

One major downside of an unexpected in-person initial contact is that it caught the victims off guard. Many were shocked to see an investigator at their door.¹¹⁸ Thus, an in-person visit might be best if it follows one of the other methods.¹¹⁹

ii. Letter

With regards to a letter,¹²⁰ the studies generally yielded two different responses.¹²¹ On the one hand, victims appreciated the letter as the initial form of contact because it was less shocking than having a law enforcement agent show up at their door unannounced.¹²² Some also really appreciated the sensitive and kind words in the letter.¹²³ On

¹¹⁵ See SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 9–10.

¹¹⁶ *Id.*

¹¹⁷ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 20.

¹¹⁸ SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11.

¹¹⁹ *Id.*; AHRENS ET AL., *supra* note 4, at 60.

¹²⁰ The letterhead and appearance of the letter was also a point of disagreement amongst the studies. See HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 17. Ultimately, it appeared that the disagreement was rooted in the victims' personal experiences with law enforcement. *Id.* For example, many who had prior negative experiences with law enforcement did not want to receive a letter on the law enforcement's letterhead. *Id.* But those with positive experiences felt that a blank letterhead was inappropriate and instead should be on the law enforcement's letterhead. *Id.* Professionals made interesting points about the letterhead, noting that while the blank letterhead could be better for confidentiality, the law enforcement letterhead made the letter look more official and trustworthy. *Id.* at 24.

¹²¹ *Id.* at 12.

¹²² See SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 12 (“One victim stated that she would prefer a letter over a phone call because if she received a call she would ‘probably just fall dead. It would be such a shock.’”).

¹²³ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 14. Several studies provided sample letters to the participants, which elicited interesting insights and helpful opinions regarding the specific word choice used to effectively contact the victim by letter. *Id.* at 14–16. Negative reactions included: (1) Some victims reacted negatively to “sexual assault,” noting “how difficult it can be for

the other hand, many felt that the letters were impersonal and showed a lack of respect for them and what they had been through.¹²⁴ Victims also disliked the letter because it presented privacy and confidentiality concerns if someone else happened to read the letter.¹²⁵ Additionally, for many, the letter simply reinforced the sense of distrust they already had in the system.¹²⁶ Lastly, one victim suggested that she likely would have thrown a letter away if she had received one, assuming it was unimportant or “a parking ticket.”¹²⁷

It appears that a deciding factor for whether a letter would be well received is whether the law enforcement agency is planning to move forward with the case.¹²⁸ Victims who received a letter simply telling them that their case was not going to be reopened or move forward felt “hurt, humiliated, angry, and patronized”¹²⁹ After years of failing to test their sexual assault kit, this type of letter reinforced victims’ belief that the law enforcement agency did not believe them

a victim to name and own what had happened to them.” *Id.* at 15. Instead, they suggested using the phrase “crime of a personal nature;” (2) Many did not like the use of the word “victim” and instead suggested “individuals” or “people;” (3) Some victims were angry and hurt when the letters failed to acknowledge how much time had passed since the attack happened, causing them to feel like the crime was being minimized; (4) Generally, vague language confused the victims, leaving them feeling like the letter did not provide enough information about what was happening with the case and what would happen next; (5) Instead of asking the victim to contact law enforcement for a subsequent “interview,” which reminded some of a job interview, one victim suggested “consultation;” (6) Referring to the crime as an “incident” was also not well received and was reported as “impersonal and demeaning;” and (7) Sentences that attempted to convey empathy for the victim, such as “we know that receiving this letter may trigger feelings,” generally created negative reactions. *Id.*; see also Sulley et al., *supra* note 4, at 4371. But some victims reacted positively to the letter and appreciated the kind statements addressing what had happened and how much they had been through, such as “I want to commend you for your courage” and “it can [be] very hard to report crimes of a personal nature.” HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 14; see also Sulley et al., *supra* note 4, at 4371.

¹²⁴ See Sulley et al., *supra* note 4, at 4370–71.

¹²⁵ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 12; AHRENS ET AL., *supra* note 4, at 53 (emphasizing the negative effect that a breach of confidentiality could have on a survivor); *but see id.* at 54 (noting differences in survivor opinions on how best to protect confidentiality).

¹²⁶ Sulley et al., *supra* note 4, at 4370.

¹²⁷ SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 8.

¹²⁸ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 12.

¹²⁹ *Id.*

or did not care about their case.¹³⁰ Even worse, some victims indicated that this type of letter and disrespect would negatively affect their ability to heal and cope with the incident.¹³¹

But victims found that a letter could be a more appropriate method of communication if it was used to open the lines of further communication to discuss the next steps in the case.¹³² In that scenario, victims preferred a short, to-the-point letter that asked victims to contact law enforcement for more information.¹³³ Importantly, victims noted that this gave them control over the situation, something that was consistently important to victims throughout the notification process.¹³⁴

iii. Phone

If a victim's phone number is accessible, law enforcement may want to consider a telephone call.¹³⁵ Many victims seemed to think that this would be a good initial contact method, rating it between a letter and face-to-face contact.¹³⁶ Victims preferred phone calls over a letter because a phone call could be used to set up an in-person meeting if the victim desired, and unlike a letter, it provided the victim an opportunity to ask questions and talk through the process in more detail.¹³⁷ Further, it allowed for more private and confidential communication than a letter.¹³⁸ Finally, similar to the letter, some victims suggested that a phone call only be used when the law enforcement agents were moving forward with the case.¹³⁹

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 4, 9. Consistent with the desire for control, some victims also indicated that it was important for them to be able to decide if their case moved forward in the criminal justice system. HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 10.

¹³⁵ *See* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11. The studies also pointed out that a phone call was preferred for some victims because it allowed them to move to a private area to talk, which would help preserve confidentiality for the victim. *Id.*

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11. But one group of professionals worried that notification over the phone made it

iv. Other Options

Other responses from the studies indicated that law enforcement could develop other methods for initial contact.¹⁴⁰ Ideally, methods that allow victims to decide if they want to contact the officers directly.¹⁴¹ The victims suggested that officers could reach out to the public using public service announcements,¹⁴² social media outlets, and victim advocacy groups.¹⁴³ These announcements could provide information to victims on how to obtain information on their backlogged kits if they wanted to, whether that be on a website, call center, or something else.¹⁴⁴ Professionals suggested a “hotline or call-in number” to allow victims to reach out when they are ready for information on the testing of their kits.¹⁴⁵ Additionally, they could obtain resources for counseling and other services when they call.¹⁴⁶

v. Multistage Process

Deciding how to notify the victim in a way that promotes reengagement will be an important question with which all jurisdictions must grapple. The overarching agreement from the varying studies was that the communication methods should be a

hard to gauge the victim’s emotional reaction, which could also make it hard to determine what support the victim needed. *Id.* at 20.

¹⁴⁰ *See id.* at 13; AHRENS ET AL., *supra* note 4, at 63.

¹⁴¹ *See* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 13.

¹⁴² Criminal justice professionals suggested using public service announcements as a way to send a message to the community that law enforcement was committed to righting the wrong of backlogged kits. *Id.* at 21. The chief of police, for instance, could also speak about the notification process in an effort to prepare victims or provide an avenue for the least traumatic contact. *Id.*

¹⁴³ *Id.* at 13 (suggesting that notifications could be posted on Facebook and YouTube).

¹⁴⁴ *Id.* (acknowledging that some victims expressed concern about having their case and kit information accessible on a website).

¹⁴⁵ *Id.* at 22 (noting that it might be better to have an advocacy group handle a hotline to avoid instances where victims have lost faith in their local law enforcement agency). In Houston, the multidisciplinary team developed a notification hotline called the Sexual Assault Information Line (SAIL). Sulley et al., *supra* note 4, at 4375; *see* DOWN THE ROAD, *supra* note 7, at 25. It provided victims with control over “when and how to get testing results,” provided them with information about the case, support services, and an option to be connected to an officer or advocate. Sulley et al., *supra* note 4, at 4375; *see* DOWN THE ROAD, *supra* note 7, at 25.

¹⁴⁶ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 22.

“multistage” process guided by the survivor’s preferences for contact. It is difficult to know a survivor’s preferences, however, without at least initially contacting them to find out. Given this limitation, many victims indicated that jurisdictions should consider the “less intrusive” option; one that is personal.¹⁴⁷ In fact, one group of survivors noted that it “is less about the form of the notification than it is about nature of the interaction.”¹⁴⁸

3. Who Should Notify

Unlike the other considerations discussed here, there was a more uniform answer to the question of who should notify the victim.¹⁴⁹ The victims wanted the notification to involve someone with trauma-informed training, such as a sexual assault victim advocate.¹⁵⁰ This is essential because a trauma-informed individual will be equipped to “demonstrate compassion, concern and flexibility to reduce the likelihood of re-traumatization.”¹⁵¹ The advocate could further validate the victims feelings of “denial, self-blame and isolation,” and support them in a nonjudgmental manner.¹⁵² Likewise, an advocate is typically better informed on how to initiate other services for the victims, such as counseling.¹⁵³

The studies provided several other considerations for who else should be present with the advocate.¹⁵⁴ First, the majority stated that the original detective should not be involved in contacting the victim

¹⁴⁷ AHRENS ET AL., *supra* note 4, at 60–62.

¹⁴⁸ *Id.* at 62.

¹⁴⁹ *See id.*; DOWN THE ROAD, *supra* note 7, at 12; *see* SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11.

¹⁵⁰ *See* AHRENS ET AL., *supra* note 4, at 72–73, 79–81; NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 12; SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11; HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11; DOWN THE ROAD, *supra* note 7, at 25.

¹⁵¹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 12.

¹⁵² HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11. Another common request from victims was that the advocate be female. SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11.

¹⁵³ AHRENS ET AL., *supra* note 4, at 72. The importance of an advocate in the notification process is extremely consistent with my experience as well.

¹⁵⁴ *See id.* at 72–82.

after years without contact.¹⁵⁵ Many of the victims blame the detective for the delay and for forgetting about their case.¹⁵⁶ Moreover, several victims reported that the detective was disrespectful and did not believe them at the time they reported the sexual assault.¹⁵⁷ As such, the original detective's involvement would re-traumatize the victims and likely reduce their willingness to re-engage in the criminal justice system.¹⁵⁸

Further, victims either had positive experiences with law enforcement during the initial reporting or thereafter preferred to have an officer present in addition to the advocate.¹⁵⁹ An officer's presence not only showed victims that their case was being taken seriously, but also helped for answering legal questions that many victims had.¹⁶⁰ Importantly, the victims suggested that any officer present should also receive trauma-informed training.¹⁶¹

¹⁵⁵ *Id.* at 79, 81; *but see* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11; NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 9; SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11. For this reason, Detroit used an investigator from the prosecutor's office as a way to distance the notifier from the original police department. NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2–3.

¹⁵⁶ AHRENS ET AL., *supra* note 4, at 79.

¹⁵⁷ *Id.* at 79–81.

¹⁵⁸ *Id.*; *see* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 4. Yet one study revealed that victims, who had a negative experience with law enforcement when they reported the sexual assault, were willing to re-engage with the criminal justice system if the notification “was provided by a team of investigators and a victim advocate.” HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 11.

¹⁵⁹ SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11; *but see* AHRENS ET AL., *supra* note 4, at 80 (revealing that some victims advocated that law enforcement should not be involved in the notification process because they would not “be capable of providing the level of emotional support that survivors would need”).

¹⁶⁰ SEXUAL ASSAULT VICTIMS' EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 11; AHRENS ET AL., *supra* note 4, at 73–75 (noting that criminal justice professionals thought it was important to have someone present who could provide legal explanations of the delay, as well as real-time updates on the status of the case and upcoming steps).

¹⁶¹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 12. Regarding the victims in the JFH study, it appeared that victims were less concerned with who notified them, and instead were more concerned that the notifier have the appropriate trauma-informed training. AHRENS ET AL., *supra* note 4, at 81. Further, these victims were also in favor of including others in the notification process, such as people who had personal experience with sexual assault. *Id.*

4. What to Notify

Lastly, the type of information that should be communicated is an extremely important consideration.¹⁶² First, notifiers should consider a “slow and patient” approach, along with preparing materials in advance to provide to the victims.¹⁶³ Moreover, most victims agreed that they want to know as much information as possible.¹⁶⁴ This will allow them to make an informed decision on how they want to proceed.¹⁶⁵ The more information, the better.¹⁶⁶ Additionally, if the communication is simply to tell the victim that the case cannot proceed, then the victims want to know why.¹⁶⁷

This communication should focus on the victim’s goals, not the officer’s.¹⁶⁸ The notifiers should inform the victim that they have the choice to be involved and participate in the process.¹⁶⁹ This should also include asking the victim for their preference on how they would like to be contacted in the future.¹⁷⁰ Consistent with focusing on the victim, another important content component was information about service referrals.¹⁷¹ Many victims explained that they wanted information on support services, such as rape crisis centers, national hotlines, mental health clinicians and faith-based counselors.¹⁷² Thus, the notification should anticipate what information the victims will

¹⁶² AHRENS ET AL., *supra* note 4, at 96–97; Sulley et al., *supra* note 4, at 4373–74. Notifiers should consider a “slow and patient” approach, along with preparing materials in advance to provide to the victims. AHRENS ET AL., *supra* note 4, at 96–97.

¹⁶³ AHRENS ET AL., *supra* note 4, at 96–97.

¹⁶⁴ *Id.* at 63, 82–96 (suggesting the following pieces of information be available for the victims: (1) why did you test the kit now?; (2) what are the next steps?; (3) what might the survivor need to do during these steps?; (4) does the survivor have any options or say?; (5) any other details about the investigation/criminal case/assaulter?; (6) estimated timeline; (7) statute of limitation concerns; and (8) an apology for not testing the kit sooner).

¹⁶⁵ *See id.* at 95. *Cf.* Sulley et al., *supra* note 4, at 4373–74 (discussing recommendations for notifications’ content and delivery).

¹⁶⁶ *See* AHRENS ET AL., *supra* note 4, at 97; Sulley et al., *supra* note 4, at 4374 (suggesting informing the victim about “the case number, contact information, and the chronology of events,” along with a discussion about the next steps).

¹⁶⁷ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 10; *see* AHRENS ET AL., *supra* note 4, at 40–43.

¹⁶⁸ *See* Sulley et al., *supra* note 4, at 4374.

¹⁶⁹ *See* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 7.

¹⁷⁰ *Id.* at 14.

¹⁷¹ Sulley et al., *supra* note 4, at 4374–75; *see* AHRENS ET AL., *supra* note 4, at 96–97.

¹⁷² *See* AHRENS ET AL., *supra* note 4, at 82–96.

want, as well as provide them with support to assist them in dealing with the notification.¹⁷³

Further, many victims simply wanted an apology.¹⁷⁴ In particular, they wanted law enforcement individuals to acknowledge what happened, that it should not have happened, and that law enforcement was sorry for what the victim had been through.¹⁷⁵ Similarly, the victims wanted to know how this backlog happened and why it took so long for their kit to be tested.¹⁷⁶

Lastly, while providing all of the above relevant information is important, it must be provided in a clear, understandable manner. Thus, many victims expressed concern with the overuse of legal jargon.¹⁷⁷ Victims emphasized that the communication should not rely on legal jargon.¹⁷⁸

While it is important for the MDT to generate notification protocols, the MDT must also be prepared to evaluate their protocols and adjust accordingly.¹⁷⁹ This will be an important step towards ensuring a notification process that re-engages the victim and limits re-traumatization.

C. *Evaluating and Re-Evaluating the Notification Protocols*

Once the protocol decisions are complete, the MDT should plan to test them on a small group of survivors.¹⁸⁰ This gives the MDT the opportunity to see how their protocols work. Naturally, if the protocols seem to be problematic, the MDT should be prepared to reevaluate their prior decisions.¹⁸¹ Ultimately, as noted above, the MDT should aim to develop protocols that factor in the uniqueness of each

¹⁷³ *Id.* at 96.

¹⁷⁴ *Id.* at 56–57; *see also* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 9 (explaining that in one study, victims reported that an apology and opportunity to receive additional services was an important opportunity for healing); *see also* DOWN THE ROAD, *supra* note 7, at 23 (in addition to the apology, notifiers should show compassion for the victim). *But see* AHRENS ET AL., *supra* note 4, at 57–67 (explaining that the criminal justice professionals did not necessarily find that an apology was necessary, but instead, that the notification occur with sensitivity).

¹⁷⁵ AHRENS ET AL., *supra* note 4, at 56–57, 63.

¹⁷⁶ HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 8.

¹⁷⁷ *See* Sulley et al., *supra* note 4, at 4374.

¹⁷⁸ *Id.*

¹⁷⁹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 7.

¹⁸⁰ *Id.*

¹⁸¹ VICTIM NOTIFICATION: WHY, WHEN, AND HOW, *supra* note 4, at 1.

survivor's situation and will provide consistent victim-centered, trauma-informed treatment for all.¹⁸²

Jurisdictions should look at existing protocols from other jurisdictions for insight on how best to proceed with notification requirements. Several of the studies in this article rely on the notification protocols from Detroit and Houston, which are briefly highlighted below:¹⁸³

1. Detroit¹⁸⁴

When: The MDT in Detroit reviews cases where the DNA from the victim's sexual assault kit matched with someone's DNA in CODIS, also known as a "CODIS hit."¹⁸⁵

How & Who: Once the case is reviewed and any special circumstances are identified, the MDT uses a two-step process to notify the victims.¹⁸⁶ An investigator from the prosecutor's office makes the first contact, either in-person or by phone.¹⁸⁷ The second contact occurs in-person with an investigator and an advocate.¹⁸⁸

What: At the first meeting, the investigator explains that the sexual assault kit has not been tested originally, but has recently been tested.¹⁸⁹ The investigator also apologizes for the delay in testing the kit and requests a follow-up meeting to discuss additional information.¹⁹⁰ Then, at the follow-up meeting, they provide further

¹⁸² *Id.*

¹⁸³ See DETROIT SAK PROJECT, *supra* note 12, at 251–55 (it is worth noting that the Detroit and Houston MDTs considered much more than what is laid out in this Article. Thus, this Article should serve as a starting point, but any jurisdiction addressing notification will necessarily encounter many more factors for consideration.).

¹⁸⁴ *Id.* at 235–44 (Detroit's MDT coordinated a two-day "planning retreat" to develop a victim-centered trauma-informed step-by-step guide for victim notification, along with sample documents for other jurisdictions).

¹⁸⁵ *Id.* at 246–47; NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2.

¹⁸⁶ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DETROIT SAK PROJECT, *supra* note 183, at 247–49.

¹⁸⁷ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DETROIT SAK PROJECT, *supra* note 183, at 249.

¹⁸⁸ *Id.* NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DETROIT SAK PROJECT, *supra* note 183, at 249.

¹⁸⁹ *Id.* NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; see also DETROIT SAK PROJECT, *supra* note 183, at 249.

¹⁹⁰ *Id.* NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DETROIT SAK PROJECT, *supra* note 183, at 249.

details about the case, discuss and review the options moving forward, and provide resources and services to the victim.¹⁹¹

Lessons from Evaluation: One of the “most critical lessons” learned in Detroit was the importance of an MDT for a diverse perspective on victim notification.¹⁹² Other notable lessons include recognizing the importance of: (1) preparing time for developing the victim notification protocols; (2) being prepared for disagreement amongst the MDT; (3) ensuring that the protocols protect the victim’s confidentiality; (4) providing comprehensive training to notifiers; (5) tailoring the protocols to your specific community; (6) being flexible and prepared to change your protocols; (7) establishing support resources for victims; and (8) considering how the protocols will also ensure the safety of the notifiers.¹⁹³ Lastly, it is important for everyone to acknowledge that there is no one right way to notify a victim.¹⁹⁴

Re-engagement Results: Detroit’s evaluation revealed that 64 percent of the victims wanted a follow-up meeting after the initial contact to discuss their options in more detail, and ultimately 57 percent of the victims re-engaged and decided to participate in the investigation and subsequent prosecution.¹⁹⁵

Further, the re-engagement rate appeared to rely on how many years had passed between the sexual assault and this notification.¹⁹⁶ The longer the time period, the more likely the victims would react negatively and decline to re-engage.¹⁹⁷ Lastly, victims who were 16–24 years old at the time of the sexual assault “were somewhat more likely to have had negative reactions to the notification and were somewhat

¹⁹¹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2–3; *see also* DETROIT SAK PROJECT, *supra* note 183, at 249, App. C3 at viii (explaining that at the initial meeting, victims were also provided with “a comprehensive packet of community resources”).

¹⁹² NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 3–4.

¹⁹³ *Id.* at 4–8.

¹⁹⁴ *Id.* at 6.

¹⁹⁵ DETROIT SAK PROJECT, *supra* note 183, at viii. I want to note that my argument for re-engagement does not rely solely on re-engaging for the purposes of participating in the subsequent investigation. *See* discussion *infra* Part IV. This will not be the best path for some victims. Instead, my argument relies on re-engaging for the purposes of identifying their options, which will include the criminal justice system, but also restorative justice options.

¹⁹⁶ *See id.*

¹⁹⁷ *Id.*

less likely to want to have continued contact with the criminal justice system.”¹⁹⁸

2. Houston

When: In addition to only reviewing cases where the DNA from the victim’s sexual assault kit matched with someone’s DNA in CODIS, the MDT also only selects cases where the statute of limitations has not expired.¹⁹⁹

How & Who: Houston police department investigators, along with a “justice advocate,”²⁰⁰ first attempt to contact victims by phone to set up an in-person discussion.²⁰¹ If they are unable to make contact by phone, however, then the investigators attempt to notify the victim at home.²⁰² As a last resort, investigators send a letter.²⁰³ As noted *supra*, the MDT also created a telephone/email hotline, which allows victims to contact the hotline to obtain information about their sexual assault kits, services and resources, and the option to be connected to an investigator or advocate.²⁰⁴ In addition to this, the MDT uses different media outlets to provide information to the public about their notification efforts.²⁰⁵

What: The initial contact aims to provide the victim with information about their case, options for their participation moving forward, and, if interested, how they would like to be contacted moving forward.²⁰⁶ Overall, the contact should include an apology and demonstrate “compassion, care, concern, flexibility, and

¹⁹⁸ *Id.*

¹⁹⁹ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 9. Additionally, the case could also be included in notification even if the statute of limitations had expired, so long as “the CODIS hit linked to a suspect who was on trial (or in the punishment phase) for another sexual assault.” *Id.*

²⁰⁰ *Id.* at 10–11. While this position was initially only temporary, the response from victims was so positive that it quickly became a permanent position.

²⁰¹ *Id.* at 10. Notably, Houston decided to use police department investigators, compared to Detroit who actively avoided investigators affiliated with the police department, instead using investigators from the prosecutor’s office. *Id.* at 2, 9. Detroit’s decision sought to address the victim’s responses of negative interactions with police department officers when initially reporting the sexual assault. *Id.* at 3.

²⁰² NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 10.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* (using the internet, the news, brochures, and presentations).

²⁰⁶ *Id.* at 12.

accommodation towards the victims to reduce the potential harm of re-traumatization”²⁰⁷

Lessons from Evaluation: As part of the victim-centered approach, notifiers should make sure to inform victims of their options regarding participation in the investigation and prosecution.²⁰⁸ Further, Houston emphasized that notifiers: (1) must be prepared for a wide range of emotions from the victim; (2) should be trained to treat the victim with “care and compassion” to help “establish trust and rapport and also create a lasting impact”; (3) should use an advocate to improve the victim’s experience during notification; and (4) should provide information for support services to victims.²⁰⁹

Re-engagement Results: Unfortunately, it does not appear that the Houston study calculated a re-engagement percentage as Detroit did. But the study did indicate that “many said they would be willing to be re-engaged in the criminal justice system.”²¹⁰ Further, these victims indicated that in order to be re-engaged, “they wanted to be in control of when the notification happened, to be prepared for the results.”²¹¹ This led to the creation of the hotline discussed above.²¹²

III. ADDITIONAL NOTIFICATION EFFORTS: SEXUAL ASSAULT KIT TRACKING SYSTEMS AND RIGHT TO NOTICE LAWS

In addition to developing notification protocols to encourage re-engagement, many jurisdictions are also using sexual assault kit tracking systems and “right to notice” laws to further promote victim re-engagement and provide survivors with the information they need and deserve. These are both often accomplished through legislative action.²¹³ Thus, jurisdictions that are in the process of developing

²⁰⁷ SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note 4, at 9, 13.

²⁰⁸ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 12.

²⁰⁹ *Id.* at 11–12.

²¹⁰ DOWN THE ROAD, *supra* note 7, at 24.

²¹¹ *Id.* (emphasis omitted).

²¹² *See id.* at 25.

²¹³ *Pillar: Implement Tracking System, END THE BACKLOG*, <https://www.endthebacklog.org/the-six-pillars/pillar-implement-tracking-system> (last visited Jan. 27, 2023); *see also Pillar: Victim’s Right to Know*, *supra* note 40.

The National Institute of Justice and the Joyful Heart Foundation both recommend that each state implement a sexual assault kit tracking system. They emphasize how important a tracking system is to sexual assault reform in each state: (1) it prevents any lost, misplaced, or forgotten sexual assault kits; (2) it prevents a future backlog of

notification protocols should also consider the implementation of these two additional avenues for providing victims with information about their sexual assault kits and the subsequent investigations.

A. *Sexual Assault Kit Tracking Systems*

In an effort to avoid another backlog of sexual assault kits, jurisdictions began passing legislation that required implementing a tracking system for each sexual assault kit collected.²¹⁴ In general, the tracking systems allow everyone involved in the sexual assault kit process—medical facilities, law enforcement agencies, forensic laboratories, prosecuting attorneys, and survivors—to track a sexual assault kit and its status within the testing process.²¹⁵ Importantly, these tracking systems serve the essential purpose of preventing any sexual assault kit from being lost, misplaced, or forgotten.²¹⁶

More specifically, the tracking systems track the sexual assault kits through each step of the process.²¹⁷ As soon as the sexual assault nurse completes her exam, collects the kit, and scans it into the system, the tracking will begin.²¹⁸ The program will then automatically notify law enforcement that the kit is ready for pickup.²¹⁹ Once the kit is picked up and delivered to the forensic lab, the program will update the kit's status within the system.²²⁰ In fact, the tracking system will let the forensic lab know when the kit is on its way, if the delivery will be late, or if the delivery never arrives.²²¹ Once the testing is complete, the status and results will again be updated within the system.²²² Throughout this process, prosecuting attorneys will be able to review

sexual assault kits; (3) it creates accountability and transparency in the process; (4) it shows victims of sexual assault that their sexual assault kit is important; and (5) provides closure and immediate answers to victims. *Pillar: Implement Tracking System*, *supra* note 213; *see also National Best Practices for Sexual Assault Kits*, *supra* note 26, at 33.

²¹⁴ *See Pillar: Implement Tracking System*, *supra* note 213.

²¹⁵ *Track-Kit Sexual Assault Kit (SAK)*, INVITA—HEALTHCARE TECHNOLOGIES [hereinafter *INVITA Tracking*], <https://www.invitahealth.com/sexual-assault-kit> (last visited Jan. 29, 2023).

²¹⁶ *See id.*; *see also Pillar: Implement Tracking System*, *supra* note 213.

²¹⁷ *INVITA Tracking*, *supra* note 215.

²¹⁸ STACS DNA, *Tracking Sexual Assault Kits: Giving Survivors Control* [hereinafter *STACS DNA*], YOUTUBE (Mar. 29, 2018), https://www.youtube.com/watch?v=LpWfHSISrw&feature=emb_logo; *see also INVITA Tracking*, *supra* note 215.

²¹⁹ *STACS DNA*, *supra* note 218.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

the status of the testing in order to determine when they will receive the results.²²³ Likewise, the survivors are able to stay up to date on the progress on each step.²²⁴ They can often even opt for automatic notifications about their kit's status.²²⁵ Finally, the system also provides the survivor with access to resources for survivor assistance.²²⁶

According to the Joyful Heart Foundation, twenty-nine states, Washington D.C., and Puerto Rico have enacted legislation requiring the implementation of a sexual assault kit tracking system.²²⁷ Notably, in 2014 Michigan became the first state to pass legislation for a tracking system.²²⁸ The specific legislation created a commission to oversee the creation of the sexual assault kit tracking system and guidelines for the tracking system.²²⁹ The legislation also appropriated the necessary funds to fund the project.²³⁰

For jurisdictions considering this addition, it is important to note that sexual assault kit tracking systems cost money to implement and

²²³ *Id.*

²²⁴ *Id.*

²²⁵ STACS DNA, *supra* note 218.

²²⁶ *Id.*

²²⁷ *Rape Kit Tracking Systems: What They Are and Why We Need Them*, END THE BACKLOG (April 30, 2021) [hereinafter *End the Backlog Tracking Systems*], <https://www.endthebacklog.org/blog/rape-kit-tracking-systems-what-they-are-and-why-we-need-them>; *see also* *Pillar: Implement Tracking System*, *supra* note 213 (noting these states include Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin); The Joyful Heart Foundation provides model legislation for all of its recommendations, including the tracking system. *See also* COMPREHENSIVE RAPE KIT REFORM, *supra* note 41, at 15. Ideally, the legislation should include: (1) “[c]onvene a multidisciplinary task force on the rape kit handling process to develop recommendations for establishing a statewide tracking system”; (2) “[e]nsure the system tracks the status of the kits from the collection site throughout the criminal justice process”; (3) “[a]llow victims to access the system anonymously and receive updates regarding the location and status of their kit”; (4) “[i]nstruct law enforcement agencies, medical facilities, crime laboratories, and any other facilities that receive, maintain, store, or preserve kits to fully participate”; (5) “[r]equire all previously untested kits to be entered into the system”; (6) “[e]nsure anonymous kits remain anonymous in a tracking system”; and (7) “[m]andate CODIS upload.” *Id.*

²²⁸ MICH. COMP. LAWS ANN. § 752.962 (2014).

²²⁹ *Id.*

²³⁰ *Id.* Section 10 of the law reads: “There is appropriated \$25,000.00 for the department of human services for the fiscal year ending September 30, 2015 and each fiscal year after that. The funds appropriated under this subsection shall be used only to implement and carry out the purposes of this act.”

operate.²³¹ Many states have been able to take advantage of federal grants to fund the creation of their sexual assault kit tracking systems.²³² Further, as illustrated above, states that have passed legislation requiring a sexual assault kit tracking system allocated funds for its creation. Ultimately, the tracking system is an important piece to not only provide victims with access to crucial information, but also an important way to hold law enforcement accountable for keeping track of sexual assault kits and avoiding a future backlog.²³³

B. *Right to Notice Laws*

Consistent with improving accessibility through a tracking system, it is also important for jurisdictions to consider improving the victim's accessibility to information through laws that grant them the right to specific information from law enforcement. In the context of sexual assault investigation reform, a victim's "right to notice" is a law or right that entitles the victim to receive specific information about their sexual assault kit.²³⁴ This law could guarantee that the victim be notified about a variety of things, including: (1) the status of their sexual assault kit—"when the kit is submitted to the lab, if a DNA profile is obtained, when the kit is entered into the DNA database, and when a match occurs"; (2) notice prior to the destruction of the sexual assault kit; and (3) the option to ask for the kit to be preserved.²³⁵

Importantly, these types of laws can help "counter the loss of self-determination and control that is often at the core of a sexual

²³¹ For example, in Maine, one article notes that it would cost approximately \$40,000 for the tracking software and about \$120,000 a year to operate the system. Edward D. Murphy, *Bill Would Create Statewide System to Track Rape Testing Kits*, PORTLAND PRESS HERALD (Mar. 22, 2017), <https://www.pressherald.com/2017/03/22/bill-would-create-statewide-system-to-track-rape-testing-kits>.

²³² See, e.g., *FY 2021 Sexual Assault Forensic Evidence—Inventory, Tracking, and Reporting*, BUREAU OF JUST. ASSISTANCE—U.S. DEP'T OF JUST., <https://bja.ojp.gov/funding/opportunities/o-bja-2021-104001> (last updated June 8, 2021); *FY 2020 Sexual Assault Forensic Evidence—Inventory, Tracking, and Reporting (SAFE-ITR) Program*, BUREAU OF JUST. ASSISTANCE—U.S. DEP'T OF JUST. (Apr. 16, 2020), <https://bja.ojp.gov/funding/opportunities/bja-2020-18439>; *FY 2019 Sexual Assault Forensic Evidence—Inventory, Tracking, and Reporting Program (SAFE-ITR)*, BUREAU OF JUSTICE ASSISTANCE—U.S. DEP'T OF JUST. (Apr. 21, 2020), <https://bja.ojp.gov/funding/opportunities/bja-2019-15528>; *FY 2018 Sexual Assault Forensic Evidence—Inventory, Tracking, and Reporting Program (SAFE-ITR)*, BUREAU OF JUST. ASSISTANCE—U.S. DEP'T OF JUST. (Apr. 21, 2020), <https://bja.ojp.gov/funding/opportunities/bja-2018-13742>.

²³³ See *Pillar: Implement Tracking System*, *supra* note 213.

²³⁴ COMPREHENSIVE RAPE KIT REFORM, *supra* note 41, at 17.

²³⁵ *Id.*

assault.”²³⁶ In fact, the studies discussed *supra* highlight the importance of providing control to the victims of sexual assault.²³⁷ Ultimately, allowing victims to obtain information about their case can “promote healing.”²³⁸

During the recent sexual assault reform movement, many states passed legislation establishing a victim’s “right to notice.”²³⁹ Some jurisdictions may contend that the sexual assault kit tracking systems and “right to notice” laws are unnecessary because those jurisdictions believe they are already sufficiently tracking the kits and providing the victims with information. Nevertheless, these laws are an important step in providing victims with control as they attempt to navigate a path toward healing.²⁴⁰ Further, these steps also allow for clearer accountability if something goes wrong in the future.²⁴¹ Lastly, by providing more control and access to victims, jurisdictions can demonstrate that they care about the victim and addressing the wrongs that have occurred.²⁴² In the end, tracking systems and right to notice laws will hopefully promote victim re-engagement, which will improve our ability to provide justice for each victim.

²³⁶ *Pillar: Victim’s Right to Know*, *supra* note 40.

²³⁷ SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, *supra* note SEXUAL ASSAULT VICTIMS’ EXPERIENCES OF NOTIFICATION AFTER A CODIS HIT, at 9; *see also* HOW TO NOTIFY VICTIMS ABOUT SEXUAL ASSAULT KIT EVIDENCE, *supra* note 4, at 8–9; Sulley et al., *supra* note 4, at 4375; DOWN THE ROAD, *supra* note 7, at 25.

²³⁸ *Pillar: Victim’s Right to Know*, *supra* note 40.

²³⁹ COMPREHENSIVE RAPE KIT REFORM, *supra* note 41, at 17. Each state will want to consider exactly what language is appropriate for their right to notice laws. For example, New York’s Right to Notice law includes language that allows the specific law enforcement agency to delay the release of information if it “would compromise the successful investigation” of the sexual assault. N.Y. EXEC. LAW § 838-b (LexisNexis 2019). It also provides the victim with 90 days notice when the kit will be destroyed and no longer stored, which occurs after 20 years. *Id.* Further, the Joyful Heart Foundation has created model legislation to assist legislators in drafting their laws. COMPREHENSIVE RAPE KIT REFORM, *supra* note 41, at 18.

The Joyful Heart Foundation’s website, which tracks the various reform measures by state, indicates that thirty states and Washington D.C. have passed “right to notice” legislation. *Pillar: Victim’s Right to Know*, *supra* note 40.

²⁴⁰ *See id.*

²⁴¹ *Pillar: Implement Tracking System*, *supra* note 213.

²⁴² *See* NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 1, 12.

IV. IMPROVING NOTIFICATION PROTOCOLS WILL PROMOTE JUSTICE AND HEALING FOR VICTIMS

This Article has laid out the different steps, improvements, and considerations for each jurisdiction when addressing how each will notify victims regarding backlogged sexual assault kits. With the process and options in mind, this Part shows how victim re-engagement will likely (1) promote justice and closure for the victim, and (2) improve a victim's path toward healing.

To start, readers must keep in mind the following points. First, each victim's path through notification toward justice, closure, and healing will be different. Thus, each victim's idea of justice will vary. In fact, a victim may not be interested in pursuing justice under the criminal justice system or restorative justice. Restorative justice in particular is not often used in adult sexual assault cases. Thus, many jurisdictions likely have not even considered its application within backlogged sexual assault kit cases.

With this in mind, this Article should not be construed to suggest that these two forms of justice will be appropriate for every victim. Instead, this Article points out that every victim deserves the opportunity to consider these two options of justice and closure. Without considering and implementing the above notification recommendations in a way that will best promote victim re-engagement, the victim will likely miss out on the opportunity to consider these options under the criminal justice system and through restorative justice.

Additionally, there are no guarantees when it comes to either form of justice. Consistent with the fact that jurisdictions should not expect 100 percent re-engagement, law enforcement similarly must acknowledge and make clear to victims that these two forms of justice are not certain. Again, re-engagement will place the victim in the best place possible to (1) consider whether the criminal justice system or restorative justice is the right path for them, and (2) find a path toward healing within these two forms of justice.

In referring to "justice," I am focusing on justice and closure for the victim utilizing one of two options: (1) the criminal justice system, or (2) through restorative justice. Jurisdictions should consider how both of these options can be used to promote healing for the victim, which is the ultimate goal of a "victim-centered" approach.²⁴³ Notifiers

²⁴³ As noted previously, a "victim-centered" approach should place the victim at the center of all decisions regarding the case to help determine what will be best for them.

must be familiar with the below material in order to appropriately advise the victim about each.

Thus, the following sections will show how and why a re-engaged victim is the necessary first step for placing the victim in the best place possible for obtaining justice and closure through either (1) the criminal justice system, or (2) restorative justice. Additionally, since it does not appear that jurisdictions or scholars have considered the use of restorative justice for backlogged sexual assault kit cases, this Article will initiate this discussion by suggesting that restorative justice should be an option for survivors to consider. If we can put our victims in the best place possible to obtain justice, then we are putting victims in the best place possible to heal.

A. *The Criminal Justice System*

For the purposes of backlogged sexual assault kits, the research primarily focuses on re-engagement for the purposes of utilizing the criminal justice system, which would generally include testifying as part of the prosecution.²⁴⁴ This section will focus on why a re-engaged victim will necessarily promote a better result, thus ideally providing justice for the victim.²⁴⁵

Naturally, each victim will define “justice” differently, meaning each will have their own conception of a positive outcome within the criminal justice system. Some victims may want the offender to serve a specific number of years in prison, to register as a sex offender, or to be ordered to have “no contact” with the victim moving forward. Some victims may simply want the opportunity to tell the judge how the sexual assault has affected their life. Some may want the offender punished, but may not want to have to see the offender, testify, or be subject to cross-examination.

Thus, the first benefit to re-engagement is simply informing the victim of their options within the criminal justice system. Law enforcement will have the chance to speak with them, explain the various steps, and see if the criminal justice system is an option that is

NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 2; DOWN THE ROAD, *supra* note 7, at 21–24; *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 381–84.

²⁴⁴ DOWN THE ROAD, *supra* note 7, at 21 (stating that “the victim’s participation is critical” for prosecuting sexual assault cases); *see* NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 1.

²⁴⁵ To be clear, this assumes that a victim wants to pursue the outcomes discussed below. It is certainly possible that a re-engaged victim will consider the options and decide not to participate in the criminal justice system.

best for them and their healing path. Without a re-engaged victim, however, law enforcement will likely never have the chance to discuss this option with them.

Building from this idea, a re-engaged victim is more likely to have a better opportunity for justice and closure within the criminal justice system.²⁴⁶ With a re-engaged victim, there are two avenues within the criminal justice system in which a case typically proceeds: either a guilty plea agreement or a jury trial. A sentencing hearing then follows both avenues.²⁴⁷ This Article posits that a re-engaged victim is in a better position under either avenue for ultimately achieving their desired outcome from the criminal justice system, which will promote justice, closure, and healing.

B. *Guilty Plea Agreements*

The majority of all criminal cases across the country do not go to a jury trial, but instead end with a guilty plea agreement.²⁴⁸ A guilty plea agreement is an agreement between the parties wherein the defendant agrees to plead guilty to a crime.²⁴⁹ There are many other terms that could also be contained in such an agreement, like a specific agreed upon sentence, the specific rights that the defendant waives by signing the agreement, and safeguards to ensure that the defendant has made the decision voluntarily.²⁵⁰ But, since both parties must

²⁴⁶ This is indirectly supported by research that indicates that a victim's statement has a positive effect on conviction rates. Sulley et al., *supra* note 4, at 4363.

²⁴⁷ It cannot be overstated that discussing the different options and possibilities with a victim is extremely important. In addition to a guilty plea agreement and a jury trial, a sexual assault case could also be dismissed. This is a real risk that must be discussed with a victim prior to pursuing the criminal justice option. While dismissal is a possibility in any case, it would be much less likely to happen with a re-engaged victim, so this Article will not discuss dismissal at length. Similarly, a case could proceed to jury trial and result in a not guilty verdict. In that case, there would not be a sentencing hearing.

²⁴⁸ Stephen Handelman, *Why Innocent Defendants Plead Guilty to Rape Charges*, THE CRIME REP. (June 30, 2015), <https://thecrimereport.org/2015/06/30/2015-06-why-innocent-defendants-plead-guilty-to-rape-charges> (indicating 90 percent of criminal cases resolve with a guilty plea agreement); RAM SUBRAMANIAN, LEON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING iii (Sept. 2020) [hereinafter IN THE SHADOWS], <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>; *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.

²⁴⁹ *How Courts Work*, *supra* note 248; see Brian R. Shipley & Kimberlee A. Cleaveland, *Guilty Pleas*, 87 GEO. L.J. 1433, 1433–34 (1999) [hereinafter *Guilty Pleas*].

²⁵⁰ *Guilty Pleas*, *supra* note 256, at 1433–43.

agree, a guilty plea can only occur if both the prosecutor and the defendant agree on the terms.²⁵¹ Further, in many situations, the judge must accept the terms of the agreement as well.²⁵²

With a re-engaged victim, there is a better chance of obtaining justice for the victim through a guilty plea agreement for many reasons. Primarily, a re-engaged victim will typically be willing to appear in court and testify about what happened. For a case to proceed through the criminal justice system, a victim may need to testify in court prior to the jury trial at a preliminary hearing, a grand jury hearing, or an evidentiary hearing. Without a victim that is willing to appear in court, it will be much harder to prove to the judge and jury what occurred.²⁵³

If a re-engaged victim is willing to appear in court and testify against the offender, however, then the offender will be more likely to plead guilty and enter into a guilty plea agreement.²⁵⁴ This often occurs because knowing that the victim is re-engaged and willing to testify will cause an offender to worry about what could happen at a later stage in the case.²⁵⁵ Additionally, a defendant typically risks a much higher sentence if they decline to plead guilty and go to trial.²⁵⁶

²⁵¹ *How Courts Work*, *supra* note 248.

²⁵² *Id.*

²⁵³ To be fair, there are conceivable situations where a case may be able to proceed without the victim; however, this Article does not address such situations as they occur much less often.

²⁵⁴ *But see* IN THE SHADOWS, *supra* note 247, at 11–15 (pointing out that “coercive factors,” such as “pretrial detention,” influence defendants to plead guilty).

²⁵⁵ This is supported by one study’s findings that the strength of evidence is an important factor for prosecutors when considering offering a plea. IN THE SHADOWS, *supra* note 247, at 19–21. Thus, it would follow logically that if prosecutors are concerned about the strength of the evidence and the likelihood of conviction, then a defendant would be as well. Finally, if a re-engaged victim is willing to participate in the court process, this would begin to directly impact the strength of the evidence against the defendant.

²⁵⁶ *See id.* at 40 (discussing how one study of serious violent felonies in Pennsylvania found that defendants received 57 percent longer sentences and were 2.7 times more likely to be incarcerated than defendants who pled guilty, referring to it as a “trial penalty”); *see* Daniel Donovan & John Rhodes, *To Plea or Not to Plea: That Is the Question*, 37 MONT. LAW. 24, 24 (2012) (noting “if the accused goes to trial and loses, he will often realize the mistake he has made when he suffers the attendant consequence of greater punishment”). For example, I was involved in a sexual assault prosecution using a backlogged sexual assault kit where the defendant ultimately signed a guilty plea agreement and agreed to go to prison for up to 20 years to avoid the risk of a harsher punishment if he lost at trial. Guilty Plea Agreement, Nevada v. Dryden, No. C334955 (Nev. Dist. Ct. 2019).

A guilty plea agreement normally includes a charge reduction or an agreement for a lesser sentence to incentivize the offender to accept it instead of going to trial. A guilty verdict at trial, however, almost guarantees that the defendant will receive a higher punishment than through a guilty plea.²⁵⁷

Importantly, pursuing a guilty plea is a conversation that the prosecution should first have with the victim.²⁵⁸ This conversation could quickly reveal that justice for the victim would not be through a guilty plea agreement. This could be for a number of reasons, but typically involves the victim being unsatisfied with the length of the sentence. On the other hand, a guilty plea can provide a quicker

²⁵⁷ This will depend on each jurisdiction, but many sexual assault charges have mandatory statutory sentences, which give the judge little to no discretion in sentencing. These mandatory sentences are usually substantial and often include a life sentence. Because of this, a defendant is often likely to accept a plea agreement to avoid the risk of losing at trial. For example, in Nevada, where I practiced, if a jury convicted an offender of sexual assault at trial, the law required the judge to sentence the offender to life in prison, with the possibility of parole after ten years. NEV. REV. STAT. § 200.366(2)(b) (2021). On another note, the research also indicates that these significant sentences can lead innocent defendants to plead guilty. See Handelman, *supra* note 248; IN THE SHADOWS, *supra* note 248, at 44–47. Two studies collectively found that between 8–11 percent of individuals who were later exonerated had pled guilty. IN THE SHADOWS, *supra* note 248, at 45–46. Clearly this outcome would not be justice for the defendant or the victim, meanwhile the true offender would still be in a position to harm others. This further raises the point of false accusations, which the NSVRC acknowledges occurs between 2 percent and 10 percent of the time. *Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR.,

<https://www.nsvrc.org/statistics> (last visited Mar. 17, 2023). This Article does not seek to address the important concerns regarding how to protect or safeguard against false accusations and the punishment of innocent individuals.

²⁵⁸ Additionally, a victim may encounter a situation where the prosecutor decides to resolve the case in a way that the victim does not like. It is ultimately the prosecutor's decision how to resolve the case. Thus, it is unavoidable that there could be a re-engaged victim who wants to proceed to a jury trial, but the prosecutor instead resolves the case through a guilty plea agreement. The ABA identifies that the "primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." PROSECUTION FUNCTION, STANDARD 3-1.2(b), AM. BAR ASS'N (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition. Thus, a prosecutor may feel that a guilty plea agreement is the most appropriate way to seek justice. But the prosecutor's assessment must be balanced with the "victim-centered" approach that sexual assault reform encourages. What should the prosecutor do if the victim perceives a jury trial as the only way for justice, closure, and healing? Unless both the prosecutor and the victim engage in open and honest conversations prior to making decisions about the case, the prosecutor will make such decisions without accounting for the victim's desired form of justice.

resolution than waiting for a case to proceed to a jury trial. A victim may value this aspect of a guilty plea because it finally gives them closure, allowing them to focus solely on healing, which hopefully improves with a just resolution.

Moreover, even if the victim is re-engaged and willing to testify, testifying at trial will be a traumatic experience where they will publicly relive what happened to them. They will further be subjected to cross-examination, where their testimony is called into question and their choices scrutinized.²⁵⁹ Even more, testifying will necessarily include the victim being face-to-face with the offender, and in some cases, being asked to identify the offender in court. For each victim, the traumatic impact will be different. A guilty plea agreement protects the victim from many of these re-traumatization opportunities of our adversarial criminal system.

Thus, a guilty plea can certainly provide much needed justice and closure for a victim, which in turn will promote their healing. Because the victim has re-engaged, the likelihood of a guilty plea is increased. Other victims, however, will prefer to go to trial. For these victims, justice will not include lowering the charges or agreeing to a lesser sentence. Fortunately, a re-engaged victim is more likely to yield better results at trial.

C. *Jury Trials*

Although it does not occur frequently, some criminal cases will proceed to a jury trial.²⁶⁰ A successful sexual assault jury trial necessarily relies on the victim's testimony about what happened. As such, the victim's credibility with the jury will be very important for a successful outcome.

Interestingly, any jury trial involving a sexual assault victim who was notified for a CODIS hit on their backlogged kit will also have that

²⁵⁹ Unfortunately, even though the law prevents defense attorneys from asking certain questions of a sexual assault victim, the defense will often ask questions seeking to place blame on the victim. For example, the defense may scrutinize the victim's choice to drink, hang out with the offender, or wear a revealing outfit.

²⁶⁰ The Sixth Amendment provides a defendant in a criminal case the right to a trial by jury. U.S. CONST. amend. VI. A Defendant may waive his right to a jury and instead proceed with a bench trial. *See* 75B Am. Jur. 2d Trial § 1575 (2022). A bench trial is the same as a jury trial, except instead of a jury, the judge will play the role of the jury. *See id.* Thus, the judge ultimately determines whether the defendant is guilty or not guilty. *See id.* A defendant, however, rarely opts for a bench trial, determining that they are more likely to be found not guilty by a jury of their "peers" than by a judge.

piece of evidence. The prosecutor will be able to present the DNA evidence to the jury, showing that the defendant's DNA was found on the swabs from the victim's sexual assault exam. This is extremely powerful evidence because it shows that sexual contact occurred between the victim and the defendant. But, with this powerful evidence, it often forces one defense: the sexual contact was consensual. Thus, a re-engaged victim's testimony will be crucial for the jury in determining that this was not consensual, but sexual assault.

My argument relies on this position: a re-engaged victim is likely to be considered more credible by a jury.²⁶¹ The jury could believe a victim is lying if the victim does not want to testify and is not forthcoming with their testimony. Even though there are valid reasons why a victim may not want to talk about being sexually assaulted, a jury often requires that the victim be able to tell them what happened in the manner in which that jury expects to hear it. If the victim appears to the jury as uninterested or disconnected, then the jury may not care about what happened. A re-engaged victim thus puts the prosecution in the best position to return a guilty verdict and provide justice for the victim.²⁶²

²⁶¹ See U.S. DEP'T OF JUST., U.S. ATTY'S OFF., EASTERN DIST. OF CAL., *Victim Rights*, <https://www.justice.gov/usao-edca/victim-witness-assistance/rights> (noting the importance of "complete cooperation and truthful testimony of all witnesses and victims" for the criminal justice system to function appropriately). The importance of a sexual assault victim's credibility is consistent with a study surrounding jury decisions in sexual assault trials, which in part analyzed the various factors that could impact a victim's believability. See Lauren E. Thompson, Emily Pica & Joanna Pozzulo, *Jurors' Decision Making in a Sexual Assault Trial: The Influence of Victim Age, Delayed Reporting, and Multiple Allegations*, 39 AM. J. FORENSIC PSYCH. 19, 34–40 (2021). Further, it is also supported by studies regarding "Rape Myth Acceptance," or RMA, which provide "overwhelming evidence that jurors take into the deliberation room false and prejudicial beliefs about what rape looks like and what genuine rape victims would do and that these beliefs affect attitudes and verdict choices in concrete cases." Fiona Leverick, *What Do We Know About Rape Myths and Juror Decision Making?*, 24 INT'L J. EVIDENCE & PROOF, 255, 273 (2020). RMA necessarily surrounds the victim, their actions, and their demeanor. See *id.* at 256–57. Thus, given the importance on the victim and their testimony, it follows that a re-engaged victim could present a better opportunity to persuade a jury.

²⁶² A jury trial is certainly a gamble for everyone involved. Even with a re-engaged victim and DNA evidence, a jury may not believe the victim's testimony or feel that there is still not enough evidence to prove that it was sexual assault. This will necessarily depend on whether there is any evidence that the victim's testimony is not credible, such as a motive to lie. Lastly, prior to proceeding forward with a jury trial, the victim and prosecutor should discuss the possibility of the jury finding the defendant not guilty and the effect this could have on the victim and their healing. A

A victim who chooses not to engage will not learn about the jury trial option. Thus, a re-engaged victim has the benefit of learning the options. Moreover, many re-engaged victims may not want to go through the re-traumatization of a jury trial, wherein they will need to talk about the sensitive and horrific details about the day they were sexually assaulted and then be cross-examined about it. As mentioned, this is an important discussion that the prosecution and the victim will need to have in order to determine if this is the best option for the victim in obtaining justice.

Assuming this is the best route for the victim, a re-engaged victim will necessarily be a more effective witness for the average jury. When it comes to strategically planning how best to present a case to a jury, the prosecution must consider what is believable to a jury and what could impact their decision. A victim who is cooperative and feels supported by “the team” will be more likely to have a stronger impact on a jury and will be considered more believable. Conversely, a victim who testifies that the police screwed up and did not believe them at the time they reported will often not come across as believable, even if those are accurate statements about what happened. Instead, a jury will be more likely to apply unfair stereotypes to the victim.

Therefore, a jury is more likely to find a re-engaged victim at trial credible and, thus, more likely to find the offender guilty. As such, it will provide the victim with much-deserved closure and justice, allowing them to continue healing.

D. *Sentencing Hearings*

After a guilty plea agreement or a jury trial guilty verdict, the court will conduct a sentencing hearing. At this hearing, a re-engaged victim will be more likely to persuade the judge, which will likely result in a sentence that is more consistent with what the victim asked for.

A typical sentencing hearing consists of several parts. To start, the judge will find the defendant guilty of the crimes he pled guilty to or was found guilty of by the jury. Next, the judge will give the defendant an opportunity to make a statement. This could be a sentencing request, an apology, an explanation, or anything else the defendant wants the judge to know prior to sentencing.

Similarly, the defense attorney will be given an opportunity to make an argument on the defendant’s behalf, usually advocating for a specific sentence while highlighting any mitigating circumstances of

jury “not believing” the victim could have an extremely detrimental impact on the victim’s recovery.

the crime or the defendant's background. The prosecution will then have a similar opportunity to provide an argument for the punishment and highlight any aggravating circumstances about the crime or the defendant's background.

Lastly, the victim is given an opportunity to speak about how this crime has affected them and what punishment they would like to see. This is the most impactful part of the sentencing hearing and will likely have the strongest effect on what the judge will decide for punishment.²⁶³ Because of this, a re-engaged victim will provide the best opportunity for achieving their justice.

To start, a re-engaged victim will be present at sentencing, where it is optional for them to speak. Further, a judge deals with hundreds of different cases each week. Thus, when a victim is present to stand in front of them and tell them face-to-face how this crime has affected them, a judge is more likely to care about the case, which will become about this person in court versus a name on a piece of paper. Conversely, a victim that is not re-engaged will likely not appear at sentencing: thus, the judge may not feel as much of a connection to punishing the wrong that occurred. Thus, a judge is more likely to deliver a sentence consistent with the victim's desire if the victim is present in court to talk about how this crime has affected them.

Finally, aside from the actual sentence, speaking at sentencing could also have important healing benefits for the victim. They will have "said their piece" to the judge and the offender. Regardless of the outcome, they will have done all they could at sentencing to seek justice, which could provide some closure.

E. Restorative Justice

The research and discussion surrounding notification protocols focuses primarily on the importance of re-engaging victims for participation in the criminal justice system.²⁶⁴ But not all re-engaged victims will want to pursue their options within the criminal justice

²⁶³ See *Victim Impact Statements*, U.S. DEP'T OF JUST. (2020), <https://www.justice.gov/criminal-vns/victim-impact-statements>.

²⁶⁴ NOTIFYING SEXUAL ASSAULT VICTIMS AFTER TESTING EVIDENCE, *supra* note 10, at 1; DOWN THE ROAD, *supra* note 7, at 21 (stating that the victim's participation is critical for the investigation and prosecution of a case within the criminal justice system); *Creating a Victim Notification Protocol*, *supra* note 4, at 3–4; AHRENS ET AL., *supra* note 4, at 13; Sulley et al., *supra* note 4, at 4361; see *Evaluation of a Victim-Centered, Trauma-Informed Victim Notification Protocol*, *supra* note 4, at 380. At this time, it does not appear that there is any research surrounding restorative justice and victims with a backlogged sexual assault kit.

system. In fact, many victims and the general public no longer believe in the criminal justice system.

The criminal justice system also focuses primarily on punishing the assaulter to deliver justice, but sometimes the punishment is not enough, or even worse, there may end up being no punishment at all. In fact, it often fails to provide the things that many victims want—an acknowledgement from the assaulter that they did something wrong, confirming that the victim is telling the truth, and a sincere effort to truly understand the effect of what they did. Based on these shortcomings of the criminal justice system, restorative justice could play an important role in providing the kind of justice that a victim needs in order to heal.

In addition to providing some background information on restorative justice, this section will focus on two specific points. First, given the victim-centered approach, jurisdictions should consider an option for implementing restorative justice in backlogged sexual assault kit cases. And second, similar to the criminal justice system, a re-engaged victim who chooses the restorative justice route will be more likely to receive justice and improved healing.

1. Brief Background Information

Restorative justice can take a variety of forms, but in general it relies on “the belief that those most affected by a crime should have the opportunity to become actively involved in its resolution.”²⁶⁵ It allows the victim and the assaulter to speak to each other about what happened, with others present to help guide and provide support.²⁶⁶ One restorative justice non-profit director describes it as seeking to produce “consensus-based plans through face-to-face dialogue that meets the needs of everyone impacted, beginning with the crime survivor.”²⁶⁷

One article sums it up perfectly:

²⁶⁵ Amy Kasparian, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377, 390 (2014).

²⁶⁶ Restorative justice has a long history of use throughout the world. This Article will primarily focus broadly on what restorative justice is and its application within sexual assault cases.

²⁶⁷ Sujatha Baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018), <https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle> (stating that “[t]he process invites truth-telling on all sides by replacing punitive approaches to wrongdoing in favor of collective healing and solutions”).

[restorative justice] excludes processes that weigh evidence and deliberate fault. Instead, the emphasis is on opportunities for victims to make decisions about how their case proceeds, to express how the wrongdoing affected them, to experience acknowledgement of the wrongful act imposed on them, and to individualize the accountability that is imposed.²⁶⁸

The process of restorative justice can take many forms.²⁶⁹ In general, a restorative justice facilitator will first meet with the survivor and the assaulter separately, yet multiple times, to build trust, answer questions, discuss goals, and determine who will be present.²⁷⁰ For restorative justice to work, both the survivor and the assaulter need to voluntarily participate.²⁷¹ Ultimately, the survivor and the assaulter will have one or multiple face-to-face meetings.²⁷² The entire circle—the survivor with their support plus the assaulter with their support—will develop a plan to meet the survivor’s self-identified needs.²⁷³ This often includes an acknowledgement from the assaulter that they did something wrong, confirming that the victim is telling the truth, and a sincere effort to truly understand the effect of what they did.²⁷⁴

2. Consider Restorative Justice for Backlogged Sexual Assault Kit Cases

While the research surrounding restorative justice has considered its application within sexual assault cases in general, it appears that there has not been a separate discussion started on whether restorative justice should be used for sexual assault cases that result from a backlogged sexual assault kit. As such, this section will begin this discussion, suggesting that it is important for survivors to have a restorative justice option when re-engaging with law enforcement after many years of waiting for the results of their sexual assault kit.

In considering this option, it is important to first establish the relationship between restorative justice and the criminal justice system.

²⁶⁸ Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE, 1623, 1624 (2014).

²⁶⁹ *See id.* at 1628–30 (providing a flow chart of the RESTORE program, discussed *infra*). *See also infra* notes 277–287.

²⁷⁰ *See* Baliga, *supra* note 267; Kasparian, *supra* note 264, at 391.

²⁷¹ *See* Baliga, *supra* note 267.

²⁷² *Id.*; Kasparian, *supra* note 264, at 391.

²⁷³ Baliga, *supra* note 267.

²⁷⁴ *See id.*

Restorative justice “ha[s] been implemented at [the] completion of police investigation[s], as pre-charging diversion, as components of post-charging plea agreements, post-conviction, during incarceration, immediately prior to or following release, and throughout the reintegration of the offender who has been returned to the community.”²⁷⁵ Thus, restorative justice could be a separate avenue of justice or it could exist within the justice sought through the criminal justice system.

Historically, many jurisdictions have been hesitant to utilize restorative justice for sexual assault cases, “deem[ing these cases] too sensitive or serious to be handled by the process.”²⁷⁶ One of the primary United States-based studies regarding restorative justice for adult sexual assault cases involved a program in Arizona called RESTORE.²⁷⁷ This community-based program focused on adult sexual assault crimes that the local prosecutors referred.²⁷⁸ The study analyzed twenty-two cases where both the victim and the offender consented to participate in RESTORE.²⁷⁹

Ultimately, the program appeared to be successful for the victims involved.²⁸⁰ All victims who completed the program conferences reported feeling “satisfied” or “very satisfied,” and 90 percent of all individuals involved, including the victims, offenders, and supporters, reported feeling satisfied.²⁸¹ The responses from the victims also illustrated the important benefits they received, including feeling empowered, having input on the consequences, and offender accountability.²⁸² This was further illustrated by the successful completion of the entire program in 66 percent of the felonies and 91 percent of the misdemeanor cases, which included twelve months of supervision after the final conference.²⁸³ Interestingly, while this

²⁷⁵ Koss, *supra* note 268, at 1624.

²⁷⁶ Kasparian, *supra* note 265, at 391.

²⁷⁷ See Koss, *supra* note 268, at 1632.

²⁷⁸ *Id.* at 1633. But “repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault” were excluded from consideration for the program. *Id.*

²⁷⁹ *Id.* at 1633. Not only did both the victim and the offender need to consent, but there were extensive assessments completed on the offender to ensure that he or she would be a good fit for the program. *Id.* at 1627.

²⁸⁰ See *id.* at 1647.

²⁸¹ Koss, *supra* note 268 at 1647.

²⁸² *Id.* at 1652.

²⁸³ *Id.* at 1654.

provided validation for each victim and accountability for each offender, 75 percent of the cases maintained in the criminal justice system by the prosecutors were closed without any consequences.²⁸⁴ In the end, the study found that the “conferences were more likely than court to result [in] admission of responsibility and raised the likelihood that offenders would receive counseling.”²⁸⁵

With this in mind, jurisdictions should consider a restorative justice option for victims with backlogged sexual assault kits. This option has the possibility of truly providing victims with validation for what happened. Restorative justice might be exactly what a victim needs to feel closure, which will promote their healing. Restorative justice is absolutely not going to be an option that will be right for everyone, but given the emphasis on “victim-centered trauma-informed” sexual assault reform and the benefits noted in the RESTORE program, restorative justice is worth consideration because it might be exactly what the victim wants and needs for justice and healing.

Finally, once a jurisdiction is willing to consider it, there are numerous factors for the MDT to discuss. To start, the RESTORE program noted that in order to replicate the program, a jurisdiction would need significant funding, which can prove difficult with most governmental entities opposing restorative justice in sexual assault cases.²⁸⁶ Further, the mere logistics of how the program would work could take many forms. Thus, as with developing notification protocols, the MDT will want to involve the necessary individuals to determine what the best course of action is for their community of victims.²⁸⁷

²⁸⁴ *Id.*

²⁸⁵ *Id.* The RESTORE program noted that even though the sample only involved twenty-two cases, they considered it “large in the context of the available literature.” *Id.* at 1655.

²⁸⁶ *See* Koss, *supra* note 268, at 1655 (opining that it “would be difficult to replicate in the United States today without substantial local funding”).

²⁸⁷ *See id.* at 1655–56 (suggesting that it would be productive to plan a “listening project to renew our understanding of the justice[,] desires[,] and interests of survivor victims so that we can align our priorities with theirs”).

F. *The Importance of Re-engagement for Restorative Justice*

Returning to the importance of re-engagement, restorative justice, in part, seeks to return the power and control to the victim.²⁸⁸ Further, given the uniqueness of each victim, a successful restorative justice program must focus on the needs of each individual victim.²⁸⁹ Thus, the victim's "feelings and opinions are central to effective restorative justice practices."²⁹⁰

For restorative justice to be successful, it requires the participation of the victim and the offender. This is evidenced by restorative justice's emphasis on the victim's "feelings and opinions," which will not only help guide the initial meetings with the facilitator, but also to guide the face-to-face meeting with the offender. This re-engagement will promote a healthy and healing discussion during the face-to-face conference, wherein "the victim is able to share his or her position about the . . . impact of the crime with the offender, receive answers to questions about the crime and the offender, and be involved in developing a case plan for the offender . . ."²⁹¹ The RESTORE findings further support the significance of victim engagement and participation, noting that the only cases that did not make it through the restorative justice process involved non-compliance with the rules of the program.²⁹²

Lastly, it is an interesting discussion to consider the results of re-engagement and participation in restorative justice versus the criminal justice system. Each involves significantly different steps and approaches, but in the end, both aim to provide the survivor with the same results—closure, justice, and healing.

CONCLUSION

As jurisdictions continue, and some begin, addressing their backlog of sexual assault kits, they must also develop notification protocols for how they will notify and communicate with survivors. Given the trauma and detrimental delay that these survivors have been

²⁸⁸ Sandra Pavelka & Anne Seymour, *Guiding Principles and Restorative Practices for Crime Victims and Survivors*, CORR. TODAY 36, 39 (2019), https://www.aca.org/common/Uploaded%20files/Publications_Carla/Docs/Corrections%20Today/2019%20Articles/Guiding-Principles-and-Restorative-Practices-for-Crime_Victims-and-Survivors.pdf.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 42.

²⁹² Koss, *supra* note 268, at 1647.

through, it is essential that jurisdictions rely on a victim-centered, trauma-informed approach. In doing so, victims will be provided with the best opportunity to re-engage with law enforcement, which in turn will provide them with the best opportunity for justice. While both systems have their benefits and risks, the criminal justice system and restorative justice aim to provide the survivor with the justice, closure, and healing that they have been waiting for and desperately need.

