

The Women's Legal Defense  
and Education Fund

**THE FAILURE TO PROCESS RAPE KITS VIOLATES THE U.S. CONSTITUTION**

Three girls, ages 14 and 15, were raped over a nine month span in Portland, Oregon, in 1997.<sup>1</sup> Each girl was on her way to school when she was grabbed by the neck, pulled behind a house, and brutally raped and sodomized.<sup>2</sup> In each case, the rapist ordered the victim to cover her eyes and count to 50 or 100 while he fled.<sup>3</sup> Despite these threats, all three victims reported the rape to the police, and each girl underwent a “rape kit examination.” This is a grueling, hours-long physical examination in which DNA evidence is collected from the victim’s body and stored for testing.<sup>4</sup> Despite the girls reporting identical facts surrounding their sexual assaults to the police, in two of the cases, detectives decided not to submit the rape kit evidence to a crime laboratory for testing.<sup>5</sup>

By choosing not to test the rape kit evidence in 1997, law enforcement left a serial rapist free to rape, terrorize, and murder with impunity. The Portland Police did not thoroughly investigate the 1997 cases. Despite a nearly identical modus operandi in the three cases, police did not connect the attacks or test crucial DNA evidence that would have shown that all three children had been raped by the same man.

Police did not publicize the first two attacks or inform the community that a rapist was on the loose. Moreover, in their interviews with the victims, police expressed skepticism. One

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<sup>1</sup> Maxine Bernstein, *Rape victims say Portland police didn't take attacks seriously or warn public*, OREGON LIVE (Feb. 3, 2014) (originally published Jul. 28, 2002), available at [http://www.oregonlive.com/portland/index.ssf/2014/02/rape\\_victims\\_say\\_portland\\_poli.html](http://www.oregonlive.com/portland/index.ssf/2014/02/rape_victims_say_portland_poli.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Maxine Bernstein, *Brenda Tracy, Melissa Bittler's family work to protect rape victims with 'Melissa's Bill'*, OREGON LIVE (Oct. 31, 2015), available at [http://www.oregonlive.com/portland/index.ssf/2015/10/brenda\\_tracy\\_melissa\\_bittlers.html](http://www.oregonlive.com/portland/index.ssf/2015/10/brenda_tracy_melissa_bittlers.html).

victim later said that the detective “didn’t believe [her] at all.”<sup>6</sup> The father of Michelle Horst, who was 15 when she was raped, said that police treated his daughter “like she was lying.”<sup>7</sup>

In 2001, four years after the string of attacks in 1997, 14 year-old Melissa Bittler was dragged behind her neighbor’s house, brutally raped, and murdered.<sup>8</sup> Detectives investigating the murder searched their database for similar cases and stumbled upon the three rapes that had occurred in 1997.<sup>9</sup> Upon discovering the untested rape kits, detectives sent them to a crime lab for testing. The tests revealed that the four rapes were committed by the same man.

Ladon Stephens, the serial rapist who was responsible for the four brutal rapes and the murder of Melissa Bittler, was identified in 2002, when he was arrested for raping yet another victim—this time a 24 year-old woman.<sup>10</sup> Notably, Stephens was already on law enforcement’s radar before the three girls were raped in 1997. He was under parole supervision connected with multiple attempted kidnappings of girls in 1989 and was classified as a high risk offender.<sup>11</sup> Had the police investigated the rapes thoroughly and tested DNA evidence, they would have linked the 1997 rapes to Stephens, and he would most likely have been incarcerated. This means that he never would have raped and killed Melissa Bittler or raped the 24 year old woman.

While all these brutal attacks were taking place in Portland, in Oregon alone, 5,652 rape kits sat untested, some for decades.<sup>12</sup> Unfortunately, the failure to investigate rapes in Portland is

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<sup>6</sup> Maxine Bernstein, *Rape victims say Portland police didn't take attacks seriously or warn public*, OREGON LIVE (Feb. 3, 2014) (originally published Jul. 28, 2002), available at [http://www.oregonlive.com/portland/index.ssf/2014/02/rape\\_victims\\_say\\_portland\\_poli.html](http://www.oregonlive.com/portland/index.ssf/2014/02/rape_victims_say_portland_poli.html).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *The Backlog: Oregon*, END THE BACKLOG, <http://endthebacklog.org/Oregon> (last accessed Apr. 27, 2016).

not the exception but the norm throughout the United States. According to the White House, there are as many as 400,000 untested rape kits throughout the United States.<sup>13</sup>

Rape is a violent crime that is not adequately investigated and prosecuted in the United States. For the past decade, multiple reports by the media, advocacy groups, and the federal government have exposed widespread failure to process rape kits (DNA evidence gathered and preserved immediately after a rape), revealing that thousands of rape kits are gathering dust in warehouses, police stations, and crime labs.<sup>14</sup>

This is no oversight. Nearly half a million rape kits do not pile up overnight. Rape kits are not tested because there is a culture of complacency surrounding violence against women, and women's access to justice. Rape and other sexual offenses are crimes that disproportionately affect women and girls.<sup>15</sup> Failing to process rape kits in the United States is a result of the conscious decisions not to investigate crimes that impact women. Rape kits could, if tested, potentially lead to the identification, arrest, and imprisonment of violent sexual offenders.<sup>16</sup> Indeed, studies have shown that most people who rape are serial rapists.<sup>17</sup> Rape kits are piled on shelves signify that crimes that impact women are not worthy of investigation. This is discrimination on the basis of gender, which violates the Equal Protection Clause of the United States Constitution and other federal laws.

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<sup>13</sup> THE WHITE HOUSE, FACT SHEET: INVESTMENTS TO REDUCE THE NATIONAL RAPE KIT BACKLOG AND COMBAT VIOLENCE AGAINST WOMEN (Mar. 16, 2016), available at <https://www.whitehouse.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole>.

<sup>14</sup> See Richard Willing, *DNA's success in crime-fighting spread unevenly*, USA TODAY, Oct. 6, 2002; Bill Hewitt, *No Time to Wait*, PEOPLE, June 3, 2002, available at <http://www.people.com/people/archive/article/0,,20137221,00.html>; John J. Monahan, *Crime lab didn't test 16,000 cases*, TELEGRAM, July 17, 2007, available at <http://www.telegram.com/article/20070717/NEWS/707170628/1116>.

<sup>15</sup> Roni Caryn Rabin, *Nearly 1 in 5 Women in U.S. Survey Say They Have Been Sexually Assaulted*, N.Y. TIMES, Dec. 14, 2011, available at [http://www.nytimes.com/2011/12/15/health/nearly-1-in-5-women-in-us-survey-report-sexual-assault.html?\\_r=0](http://www.nytimes.com/2011/12/15/health/nearly-1-in-5-women-in-us-survey-report-sexual-assault.html?_r=0).

<sup>16</sup> *Infra* Section II.

<sup>17</sup> Lisak, D. & Miller, P.M., *Repeat Rape and Multiple Offending Among Undetected Rapists*, VIOLENCE AND VICTIMS 17(1), 73-84 (2002).

No other violent crime goes uninvestigated in the United States. While our country spends an estimated \$15 billion dollars each year testing narcotics and prosecuting mostly non-violent<sup>18</sup> drug offenders as part of our war on drugs,<sup>19</sup> evidence that is critical to the identification and prosecution of violent rapists is effectively abandoned and sometimes even lost. For example, in September 2014, the police department in Memphis, Tennessee, discovered 200 unprocessed rape kits. These rape kits were in addition to 12,000 kits that the city announced it had not processed in late 2013.<sup>20</sup> In 2016, the Florida Department of Law Enforcement announced the results of an audit, which found more than 13,000 untested rape kits throughout the state.<sup>21</sup> In 2015, the White House estimated that more than 400,000 rape kits in the United States have not been tested.<sup>22</sup>

Gender discrimination in the investigation of rape has to stop. For decades, the U.S. government has given states and municipalities funding to test rape kits as mandated by several federal statutes, the Violence Against Women Act (VAWA), the Debbie Smith Act of 2004, and most recently the Sexual Assault Kit Initiative (SAKI) of 2015.

Misleadingly, the media and state and federal governments refer to the failure to process rape kits as a “backlog.” That term is not accurate. “Backlog” suggests that municipalities intend to eventually process all rape kits and that testing is simply on hold or making slow progress. The truth is that municipalities never intended to test them, ever, despite a federal mandate

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<sup>18</sup> Editorial Board, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES, Nov. 23, 2015, available at <http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html>.

<sup>19</sup> Matt Sledge, *The Drug War And Mass Incarceration By The Numbers*, HUFFINGTON POST, Apr. 8, 2013, available at [http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration\\_n\\_3034310.html](http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html).

<sup>20</sup> *Memphis police: 12,000 backlogged rape kits tested, suspects ID'd*, CHICAGO TRIBUNE, March 10, 2015, <http://www.chicagotribune.com/news/nationworld/chi-memphis-rape-kits-20150309-story.html>

<sup>21</sup> Clifford Parody, *Florida Department of Law Enforcement says it has backlog of 13,000-plus rape test kits*, THE LEDGER, Jan. 4, 2016, available at <http://www.theledger.com/article/20160104/NEWS/160109863>.

<sup>22</sup> THE WHITE HOUSE, FACT SHEET: INVESTMENTS TO REDUCE THE NATIONAL RAPE KIT BACKLOG AND COMBAT VIOLENCE AGAINST WOMEN (Mar. 16, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole>.

requiring testing. There is no other reason to explain the sheer volume of rape kits that have gone untested for years or even decades.

This is most clearly demonstrated by the City of Houston, where untested rape kits have continued to pile up, despite concrete evidence that testing rape kits solves cold cases. In 2015, Houston cleared its backlog of 6,600 untested rape kits, some of which dated back to the 1980s. The testing yielded 850 matches to the national Combined DNA Index System (“CODIS”).<sup>23</sup> CODIS is a software program that allows law enforcement personnel to search the National DNA Index System (“NDIS”), a national database of DNA profiles that have been gathered during state and federal crime investigations.<sup>24</sup> This means that 850 rapists whose semen was gathered as evidence at the crime scene had either raped before or raped again.

Despite clearing its rape kit “backlog” in 2015, by the spring of 2016, more than 300 untested rape kits had again piled up in the crime laboratory used by the Houston Police Department.<sup>25</sup> Most of the kits had been sitting for at least three months.<sup>26</sup> Houston officials blamed the new backlog on a lack of financial resources. The laboratory, however, has been operating with a projected budget surplus of 2 million dollars.<sup>27</sup> After public uproar, Houston’s Mayor, Sylvester Turner, announced a plan to get these rape kits tested by the end of June 2016.<sup>28</sup> This second backlog should not have occurred. All municipalities, large and small,

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<sup>23</sup> *The Backlog: Houston*, ENDTHEBACKLOG, <http://www.endthebacklog.org/houston> (last visited Apr. 29, 2016).

<sup>24</sup> See FBI, FREQUENTLY ASKED QUESTIONS (FAQS) ON THE CODIS PROGRAM AND THE NATIONAL DNA INDEX SYSTEM, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Apr. 29, 2016).

<sup>25</sup> Jeremy Rogalski, *City’s Rape Kit Backlog Creeping Back*, KHOU, Apr. 4, 2016, available at <http://www.khou.com/news/investigations/citys-rape-kit-backlog-creeping-back/119672065>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Houston Mayor Takes Steps to End Rape Kit Backlog*, KHOU, Apr. 6, 2016, available at <http://www.khou.com/news/investigations/mayor-citys-rape-kit-backlog-will-be-tested-by-june/122781136>.

should have a system in place to ensure that rape kits are processed as a matter of course and that no backlog can build up.

Legal Momentum, the nation's oldest advocacy organization devoted to advancing the rights of girls and women, will issue a report in 2016 to demonstrate that the failure to test rape kits is not only morally wrong, but also violates federal law, including the United States Constitution. Rape kits should be tested to ensure that women and girls who are victims of an all too commonplace violent crime can obtain access to justice. When rape kits sit on the shelf, so too do the lives of rape victims and members of the community who remain at risk of being rape victims.

Legal Momentum's upcoming report will be a call to action for rape survivors, the public, law enforcement agencies, and federal, state, and local governments to ensure that every rape is fully investigated, including by processing rape kit evidence. Legal Momentum's report will propose solutions for government actors to implement real, durable reform that will end the rape backlog, ensure that every rape kit is processed in a timely fashion, and sex crimes are prosecuted.

Legal Momentum offers the following recommendations to ensure that every rape kit is tested as a matter of course:

- Municipalities must work to eliminate all "backlogs" through auditing untested rape kits in law enforcement agencies and storage facilities, including crime labs, and testing every existing rape kit;
- Municipalities must budget for administering and processing rape kits and must continue to process rape kits even after "backlogs" have been eliminated;

- State laws should mirror the federal mandates that require that all rape kits be tested;
- The federal government should engage in strict oversight of federal funds to ensure that funds allocated for rape kit testing are properly expended;
- Law enforcement agencies should work to identify and eliminate gender bias.

Such measures will end the culture of complacency toward victims of gender-based violence. Widespread rape kit testing has the potential to restore confidence in law enforcement, increase reporting, and decrease overall rates of violent crime. Decades of inaction must be countered by ensuring that every rape kit—past, present, and future—is tested.