

Written Submission of Margaret Garvin, MA, JD
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before the
Oregon Senate Committee on the Judiciary
Honorable Senator Floyd Prozanski, Chair

Hearing on HB 2317

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Mr. Chairman and members of the Committee, thank you for the opportunity to present my views regarding HB 2317 through this written testimony.

By way of background, NCVLI is a nonprofit educational and advocacy organization located at Lewis and Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. In February of 2003 I joined NCVLI and shortly thereafter became a Clinical Professor of Law at Lewis & Clark Law School. As Director of NCVLI, I provide programmatic oversight to each of NCVLI's victims' rights programs, including its education, technical assistance and *amicus curiae* work. In addition to my prior testimony before the Oregon Legislature, I have testified before the Nevada and Hawaii State Legislatures, as well as the United States Congress, on the state of victims' rights, and consulted with Congress on the drafting of the 2004 Federal Crime Victims' Rights Act. Prior to joining NCVLI, I clerked for the Honorable Donald P. Lay of the Eighth Circuit Court of Appeals and then practiced in a private law firm in Minneapolis, Minnesota.

I write today to encourage Passage of HB 2317, but truly to encourage passage of the bill in its original form which would extend the statute of limitations to 20 years. While an extension to 12 years is certainly a step in the right direction, we can and should do more to promote access to justice for victims and to come in line with the rest of the country.

Statutes of limitations in the criminal justice system are traditionally justified in three ways: 1) they foster a more forward-looking society; 2) they help to ensure the quality and availability of evidence is not negatively impacted by passage of time; and 3) they incentivize timely and diligent prosecution, which also helps to ensure diligent police work. Notably, statutes of limitations are not a constitutional right. Instead, they reflect a legislative judgment

that the overall societal benefits of not allowing a case to go forward outweigh the societal benefits of prosecuting guilty individuals. In the case of victims of sexual crimes the calculus simply requires a different outcome than is currently in place in Oregon because the justifications for a short statute of limitations simply do not exist.

What we do know is that sexual violence is a “significant social and health problem” in this country.¹ We also know that despite its prevalence, few incidents of sexual violence are reported to law enforcement and even fewer are charged and criminally prosecuted.² The reality is that “many sexual assault victims never report offences, and . . . many more will delay reporting, often for significant periods.”³ Research reveals that this reality is due to a variety of reasons, including: (1) confusion, guilt, and shock about the assault; (2) not immediately recognizing the assault as rape;⁴ (3) fear of retaliation;⁵ (4) fear of being disbelieved or blamed;⁶

¹ Patricia Tjaden & Nancy Thoennes, Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, at 1 (Jan. 2006), available at <http://www.ncjrs.gov/pdffiles1/nij/210346.pdf>. See also Rebecca Campbell, et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes: A Multisite Replication Study*, Violence Against Women 1, 2 (explaining that “[s]exual violence is a pervasive social problem: national epidemiological data indicate that 18% to 25% of women are raped or sexually assaulted in their adult lifetimes”); Staff of S. Comm. on the Judiciary, *Violence Against Women: The Increase Of Rape In America 1990*, 102d Cong. 1 (1991) (describing the “rape epidemic” in this country); Nat’l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Testimony*, NCVLI Violence Against Women Bulletin (Nat’l Crime Victim Law Inst., Portland, OR.), Sept. 2011, at 1, 8 n.7 (describing that rape affects hundreds of thousands of victims each year, but explaining that “[t]he statistical data on the number of sexual assault crimes varies depending on the methodology of the study, the way the crimes are defined, the time period studied, and the population studied[,]” and citing sources concluding that anywhere from 300,000 to over 800,000 adult women were raped in a given year).

² See, e.g., *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases*, Hearing Before the Subcomm. on Crime and Drugs, S. Comm. on the Judiciary, 111th Cong. 27 (2010) (statement of Dean G. Kilpatrick), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/pdf/CHRG-111shrg64687.pdf> (observing that “most of the [rape] cases—in fact, over 80 percent of the cases still go unreported”); Tjaden & Thoennes, *supra* note 3, at 33 (finding that “only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police”); Patricia L. Fanflick, *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?*, Special Topics Series, Nat’l Dist. Attorneys Ass’n, at 1 (2007) (describing “[r]ape and other forms of sexual victimization” as “among the most severe and underreported crimes in the United States”); Campbell, *supra* note 1, at 2 (citations omitted) (noting that “[d]espite the alarming prevalence of this crime, most sexual assault victims do not report to law enforcement, and of those incidents that are reported, the vast majority will not be prosecuted”).

³ Louise Ellison & Vanessa E. Munro, *Reaction to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, 49 Brit. J. of Criminology 202, 203 (2009). See also Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 St. John’s L. Rev. 979, 1013 (1993) (emphasis in original) (observing that “data from numerous sources demonstrate that rape is rarely reported to anyone, and women who do report the crime often wait days, weeks, months, or even years before confiding in a family member, a friend or a rape crisis counselor, much less going to the police”).

⁴ See Dean G. Kilpatrick, et al., Nat’l Crime Victims Research and Treatment Center, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, at 47-48 (2007), available at <http://www.niccsa.org/downloads/elders/DRUGFACILITATEDINCAPACITATEDANDFORCIBLERAPE.pdf>.; Schafran, *supra* note

(5) fear of public exposure and loss of privacy;⁷ (6) fear of being treated badly by the criminal justice system;⁸ and (7) denial or suppression.⁹ Notably, nothing in the research reveals that victims are incentivized to report sooner simply because of the statute of limitations. Thus, what the research makes clear is that the real impact of short statutes of limitations is an operational bar to victim access to justice.

We also know that where crimes are less likely to be reported, the deterrent effect of the criminal justice system may be inadequate. It is well-documented that predators tend to perpetrate upon many victims not just one victim. Because their victims often cannot and therefore do not report their victimization for years, perpetrators are left undeterred from seeking out new victims. Allowing victims to come forward when they are able and ready is a key way to begin to foreclose future victims of the same offender.

Concerns regarding potential negative ramifications on defendant's rights from extended or eliminated statutes of limitations are overstated. Commonly cited concerns such as evidentiary issues about witness credibility, unavailability of or compromised forensic evidence,

3, at 1014 (reporting that many victims “did not realize that forced sex is rape even when the victim knows the rapist or when the forced acts are other than penile-vaginal penetration”).

⁵ See Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 4, at 47-48; Schafran, *supra* note 3, at 1015.

⁶ See Schafran, *supra* note 3, at 1015 (citing the *Rape in America* study for the statistic that “69% of rape victims were somewhat or extremely concerned about people thinking that the rape was their fault or that they were responsible”). See also Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 *Trauma, Violence, & Abuse* 225, 226 (2009) (internal citation omitted) (explaining that “[s]exual assault does not occur in social and cultural isolation: we live in a rape prone culture that propagates messages that victims are to blame for the assault, that they caused it and indeed deserve it. Victims are faced with negotiating postassault help seeking and ultimately, their pathway to recovery, within multiple hostile environments. If survivors turn to their family and friends for social support, how will they react, as they too have been inundated with these cultural messages? If victims turn to formal systems, such as the legal, medical, and mental health systems, they may face disbelief, blame, and refusals of help instead of assistance.”).

⁷ See Brett Jarad Berlin, Comment, *Revealing the Constitutional Infirmities of the “Crime Victims Protection Act,” Florida's New Privacy Statute for Sexual Assault Victims*, 23 *Fla. St. U. L. Rev.* 513, 520 (1995) (“[S]tudies indicate that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, if statutorily enforced anonymity were available or dependable.”); Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 4, at 47-48 (describing that “50% or more [of victims] endorsed responses related to not wanting family or others to know about the rape”).

⁸ See Kilpatrick, *Drug-Facilitated, Incapacitated and Forcible Rape: A National Study*, *supra* note 4, at 47 (describing that “a third or more of participants . . . indicated that the main reason they did not report the incident was because they did not know how to report or because they feared they would be treated badly by police, lawyers, or other parts of the criminal justice system”); Schafran, *supra* note 3, at 1016 (explaining that “[a] significant percentage of victims fear that if they report the rape they will be humiliated and blamed by everyone in the criminal justice system from the police to the jurors”).

⁹ See Schafran, *supra* note 3, at 1017 (explaining that “denial of all or part of the assault or that it was a rape is an extremely common response” and that “[t]he phenomenon of ‘denial’ makes some victims deny at first that they knew the rapist and later acknowledge that they did”).

and a lack of physical evidence are easily contained by other safeguards in the justice system. The essential features of our criminal justice system mandate that prosecution not go forward without adequate evidence and that conviction not occur unless there is evidence of guilt beyond a reasonable doubt. Nothing about the statutes of limitations changes this calculus.

An additional ground asserted during debate on this issue in Oregon has been that defendants lack pretrial discovery rights in Oregon and therefore a shortened time period is appropriate. This argument is a red herring. As an initial matter, it should be noted that there is no federal constitutional pretrial right of a defendant to discovery from a victim under the Confrontation Clause, Compulsory Process Clause, Due Process Clause or otherwise.¹⁰ Further, Oregon does not stand alone in limiting defendant's access to victims pretrial.¹¹

If Oregon takes the positive step of extending the statute of limitations it will be in good company nationally. Many states have abolished the statute of limitations for sexual violence crimes, others have extended it. In fact just this week Nevada took the very step that Oregon is contemplating, extending the statute of limitations to 20 years in a bill pending with the Governor. While an extension of the limitations period to 12 years is certainly a step in the right direction, the originally proposed 20 years, which already represented a compromise time period, is a far fairer balance of rights and interests and will best serve our state.

Thank you for the opportunity to submit this written testimony.

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¹⁰ For a detailed discussion of this, see XXX, available at <http://law.lclark.edu/live/files/18060-quashing-pretrial-subpeonabulletinpdf>

¹¹ See, e.g., Ariz. Const. art. II, § 2.1(A)(5) (“[A] victim of crime has a right . . . to refuse an interview, deposition, or other discovery request by the defendant”); Cal. Const. art. I, § 28(b)(5) (“[A] victim shall be entitled to . . . refuse an interview, deposition or discovery request by the defendant”); see also Idaho Const. art. I, § 22(8) (providing victims with the right “[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law.”).