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April 1, 2019

House Judiciary Committee

House Leader Jennifer Williamson, Chair
Representative Chris Gorsek, Vice-Chair
Representative Sherrie Sprenger, Vice-Chair

Re: Testimony in Support of HB 3293 (Extending Civil Statute of Limitations for Sexual Assault)

To the Honorable Chair Williamson, Vice-Chairs Gorsek and Sprenger, and Members of the House Judiciary Committee:

My name is Jacqueline Swanson. I am an attorney licensed to practice in the State of Oregon. I have dedicated my entire career to fighting for the rights of sexual violence survivors; indeed, my work as a sexual assault victim advocate ultimately propelled me to attend law school in order to vindicate the rights of crime victims. Unsurprisingly, then, a large component of my practice at Graves & Swanson, LLC involves representing survivors of sexual and domestic violence in civil litigation. I therefore write to you today to urge your support of HB 3293, which would extend the statute of limitations for adult survivors of sexual assault to seek redress for their harm by and through the civil justice system.

This legislature has a long history of recognizing the myriad barriers survivors face in the aftermath of a sexual assault, and has enacted reforms aimed at reducing those barriers where possible, such as extending the statute of limitations for civil damages relating to sexual abuse of a minor and increasing the time in which a criminal action may be commenced to prosecute rape and other non-consensual acts. Specifically, pursuant to ORS 12.117, if a person under the age of 18 is sexually assaulted, he or she has until age 40 or anytime within five (5) years of discovering the causal connection between the abuse and their injury, whichever is later. Likewise, we've extended the criminal statute of limitations to prosecute first degree sex crimes from six years to twelve years.

We've done all this in recognition of the fact that the emotional trauma following sexual assault does not present the same in all survivors – whether adult or child – but nearly always involves intense feelings of shame, guilt, self-blame and denial, and oftentimes leads to a delay in seeking medical or legal assistance. Indeed, ample research has shown that the trauma of sexual abuse quite literally affects the neurobiological makeup of the brain, affecting key processing centers such as the limbic system, prefrontal and neocortex. For instance, trauma affects Broca's area, which – along with Wernicke's area – is one of the two areas of the brain most closely tied to or affiliated with speech. What this means, in effect, is that survivors are quite literally unable to come forward, because the part of their brain that controls their ability to verbalize experiences – to put words to their trauma – is substantially changed, and it takes time for them to recover to be able to even begin to communicate what happened.

Despite this, however, current law provides that an adult victim of sexual assault has only two (2) years to bring a civil action for damages arising out of sexual assault. Two years: the same as a car accident. This presents a significant and often insurmountable obstacle to justice for survivors, many of whom haven't even begun to recognize what happened to them as rape, or to connect the harm they've suffered with the act perpetrated against them by the end of two years, much less feel prepared to bring legal action. The time a survivor needs to process and recover from their assault – much less to engage with the legal system – can take months and even years, certainly longer than the two years currently allowable for many survivors to seek civil justice through our legal system.

Whether a criminal case is filed or not, survivors of sexual assault may also turn to the civil court for recovery of costs related to medical and non-medical needs, which are required for healing. But if a survivor awaits the outcome of a criminal case to initiate civil proceedings, they may find their search for justice blocked, if the two years have passed. Given the potential lifetime costs a survivor may face, both immediate and long-term, the option to recover damages through the civil court is critical, and the loss of this option is punitive and unquestionably injurious to the survivor.

It is widely acknowledged that the civil legal system, like the criminal justice system, is more than capable of serving as a vehicle for the enforcement and distribution of social norms. Of course, every survivor is different and his/her needs will vary according to his/her particular background and circumstances. But the need for privacy, autonomy, and compensation for harm suffered is salient among many victims. And while the incarceration of the offender is a goal for some survivors, a more common goal is merely exposure of the offender as an offender, or preventing the individual or institution from harming someone else.¹

For all of these reasons, the civil justice system – and tort law in particular -- can provide survivors with holistic remedies uniquely tailored to their individualized needs. While not a replacement for criminal actions, civil remedies offer a crucial alternative (or complementary) avenue for deterrence, punishment, and compensation.

This is particularly important given the fact that, for a variety of reasons, the criminal justice system often fails to meet the needs of sexual assault survivors – a problem which is made more apparent by the low rate of arrests, prosecutions and convictions in sexual offense cases, not to mention the fact that many victims never report the crime to police.² It is also worth noting that even if an adult survivor is able to make a report to police soon after the assault, the criminal process itself may take longer than two years, leaving the survivor out of options in terms of seeking meaningful compensation for their injuries. Moreover, if a survivor *does* file a civil suit while a criminal prosecution is ongoing, this may operate to the extreme detriment of the victim, because the judiciary (and society) as a whole

¹ In addition, many sexual assault survivors seek redress from institutional and corporate defendants who negligently or recklessly caused their injuries. For example, an employer who failed to perform a background check on a convicted sex offender who subsequently abused the plaintiff, or a school with knowledge of a particular culture of sexual violence on campus and yet takes no action to remedy it. In such cases, the civil justice system can provide the only remedy possible: accountability in the form of monetary damages, and the effect of promoting policy changes to prevent future reoccurrences. To that end, this bill – like its companion ORS 12.117 – is not intended to be limited to claims for intentional misconduct, but applies more broadly to claims of negligence for allowing, permitting, or encouraging sexual assault. *See, e.g.*, ORS 12.117(1); *Lourim v. Swensen*, 328 Or 380 (1999).

² *See, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1244-52 (1997).

seems more suspicious of rape suits than of suits seeking damages for other crimes, and courts in criminal proceedings frequently permit scathing impeachment of rape victims by criminal defense attorneys based on their parallel civil claims.³

Because of the particular nature of the crime of rape – a theft of autonomy of the survivor – it is particularly important for a survivor to regain control and assert autonomy over their recovery. In a criminal case, the prosecutor – not the victim -- controls the case. As a plaintiff, the survivor has vastly greater control over civil suits than criminal prosecutions. For example, as plaintiffs, survivors may determine whether and when to initiate or dismiss a suit, unlike in criminal cases.

In criminal cases, law enforcement and prosecutors represent the interests of the state, and defense attorneys the interest of the accused; however, there is no one present to legally advocate for the victim's interests. In contrast, a central feature of tort law is to vest in victims a power to pursue and even obtain redress. As tort law empowers victims to control the legal process for the vindication of their rights, survivors' agency is intrinsic to the very nature of the system. As a plaintiff's attorney, I am duty-bound to represent the interests of the Plaintiff and have both the professional freedom and the ethical duty to empower the client to make her own choices, and to facilitate whatever action (or inaction) the victim chooses.

The civil justice system further allows for recovery of both economic and noneconomic damages from the person or entity liable for the victim's harm. While restitution is sometimes ordered as part of an offender's sentence, only the small minority of victims whose attackers are actually convicted receive financial compensation through such provisions. Even when awarded, restitution is not a substitute to the tort system and generally does not cover damages for pain and suffering, which may be extremely high in sexual assault cases.⁴

The goal of tort law, in contrast, is to make the plaintiff whole, and has the ancillary benefit of deterring future wrongful conduct by the defendant. Acting as a significant complement to the limited protection that criminal law provides rape victims, civil actions represent a means of securing more acceptable levels of compensation for victims and a higher degree of responsibility for defendants. Thus, civil monetary damages not only have the practical goal of redressing harm, but also hold the perpetrator accountable and serve to validate the survivor's experience.

³ See, e.g., *Johnson v. State*, 643 S.E.2d 556, 559-60 (Ga. Ct. App. 2007) (reversing a molestation conviction because of ineffective assistance of counsel when the defense attorney failed to investigate the accuser's civil claim and attack the accuser's credibility on this basis); *Poynor v. State*, 962 So. 2d 68, 75 (Miss. Ct. App. 2007) (addressing a suggestion by the defendant that the accuser's rape allegation "was "all about money"); *Webb v. State*, 232 S.W.3d 109, 114 (Tex. Crim. App. 2007) (describing the defense's argument that "the fact that the complainant hired an attorney and was considering filing a civil suit against him showed that she had a financial motive for claiming that the [defendant] sexually assaulted her"); *State v. Bowers*, 871 So. 2d 1178, 1186 (La. Ct. App. 2004) (reversing a rape conviction because the trial court barred the defendant from questioning the accuser about whether she had hired a civil attorney); *People v. McFarley*, 818 N.Y.S.2d 379, 380 (App. Div. 2006) (reversing a rape conviction because the trial court did not allow defense cross-examination of the accuser regarding her intention to file a civil suit); *People v. Stein*, 781 N.Y.S.2d 654, 655-56 (App. Div. 2004) (reversing a rape conviction because the defendant was not allowed to impeach the accuser with evidence that she had served her employer with notice of a tort claim); *Commonwealth v. Hanford*, 937 A.2d 1094, 1098-99 (Pa. Super. Ct. 2007) (reversing a rape conviction because the trial court denied the defense's request to introduce the accuser's civil complaint); *Ramirez v. State*, 96 S.W.3d 386, 392, 395, 397 (Tex. App. 2002) (reversing a police officer's conviction for sexual misconduct because the state did not disclose to the defense that the victim planned to sue the city and the defendant).

⁴ For these reasons, this author also supports passage of HB 2014.

However, none of this is achievable if we bar the courthouse gates in the face of the those who desperately need access, for no reason other than their trauma prevented them from conforming to a timeline which fails to recognize the very nature of the harm they've suffered.

HB 3293 seeks to remedy this by creating a companion to ORS 12.117 and extending protections to adult survivors of sexual assault by increasing the statute of limitations for recovery of damages suffered as a result of sexual assault. Specifically, this bill would provide that for a sexual assault that occurred on or after a survivor's 18th birthday, the time for commencement of the action will be seven (7) years from the date the survivor discovers or reasonably should have discovered the causal connection between the abuse and the injury.

Like ORS 12.117, the bill provides a broad definition of sexual assault along with certain enumerated acts such as rape, sexual abuse and sexual exploitation, which are intended to be inclusive, rather than exclusive.⁵ The broad definition is adapted from the United States Department of Justice,⁶ and describes "sexual assault" as "[t]he commission or attempted commission of any type of sexual contact or behavior without the explicit consent of the recipient, regardless of whether or not the contact or behavior is done for the purpose of arousing or gratifying the sexual desire of any party."

The term "explicit consent" is used to denote that sexual assault may occur when the victim does not consent, as well as when the victim cannot consent (*i.e.*, because the victim is drugged, drunk, asleep, incapacitated, etc).⁷ The phrase "contact or behavior" is included because sexual violence can take multiple forms, some of which may include *contact* and some of which may instead involve *behavior*. Aside from rape and sexual penetration, sexual assault involving unwanted sexual contact is generally defined as "[i]ntentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person without his or her consent, or of a person who is unable to consent or refuse."⁸ In contrast, *non-contact unwanted sexual experiences* include

⁵ For a salient discussion regarding the use of the phrase "includes but is not limited to" in the context of statutory interpretation, see, e.g., *Boyd v. Essin*, 170 Or App 509, 516-17 (2000), *rev den* 331 Or 674 (2001). For a more particularized discussion of application of the doctrine *ejusdem generis* in the context of ORS 12.117, see *Schmidt v. Mt. Angel Abbey*, 347 Or 389 (2009).

⁶ The United States Department of Justice traditionally defined "sexual assault" as "any type of sexual contact or behavior that occurs without the explicit consent of the recipient." See M.J. Breiding, et al., "Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements, Version 2.0.," National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, at *11 (2015), available at <https://www.cdc.gov/violenceprevention/pdf/intimatepartnerviolence.pdf> ("Sexual violence is defined as a sexual act that is committed or attempted by another person without freely given consent of the victim or against someone who is unable to consent or refuse."). This definition was listed on the DOJ's Office on Violence Against Women (OVW) website at <https://www.justice.gov/ovw/sexual-assault> until sometime in early 2018, when it was changed to "any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent."

⁷ See Office on Women's Health, "What does Sexual Assault Include?," United States Department of Health & Human Services (2018), available at <https://www.womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/sexual-assault#16> (citing to prior U.S. DOJ definition of "sexual assault" to define sexual assault as, *inter alia*, "[a]ny type of sexual contact with someone who **cannot** consent, such as someone who is underage (as defined by state laws), has an intellectual disability, or is passed out (such as from drugs or alcohol) or unable to respond (such as from sleeping); [a]ny type of sexual contact with someone who **does not** consent") (emphasis in original).

⁸ See Breiding, *supra*, at *13.

behavior such as exhibitionism and voyeurism, and other behavior which may not include contact, but it is sexually assaultive nonetheless.⁹

In addition, the definition makes clear that sexual contact need not be for the purpose of sexual gratification; this distinction is important because many of the offenses listed in ORS Chapter 163 rely on a definition of “sexual contact” which requires the touching to have been done “for the purpose of arousing or gratifying the sexual desire of either party.”¹⁰ This is problematic insofar as the definition of “sexual contact” utilized in ORS 163.305(6) fails to adequately recognize that while sexual assault *may* result in sexual gratification on the part of the perpetrator, its underlying purpose is frequently the expression of power and dominance over the person assaulted; equally or more predominant in the assaulter's mind may be the intent to injure, humiliate, shame, or hurt the person assaulted, rather than mere sexual gratification alone.¹¹

The current two-year statute of limitations simply does not provide sexual assault survivors adequate time to heal from the physical and emotional trauma of a sexual assault and prepare for a civil case. In this era of #MeToo, it has become clear that civil remedies are an important avenue of redress for survivors of sexual assault. To further demonstrate this, I am including with this testimony a 56-page report compiled last month by the Center for Justice and Democracy, which concludes – in no uncertain terms – that laws such as our current two-year statute of limitation which limit survivors’ access to the civil courts “do a terrible disservice to sexual assault survivors, precluding them from holding fully accountable those responsible, as well as those who are in a position to prevent future abuse and assaults.”¹²

⁹ *Id.*; see also S.G. Smith, *et al.*, “The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report,” National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *17 [pdf page 31] (2017), available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (defining unwanted sexual contact and non-contact unwanted sexual experiences); Office of Justice Programs, “Rape and Sexual Violence,” National Institute of Justice (2017), available at <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/welcome.aspx> (“Sexual assault covers a wide range of unwanted behaviors—up to but not including penetration—that are attempted or completed against a victim's will or when a victim cannot consent because of age, disability, or the influence of alcohol or drugs. Sexual assault may involve actual or threatened physical force, use of weapons, coercion, intimidation, or pressure and may include—Intentional touching of the victim's genitals, anus, groin, or breasts. Voyeurism. Exposure to exhibitionism. Undesired exposure to pornography. Public display of images that were taken in a private context or when the victim was unaware.”).

¹⁰ See ORS 163.305(6) (defining “sexual contact” for purposes of ORS Chapter 163 as “any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.”).

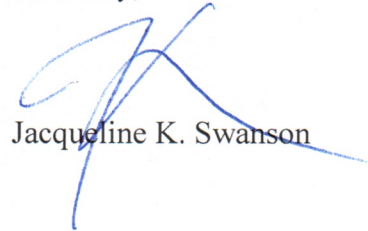
¹¹ The legislature has since appeared to recognize the limitation of this definition in other recent additions to ORS chapter 163. See, e.g., ORS 163.472(1)(a) (“A person commits the crime of unlawful dissemination of an intimate image if: The person, with the *intent to harass, humiliate or injure* another person, knowingly causes to be disclosed through an Internet website an identifiable image of the other person whose intimate parts are visible or who is engaged in sexual conduct[.]”) (emphasis added).

¹² Emily Gottlieb & Joanne Doroshov, “The Importance of Civil Justice to Sexual Assault Survivors,” Center for Justice and Democracy, at p. 3 (March 2019).

As William L. Prosser, in his classic tort treatise, observed, “perhaps more than any other branch of the law, the law of torts is a battleground of social theory.”¹³ Although torts are sometimes perceived as a system of immutable rules, tort remedies are inevitably contested and contestable socio-legal terrain. As Karl Mannheim reminded us, all law reflects social and economic interests.¹⁴ It is imperative that we recognize this reality, and demonstrate our dedication to remedying the evils of sexual violence and those who aid, abet and ignore it.

For all of these reasons, I entreat the members of this honorable Committee recommend HB 3293 DO PASS for a full vote on the Senate floor.

Sincerely,



Jacqueline K. Swanson

With enclosure:

Emily Gottlieb & Joanne Doroshov, “The Importance of Civil Justice to Sexual Assault Survivors,” Center for Justice and Democracy (March 2019).

¹³ William L. Prosser, *Handbook of the Law of Torts*, § 3 (3d Ed. 1964).

¹⁴ Karl Mannheim, *Ideology and Utopia*, at 36 (1929).