

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON) Multnomah County
) Circuit Court No. 060432571
 Plaintiff-Relator,)
) Supreme Court No. S054377
 v.)
)
 DAVID O. BURLESON MD.,)
)
 Defendant-Adverse Party.)

AMICI CURIAE BRIEF OF THE NATIONAL CRIME VICTIM LAW
INSTITUTE AND OREGON TRIAL LAWYERS ASSOCIATION IN
SUPPORT OF PLAINTIFF-RELATOR

Original Proceedings in Mandamus Relating to an Order of
The Honorable Ronald E. Cinniger, Judge

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STATEMENTS OF INTEREST OF AMICI CURIAE

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & 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. NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

The Oregon Trial Lawyers Association (OTLA) is a statewide organization committed to the constitutional principles of access to the courts and trial by jury, and to a fair and efficient civil justice system. Its members represent plaintiffs or claimants in personal injury, civil rights, consumer, employment, workers compensation, and business tort litigation. OTLA members often represent individuals who have been the victims of crimes and who have suffered sexual abuse.

STATEMENT OF FACTS

Based upon available public information, the following facts appear to be undisputed. On October 6, 2005, the Board of Medical Examiners (Board), the state agency responsible for licensing, regulating and disciplining physicians in Oregon, entered a stipulated order in which it suspended defendant's medical license for a minimum of two years, and ordered that defendant enroll in and successfully complete a residential program for sexual offenders as a prerequisite to relicensure. Stipulated Order, p. 3, lns. 4-9.¹

The Stipulated Order contains the following allegations. In 2002, defendant provided anesthesia to an adult woman and made contact with her breasts while examining her; on two separate occasions, in 2003 and 2004, defendant provided anesthesia to women who were

¹ The Stipulated Order is attached to this brief as Appendix A.

undergoing surgery and on each occasion touched the sedated women. *Id.* at 1, Ins. 17-25.

On numerous occasions defendant phoned female patients postoperatively for his own personal gratification, not for medical follow-up, and he “sexually acted out in the health care setting about 2-4 times a year” since 2000, including “inappropriately touching adult female patients while providing medical service, inappropriately placing EKG leads on adult female patients for his own sexual gratification, and fondling the breasts of sedated adult female patients.” *Id.* at 2, Ins. 1-3, 9-15. Nurses working with defendant reported that he made unwanted sexual advances toward them while they were on duty. *Id.* at Ins. 7-8. Defendant stipulated that he engaged in the conduct alleged in the Stipulated Order. *Id.* at 3, Ins. 16-21.

After learning the results of the investigation and stipulation, on May 3, 2006, the State of Oregon filed a criminal information against defendant charging him with two counts of Sexual Abuse I in violation of ORS § 163.427, a class B felony.

A Multnomah County grand jury began hearing evidence relating to defendant’s activities. During these grand jury proceedings, a properly subpoenaed witness appeared before the grand jury but refused to provide certain information regarding defendant’s conduct. *See* Order Denying District Attorney’s Motion to Hold Grand Jury Witness in Remedial Contempt [Filed Under Seal] (Order), p. 6, Ins. 8-12.² The grand jury ordered the witness to provide the information, but the witness “persisted in his refusal to provide this information to the grand jury.” *Id.* at Ins. 13-16. The prosecutor requested that the court hold the witness in remedial contempt for failing to comply with the grand jury’s order. *Id.* at 1, Ins. 14-16.

Following a closed hearing, the trial court denied the prosecutor’s motion. *Id.* at 8, Ins. 8-9. Despite finding that the witness’s knowledge about certain unnamed victims was “relevant” to the grand jury’s investigation and “not privileged,” the trial court concluded

² The Order is attached as Appendix B to this brief.

that disclosure would be “clearly contrary to the public interest” and that the “immediate adverse consequences of [disclosure] substantially outweigh the grand jury’s limited need for this information.” *Id.* at 6, Ins. 19-22; 8, 1-7. The court reasoned, in part

“Disclosure * * * would be detrimental to * * * psychological and physical health in that it is reasonably certain that * * * would forgo necessary medical care in the future if * * * learned that * * * had been subjected to sexual contact while sedated[.]”

Id. at 4, Ins. 16-20.

The State of Oregon filed a petition for a writ of mandamus with this Court. *See* State’s Redacted Memorandum in Support of Pet. for Peremptory or Alternative Writ of Mandamus. This Court issued an alternative writ on February 21, 2007.

INTRODUCTION

The trial court erred in applying ORS § 136.617 to the grand jury’s request for assistance in enforcing its order to a witness to produce relevant, unprivileged information. Where, as here, a grand jury seeks the court’s assistance in enforcing a valid order, the trial court’s discretion, if any, is constrained by federal and state constitutions, statutes, court rules, common law, and public policy.

Under the guise of considering the “public interest,” the trial court ignored this state’s clear law and public policy, and crafted an unsupportable policy based upon antiquated and paternalistic assumptions about women and crime victims to justify its refusal to enforce the grand jury’s valid order. The trial court’s refusal to enforce the grand jury’s order was an unwarranted intrusion on the grand jury’s crucial investigative role in the criminal justice process. Further, in concluding that disclosure of the relevant information would be “contrary to the public interest,” the trial court ignored the victims’ federal and state constitutional interests in bodily integrity, as well as their constitutional, statutory, and

common law rights and remedies under Oregon law, thereby interfering with the victims' exercise of those rights in both the criminal and civil justice systems.

I. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT REFUSED TO ENFORCE THE GRAND JURY'S ORDER IN CONTRAVENTION OF WELL ESTABLISHED LAW AND PUBLIC POLICY, AND THE PROPER FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM.

The trial court erred in applying ORS §§ 137.617 and 33.085(1)³. It is only “where a witness refuses to testify or produce evidence of any kind based on the ground that the witness may be incriminated thereby” that ORS § 137.617 is implicated. Where, as here, a recalcitrant witness has not claimed that the information sought is protected by the privilege against self-incrimination, ORS § 136.617 does not apply. The trial court’s reference to ORS § 33.085(1) is equally erroneous since that section merely incorporates the inapplicable ORS § 136.617.

A trial court has both statutory and inherent authority to enforce a grand jury’s order. ORS § 1.010 provides:

“Every court of justice has power:

* * *

(2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority.

* * *

(4) To compel obedience to its judgments, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein.

* * *

(6) To compel the attendance of persons to testify in an action, suit or proceeding pending therein, in the cases and manner provided by statute.”

³ The trial court’s reference in its Order to ORS § 33.065(1) appears to be a clerical error since the court’s quoted language is from ORS § 33.085(1).

Enforcement power of a court lies in its inherent authority to impose remedial or punitive sanctions for contempt of court. *See State ex rel. Oregon State Bar v. Lenske*, 243 Or 477, 495-96, 407 P2d 250, 256 (1965), *cert denied*, 384 US 943 (1966) (discussing inherent judicial power to punish for contempt); ORS §§ 33.025 *et seq.* (procedures governing a court's exercise of its contempt power); UTCR 19.010(2). This inherent authority does not, however, provide a trial court with unfettered discretion in determining whether to enforce a grand jury's order. Instead, a trial court must exercise its role within the confines of the statutes and policies providing for the effective functioning of the criminal justice system. *Cf. Dunwoody v. Handskill Corp.*, 185 Or App 605, 618, 60 P3d 1135, 1143 (2003) (recognizing an important public duty in responding to a properly issued subpoena, then-Judge Linder stated: "The state's ability to effectively administer the criminal law depends on many factors. Included among them is the prosecutor's authority, backed by the court's contempt power, to compel a witness or crime victim to testify at trial.").

When exercising discretion, courts are constrained by law. *See State v. Lewis*, 113 Or 359, 365, 230 P 543, 544-45 (1924) (stating that "[discretion] cannot be exercised where a strict rule of law is applicable, as the term 'discretion' implies the absence of any such rule. . . . Discretion, however, is not an arbitrary and unrestricted power, but must be exercised according to fixed and settled rules"). *Cf. Benjamin Cardozo, Nature of the Judicial Process* 140-41 (1921) (discussing the limitations that constrain judicial discretion). Rather than looking to this state's law, the trial court, purporting to consider the "public interest," *see* Order at p. 8, Ins. 1-7, resorted to antiquated and paternalistic assumptions about women and crime victims, and *sua sponte* crafted a policy to justify its refusal to enforce the grand jury's order.

Historically, a grand jury has served a dual function: to “investigat[e] cases to bring to trial persons accused on just grounds,” and to protect the accused against unfounded or malicious prosecutions. *State ex rel. Miller v. Smith*, 168 W Va 745, 751, 285 SE2d 500, 504 (1981). *See also, e.g., In re Grand Jury Proceeding*, 586 F2d 724, 725 (9th Cir 1978) (stating that “the duties of a grand jury are not performed until every clue and all witnesses are examined in order to charge the proper person with the appropriate crime”). Addressing the scope of this investigative function, the United States Supreme Court has stated that a grand jury is “a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.” *Branzburg v. Hayes*, 408 US 665, 687-88 (1972) (acknowledging the difference between a federal and state grand jury, but explaining that where the constitution provides for initiation of a criminal prosecution by grand jury its “investigative powers are necessarily broad.” The Court explained that “the longstanding principle that the public . . . has a right to every man’s evidence . . . is particularly applicable to grand jury proceedings.” *Id.*

Thus, a grand jury’s ability to effectively conduct an investigation into suspected criminal activity is fundamental to the proper functioning of our criminal justice system, and this function cannot be fulfilled without the ability to have witnesses provide relevant testimony regarding suspected criminal activity. *See, e.g., State v. Tripp*, 36 Or App 141, 147, 583 P2d 591, 594 (1978) (upholding contempt finding for witness whose testimony was critical to grand jury’s investigation), *rev denied* 285 Or 73 (1979). *Cf. In re Grand Jury Subpoena Served on Meserve*, 62 F3d 1222, 1224 (9th Cir 1995) (enforcing grand jury subpoena despite protective order issued in civil litigation because protective order interfered

with grand jury’s “right to all relevant evidence”). Where a trial court refuses to enforce a proper grand jury order that seeks relevant information, and where the information sought is not protected from disclosure by a valid privilege, the court’s failure to enforce that order prevents the grand jury from fulfilling its constitutional and statutory duties to investigate crimes and return indictments when warranted by the evidence before it. *See* Or Const art VII (Amended) § 5(3) (setting out grand jury’s authority to bring felony charges without a magistrate’s review); ORS §§ 132.310 (setting out investigative authority); 132.380 (setting out grand jury’s authority to “indict a person for a crime when it believes the person guilty thereof”); 132.390 (setting out grand jury’s authority to indict when “when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury”).

The trial court’s debilitation of the grand jury’s investigative role in our criminal justice system is evident from its Order. Despite the court’s conclusion that the information sought was both “relevant” and “not privileged,” Order at p. 6, Ins. 19-22, the court suggested the grand jury did not need this information for two reasons: first, that the grand jury could return an indictment without the information sought from the witness; and second, that the charges against defendant may be resolved “by agreement or stipulation” Order at p. 7, Ins. 1-8. Both reasons set forth by the trial court are flawed.

First, whether the grand jury could return an indictment without the information sought by order from a particular witness is an improper consideration. The grand jury is an arm of the judicial branch with an independent investigative function that is essential to the proper functioning of the criminal justice system. The unwarranted abrogation of the grand jury’s investigative function damages public trust in the criminal justice system. *C.f.*

Dunwoody, 185 Or App at 617-18, 60 P3d at 1142 (explaining that the inability to enforce a

subpoena would “adversely affect not only the victim in the individual case, but the public generally because the prosecution of such crimes, although solved, could be frustrated and the criminal could go unpunished”).

Second, the trial court’s suggestion that if the target of a criminal investigation may be willing to resolve certain charges “by agreement or stipulation,” the grand jury need not investigate those or other potential criminal charges is similarly misguided. The grand jurors’ statutory oath requires that they

“diligently inquire into . . . all crimes against this state committed or triable within this county that shall come to your knowledge . . . that you will leave any person not indicted through fear, favor, affection, or hope of reward; but that you will indict upon the evidence before you according to the truth and the laws of this state. . .”

ORS § 132.060. The trial court’s order thwarts the grand jury’s independent obligations, and further, ignores the significant ramifications of doing so.

In refusing to enforce the grand jury’s order, the trial court sent a message that the criminal justice system is unwilling or unable to hold sexual offenders accountable, particularly where the crimes occur in a professional setting and involve a reluctant witness. That is a dangerous message given the alarming fact that less than half of all sexual assaults are reported to the authorities. *See Callie Marie Rennison, Ph.D., Bureau of Justice Statistics, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* 1 (2002) (“Thirty-six percent of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to police [between] 1992 [and] 2000.”), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf>. Patients, particularly women, in need of medical treatment are more likely to forego that treatment if they receive the message that the criminal justice system will not seek to fully uncover the extent of criminal wrongdoing by a member of the very class of professionals they must access for that treatment. This Court

cannot approve of such a result. *Cf. State v. Sharp*, 28 Or App 429, 432, 559 P2d 930, 931 (1977) (explaining that the dismissal of a criminal prosecution creates “the possibility of unforeseen consequences to the unforeseen public . . .”).

The integrity of the criminal justice system and public confidence in that system depend on the grand jury’s ability to exercise its investigative function. The trial court’s unjustified refusal to enforce the grand jury’s order through its contempt power undermined the grand jury’s ability to perform its duties.

II. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY IGNORING THE CONSTITUTIONAL, STATUTORY, COMMON LAW, AND RULE-BASED RIGHTS OF OREGON’S CRIME VICTIMS.

The trial court exceeded its authority when, rather than looking to this state’s well-settled law, it *sua sponte* crafted a novel public policy as the basis for refusing to enforce the grand jury’s order. As noted *supra*, when exercising discretion, courts are constrained by law. *See Lewis*, 113 Or at 365, 230 P at 544-45. *Cf. Benjamin Cardozo, Nature of the Judicial Process* 140-41 (1921) (discussing that even when judicial decision making is founded in discretion, there are limits on that discretion). Instead of exercising its discretion within proper constraints, the trial court resorted to antiquated and paternalistic assumptions about women and crime victims and crafted a “justification” for its refusal to enforce a grand jury order. The trial court’s order fundamentally undermines clear law establishing victims’ rights to bodily integrity, to meaningful participation in the criminal justice system, and to access to the court for civil redress.

A. The trial court’s ruling is abhorrent to a person’s constitutional right to bodily integrity.

The right to bodily integrity is well-established.⁴ Before the turn of the last century the United States Supreme Court explicitly acknowledged the importance of this right:

“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”

Union Pac. Ry. v. Botsford, 141 US 250, 251 (1891) (affirming trial court’s refusal to order female plaintiff to submit to a medical exam in a personal injury action).

Historically, the sexual violation of a woman’s bodily integrity was not seen as an offense against the woman. Women were perceived as property, and a woman’s body was a commodity which accrued to the benefit of her father, husband, owner, or family. See Erin G. Palmer, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape should be a Crime in North Carolina*, 82 NC L Rev 1258, 1266-67 (2004). Thus, when a woman was raped or sexually assaulted, the injury was perceived as a violation of the man’s property interest, and the harm was that of devaluation of the man’s

⁴ The United States Supreme Court has held that an individual has a fundamental liberty interest in making autonomous choices in the areas of reproductive freedom, see, e.g., *Eisenstadt v. Baird*, 405 US 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Roe v. Wade*, 410 US 113, 154 (1973) (concluding that “the right of personal privacy includes the abortion decision”); *Planned Parenthood v. Casey*, 505 US 833, 846 (1992) (reaffirming the essential holding of *Roe v. Wade*); medical treatment, see, e.g., *Washington v. Glucksberg*, 521 US 702, 720 (1997) (concluding, “that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment”); *Cruzan v. Mo. Dep’t. of Health*, 497 US 261, 269 (1990) (holding that the decision to terminate life support is related to “bodily integrity”) (1990); *Washington v. Harper*, 494 US 210, 221-22 (1990) (explaining that an individual “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”); and intimate associations, see *Lawrence v. Texas*, 539 US 558, 577 (2003) (holding that consenting adults have the right to engage in sexual activity in the privacy of their own home free from governmental interference). This fundamental right to bodily integrity prevails even where detrimental to the individual’s physical health. See, e.g., *Washington v. Glucksberg*, 521 US 702, 720 (1997) (holding that “the Due Process Clause protects the . . . right to refuse unwanted lifesaving medical treatment”); *In re President and Drs. of Georgetown Coll.*, 331 F2d 1010, 1017 (DC Cir 1964) (affirming the right to refuse medical treatment “even at great risk”).

property. *Id.* at 1267. *See also* Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. Marshall L Rev 393, 394 (1991) (discussing idea that rape laws developed from the view that men were the victim if their wife or daughter was raped because such conduct affected their property).

To counter this historically patriarchal harm analysis, the feminist movement successfully lobbied over the last century to discard some of the legal requirements underpinning sexual assault laws, including eliminating requirements of utmost resistance, corroboration, cautionary instruction and prompt outcry, criminalizing the rape of one's spouse, and creating a recognition in the law of the brutality and harm of sexual assault. *See* Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 St. John's L Rev 315, 332-334 (2001); Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 31 (1998); Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": *Recognizing Gender-Bias Crimes*, 5 Stan L & Pol'y Rev 21, 30-31 (1994).

The horrific and very personal realities of sexual assault have now been recognized by the United States Supreme Court:

“[Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege to choose those with whom intimate relationships are to be established. Short of homicide, [rape] is the ‘ultimate violation of self.’”

Coker v. Georgia, 433 US 584, 597 (1977) (quoted in *Florida Star v. B. J. F.*, 491 US 524, 542 (1989) (White, J., dissenting)). Today, it is well-accepted that a woman is not the property of another; she is an autonomous person to whom the right to bodily integrity personally attaches. *See Trammel v. United States*, 445 US 40, 52 (1980) (“Nowhere in the common-law world – indeed in any modern society – is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast

aside . . .”). The law now recognizes that sexual assault is a crime that fundamentally undermines an individual’s right to autonomy and bodily integrity.⁵

This contemporary right to bodily integrity includes both the right to be free from unwarranted physical intrusion and the right to make independent choices about one’s body. See *Vacco v. Quill*, 521 US 793, 807 (1997) (explaining that the right to refuse medical treatment is based on “well-established, traditional rights to bodily integrity and freedom from unwanted touching”); *Planned Parenthood v. Casey*, 505 US 833, 846 (1992) (“It is settled . . . that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about . . . bodily integrity.”).

Despite this evolution of the law and policy governing bodily integrity, the trial court took it upon itself to evaluate the harms caused by defendant’s violation of the victims’ bodily integrity, co-opting the victims’ ability to personally respond to that harm. The court reasoned

“Disclosure * * * would be detrimental to * * * psychological and physical health in that it is reasonably certain that * * * would forgo necessary medical care in the future if * * * learned that * * * had been subjected to sexual contact while sedated[.]”

Order at 4, Ins. 16-20. This reasoning is based on two faulty assumptions. First, that the unnamed victims are too fragile to make competent decisions about how to respond to violations of their bodily integrity. Second, that lack of knowledge of a sexual assault translates into no harm from such assault. This latter assumption is contrary to Oregon law and policy. Compare ORS § 163.415 (providing that a person commits sexual abuse in the third degree, a Class A misdemeanor, by subjecting a minor to any sexual contact or an adult

⁵ Recognition that rape is a violation on the constitutional right to bodily integrity can also be found in civil proceedings. See, e.g., *Alexander v. DeAngelo*, 329 F3d 912, 916 (7th Cir 2003) (holding that, in the context of a claim under 42 USC § 1982, an act of rape is actionable as “a deprivation of liberty without due process of law”), *Doe v. Taylor Indep. School Dist.*, 15 F3d 443, 451-52 (5th Cir 1994) (explaining that bodily integrity, a right “vouchsafed by the Fourteenth Amendment,” is violated when a state actor commits sexual abuse).

to unwanted sexual contact) *with* ORS § 163.427(1)(a)(C) (providing that sexual abuse in the first degree, a Class B felony, occurs where a person subjects an incapacitated victim to unwanted sexual contact).

The court's faulty reasoning led to an order that vitiates both components of the victims' right to bodily integrity. First, by failing to compel disclosure and allow full investigation and prosecution of defendant's criminal conduct, the court allowed the justice system to be complicit in the defendant's assault of the victims. Second, by failing to compel disclosure the court interfered with the victims' right to make independent choices about their bodies. The trial court's order echoes the very archaic and paternalistic views that the legal movement for gender equality overcame during the last century.

B. The trial court's ruling forecloses the victims' opportunity to exercise their rights to meaningfully participate in criminal proceedings.

The Oregon Constitution affords rights to crime victims in part to "ensure that criminal . . . proceedings are conducted *to seek the truth* as to the defendant's innocence or guilt . . ." Or Const art I, § 42(1) (emphasis added). Oregon's constitutional and statutory crime victims' rights also mandate that crime victims be afforded a meaningful role in criminal justice proceedings and be protected from their offenders. *Id.*; Or Const art I, § 43. *See also* ORS §§ 147.405 to 147.421. The trial court failed to consider these victims' rights. Instead, the trial court issued an anachronistic order that prevented disclosure of critical information, thereby barring victims from exercising their rights in the defendant's criminal prosecution, and impeding the search for the truth as to defendant's guilt or innocence.

The modern crime victims' rights movement in the United States began more than 30 years ago, and aspired to counteract the recent historical exclusion of victims as meaningful

participants in the criminal justice process.⁶ Beginning in 1986 the citizens of Oregon joined this national movement, passing Ballot Measure 10, a citizens' initiative designed to "achieve broad-based recognition of victims' rights in the criminal justice system," and which is codified in various places in the Oregon Revised Statutes. *State v. Metz*, 131 Or App 706, 723, 887 P2d 795, 805 n 2 (1994) (P.J. Deits, dissenting).

In 1999, after a three year campaign,⁷ Oregon joined the growing number of states that had constitutional victims' rights. *See* Or Const art I, §§ 42 (establishing victims' rights in criminal prosecutions), 43 (establishing victims' rights to protection from defendant). The articulated purpose of Oregon's constitutional rights is:

"To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the courts and conduct of criminal and juvenile court delinquency proceedings. . ."

Or Const art I, § 42(1).

⁶ Since 1980, more than thirty states have amended their state constitutions to address crime victims' rights, and the remaining states and the federal government have passed crime victims' rights legislation. *See* Ala Const amend 557; Alaska Const art 1, § 12, art 2, § 24; Ariz Const art 2, § 2.1; Cal Const art 1, § 28; Colo Const art II, § 16a; Conn amend XXIX; Fla Const art I, § 16; Idaho Const art 1, § 22; Ill Const art I, § 8.1; Ind Const art I, § 13(b); Kan Const art 15, § 15; La Const art I, § 25; Md Const art 47; Mich Const art 1, § 24; Miss Const § 26A; Mo Const art I, § 32; Mont Const art II, § 28; Neb Const art I, § 28; Nev Const art 1, § 8; NJ Const art I, ¶ 22; NM Const § 24; NC Const art 1, § 37; Ohio Const art I, § 10a; Okla Const art II, § 34; Or Const art I, § 42; RI Const art 1, § 23; SC Const art I, § 24; Tenn Const art 1, § 35; Tex Const art 1, § 30; Utah Const art I, § 28; Va Const art I, § 8-A; Wash Const art 2, § 35; Wis Const art I, § 9(m). *See also* 18 USC § 3771; Ark Code Ann §§ 16-21-106, 16-90-701 to -719; Del Code Ann tit 11, §§ 9401 to 9419; Ga Code Ann §§ 17-17-1 to -16; Haw Rev Stat §§ 801D-1 to -7; Iowa Code Ann §§ 915.1 to .100; Ky Rev Stat Ann § 421.500; Me Rev Stat Ann tit 17-A, §§ 1171 to -75, § 6101; Mass Gen Laws ch 258B, § 3; Minn Stat §§ 611A.01 to .046; NH Rev Stat Ann § 21-M:8-k; NY Exec Law §§ 640 to 649; ND Cent Code § 12.1-34-02; Pa Stat Ann §§ 11.101 to .216; SD Codified Laws §§ 23A-28C-1 to -6; Vt Stat Ann tit 13, §§ 5301 to 5321; W Va Code §§ 14-2a-1 to -29; Wyo Stat Ann § 14-6-502.

⁷ The inclusion of victims' rights and protections in the Oregon Constitution was a hard fought battle. In 1996, Ballot Measure 40 was passed, providing victims with state constitutional rights and protections in criminal justice proceedings. *See Armatta v. Kitzhaber*, 327 Or 250, 254-55, 959 P2d 49, 51-52 (1988). The Oregon Supreme Court subsequently invalidated Measure 40. *See id.* at 289-90, 959 P2d at 71. In 1999, in a special election, the voters passed the two provisions that are now part of the Oregon Constitution. *See* Or Const art. I, §§ 42, 43.

Oregon's law is clear – victims have constitutional and statutory rights to meaningfully participate in criminal justice proceedings and to seek protection from their offenders. Among a victim's rights are the right to information about the “conviction, sentence, imprisonment, criminal history and future release from physical custody of the criminal defendant” Or Const art I, § 42(1)(b). *See also* ORS § 147.421 (providing that, upon request, victims have the right to have a public body disclose information about a defendant's conviction and sentence, imprisonment, and future release). Victims have the right to be heard at a pretrial release proceeding and at sentencing, Or Const art I § 42(1)(a), and to be consulted by the prosecutor regarding plea negotiations. *Id.* at (1)(f). Victims also have the right to be informed that they can seek testing for communicable diseases, and that counseling is available if the offense may have involved an exchange of body fluids. ORS § 135.139. They have the right to financial recompense for their injuries, including the right to compensation for counseling and other expenses, *see* ORS §§ 147.035, and to prompt restitution for counseling expenses and other losses. *See* Const art I, § 42(1)(d); ORS § 137.106. Victims cannot exercise any of these rights without the very information the trial court shielded from them – the fact that they are crime victims.

Through its citizen-driven constitutional and legislative enactments, Oregon has resoundingly declared that the historically recent bilateral adversarial criminal justice system must now integrate crime victims' rights and interests. *See, e.g., Kenna v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 435 F3d 1011, 1016 (9th Cir 2006) (criticizing the criminal justice system's outdated “assumption that crime victims should behave like good Victorian children-seen but not heard” and rejecting any suggestion that justice can be done without the participation of the very person harmed by a crime). *See also* Dean G. Kilpatrick,

Interpersonal Violence and Public Policy: What About the Victims?, 23 JL Med & Ethics 73, 77-78 (2004).

The trial court's order fundamentally undermines the victims' constitutional and statutory rights, and is wholly contrary to this state's clear law and public policy.⁸ By ignoring these effects of its ruling, the trial court exceeded its authority.

C. The trial court's ruling effectively forecloses civil remedies otherwise available to redress individual harm and promote institutional change.

While the criminal system is designed primarily to address individual criminal conduct, the civil justice system affords multiple opportunities to both remedy individual harm and to effect institutional change. The trial court's ruling has the practical effect of preventing the defendant's victims from pursuing these remedies.

The remedies clause of the Oregon Constitution states:

“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

Or Const art I, § 10.⁹

The drafters of the remedies clause set forth the rights of Oregon citizens to a remedy by due course of law for any intrusion to certain absolute rights respecting person, property, and reputation. *See Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 92, 23 P3d 333, 339 (2001). The term “remedy” refers to both a remedial process for seeking redress, and that which is required to restore a right that has been injured. *Id.* The term “injury” is a wrong or harm for which a cause of action existed at the time of the drafting of the Oregon

⁸ A distinct public interest at stake in this matter is the interest in encouraging victims to provide relevant information to state actors through the criminal justice process. For example, a person preparing a presentence investigation report must obtain the victim's statement regarding the effect of the offense, ORS § 137.350; the court must consider a victim's vulnerability in imposing a sentence, ORS § 137.085. *See also* OAR 213-08-002(1)(b) (setting out aggravating sentencing factors which require information about the effect of the crime on the victim).

⁹ The phrase “every man” means every person. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 92, 23 P3d 333, 339 (2001).

Constitution, *see id.* at 124, 23 P2d at 356, including the private wrong of battery. 3 William Blackstone, *Commentaries on the Laws of England*, *120 (1765) (defining battery as “the unlawful touching of another’s person willfully, or in anger”). In this case, the trial court’s ruling is unconstitutional because it prevents defendant’s victims from identifying themselves as victims, thereby frustrating their ability to access civil remedies.

There are a number of possible civil remedies available for the individual harms resulting from defendant’s actions, including common law claims for sexual battery and professional malpractice, and statutory claims for invasion of personal privacy, ORS § 30.865, and possibly, for stalking, ORS § 30.866(1). Defendant’s actions may also support the imposition of punitive damages awards against him. *See* ORS § 31.730 (setting forth the availability of punitive damages from a defendant who has “acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others”). Unless defendant’s victims know of their sexual victimization, however, they will not understand their risk or be apprised of the civil remedies available to them to redress their individual harm.

Further, the trial court’s ruling forecloses victims of defendant’s actions from effectuating any necessary institutional changes, the need for which are suggested by the defendant’s ability to engage in the undetected sexual abuse of incapacitated patients for years. Civil litigation is an important tool for reforming institutions: tort law reinforces participants’ personal motivation to do what is right, provides motivation for the adoption of institutional risk management programs, produces market incentives for correct behavior, creates incentives for the government to institute regulatory reforms, and serves as an enforcement mechanism for already existing regulations. *See* Guy T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L Rev 377,

384-85, 403 (1994). *Cf. Brown v. Bd. of Ed.*, 347 US 483 (1954). Further, the civil justice system can serve to deter future bad conduct. *See* William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 10 (1987) (“Although there has been little systematic study of the deterrent effect of tort law, what empirical evidence there is indicates that tort law likewise deters . . .”).

The civil justice system affords opportunities beyond remedying individual harm, including the punishment of the offender and enhanced institutional protections. By denying victims the opportunity to learn of their victimization, the trial court’s order effectively bars any individual or institutional redress and frustrates the proper functioning of the civil justice system.

III. CONCLUSION

In this case the trial court exceeded its authority when it ignored this state’s existing law and the public policy emanating from those laws and, instead, resorted to antiquated and paternalistic assumptions about women and crime victims in crafting a novel and unsupported policy to justify its refusal to enforce a grand jury’s order. The consequences of the trial court’s ruling are to defeat the grand jury’s constitutional and statutory responsibilities to investigate crimes and return indictments, and to foreclose defendant’s victims from exercising their constitutional, statutory, and common law rights in both the criminal and civil justice systems.

DATED this 28th day of March, 2007.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original AMICI CURIAE BRIEF OF THE NATIONAL CRIME VICTIM LAW INSTITUTE and OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-RELATOR to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on March 28, 2007.

I further certify that on March 28, 2007, I served the foregoing Amicus Curiae Brief of the National Crime Victim Law Institute by emailing a true copy thereof to each of the following persons at the following addresses, and by mailing a true copy thereof by first-class mail through the U.S. Postal Service to each of the following persons at the following addresses:

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