

# Rape and Sexual Assault of Women in Prison, Nationally and in Oregon

Brett Landis, *Women & the Law*, Fall 2005

## Introduction

Rape within the context of a women's prison ought to be a major concern for the state of Oregon. The legislature ought to revise the law criminalizing custodial sexual misconduct to better encourage reporting and to reflect the nature and seriousness of the crime. On the crime of rape, Catherine MacKinnon wrote:

“If heterosexuality is males over females, gender matters independently. Arguably, heterosexuality is a fusion of the two, with gender a social outcome, such that the acted upon is feminized, is the ‘girl’ regardless of sex, the actor correspondingly masculinized. Whenever women are victimized, regardless of the biology of the perpetrator, this system is at work. But it is equally true that whenever powerlessness and ascribed inferiority are sexually exploited or enjoyed- based on age, race, physical stature or appearance or ability, or socially reviled or stigmatized status- the system is at work.”<sup>1</sup>

Rape is a crime of violence and a crime of sex, but it is also a crime of hierarchies. The rapist uses his power over the raped. Gendered systems of power exist in the correctional system. Rape in prison enforces rape as a crime asserting power over the powerless.

Until 2005 Oregon did not have a statute criminalizing sexual contact between prison staff and prisoners.<sup>2</sup> It was joined only by Alabama and Vermont.<sup>3</sup> In late June, Oregon's legislature passed a statute criminalizing custodial sexual misconduct in the first and second degrees.<sup>4</sup> The current statute still leaves many of the problems of custodial sexual misconduct in prison unanswered.

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<sup>1</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 178-179 (1989).

<sup>2</sup> Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 39-40 (Fall 2004).

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

<sup>4</sup> Custodial Sexual Misconduct, O.R.S. §163.412, sec. (1)-(4) (2005).

I will discuss the violation of rape, the way it is treated in the legal system, and the phenomenon of underreporting. I will summarize the history of women in prison and the current demographics of women in prison. Next, I will discuss the issue of guards raping prisoners. Finally, I will examine Oregon's system and the problems with the new custodial sexual misconduct statute.

### **Methodology**

In the course of this paper, I will refer to rape, sexual assault, sexual abuse, and custodial sexual misconduct. Generally, I will call the act what a source refers to it as. If a court calls it sexual abuse, I will use that term. If a statute uses the term custodial sexual misconduct, I will use that phrase. I will use the word rape to refer to the gamut of sexual violations to women. In prison, rape is any sexual contact between inmates and correctional officers. As with girls under a certain age, consent for women in prison is meaningless. If a woman does not have her freedom, how can she consent to a sexual act with a man who has control over her? Sex between an inmate and a correctional officer can never be consensual.

While I am aware that many men suffer abuse at the hands of prison guards, this paper will focus on women's experiences of being raped in prison. Women are more likely to be raped by employees of the prison, while men are more likely to be raped by other inmates.<sup>5</sup> Due to the gendered nature of the crime of rape, examining the effects of rape on female prisoners makes more sense in the framework of existing theory, and it may shed light on how to understand rape between men. Scholars have suggested that when men rape other men, the raped men are being treated like women and being socially

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<sup>5</sup> Golden, *supra* note 2 at 41.

coded women.<sup>6</sup> Therefore by examining the problem of the rape of women prisoners by guards, the harm can be seen as one against their gender more clearly and can be applied to men as well.

When referring to the rapist, I will use the masculine pronouns. While a small minority of women commit rapes, generally, rape is something men do to women and occasionally to other men. Also, although there are more male victims of rape than there are female perpetrators, I will use the feminine pronoun to describe the person who has been raped. This is consistent with the vast majority of rape survivors being female and with the scholarship written on this issue. In prison, most survivors of guard on inmate rape are women.

When referring to people in prison, I will sometimes refer to them as inmates or prisoners. This is not meant to define the individual, but merely to denote that person's status. When referring to correctional staff, I will sometimes refer to them as correctional officers or guards. This is not meant to offend the many correctional staff members who do not abuse inmates and who have very difficult jobs to do. Much of the literature refers to correctional staff as guards and much of the history is couched in terms of guards, since the term correctional officer is more recent. Finally, I use the term prison to refer to correctional facilities more generally.

### **The Violation of Rape: a Stacked Deck against the Accuser**

The Oregon Revised Statutes define rape in the first degree as sexual intercourse when the victim is subject to “forcible compulsion”, is under twelve, is under sixteen and a relative in the first degree, or “is incapable of consent by reason of mental defect,

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<sup>6</sup> MACKINNON, *supra* note 1.

mental incapacitation or physical helplessness.”<sup>7</sup> Rape in the second and third degrees are sexual intercourse with a person under the age of fourteen and under the age of sixteen.<sup>8</sup> Oregon’s statutes also define incapacity to consent. A person is incapable to consent to sexual acts if that person is less than eighteen years old, “mentally defective”, “mentally incapacitated”, or “physically helpless”.<sup>9</sup> The statute also states, “A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence.”<sup>10</sup> These statutes theoretically apply when an inmate is raped by her guards. However, getting a conviction is difficult.

Generally, courts will require a victim to show that she physically resisted her attacker to find him guilty of rape. Facially, the Oregon statute on consent does not require this. However, by stating that a lack of physical resistance may be considered, the law invites defense attorneys to introduce evidence and appellate judges to overturn convictions where there was no physical resistance.<sup>11</sup> In a Pennsylvania case, a superior court judge overturned a conviction for sexual assault for lack of physical resistance despite a statute stating that this was not a requirement.<sup>12</sup> While a higher court overturned this decision, it remains possible that a judge might ignore Oregon’s statute and continue to require a showing of physical resistance.<sup>13</sup> In prison, physical resistance to a guard is dangerous. Correctional officers are given great leeway in the name of maintaining order. It is unlikely that a woman in prison would physically resist a correctional officer.

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<sup>7</sup> O.R.S. §163.375 (2003).

<sup>8</sup> O.R.S. §163.365 (2003); O.R.S. §163.355 (2003).

<sup>9</sup> O.R.S. §163.315 (2003).

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

<sup>11</sup> O.R.S. §163.315 (2003).

<sup>12</sup> Commonwealth v. Berkowitz, 415 Pa. Super. 505, 512-520, 609 A.2d 1338, 1342-1346 (1992).

<sup>13</sup> Commonwealth v. Berkowitz, 537 Pa. 143, 641 A.2d 1161 (1994).

Susan Estrich observed two categories of rape in her groundbreaking work *Real Rape*. She describes “simple rape,” where “a single defendant who knows his victim and neither beat her nor threatened her with a weapon.”<sup>14</sup> Estrich states that although most rapes are perpetrated by someone the victim knows she is unlikely to report these rapes to the authorities.<sup>15</sup> This is reinforced by the treatment simple rapes receive within the criminal justice system. Police treat these cases as without merit and prosecutors often resist prosecuting these cases.<sup>16</sup> Since she knew him, she must have consented. This applies in prison as well. When the inmate knows her guard, she would have no reason to withhold consent. When simple rapes are prosecuted, these cases are less likely to result in convictions than stranger rapes.<sup>17</sup> There is no motive for the victims of simple rape to report the crime, and open herself up to criticism. In prison, the disincentive to report includes fear of retaliation and a belief that she will not see justice.

MacKinnon adds to the theoretical discussion of rape, placing the violation within the context of women’s inequality to men. She writes, “Politically, I call rape whenever a woman has sex and feels violated. . . . To me, part of the culture of sexual inequality that makes women not report rape is that the definition of rape is not based on our sense of our violation.”<sup>18</sup> She criticizes the legal definitions of rape which tend to focus on sexual penetration. “I do think the crime of rape focuses more centrally on what men define as sexuality than on women’s experience of our sexual being, hence its violation.”<sup>19</sup> For women in prison, the actual inequalities that exist between inmates and guards create a

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<sup>14</sup> SUSAN ESTRICH, *REAL RAPE* 4 (1987).

<sup>15</sup> ESTRICH, *supra* note 14 at 11.

<sup>16</sup> *Id* at 16-19.

<sup>17</sup> *Id* at 19-20.

<sup>18</sup> MACKINNON, *FEMINISM UNMODIFIED* 82 (1987).

<sup>19</sup> MACKINNON, *supra* note 18 at 87.

severe violation. A different definition of the violation would center on a woman's experience of the violation, not a man's understanding of what was done to her.

MacKinnon finds rape and violence in how she defines masculinity and femininity. "Dominance eroticized defines the imperatives of its masculinity, submission eroticized defines its femininity. So many distinctive features of women's status as second class- the restriction and constraint and contortion, the servility and the display, the self-mutilation and requisite presentation of self as a beautiful thing, the enforced passivity, the humiliation- are made into the content of sex for women."<sup>20</sup> That men dominate women is central to their gendered identities. Women in prison are second-class citizens by law. They are not allowed freedom. By definition, guards dominate inmates. Thus, by raping a woman in prison, men who guard them are enforcing the traditional hierarchy.

According to MacKinnon, society deems certain groups of women as always consenting. "All women are divided into parallel provinces, their actual consent counting to the degree that they diverge from the paradigm case in their category. Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable."<sup>21</sup> Most people would view women prisoners as falling into the second category, as women who have deviated from the "normal" social order. Some women are even in prison because they were prostitutes. Stereotypes about consent also fall heavily on women of color, who are disproportionately represented in America's jails and who are raped four times as often as

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<sup>20</sup> MACKINNON, *supra* note 18 at 130.

<sup>21</sup> *Id* at 175.

white women.<sup>22</sup> Often when men rape women, they are enforcing both a gendered hierarchy and a racial hierarchy.

One option for women raped in prison is to pursue their case in the state criminal courts. Often, the punishments for a rape conviction are quite strong. Under the Oregon statute for first degree rape, the crime is a class A felony.<sup>23</sup> However, in order for the rapist to be punished for a class A felony, the police, the district attorney, and the jury must believe the woman. For women in prison, making the criminal justice authorities believe her can be extremely difficult. MacKinnon writes, “The law, speaking generally, defines rape as intercourse with force or coercion and without consent. Like sexuality under male supremacy, this definition assumes the sadomasochistic definition of sex: intercourse with force or coercion can be or become consensual.”<sup>24</sup> If men think the act is sex, then it is sex and not rape. In cases where a woman knows her attacker, dresses provocatively, or has had sexual intercourse in the past, proving rape beyond a reasonable doubt is very difficult.<sup>25</sup> How much harder it is for women in prison who are already considered to always consent. Furthermore, many women regard the criminal trial as extraordinarily invasive.<sup>26</sup> Women in prison are subject to stronger character scrutiny as they have been convicted of a crime. This is often enough for a jury without a criminal record to disbelieve what the victim is saying.

However, a woman raped in prison is lucky to even get to the stage of a criminal trial. Human Rights Watch noted in its investigation into five states’ prisons that

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<sup>22</sup> *Id* at 81-82.

<sup>23</sup> O.R.S. §163.375 (2003).

<sup>24</sup> MACKINNON, *supra* note 1 at 172.

<sup>25</sup> *Id* at 179.

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

criminal prosecution rarely occurred.<sup>27</sup> A criminal investigation was likely to lead to the prison dropping its own internal investigation to let the police take over.<sup>28</sup> Often, the police would drop their investigations shortly afterwards.<sup>29</sup> For women who have been raped in prison, it is nearly impossible to see justice from the criminal justice system.

Civil tort liability is another potential remedy for women raped in prison. Common law assault and battery might be an appropriate tool against rape. However, litigation is expensive and the individual rapist will often not have funds worth pursuing. Unless a woman is independently wealthy, as most women in prison are not, the costs of litigation will not justify this course of action. For attorneys who work pro bono or for a non-profit organization, state tort law is less desirable because there is no possibility to collect attorneys' fees.<sup>30</sup> Most women raped in prison will turn to a non-profit organization for legal help, and state tort law is less desirable to these groups. Furthermore, in the state of Oregon, the Oregon Tort Claims Act places a cap of one-hundred thousand dollars on economic damages and one-hundred thousand dollars on non-economic damages for public bodies.<sup>31</sup> A public body would include any state prison, a probable defendant in a prison rape case. The plaintiff who is a victim of prison rape is unlikely to get a recovery that would cause any sort of institutional change or that would even cover her own personal litigation costs.

Constitutional claims under 42 U.S.C. §1983 are another option for women who have been raped in prison. These claims are pursued in federal court, which eliminates

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<sup>27</sup> Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), available at <http://hrw.org/reports/1996/Us1.htm> (last visited on October 27, 2005).

<sup>28</sup> *Id.*

<sup>29</sup> Human Rights Watch, *supra* note 27.

<sup>30</sup> Golden, *supra* note 2 at n13.

<sup>31</sup> Oregon Tort Claims Act, O.R.S. §30.270 (2003).

many concerns for attorneys' fees and caps on tort damages. Furthermore, §1983 claims exist to protect an individual's constitutional rights. Rape by prison guards, as cruel and unusual punishment, is a constitutional violation. However, the Prisoner Litigation Reform Act, which I will discuss later, places many hurdles in the way of women prisoners seeking to pursue claims under constitutional law.

Women in prison have a difficult time proving rape. It is very hard for them to get criminal or civil law to protect them and punish the rapist. Rape is a crime that enforces a power structure. In prison, guards are at the top of that power structure and inmates are at the bottom. Understanding the context and history of women in prison helps to understand how many different social power structures are in place when a guard rapes an inmate.

## **Women's Experience in Prisons**

### The History of Women in United States' Prisons

Until the 1870s, most women in prison were housed with men.<sup>32</sup> This gave male guards and male prisoners greater access to incarcerated women. Prominent in this period was the image of the "fallen woman," lewd, sexual deviants, who refused to comply with proper gender roles.<sup>33</sup> Women in prison were in the category of women who could not be raped because they would always consent. Reform movements helped to change the situations for women in prisons by separating women from men.<sup>34</sup> They pressed the belief that these women, if properly treated, could be rehabilitated and reintegrated into society.<sup>35</sup>

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<sup>32</sup> CYNDI BANKS, WOMEN IN PRISON 1 (Contemporary World Issues ed., 2003).

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

In 1835 Mount Pleasant female prison at Ossining, New York became the first women's prison.<sup>36</sup> While this facility retained administrative connections to Sing Sing, Mount Pleasant contained separate buildings and its own staff.<sup>37</sup> This marked the beginning of a different approach to women's prisons.

The period between 1840 and 1860 saw many changes in the ways women were treated in prison. Elizabeth Fry, an English Quaker reformer, began the reform movement through her work at Newgate jail in London.<sup>38</sup> In the United States, most reformers were upper or middle class women, approximately a third of whom were Quaker.<sup>39</sup> This reform movement was often connected to other social work on slavery, temperance, and women's rights.<sup>40</sup> Margaret Fuller, writer and editor of the *New York Tribune*, also became active in the movement, writing articles on the conditions of women in prison to raise community awareness of the issue.<sup>41</sup>

From 1870 until 1930 the women's reformatory movement developed.<sup>42</sup> The three goals of the movement were the separation of female prisoners from male prisoners, specific feminine care for women in prison, and the introduction of female staff.<sup>43</sup> Unfortunately, the rise in facilities specifically for women prisoners led to women being incarcerated for minor offenses and being assigned harsher sentences than men would get for the same crimes.<sup>44</sup>

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<sup>36</sup> *Id* at 5.

<sup>37</sup> BANKS, *supra* note 32 at 5.

<sup>38</sup> *Id* at 6.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id* at 7.

<sup>42</sup> *Id* at 1.

<sup>43</sup> *Id* at 8.

<sup>44</sup> *Id* at 9.

The reformers believed strongly that women staff should be hired to supervise women in prison and to govern women's institutions. Some saw this as an extension of the nurturing role women played in society.<sup>45</sup> Others saw this as a necessary step towards rehabilitation, since men were thought to contribute to a woman's delinquency.<sup>46</sup> When newspapers started writing about women prisoners giving birth behind bars, the general public began to see the need for female staff to supervise women in prison.<sup>47</sup> The timing of the births demonstrated that the women became pregnant while incarcerated, and that the male guards were the fathers.<sup>48</sup> The scandal that resulted from these indications of sexual abuse by male staff won female staff higher status and greater power within prisons by the beginning of the twentieth century.<sup>49</sup>

However, other problems remained in the system, particularly issues of racism. Many Southern institutions leased their female prisoners out to do farm work on private farms or on a prison farm.<sup>50</sup> Black women prisoners were far more likely to be leased out than white women.<sup>51</sup> This program was essentially reinstating the condition of slavery for women prisoners in the South. The institution of slavery was notorious for the sexual abuse and exploitation of women. Women were often raped by their masters. In this leasing system, women leased out to employers were often subject to slavery-like conditions, including potential sexual abuse. Regardless of where the prison was located, white women in prison were typically treated better than black women, reinforcing a

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<sup>45</sup> *Id* at 12.

<sup>46</sup> BANKS, *supra* note 32 at 12.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id* at 13.

<sup>50</sup> *Id* at 35.

<sup>51</sup> *Id* at 38.

racial as well as gendered hierarchy.<sup>52</sup> As stated earlier, black women are far more likely to be a victim of sexual assault than white women.

Ironically, the 1964 Civil Rights Act, which was a major part of the Civil Rights Movement and the Woman's Movement, resulted in problems for women in prison for many years. It reversed the trend in maintaining female staff in women's prisons. Title VII requires that, absent a bona fide occupational qualification, an employer may not refuse to hire someone because of that person's gender. In the prison context, experts assumed that Title VII meant that a women's prison may not refuse to hire men to work as correctional officers, putting women in prison at a higher risk for sexual abuse.<sup>53</sup> By 1988 only sixty-five percent of correctional staff was female.<sup>54</sup> By 1996, Human Rights Watch reported that the majority of correctional staff working in women's prisons was male.<sup>55</sup> This increase in male correctional staff allowed more opportunities for male correctional staff to misuse their power. However, many appellate courts have begun to consider gender a bona fide occupational qualification for employees in women's prisons.

The Eighth Circuit Court of Appeals considered this question in 1995 in *Tharp v. Iowa Department of Corrections*.<sup>56</sup> To protect the inmates' privacy rights and to "provide more positive role models," the department created a rule that only female Residential Advisors would staff the women's unit of a minimum security prison.<sup>57</sup> Two male Residential Advisors with the greatest seniority filed suit after they were denied these preferred shift assignments.<sup>58</sup> The court determined that this policy did not violate

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<sup>52</sup> *Id* at 37-38.

<sup>53</sup> Human Rights Watch, *supra* note 27.

<sup>54</sup> BANKS, *supra* note 32 at 39.

<sup>55</sup> Human Rights Watch *supra* note 27.

<sup>56</sup> 68 F.3d 223 (8 Cir., 1995).

<sup>57</sup> *Id* at 224.

<sup>58</sup> *Id* at 224-225.

Title VII, since it was made to meet legitimate penological and privacy concerns, and the restriction on the plaintiffs was minimal.<sup>59</sup> The court relied heavily on the concept of affirmative action plans which provide only a minimal restriction.<sup>60</sup> The court also found that deference “to the prison administrators’ professional judgment warranted allowing this type of gendered employment.”<sup>61</sup> Other courts have followed suit.

Three years later, the Ninth Circuit Court of Appeals created mandatory precedent for Oregon in *Robino v. Iranon*.<sup>62</sup> A Hawaii women’s prison instituted a policy that six employment posts were designated female only after a study found that this step was necessary to protect the inmates’ privacy interests and to prevent sexual contact between officers and inmates.<sup>63</sup> Three male officers brought suit under Title VII.<sup>64</sup> The court concluded that this was a minimal restriction and that, if it was not, gender was a bona fide occupational qualification.<sup>65</sup> The court wrote, “We are concerned here with a considered prison policy that takes into account security, rehabilitation, and morale.”<sup>66</sup> Finding that the gender restriction was “reasonably necessary to the operation” of the prison, the court affirmed the importance of safety from sexual assault for the women prisoners.<sup>67</sup>

Although the issue considered by the eighth and ninth circuits involved only a minimal restriction on employment opportunities, the Sixth Circuit Court of Appeals

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<sup>59</sup> *Id* at 226.

<sup>60</sup> *Id* at 225.

<sup>61</sup> *Tharp v. Iowa*, 68 F.3d at 226.

<sup>62</sup> 145 F.3d 1109 (9 Cir. 1998).

<sup>63</sup> *Id* at 1110.

<sup>64</sup> *Id*.

<sup>65</sup> *Id*.

<sup>66</sup> *Id* at 1111.

<sup>67</sup> *Id*.

considered a rule larger in scope in *Everson v. Michigan Department of Corrections*.<sup>68</sup> After serious evidence of “rampant sexual abuse of female prisoners” and several law suits, the department designated several positions with close contact to the inmates and little supervision as “female only.”<sup>69</sup> A group of male and female employees filed a suit under title VII and the equivalent provision under Michigan’s Civil Rights Act.<sup>70</sup> The court determined that, because of the risk of sexual assaults, gender for these positions was a bona fide occupational qualification.<sup>71</sup> The court noted the importance of giving deference to the “reasoned decisions of prison officials” and that “the goals of security, safety, privacy, and rehabilitation can justify gender-based assignments in female correctional facilities.”<sup>72</sup> The court also noted the importance of inmate safety from sexual assault, particularly in the housing units.<sup>73</sup> While most male officers were not inclined to sexually assault inmates, the department’s inability to predict which male officers would abuse inmates justified this policy.<sup>74</sup> However, the court did not rule that a general risk of sexual assault allowed women’s prisons to exclude male officers.<sup>75</sup> In order to rule this way, sexual abuse of female inmates would have to be an “endemic problem,” as in Michigan.<sup>76</sup> Therefore, this decision may not allow prisons as much leeway in instituting a majority female staff.

While the future may lead to men no longer working in women’s prisons, the current situation for women in prison seeking to file claims after being raped remains

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<sup>68</sup> 391 F.3d 737 (6 Cir. 2004).

<sup>69</sup> *Id.* at 739-740.

<sup>70</sup> *Everson v. Michigan*, 319 F.3d at 739-740.

<sup>71</sup> *Id.* at 747.

<sup>72</sup> *Id.* at 751.

<sup>73</sup> *Id.* at 755.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 761.

<sup>76</sup> *Id.* at 761-762.

difficult. Many constitutional violations may not now be pursued by inmates in federal court. In 1996 the Prisoner Litigation Reform Act made it more difficult for inmates in prisons to bring claims in federal court, particularly women seeking to bring constitutional claims after being raped. Federal court is the preferred place for inmates to bring claims against the government among prisoner rights activists.<sup>77</sup> State tort law does not typically provide attorney's fees and is designed to protect an individual from other individuals, not to protect an individual's constitutional rights, such as the right to be free from cruel and unusual punishment like rape.<sup>78</sup> An inmate who wins is likely to only have a state claim against the individual officer, and not against the institution that allowed this to happen. Furthermore, federal jury pools, encompassing a larger area and often an urban area, tend to be more favorable to prisoners than smaller state jury pools.<sup>79</sup> Urban centers tend to have a larger segment of the population that is more liberal and more concerned with prisoners' rights and women's rights. Thus, the restrictions of the PLRA on prisoners' claims involving sexual assault are great.

The PLRA requires inmates to first exhaust all administrative remedies at the correctional institution before filing their claims.<sup>80</sup> This can be particularly difficult in sexual assault cases. The act also allows the court to dismiss on its own motion any claims it finds frivolous.<sup>81</sup> Considering the societal image of women in prison and the way courts mistrust women claiming to be raped, this also presents a substantial problem. Finally, the inmate must show a "physical injury" to present any claims for mental or

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<sup>77</sup> Golden, *supra* note 2 at n13.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Prisoner Litigation Reform Act, 42 U.S.C. §1997e(a) (2005).

<sup>81</sup> 42 U.S.C. §1997e(c).

emotional injury.<sup>82</sup> The question whether or not sexual abuse or assault falls under the category of “physical injury” is yet to be determined.

### Women in Prison Today

Women who have been sexually assaulted in prison have many challenges to overcome. They are predominantly non-white, economically disadvantaged, poorly educated, and many are survivors of previous sexual assaults. Women in prison have not had easy lives. If they become pregnant as a result of rape, their lives become even harder. The children they have behind bars may be taken away from them very quickly and placed into foster care, and the women have very little choice whether or not to have the child in the first place.

Today, custodial rape is becoming a more common threat. The number of women in prison is growing at a rate of seven and six tenths percent annually, while the number of men in prison is only growing at five and nine tenths percent annually.<sup>83</sup> With the prison population growing steadily, more women are exposed to the risk of sexual assault in prison.

Women in prison are also part of a group unlikely to know their legal rights. Only fifty-six percent of the women in state prisons have completed High School, although the rate is higher for women in federal prisons.<sup>84</sup> With little education, many of these women are not aware of the available legal remedies if they are sexually assaulted

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<sup>82</sup> 42 U.S.C. §1997e(e).

<sup>83</sup> BANKS, *supra* note 32 at 165.

<sup>84</sup> *Id* at 165.

while in prison. The lack of education may also be a difficulty when these women try to read and understand prison policies written in difficult, bureaucratic language.

Women's prisons also display the American racial hierarchies. Approximately two-thirds of women in prison are non-white.<sup>85</sup> Forty-eight percent are African-American.<sup>86</sup> It is estimated that eleven out of every one-thousand women will be incarcerated at some point in their lives.<sup>87</sup> That estimate changes to thirty six for every thousand women if a woman is African-American and fifteen for every thousand if the woman is Hispanic.<sup>88</sup> Women of color, who are far more likely to be rape survivors, make up a large part of the women prison population. In prison, these women are again at a greater risk of sexual assault.

Women in prison also have other grave concerns. Sixty-five percent of women in state prisons have young children at home.<sup>89</sup> Depriving women in prison from seeing their children when they come to visit is one of the many ways a guard can coerce women into a sexual act. Fewer women in prison have a criminal history as compared to men.<sup>90</sup> For many, incarceration for the first time is a particularly terrifying experience, even more so if a woman is raped while incarcerated. Human Rights Watch estimated that at least half of all women in prison have been sexually assaulted prior to incarceration.<sup>91</sup> If these women are assaulted again in prison, where many think they ought to be safe, the psychological trauma may be severe.

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<sup>85</sup> *Id.*

<sup>86</sup> BANKS, *supra* note 32 at 165.

<sup>87</sup> *Id.* at 167.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 165.

<sup>90</sup> *Id.* at 166.

<sup>91</sup> Human Rights Watch, *supra* note 27.

Women in prison face special difficulties due to their reproductive capacity. These sometimes come into play when women are sexually assaulted in prison. If a woman in prison becomes pregnant she may face special challenges. After birth, the child is taken away from the mother within forty-eight hours in Oregon.<sup>92</sup> The child is then either placed with family members or put into foster care.<sup>93</sup> In Oregon, a few women are allowed to spend time with their young children at the Head Start program, but they must have nearly perfect behavior and only a short sentence.<sup>94</sup> For most women in Oregon's prisons, the separation from their children can be traumatic. This separation is likely to happen, even when the pregnancy originated within the prison.

Abortion by choice in prison is almost non-existent. Although, in some jurisdictions, in cases of sexual assault, some prisons have forced or coerced women into have abortions.<sup>95</sup> In other jurisdictions, some prisons have denied women access to abortion.<sup>96</sup> There is little consistency among institutions regarding reproductive choices.<sup>97</sup> Pregnant inmates in Oregon may choose to have an abortion in the first trimester and after that if a medical specialist, who contracts with the institution, agrees.<sup>98</sup> However, if women in Oregon's prisons choose to have an abortion, they must pay for it themselves, including the security expenses to transport them to an abortion facility.<sup>99</sup> This becomes extremely expensive, and women in prison are not typically wealthy. This rule prevails even in cases of rape. Women in prison are in a similar situation to women

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<sup>92</sup> Merwin Moe Spencer, *Pregnancy in Prison: What Happens to the Women and Their Children*, in WOMEN IN PRISON E-11 (The Portia Project ed., November 1, 2003).

<sup>93</sup> Spencer, *supra* note 92 at E-6.

<sup>94</sup> *Id.* at E-18-E-20.

<sup>95</sup> Human Rights Watch, *supra* note 27.

<sup>96</sup> BANKS, *supra* note 32 at 83.

<sup>97</sup> *Id.*

<sup>98</sup> Spencer, *supra* note 92 at E-26-E-27.

<sup>99</sup> Tour with Lory A. Humbert, Assistance Superintendent, Program Services, Coffee Creek Correctional Facility (November 19, 2005).

living in poverty; the right to an abortion is meaningless to almost all of them, since they cannot afford to pay for it.

### Women in Oregon's Prisons

While Oregon's Women's prisons do not conform to national stereotypes in many ways, some trends are typical of the nation as a whole. Oregon's prisons hold a total of nine-hundred and seventy-five women.<sup>100</sup> The responses of the Oregon justice system to sexual assault behind bars matter to these women, and will matter to more in the future as the population continues to grow. Unlike the national norm, the majority of women in Oregon's prisons, eight-hundred and nineteen, are mostly white.<sup>101</sup> The next largest racial group is seventy-nine black women, followed by thirty-nine Native American women, and thirty-two Hispanic women.<sup>102</sup> While the racial disparities still exist in Oregon, the disproportionate rate of sexual assault on women of color is unlikely to matter as much in this context. Three-hundred and forty-six of the women are sentenced to over two years.<sup>103</sup> These women are not eligible for the Head Start program discussed earlier. Thus, women who give birth after being raped in prison are probably not going to be able to have additional bonding time with the child.

Most of the women in Oregon's prisons need some form of treatment. The majority of the women qualified in the two highest levels of need for mental health treatment.<sup>104</sup> The same is true of the women's need for substance abuse treatment.<sup>105</sup> Unfortunately, the amount funding in the system does not allow all the women who

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<sup>100</sup> Inmate Profile, Oregon Department of Corrections (October, 26, 2005).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

would benefit from treatment to receive it.<sup>106</sup> For women who are raped in prison, there is no guarantee they will get the psychological treatment they need. Furthermore, women who mental health issues or substance abuse issues are more vulnerable to sexual assault because the affects are more disturbing and these women are less likely to be believed if they report the abuse.

### **The Rape of Women in Prison by Guards**

Custodial rape is a situation where the power dynamics make true consent impossible. As MacKinnon noted, rape is power and hierarchy.<sup>107</sup> In prison, this is even more obviously true. Discussing rape in prison Human Rights Watch reported, “Given the inherently unequal nature of the custodial relationship, however, some type of pressure on the prisoner should be presumed.”<sup>108</sup> Correctional officers are responsible for almost every aspect of an inmate’s life, and thus exert enormous power over that individual.<sup>109</sup> Women’s prisons are places where men, often white men, exert power and control over poor women, often women of color.

During Human Rights Watch’s examination of five prisons, the organization discovered that lesbian and transgendered inmates were more likely to be sexually assaulted by correctional officers.<sup>110</sup> This is another example of rapists targeting groups with little power in a prison context. The officers would also be enforcing gendered stereotypes on the inmates. If women are for men to have sex with, then lesbian inmates are forced to have sex with men. If a transsexual wants to be a woman, the officers will show her what women are for.

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<sup>106</sup> Humbert, *supra* note 99.

<sup>107</sup> MACKINNON, *supra* note 1.

<sup>108</sup> Human Rights Watch, *supra* note 27.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

One of the more terrifying aspects of rape in prison is that the victims “cannot escape their abuser.”<sup>111</sup> Everywhere a woman who has been raped in prison goes, the officer who raped her has access to her. This contact also serves to reinforce the fear of retaliation if the woman reports the rape. MacKinnon noted the fear of retaliation against women who report rape prevents many women from reporting rape.<sup>112</sup> Women in prison have more to fear, since their rapist has almost absolute power over them. Human Rights Watch followed up their report on sexual abuse behind bars by examining what happened in one of the Michigan prisons they criticized two years later.<sup>113</sup> They noted that almost all of the women they had previously interviewed who had reported their rapes had faced retaliation for doing so.<sup>114</sup> Sometimes, the officer who assaulted them would directly retaliate, but often he would convince other officers to retaliate as well, creating less suspicion of the individual guard.<sup>115</sup> This retaliation would take the form of disciplinary tickets for violations which never occurred, loss of “good time”, a change in status, verbal harassment, loss of privileges, threats, and additional abuse during pat frisk searches.<sup>116</sup> Often, the women who reported sexual abuse in prison were even prevented from seeing their children when they visited.<sup>117</sup> What happened in Michigan is an example of what may be happening in other states, like Oregon. In light of the severity of the retaliation against women who reported sexual abuse in Michigan’s prisons, it is easy to understand why this crime is so seldom reported. Actual retaliation may not even be necessary to prevent women in other states from reporting. The threat may be enough.

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<sup>111</sup> *Id.*

<sup>112</sup> MACKINNON, *supra* note 18.

<sup>113</sup> Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, HUMAN RIGHTS WATCH, September 1998 at 2-3.

<sup>114</sup> *Id.* at 6.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 6-7.

<sup>117</sup> *Id.* at 7.

The frequency of rape in prison is very difficult to determine. Rape is an underreported crime, in general, but in prison it becomes more so. Human Rights Watch has stated, “One of the biggest obstacles to the eradication of custodial sexual misconduct is its invisibility at the state and national level.”<sup>118</sup> For example, in both Georgia and the District of Columbia, inmates needed to file class action law suits before the issue of custodial misconduct was seriously discussed.<sup>119</sup> Conservative estimates conclude that at least thirteen percent of all inmates have been sexually assaulted while in prison.<sup>120</sup> Other studies indicate that up to twenty-seven percent of women are sexually assaulted while in custody.<sup>121</sup> That sexual assault in prison happens at all indicates a serious enough issue that needs to be addressed.

Correctional staff have many opportunities to have sexual contact with women in prison. It can happen in many different ways. Often there may be actual or threatened physical force involved in the rapes.<sup>122</sup> However, non-physical coercion may be effectively used, since correctional officers control every aspect of an inmate’s life. The officers may threaten to change the inmate’s record and take away earned “good time” effectively making the woman’s sentence longer.<sup>123</sup> The officer may threaten to deprive the inmate of material goods, which he has to power to withhold.<sup>124</sup> The officers may also attempt to bribe the inmates into having sex with them, offering “special” goods or privileges.<sup>125</sup> Sexual abuse of inmates may also occur during the course of officer’s duties. Human Rights Watch found that many correctional officers abused their

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<sup>118</sup> Human Rights Watch, *supra* note 27.

<sup>119</sup> *Id.*

<sup>120</sup> Golden, *supra* note 2 at 42.

<sup>121</sup> *Id.*

<sup>122</sup> Human Rights Watch, *supra* note 27.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

discretion in pat frisk searches, using the search as an excuse to grope the women's breasts, buttocks, and vaginas.<sup>126</sup>

While some sexual relations between correctional staff and inmates occur absent any form of threat or bribe, these remain problematic as well.<sup>127</sup> The power correctional staff holds over all inmates makes any true consent impossible. The ability to consent is lessened when other power systems are at work. Women in prison do not have their freedom. The correctional officers do. Women in prison are mostly women of color. The correctional officers are mostly white. Women in prison are mostly ill-educated and poor. The correctional officers are not. Women in prison are female. Most correctional officers are male. These are systems of hierarchy, and the women in prison are at the very bottom of each of these. Consent comes from true equality. These women are not truly equal because our society is not an equal one. They can never consent.

Rape is a particularly heinous violation of a woman's bodily integrity. Custodial rape is particularly egregious. It is a violation of United States federal law and United Nations standards.<sup>128</sup> Custodial rape is also a situation where power dynamics are significantly present, the powerful abusing the powerless.

The rape of a person in prison is a violation of the eighth amendment prohibition against cruel and unusual punishment, according to case law.<sup>129</sup> In 1994, the United States Supreme Court declared being sexually assaulted in prison is not a part of the sentence criminals should pay.<sup>130</sup> In the landmark case, a pre-operation, male to female,

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<sup>126</sup> *Id.*

<sup>127</sup> Human Rights Watch, *supra* note 27.

<sup>128</sup> *Id.*

<sup>129</sup> U.S. CONST. amend. VIII.

<sup>130</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (finding that prison officials deliberate indifference to a substantial risk of serious harm violated the eighth amendment).

transsexual inmate was raped by other inmates, and the prison staff did nothing to protect her.<sup>131</sup> The court first determined that being raped in prison is a violation of an inmate's constitutional rights.<sup>132</sup> Then, the court found that deliberately ignoring the probable danger of an inmate being raped was another constitutional violation.<sup>133</sup> The rape of an inmate by correctional staff violates the eighth amendment. Furthermore, as a parallel to the United State's constitutional standards, international law has deemed the rape of prisoners to be a form of torture.<sup>134</sup>

In *Liner v. Good*, prison officials beat and sexually assaulted a male inmate, while slinging racial slurs at him.<sup>135</sup> The Second Circuit Court of Appeals reversed the district court's dismissal of the inmate's pro se constitutional claims, holding that allegations of sexual abuse provide a claim for emotional distress and a claim for the violation of the eighth amendment.<sup>136</sup> Raping prisoners violates the constitution and is a common law tort, and inmates can recover damages for these violations. The court also noted that sexual abuse was more than a de minimis injury and could not be dismissed for lack of showing a physical injury for the purposes of the Prisoner Litigation Reform Act.<sup>137</sup> Rape in prison by guards is a real injury, and an important injury. This court recognized that the rape of inmates by correctional officers is a serious matter.

Similarly, in the Ninth Circuit Court of Appeals, Oregon's federal jurisdiction, examined the case of a Washington male-to-female transsexual inmate who alleged

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<sup>131</sup> *Id* at 829-831.

<sup>132</sup> *Farmer v. Brennan*, 511 U.S. at 834.

<sup>133</sup> *Id* at 838.

<sup>134</sup> Human Rights Watch, *supra* note 27.

<sup>135</sup> 196 F.3d 132, 133 (2d Cir. 1999).

<sup>136</sup> *Id* at 135-136.

<sup>137</sup> *Id* at 135.

sexual harassment and attempted rape by a correctional officer in *Schwenk v. Hartford*.<sup>138</sup> The officer, Mitchell, continuously propositioned and sexually touched Crystal Schwenk, a male to female transsexual, after she repeatedly told him not to touch her.<sup>139</sup> In response, he threatened her with segregation, lost of “good time”, and transferring her to a more dangerous prison.<sup>140</sup> In response to Mitchell’s claim of qualified immunity, the court concluded that while the application of the Gender Motivated Violence Act, providing a federal claim, was unclear in regards to transsexual prisoners, the constitutional claim was clear and thus immunity was inappropriate.<sup>141</sup> The court decided that the rape of prisoners was “offensive to human dignity” and met the requirements for an eighth amendment claim.<sup>142</sup> The court states, “In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise.”<sup>143</sup> The court noted that the sexual assault of inmates by correctional officers is a violation of law, for which there is no justification.

These cases establish, without a doubt, that guards having sex with prisoners is wrong and it violates the constitution. When prison rape occurs, it ought to be condemned, and the injured inmate compensated. By holding the prisons in these cases responsible, the courts attempted to encourage these institutions to adopt changes which would better ensure inmate safety. However, civil and constitutional liability has limitations. Without

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<sup>138</sup> 204 F.3d 1187, 1192-1194 (9 Cir. 2000).

<sup>139</sup> *Schwenk v. Hartford*, 204 F.3d at 1192-1194.

<sup>140</sup> *Id* at 1194.

<sup>141</sup> *Id* at 1195.

<sup>142</sup> *Id* at 1197.

<sup>143</sup> *Id*.

strong criminal sanctions, the individual officer who rapes an inmate may avoid responsibility. He may have less incentive to behave properly. Legislation often will convey a stronger message to women in prison and would-be rapist guards that the state condemns this conduct.

In response to many allegations of custodial rape 2003, congress passed the Prison Rape Elimination Act, establishing nationally that the rape on inmates is inappropriate and should be unlawful.<sup>144</sup> This law allowed the Attorney General to establish a national rule and threatened to deny states facilities funding if they failed to enact legislation criminalizing sexual contact between correctional staff and inmates.<sup>145</sup> However, the Attorney General is not allowed to establish a new rule which would “impose substantial additional costs” to the prison authorities.<sup>146</sup> This greatly limits the power of the national standard and does nothing to alleviate the problems with enforcement of criminal statutes prohibiting sexual contact between correctional staff and inmates.<sup>147</sup> However, this law did spur the Oregon State Legislature to finally pass a statute on this subject.

The Prisoner Litigation Reform Act continues to present difficulties for women who decide to pursue federal claims after being sexually assaulted in prison. The requirement of filing administrative grievances exposes women who report rape in prison to retaliation by the officer who assaulted them or by other officers.<sup>148</sup> Judges may rely on stereotypes of “fallen” women, unrapable women, and dismiss the law suit on their own motion.<sup>149</sup> Finally, the requirement that an inmate show a physical injury presents

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<sup>144</sup> 42 U.S.C. §15601-§15609 (2005).

<sup>145</sup> 42 U.S.C. §15607(a)(1), (c).

<sup>146</sup> 42 U.S.C. §15607(a)(3).

<sup>147</sup> Human Rights Watch, *supra* note 27.

<sup>148</sup> 42 U.S.C. §1997e(a).

<sup>149</sup> 42 U.S.C. §1997e(c).

difficulties, as there is not a clear consensus on whether or not rape is considered a physical injury.<sup>150</sup> These hurdles created by the Prisoner Litigation Reform Act make civil recovery for women who have been sexually assaulted in prison unlikely and that fact makes these cases unlikely to be filed at all.

For women who have been raped in prison, there are few options. Rapes remain invisible and vastly underreported. The power dynamics between inmates and correctional staff prevent true consent and provide many opportunities for exploitation. These power dynamics also further gendered and racial hierarchies. United States law and International law forbid sexual assault of prisoners. Retaliation remains a serious problem and concern for women who attempt to report rapes. The Prison Rape Elimination Act has helped this situation somewhat, but it leaves much undone. Finally, the Prisoner Litigation Reform Act makes it much harder to bring a successful civil law suit. Women in prison, an already disadvantaged group, live in a system where violations against their bodily integrity are ignored and covered up. It is very difficult for these women to be made whole again.

### **The Rape of Women in Oregon Prisons**

Lexis Nexis reported no cases, neither civil nor criminal, of correctional staff assaulting inmates in Oregon's state prison system. This may mean that the problem of custodial rape does not occur in the state of Oregon, but more likely it means that few women are reporting rape when it does occur and those women who report it no access to the civil and criminal court systems. Considering the fear of retaliation and the

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<sup>150</sup> 42 U.S.C. §1997e(e). For a more extensive discussion on the problems the physical injury requirement presents to women in prison, see Golden, *supra* note 2 (examining this issue and making a recommendation that the Prisoner Litigation Reform Act be amended to define sexual assault as a physical injury).

unlikelihood that any civil or criminal law suits will result in favorable results, there is little incentive for women to report. This may change due to Oregon's new statute.

The reporting procedures individual prisons have established are vitally important to how often the rapes are reported. According to Carissa Casper, Diversity Coordinator of Coffee Creek Correctional Facility the standard process for reporting general grievances is as follows: 1) the inmate either speaks with or sends an inmate communication form to the staff member they are having a problem with or to the staff member responsible for questions about rules and procedures, 2) the inmate files a grievance and attaches the inmate communication form and the staff member's response, and 3) the staff responds to the grievance.<sup>151</sup> In order to report a sexual assault, an inmate may report it to any staff member and "it will be investigated."<sup>152</sup> The vast majority of grievances do not remain confidential, but sexual assaults are handled differently, as a different form of investigation takes place.<sup>153</sup> During investigations for sexual assault, the inmate and the correctional officer are kept separated.<sup>154</sup> If an inmate does not receive a suitable response from their grievance, the inmate may appeal to the Superintendent and later to the Assistant Director.<sup>155</sup> This process is currently being updated by the facility and will soon be published.<sup>156</sup> The new rule will bypass the stage where the inmate is required to speak or write to the staff member their problem is with and the grievance coordinator will be able to forward the grievance to the person best

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<sup>151</sup> Email interview with Carissa Casper, Diversity Coordinator, Coffee Creek Correctional Facility (November 22, 2005).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

able to respond.<sup>157</sup> While there is no guarantee that the process of reporting sexual assault has ever been used, the prison is required to have a process to report these abuses.

The women in prison may not know that there is a special procedure for reporting sexual abuse. Also, these women may not know how she will fare in the special grievance procedure. Who will investigate the claim? What will happen if the officials decide her claim is without merit? What happens if the officer finds out? Will she be protected from him? Will she be protected from his friends? The questions a woman who has been sexually assaulted in prison would reasonably ask remain unanswered and un-communicated by the prison officials. However, this process does allow for easy reporting, since any staff member is required to pass the information along to be investigated. As of November 2005, Coffee Creek had never received a grievance alleging sexual assault or abuse, although the facility had at least one instance where an inmate reported sexual abuse.<sup>158</sup> The staff believes that this offense is underreported.<sup>159</sup> The grievance process needs to be clearer for women who have been sexually abused. It is not clear how much women in Coffee Creek understand about their rights. Moreover, many women in prison are poorly educated, and will possibly not understand the explanation of the grievance procedures written in their paperwork. If they do not know exactly what will happen to them, women will not come forward out of fear.

Oregon's statute on custodial sexual misconduct is too new to properly judge its effects. Custodial misconduct in the first degree is defined as "sexual intercourse or deviate sexual intercourse with another person or penetrates the vagina, anus, or penis of another person with any object other than the penis or mouth of the actor" when the

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<sup>157</sup> *Id.*

<sup>158</sup> Carissa Casper, *supra* note 151.

<sup>159</sup> *Id.*

victim is in the custody of law enforcement, a correctional facility, on a work crew or work release program, or is on probation or parole and the person committing the offense is employed by law enforcement, a correctional facility, a work release program, the parole board, or trains any of these groups.<sup>160</sup> The law provides that consent is no defense, lack of supervisory authority is a defense, and that the crime is a class C felony.<sup>161</sup> By negating any consent, the statute recognizes that the power dynamics between inmates and guards make consent meaningless. The lack of supervisory authority defense, however, allows some people who do not have direct control over an inmate to claim consent. However, often women in prison will believe that someone has authority over them, even if that is not the case.

Custodial misconduct in the second degree happens when a person who is employed by law enforcement, a correctional facility, a work release program, the parole board, or trains any of these groups “engages in sexual contact” with a victim is in the custody of law enforcement, a correctional facility, on a work crew or work release program, or is on probation or parole.<sup>162</sup> Consent is still no defense, a lack of supervisory authority is, and this crime is classified as a class A misdemeanor.<sup>163</sup> The act also makes exceptions for medical procedures and searches for weapons, contraband, and evidence of a crime.<sup>164</sup>

Washington’s statute on custodial sexual misconduct is similar to Oregon’s statute. First degree custodial sexual misconduct requires sexual intercourse and the

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<sup>160</sup> O.R.S. 163.412, sec. 3(1) (2005).

<sup>161</sup> O.R.S. §163.412, sec. 3(2)-(4).

<sup>162</sup> O.R.S. §163.412, sec. 4(1).

<sup>163</sup> O.R.S. §163.412, sec. 4(2)-(4).

<sup>164</sup> O.R.S. §163.412, sec. 5.

second degree requires sexual contact.<sup>165</sup> However, Washington’s statute provides language concerning when “the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision.”<sup>166</sup> This statute has no defense for a lack of supervisory authority. By including these provisions, Washington has focused on the victim’s experience and beliefs. The only defense allowed by statute in Washington is that the defendant was subject to “forcible compulsion” by the inmate.<sup>167</sup> This was likely put into place to protect female correctional officers after being attacked by male inmates. Washington punishes first degree custodial sexual misconduct as a class C felony and second degree custodial sexual misconduct as a gross misdemeanor.<sup>168</sup>

California’s statute is written in a different formula. It only addresses cases where the inmate supposedly consented.<sup>169</sup> This leaves the fate of women who are forcibly raped in prison to the flaws of traditional rape law, and the unlikelihood that their cases will be pursued. However, it broadly defines “sexual activity” to include almost any form of sexual contact.<sup>170</sup> This focuses on the violation, rather than penetration. The only defenses this statute provides are conjugal visits, lawful searches, and bona fide medical examinations.<sup>171</sup> These defenses could be deemed necessary for the proper functioning of the prison. California punishes this crime as a misdemeanor for first time offenders and a felony for repeat offenders.<sup>172</sup>

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<sup>165</sup> R.C.W. §9A.44.160(1) (2005); R.C.W. §9A.44.170(1) (2005).

<sup>166</sup> R.C.W. §9A.44.160(1)(a)(ii); R.C.W. §9A.44.170(1)(a)(ii).

<sup>167</sup> R.C.W. §9A.44.180 (2005).

<sup>168</sup> R.C.W. §9A.44.160(3); R.C.W. §9A.44.170(3).

<sup>169</sup> Cal. Pen. Code §289.6 (2005).

<sup>170</sup> Cal. Pen. Code §289.6(d).

<sup>171</sup> Cal. Pen. Code §289.6(f).

<sup>172</sup> Cal. Pen. Code §289.6(g),(i).

Human Rights Watch reported that it was skeptical about the effectiveness of most states' statutes.<sup>173</sup> Many problems remain with enforcement of these statutes and investigatory procedures.<sup>174</sup> Also, many statutes, like Oregon's are flawed. While Washington's statute is better able to focus on the experience of the inmate, it also shares many of Oregon's statute's problems. California's statute leaves the women who did not "consent" unprotected. The punishment for the California crime is even more lenient than Oregon's and Washington's punishments for first time offenders.

Oregon's statute is too lenient.<sup>175</sup> When the crime of custodial sexual misconduct involves penetration, it is only a class C felony.<sup>176</sup> Custodial sexual misconduct when it does not involve penetration is only a misdemeanor.<sup>177</sup> Rape in the first degree is a class A felony.<sup>178</sup> Rape in the third degree, or sex with a person between the ages of fourteen and sixteen, is a class C felony.<sup>179</sup> Rape in the third degree requires no forcible compulsion and no familial relationship. Custodial sexual misconduct involves the penetration of a person who is under the power of the penetrator utterly and completely. This is arguably a more serious offense, since teenage girls are given far more freedom than women in prison. If society and state legislatures do not treat these offenses against women in prison with the seriousness they warrant, these crimes will continue to go unreported and unpunished. Women who are raped in prison will perceive their violation as minimal in the eyes of the law, and not the serious violation of human rights it is.

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<sup>173</sup> Human Rights Watch, *supra* note 27.

<sup>174</sup> Human Rights Watch, *supra* note 27.

<sup>175</sup> As stated earlier, criminal rape statutes are not a realistic option for women in prison. Women prisoners are unlikely to be believed by a jury, judge, prosecutor, or police officer, since they are typically considered to be non-virtuous women.

<sup>176</sup> O.R.S. §163.412, sec. 3(4).

<sup>177</sup> O.R.S. §163.412, sec. 4(4).

<sup>178</sup> O.R.S. §163.375(2).

<sup>179</sup> O.R.S. §163.355.

The Oregon statute also fails to differentiate between non-consensual and consensual sexual contact. While true consent is impossible, there should be differences in the degree of the offense based on the severity of the violation. Human Rights Watch also recognized a need for this.<sup>180</sup> There should be a separate category for the offense when it was committed with a bribe or a threat to take away goods. There should be a higher level when dealing with threats to deprive women of any contact with family or attorneys. There should be another category where there is a threat of extra discipline or loss of “good time.” Even higher should be threats of physical violence, and the use of violence should be the highest level and constitute a class A felony. The defense for a lack of supervisory authority ought to be repealed. It focuses on the perpetrator’s actual rather than perceived situation. By failing to address the many ways rapes take place in prison, the legislature is failing to address the problem to the best of its ability. Custodial sexual misconduct ought to be treated more seriously than rape outside an institutional setting, because in prison, rape is not only a violation of a woman’s person; it is also torture and a violation of the constitution.

In Oregon, rapes in prison are likely largely underreported. The lack of any case law coming out of Oregon indicates that women are too afraid to report rapes. The grievance procedure in Coffee Creek is flawed, but the facility is working to correct those flaws. However, the procedure needs to be communicated clearly to the women in the facility. The legislature has recently passed an act to comply with Prison Rape Elimination Act requirements to receive federal funding. However, this act is flawed and needs to be amended. Most importantly, the statute needs to be enforced and enforced

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<sup>180</sup> Human Rights Watch, *supra* note 27.

strictly. Women who are raped in Oregon's prisons are gaining more options, but much needs to be done before they are safe.

## **Conclusion**

Oregon's legislature should amend the state's statute criminalizing custodial sexual misconduct to have harsher penalties. If the politicians in the legislature are uncomfortable punishing this crime more harshly in cases where "consent" is obtained, the legislature should create a separate offense for situations where there is no explicit consent.

Another useful alternative might be to separate out the forms custodial sexual misconduct can take, and the way that women are coerced into having sex with custodial staff. If these gradations are explained to women in prison, it may help to educate them on their rights to bodily integrity and what type of contact is inappropriate. This approach would give the prosecutor's greater flexibility when charging offenders and would better reflect the experiences of women who are raped in prison.

Oregon should also repeal the part of the statute allowing for a defense for a "lack of supervisory authority." Oregon should follow Washington's example and replace this section with the element that the woman reasonably believe the employee has power over her conditions. These reforms would focus on the violation the woman feels rather than the act of penetration, providing a more woman-centered approach rather than what men think violates women.

Finally, the state legislature should consider a bill that would address the issues of enforcement and retaliation, and perhaps provide additional funding for this purpose. Such a bill could create specific “female only” positions for times and places where the women are most vulnerable. These actions would address and possibly eliminate custodial rape.

The rape of women in prison is a serious problem. It is a terrifying violation of the women’s bodily integrity. This action also harms society because it decreases the legitimacy of the justice system. If society cannot trust those responsible for guarding our prisons to behave properly, there is little hope for the rehabilitation of women in prison.