

CARDOZO

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March 15, 2010

Senator Andrew McDonald, Co-Chair
Representative Michael Lawlor, Co-Chair
Joint Committee on Judiciary
Connecticut General Assembly
Room 2500, Legislative Office Building
Hartford, CT 06106

RE: Hearing Before the Joint Committee on Judiciary on Raised Bill No. 5473, An Act Concerning Actions to Recover Damages for the Sexual Abuse, Sexual Exploitation or Sexual Assault of a Minor (March 17, 2010)

Dear Co-Chairs McDonald and Lawlor:

I commend you and the Committee for taking up Raised Bill No. 5473, which would eliminate the statute of limitations for child sex abuse, exploitation, and assault. Historically, the statutes of limitations in this arena have been too short and have protected the child predator while cutting off meritorious claims before victims were ready to come forward. This bill rights the balance.

There is an epidemic of child sex abuse in the United States and around the world. At least one in four girls is sexually abused and at least one in five boys. Sadly, 90% never go to the authorities and the vast majority of claims expire before the victims are capable of getting to court. Most victims are abused by family or family acquaintances and virtually all need decades before they are ready to come forward. This bill would protect the children of Connecticut by making it possible for victims to come forward and identify their perpetrators in a court of law. It would also bring delayed, but still welcome, justice to these victims. This is a sunshine law for children.

By way of introduction, I hold the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in church/state relations and constitutional law. Before joining the faculty at Cardozo Law School, I clerked for Supreme Court Justice Sandra Day O'Connor. My most recent book, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008), makes the case for statute of limitations reform in the child sex abuse arena, including the complete elimination of statutes of limitations for issues involving child sex abuse, exploitation, or assault. I am submitting this testimony to

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correct some common misperceptions regarding statutes of limitations reform for child sex abuse.

There are three compelling public purposes served by Raised Bill No. 5473:

- (1) the identification of previously unknown child predators to the public so children will not be abused in the future;**
- (2) giving child sex abuse survivors a day in court; and**
- (3) remedying the wrong done to child sex abuse survivors caused by an overly short statute of limitations that placed predators and their enablers in a preferred position to the victims.**

I have been involved in statute of limitations reform in numerous states. This bill, which applies to victims in the past and the future, is the only reliable means of identifying the hidden child predators. As Professor Timothy Lytton has documented, civil tort claims have been the only means by which survivors of clergy abuse have been able to obtain any justice. Timothy Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Sexual Abuse* (Harvard University Press, 2008).

Statute of limitations reform is the one tried and true means that will identify the many hidden child predators, who are grooming new child victims right now. Similar legislation in California led to the public identification of over 300 perpetrators previously unidentified. Delaware also enacted a window, which has led to the public identification of dozens of perpetrators previously hidden from public view. Given that most child perpetrators abuse many children over the course of their lives,¹ window legislation does far more than create justice for victims in the past. It also forestalls future abuse of today's children.

Typically, some have concerns about the potential for frivolous lawsuits in the face of statute of limitations reform. In my experience, this concern over adult reputation seems to be most every adult's initial reaction. It is unfounded, but it is an understandable defense for an adult to be worried about how a law affects adults. Often this concern drowns out the needs of the children. I call it "adult preferentialism." **There is no basis in fact to support such a concern.**

It is a fact that child sexual abuse is a tort that people rarely fabricate. It is not like a slip and fall, where lying about injuring yourself on someone's premises does

¹ KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 5, 37 (4th ed. 2001) available at http://www.cybertipline.com/en_US/publications/NC70.pdf. ("Except for child prostitution, most sexual-exploitation-of-children cases in the United States involve acquaintance molesters who rarely use physical force on their victims. . . . Although a variety of individuals sexually abuse children, preferential-type sex offenders, and especially pedophiles, are the primary acquaintance sexual exploiters of children. A preferential-acquaintance child molester might molest 10, 50, hundreds, or even thousands of children in a lifetime, depending on the offender and how broadly or narrowly child molestation is defined. Although pedophiles vary greatly, their sexual behavior is repetitive and highly predictable.").

not implicate your sexuality, development, or imply a traumatic past. The shame attached to child sex abuse deters large numbers of false claims, which is why there have been very few false claims in response to window legislation in other states, including California and Delaware.

Out of the 1,000+ claims filed under similar California legislation, only a handful were false, but they were efficiently and quickly washed out of the system through a certificate of merit provision (requiring a victim to consult a mental health professional and obtain an opinion regarding the merits of the victim's claims before filing suit) or through criminal investigation of the false claimant. There were no trials on the issue.

A cost/benefit analysis based on the experience in California shows that window legislation is well worth the small potential risk of harm to adult reputations: There were over 1000 claims, only a handful were false, but over 300 new perpetrators' identities were released to the public, along with crucial information regarding the way in which organizations had created dangerous conditions for children by covering up child sex abuse. That means that while 5 adults may have had to deal with rebutting the claims (and none ever had to do so in a trial), thousands of children were protected because most predators abuse many children over time.

Any claim that window legislation bankrupts institutions is irresponsible. In fact, only two bankruptcies have followed window legislation, one in San Diego and the other in Wilmington. In both cases, the bankruptcy was a voluntary bankruptcy, which was intended to protect assets and avoid trials that would have revealed the Catholic hierarchy's secrets regarding their role in endangering children. Neither was an involuntary bankruptcy filed in response to impending indigence. To the contrary, in San Diego, the bankruptcy court publicly stated that the diocese was not honest about its actual wealth and that there was no justification for the bankruptcy filing.

The window legislation in California brought justice to a large number of victims, exposed the identities of more than 300 perpetrators, and did not result in cuts in church services or even make a dent in ambitious plans for new cathedrals. Rather, the settlements were paid out of insurance proceeds and the sale of properties not dedicated to religious use.

Some have argued that retroactive civil legislation is unconstitutional, but this argument is particularly weak in Connecticut. While such an implication was true in the nineteenth century, it is no longer true, as the United States Supreme Court has explained: "The presumption against statutory retroactivity had special force in the era in which courts tended to view circumspection legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and has given way to greater deference to legislative

judgments.” Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994); see also Republic of Austria v. Altmann, 541 U.S. 677 (2004).²

Connecticut stands with the majority of states, which have deferred to state legislative determinations and upheld retroactive statute of limitations. See Justice v. RMH Aero Logging, Inc., 42 P.3d 549 (Alaska 2002); San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, 972 P.2d 179 (Ariz. 1999); Mudd v. McColgan, 183 P.2d 10 (Cal. 1947); Roberts v. Caton, 619 A.2d 844 (Conn. 1993); Whitwell v. Archmere Acad., Inc., C.A. No: 07C-08-006 (RBY), 2008 Del. Super. LEXIS 141 (Del. Super. Ct. April 16, 2008); Riggs Nat’l Bank v. District of Columbia, 581 A.2d 1229 (D.C. 1990); Vaughn v. Vulcan Materials Co., 465 S.E.2d 661 (Ga. 1996); Gov’t Employees Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999); Henderson v. Smith, 915 P.2d 6 (Idaho 1996); Metro Holding Co. v. Mitchell, 589 N.E.2d 217 (Ind. 1992); Shirley v. Reif, 920 P.2d 405 (Kan. 1996); Kentucky Ins. Guar. Ass’n v. Jeffers ex rel. Jeffers, 13 S.W.3d 606 (Ky. 2000); Lott v. Haley, 370 So. 2d 521 (La. 1979); State v. Stowe, 829 A.2d 1036 (Md. 2003); Leibovich v. Antonellis, 574 N.E.2d 978 (Mass. 1991); Rookledge v. Garwood, 340 Mich. 444 (1954); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413 (Minn. 2002); Cosgriffe v. Cosgriffe, 864 P.2d 776 (Mont. 1993); Kratochvil v. Motor Club Ins. Ass’n, 588 N.W.2d 565 (Neb. 1999); Alsenz v. Twin Lakes Village, 843 P.2d 834 (Nev. 1992); Bunton v. Abernathy, 73 P.2d 810 (N.M. 1937); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); Schoenrade v. Tracy, 658 N.E.2d 247 (Ohio 1996); Owens v. Maass, 918 P.2d 808 (Or. 1996); Bible v. Dep’t of Labor and Indus., 696 A.2d 1149 (Pa. 1997); Jenkins v. Meares, 394 S.E.2d 317 (S.C. 1990); Stratmeyer v. Stratmeyer, 567 N.W.2d 220 (S.D. 1997); Neiman v. Am. Nat’l Prop. & Cas. Co., 613 N.W.2d 160 (Wis. 2000); Hill v. Mayall, 886 P.2d 1188 (Wyo. 1994).

Indeed, in Connecticut the argument regarding constitutionality of the retroactive amendment of civil statutes of limitations is frivolous, because there is a presumption that procedural rules like statutes of limitations are to be applied both prospectively and retroactively. See, Roberts v. Caton, 619 A.2d 844, 847 (Conn. 1993) (finding, “[S]tatutes of limitation are presumed to apply retroactively [...] Although substantive legislation is not generally applied retroactively absent a clearly expressed legislative intent, legislation that affects only matters of procedure ‘is presumed to [be] applicable to all actions, whether pending or not, in the absence of any expressed intention to the contrary.’ [...] Statutes of limitation are generally considered to be procedural, ‘especially where the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action[.]’”); Giordano v. Giordano, 664 A.2d 1136, 1154 (Conn. App. Ct. 1995) (holding that “In an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired”); Massa v. Nastro, 125 Conn. 144, 146 (Conn. 1939) (holding that [s]tatutes affecting substantive rights are presumed to have been intended to operate prospectively.) State v. Skakel, 276 Conn. 633, 674-682 (Conn. 2006) (overturning State v. Paradise, 189 Conn. 346 (Conn. 1983)

² The United States Supreme Court has held that retroactive statutes of limitations in criminal cases violate the Ex Post Facto Clause. See Stogner v. California, 539 U.S. 607, 124 S.Ct. 2446 (2003).

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(holding that “[a] statute of limitations is generally considered to be procedural, and therefore presumptively retroactive, especially when the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action.”)

Once again, I applaud you for introducing this crucial legislation to protect Connecticut’s children, and the Committee for taking up the cause of child sex abuse victims who have been silenced by unfair statutes of limitations. Please do not hesitate to contact me if you have questions regarding this legislation or if I can be of assistance in any other way.

Sincerely,

Marci A. Hamilton

Submitted via email