

CARDOZO LAW

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February 6, 2014

VIA DROPBOX/EMAIL SUBMISSION

The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
Honorable Members
House Committee on Judiciary
Hawaii State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Hearing: Feb. 7, 2014 2PM

RE: Hawaii H.B. 2034 (Eliminates the civil and criminal statutes of limitations for victims of sexual assault in the first and second degree and continuous sexual assault of a minor under the age of fourteen years)[Effective 7/1/2050].

Dear Representative Rhoads, Representative Har & Members of the Committee:

I commend the Committee for taking up H.B. 2034, which would eliminate the civil and criminal statutes of limitation (“SOLs”) for victims of sexual assault in the first and second degree and continuous sexual assault of a minor under the age of 14. This is a valuable addition to Hawaii’s laws to protect children and to identify the perpetrators preying on children in Hawaii. It will shift the balance of power from the perpetrators who now can breathe a sigh of relief when the SOLs end, to the victims, who will have access to justice when they are ready.

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. My book, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), makes the case for statute of limitations reform in the child sex abuse arena. I am the leading expert on the history and constitutionality of retroactive statutes of limitations with respect to child sex abuse and have advised many child sex abuse victims on

constitutional issues, and testified in numerous states where SOL reform is being considered. I also track the SOL movement in all 50 states on my website, www.sol-reform.com.

Statute of limitations reform is the one tried and true means that will identify the many hidden child predators who are grooming children in Hawaii right now. Hawaii put itself at the vanguard of the movement to increase access to justice for victims when it enacted the “window,” which is now open. <http://sol-reform.com/News/hawaii/#news> Hawaii provided child sex abuse victims from many walks of life, who were previously blocked from justice, to be able to seek justice.

The lawsuits filed under the window, which revived previously expired SOLs, have been critical in identifying to the public the abuse and suffering that existed in Hawaii and was until the window appeared, secret. Minnesota followed Hawaii and now also has an open window, and is having the same experience: victims have been freed to seek justice, perpetrators are being named, and those who make the abuse possible are being held to account to the public. <http://sol-reform.com/News/topics/mn-post-window/>

Elimination of SOLs for child sex abuse is ideal, because the vast majority of victims need decades to come forward. There is an extensive and persuasive body of scientific evidence establishing that child sex abuse victims are harmed in a way that makes it extremely difficult to come forward and, therefore, victims typically need decades to do so.¹ On average, victims come forward in their early 40s. If passed, this bill will dramatically improve justice for children who were sexually abused in Hawaii.

Given that most child perpetrators abuse many children over the course of their lives,² SOL extension does far more than create justice for today’s victims. It also forestalls future abuse of tomorrow’s children by identifying perpetrators to the public.

The opposition by the Office of the Attorney General is incomprehensible. This is a crime where the victims routinely are incapable of filing charges or a lawsuit for damages until mid-life. The current SOL is configured so that it shuts the vast majority of victims out of the courts, before they can ever get there. That means, as currently configured, Hawaii law protects predators and disables victims. Who pays for that? The public, as opposed to those who caused the abuse.

There is no unfairness to defendants in eliminating the SOL for sexual assault of a child, because the only alteration to the law is the date of filing. The law governing at the time of the offense still governs, and the burdens on the parties remain the same, with the prosecutor or plaintiff bearing

¹ Rebecca Campbell, Ph.D., “*Neurobiology of Sexual Assault: Explaining Effects on the Brain*,” National Institute of Justice (2012); *R.L. v. Voytac*, 199 N.J. 285, 971 A.2d 1074 (N.J. 2009); Bessel A. van der Kolk M.D., et al., *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (2006).

² KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 10, 52 (5th ed. 2010) 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.”)

the initial burden of proof. If they do not have the evidence to carry their initial burden of proof, the case will be dismissed.

There are three compelling public purposes served by SOL Reform, including the removal and/or revival of SOLs for child sexual abuse:

- (1) It identifies previously unknown child predators to the public so children will not be abused in the future;
- (2) It gives child sex abuse survivors access to justice; and
- (3) It cures the injustice wreaked by the current unfairly short statutes of limitation that protect child predators and silence child sex abuse victims.

I have been involved in statute of limitations reform in numerous states, and it is, without exception, the most effective means for the public to learn who the secret predators are. 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).

Legislative reform for statutes of limitations for child sex abuse victims continues to mount every year. Criminal SOL elimination has become the norm, with Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming and the Territory of Guam having already eliminated the criminal SOL for at least some child sex crimes.³

Last year, more progress was made in opening up abuse victims' access to justice than at any point in history. Sixteen states introduced bills to increase victims' access to justice by scaling back the SOLs.⁴ In 2013 alone, SOL reform was enacted in Arkansas, where the state eliminated the criminal SOL;⁵ Illinois, where both the civil and criminal SOLs were eliminated;⁶ Vermont, where the SOL was

³ ALA. CODE § 15-3-1; ALASKA STAT. § 12.10.010, ALASKA STAT. § 11.41.427; ARIZ. REV. STAT. ANN. § 13-107; COLO. REV. STAT. § 16-5-401; CONN. GEN. STAT. § 54-193(a); DEL. CODE ANN. tit. 11 § 205(e); FLA. STAT. ANN. § 775.15(13); GA. CODE ANN. § 17-3-1(d); IDAHO CODE § 19-401; IND. CODE § 35-41-4-2; KY. REV. STAT. ANN. § 500.050; LA. CODE CRIM. PROC. ANN. ART. 571; ME. REV. STAT. ANN. tit. 17-A § 8; *Clark v. State*, 774 A.2d 1136, 1144 n.8 (Md. 2001); MASS. GEN. LAWS CH. 277, § 63; MICH. COMP. LAWS § 767.24(1); MINN. STAT. § 628.26(e)-(f); MISS. CODE ANN. § 15-1-49; MO REV. STAT. § 556.036(1); NEB. REV. ST. § 29-110; N.M. STAT. ANN. § 30-1-8; N.Y. CRIM. PROC. LAW § 30.10(2); *State v. Johnson*, 167 S.E.2d 274, 279 (N.C. 1969) (“In this State no statute of limitations bars the prosecution of a felony”); R.I. GEN. LAWS § 12-12-17(a); S.C. Judicial Dep’t, *Summary Court Judges Bench Book*, CRIMINAL(A)(2) (2000-2013) (“South Carolina does not have a general statute of limitations for criminal actions”), <http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalA.htm>; S.D. CODIFIED LAWS § 23A-42-1; TEX. CODE CRIM. PROC. ANN., art. 12.01; UTAH CODE ANN. § 76-1-301; VT. STAT. ANN. tit. 13, § 4501; *Comm. v. Gouge*, 1983 WL 210243, at *1 (Va. Cir. Ct. Feb. 24, 1983) (noting “the crime charged was a felony for which there was no statute of limitations”); W. VA. CODE § 61-11-9 (felonies other than perjury not mentioned in enumerated list); WIS. STAT. ANN. § 939.74; *Boggs v. State*, 484 P.2d 711, 714 (Wyo. 1971) (“Wyoming has no statute of limitations as to the commencement of criminal proceedings”); GUAM P.L. 31-06 & 31-07.

⁴ Marci A. Hamilton, 2013: *The Year in Review for Child Sex Abuse Victims' Access to Justice*, JUSTIA (Jan. 9, 2014), <http://verdict.justia.com/2014/01/09/2013-year-review-child-sex-abuse-victims-access-justice>

⁵ S.B. 92, 2013 Gen. Assemb., 89th Gen. Assemb. (Ark. 2013) (enacted 2013).

increased for certain sex crimes against children;⁷ Nevada, where the criminal statute of limitations was extended;⁸ and Minnesota, which removed its SOL for child sexual abuse and enacted a 3-year retroactive civil “window.”⁹ Bills were introduced for at least the second time in Pennsylvania (window; civil and criminal elimination);¹⁰ New Jersey (window and extension of discovery rule);¹¹ and Massachusetts (civil extension to age 55 with a window).¹² They were also introduced in New York (window; civil and criminal elimination);¹³ Missouri (elimination of civil and criminal);¹⁴ Oregon (elimination criminal for certain sex crimes against minors);¹⁵ Washington (extension of criminal to 30);¹⁶ and Wisconsin (elimination of civil with a window).¹⁷

Opponents argue that Hawaii’s 2-year civil “window” and modest extension in 2012 was sufficient.¹⁸ Once the window closes in several months, Hawaii’s civil SOL will revert to an age that is unreasonably young for most survivors of abuse.

The fact that a window has been in place for nearly two years is no reason to believe that Hawaii has completed the project of protecting its children adequately. The movement is progressing so quickly that many states are realizing that previous bills have been insufficient and are adding further extensions or outright elimination of the statutes of limitation; multiple extensions within a few years’ time are becoming quite common in many states. For example, in 2007, Delaware enacted its Child Victims Act (“CVA”), which (1) eliminated the SOL for civil child-sex-abuse cases, and (2) created a two-year window.¹⁹ Experience taught, however, that the Delaware CVA did not cover health care providers, and so Delaware enacted a new window for health care providers.²⁰ Further, Illinois had extended its SOL in 2011, only 3 years prior to opting for full elimination last year.²¹ Illinois had previously extended its SOL in 2003 as well.²² California had a civil window open for the calendar year of 2003, yet is already seriously considering further SOL extensions. Already, in 2014,

⁶ H.B. 1063, 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S.B. 1399, 98th Gen. Assemb., Reg. Sess. (Ill. 2013).

⁷ S.B. 20, 2013 Gen. Assemb., Reg. Sess. (Vt. 2013) (enacted 2013).

⁸ S.B. 103, 2013 Gen. Assemb., Reg. Sess. (Nev. 2013) (enacted 2013).

⁹ Minnesota Child Victims Act, 2012 Minn. Stat. § 541.073 (formerly, S.B. 534 & H.B. 681) (Minn. 2013).

¹⁰ H.B. 237, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013); H.B. 238, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013).

¹¹ S.B. 2281, 215th Leg., 1st Ann. Sess. (N.J. 2012).

¹² H.B. 1455, 188th Gen. Ct., Reg. Sess. (Mass. 2013); S.B. 633, 188th Gen. Ct., Reg. Sess. (Mass. 2013).

¹³ Assemb. A01771, 2013 Gen. Assemb., Reg. Sess. (N.Y. 2013).

¹⁴ H.B. 247, 2013 Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

¹⁵ H.B. 3284, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

¹⁶ S.B. 5100, 63rd Leg., Reg. Sess. (Wash. 2013).

¹⁷ S.B. 225, 101st Leg., Reg. Sess. (Wis. 2013).

¹⁸ Hawaii Act 068 (12), formerly S.B. 2588, 2012 Leg. Sess. (Haw. 2012) (enacted April 24, 2012) (extended and tolls statute of limitations for civil actions brought by minor victims of sexual offenses; and reviving via a civil “window” for two (2) years some actions for which the statute of limitations had previously lapsed).

¹⁹ DEL. CODE ANN. 10 § 8145 (a)-(b)

²⁰ Marci A. Hamilton, *The Progress We’ve Made -- and Haven’t Yet Made -- on Child-Sex-Abuse Statutes of Limitations: 2010, the Year in Review*, FINDLAW (Dec. 30, 2010), <http://writ.news.findlaw.com/hamilton/20101230.html>

²¹ See, 735 ILCS 5/13-202.2 (Ill. 2011) (effective 1-1-11 to 1-1-14) (increased the time to bring a civil action from 10 years to 20 years after majority; and increased discovery tolling from 5 years to 20 years).

²² See, 735 ILCS 5/13-202.2 (Ill. 2003) (effective 7-24-03 to 1-1-11) (increased the time to bring a civil action from 2 years to 10 years after majority; and increased discovery tolling from 2 years to 5 years).

Sen. Jim Beall has introduced a bill that would again extend the civil and criminal SOL in California.²³ Returning to the inadequacy of Hawaii's civil SOL now, after learning that victims will not have adequate access to justice after the window closes is rational and important.

Other state legislatures are already active on this issue in 2014 as well: Assemblywoman Markey has reintroduced her bill to eliminate the civil SOL; eliminate the criminal SOL for incest and continuing course of conduct crimes (felonies are already exempt); and create a 1-year civil "window" in New York.²⁴ Iowa is also considering a bill that would extend the statutes of limitation for civil and criminal actions brought by minor victims of sexual offenses to twenty-five (25) years from majority.²⁵ In addition, SOL reform bills are pending in Pennsylvania, Massachusetts, and New Jersey.

SOL reform has very few detractors in the United States other than the Roman Catholic bishops, who are primarily concerned that the courts will force them to divulge the secrets they still harbor in their Secret Archives. This may well be changing soon, however, as the United Nations this week pressed the Vatican to dramatically improve its policies to protect children from sex abuse, including a strong suggestion to support SOL reform: "(e) Promote the reform of statute of limitations in countries where they impede victims of child sexual abuse from seeking justice and redress" http://sol-reform.com/Jan2014_UN_Concluding_observations_on_second_periodic_report_Holy_See.pdf

Some detractors claim that as time passes there is a higher risk of false claims and thus they serve an important role in protecting the rights of innocent persons. Yet, there are very few false claims regarding sexual abuse.²⁶ The plaintiff still bears the initial burden of proof, and if he or she lacks evidence, the case does not go forward. Victims of child sex abuse rarely make false claims, as we learned when windows were open in California and Delaware. In cases brought under California's last window there were a total of about 5 false claims in over 1000, and none to my knowledge in Delaware.

²³ California Senate Bill 926 and Senate Bill 924, 2013- 2014 Reg. Sess. (Ca. 2014), available at, <http://sol-reform.com/News/california/#pending>. See also, "Senator Beall Calls for Giving Victims More Time to Seek Prosecution or File a Lawsuit," Website of Sen. Jim Beall (D-CA15) (Jan. 29, 2014), <http://sd15.senate.ca.gov/news/2014-01-29-senator-beall-calls-giving-victims-more-time-seek-prosecution-or-file-lawsuit> ("Senate Bill 926 would reform the criminal statute of limitations by raising the age at which an adult survivor of childhood sex abuse can seek prosecution from 28 to 40 years. The bill would affect sex crimes against children including lewd and lascivious acts, continuous sexual abuse of a child, and other offenses. The bill has co-authors from both parties. A second bill, SB 924, proposes to reform the two standards that now govern the statute of limitations for civil lawsuits by:

- Increasing the age deadline to file to 40 years old from 26. This existing deadline is currently used when the victim makes his or her causal connection to their trauma before they reach their 26th birthday.
- Increasing the time from the date of discovery of their trauma to child sex abuse to five years from the current standard of three years. Additionally, it stipulates the five-year period starts when a physician, psychologist, or clinical psychologist first informs the victim of the link between their adult psychological injuries and the abuse").

²⁴ New York Child Victims Act, Assemb. A01771, 2014 Gen. Assemb., Reg. Sess. (N.Y. 2014), available at <http://sol-reform.com/News/new-york/#pending>.

²⁵ Iowa Child Victims Act, S.B. 3112, 2014 Gen. Assemb., Reg. Sess. (I.A. 2014), available at <http://sol-reform.com/news/iowa#pending>.

²⁶ See, Delphine Collin-Vezina, et al., Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes, and Preventive Strategies, CHILD & ADOLESC. PSYCH. & MENTAL HEALTH (2013); Marilyn McDonald, The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases, Court Review (Spring 1998), available at <http://www.omsys.com/mmcd/courtrev.htm#Rcr2023>; E. Olafson, et al., Modern History of Child Sexual Abuse Awareness: cycles of Discovery and Suppression, 17 CHILD ABUSE NEGL. 1, 7-24 (1993).

The SOL reform Hawaii is spearheading will make Hawaii one of the safest states in the country for children. I applaud you and the Committee for considering this legislation, which will help childhood sexual abuse victims. Hawaii's children deserve the passage of this bill, which would permanently tip the balance toward the victims and away from the predators. This bill represents a huge step forward for Hawaii's children now and in the future.

Please do not hesitate to contact me if you have questions regarding statute of limitations reform, or if I can be of assistance in any other way.

Sincerely,

A handwritten signature in black ink, appearing to read "Marci A. Hamilton", with a long horizontal flourish extending to the right.

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