

CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

MARCI A. HAMILTON
Paul R. Verkuil Chair in Public Law

E-MAIL hamilton02@aol.com
PHONE 215-353-8984

February 6, 2011

SUBMITTED VIA EMAIL

The Honorable Adolpho Palacios
Chairman
Committee on Public Safety, Law Enforcement, and Judiciary
31st Guam Legislature
155 Hesler Place
Hagåtña, Guam 96910

RE: Hearing Before the Committee on Public Safety, Law Enforcement, and Judiciary on Bill No. B034-31(COR), AN ACT TO AMEND § 11306 OF ARTICLE 3, CHAPTER 11, TITLE 7 OF THE GUAM CODE ANNOTATED; RELATIVE TO THE STATUTE OF LIMITATIONS FOR CIVIL ACTIONS INVOLVING CHILD SEXUAL ABUSE

Dear Sen. Palacios:

I commend you and the Committee for taking up Bill No. B034-31(COR), which would establish a two-year window of opportunity for child sex abuse victims to file civil claims even if the previous statute of limitations has run. There are untold numbers of hidden child predators who are preying on one child after another, because the statutes of limitations have been configured to give them that opportunity. This bill would put Guam in the forefront of child protection.

This is a sunshine law for children. There is an epidemic of child sex abuse 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. This bill would protect the children of Guam 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.

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 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. I am the leading expert

JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES

BROOKDALE CENTER • 55 FIFTH AVENUE • NEW YORK, NY 10003-4391

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.

There are three compelling public purposes served by window legislation:

- (1) the identification of previously unknown child predators to the public so other children will not be abused in the future;**
- (2) giving child sex abuse survivors justice; and**
- (3) remedying the wrong done to child sex abuse survivors caused by an overly short statute of limitations that resulted in keeping child sex abuse secret and that aided perpetrators.**

I have been involved in statute of limitations reform in numerous states. This is the only means of identifying 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).

Legislative reform of statutes of limitations for child sex abuse victims is on the rise. This week alone, there are hearings in Guam and Hawaii.¹ Bills that would eliminate, extend, or create windows for the statutes of limitations covering child sex abuse are pending or have recently passed in Massachusetts,² Connecticut,³ Virginia,⁴ Florida,⁵ New Jersey,⁶ and Oregon.⁷ Information on the statutes of limitations for child sex abuse can be found 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 other children right now. The “window” in California led to the public identification of over 300 perpetrators previously unidentified. Delaware also enacted a window, which led to the public identification of dozens of perpetrators previously hidden. Given that most child perpetrators abuse many

¹ Bill No. B034-31(COR), An Act To Amend § 11306 Of Article 3, Chapter 11, Title 7 Of The Guam Code Annotated; Relative To The Statute Of Limitations For Civil Actions Involving Child Sexual Abuse, establishing a two-year window of opportunity for child sex abuse victims whose claims have expired under the Guam statute of limitations to bring their civil claims.

² H.R. 689, 187th Gen. Ct., Reg. Sess. (Mass. 2011) (pending) (statute of limitations for child sex abuse runs for three years from when claimant discovers connection between sex abuse and harm suffered).

³ S.B. No. 784, 2011 Gen. Assemb., 2011 Reg. Sess. (Conn. 2011) (pending) (eliminates the limitation of time for bringing a civil action with respect to a new occurrence of sexual abuse, sexual exploitation or sexual assault in order to recognize the severity of such occurrences and give victims increased access to the civil court system.)

⁴ H.B. 1476, 2011 Gen. Assemb., 2011 Reg. Sess. (Va. 2011) (pending) (extends the limitations period for actions for sexual abuse committed during the infancy or incapacity of the abused person from two years to 25 years from the time of the removal of the infancy or incapacity or from the time the cause of action otherwise accrues).

⁵ Fla. Stat. Ann. § 95.11(7) (2010) (enacted) (eliminating statute of limitations for sexual battery if victim was under 16 years old, for claims not barred as of July 2010).

⁶ S.B. No. A1164, 2009 (pending) (eliminating the statute of limitations for sexual assault when the victim reaches majority).

⁷ H.B. 3057, 76th Gen. Assemb., 2011 Reg. Sess. (Or. 2011)(enacted) (extending statute of limitations for sexual abuse crimes committed against minors).

children over the course of their lives,⁸ window legislation does far more than create justice for victims in the past. It also forestalls future abuse of today's children.

Any claim that window legislation leads to bankruptcy of institutions is irresponsible. First, 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 Roman Catholic hierarchy's secrets regarding their role in endangering children. These bankruptcies were not filed because the dioceses were actually indigent. 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 Wilmington bankruptcy has just settled, and the settlement includes remuneration for victims for the Diocese's cover up of child sex abuse predators, and just as important, an agreement to release the identities of those priests who have been accused of abuse.

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 legislation is unconstitutional. While such an implication was true in the nineteenth century, it is no longer an accurate description of federal constitutional law, 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 legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and circumspection 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).

The majority of states have not found retroactive statutes of limitations unconstitutional. See Catholic Bishop of N. Alaska v. Does, 141 P.3d 719 (Alaska 2006); San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, 972 P.2d 179 (Ariz. 1999), superseded by statute, Arizona Rev. Stat. § 12-505 (2010); Liebig v. Superior Court, 257 Cal. Rptr. 574 (Cal. Ct. App. 3d 1989); Mudd v. McColgan, 183 P.2d 10 (Cal. 1947); Shell Western E&P, Inc. v. Dolores County Bd. of Comm'rs, 948 P.2d 1002 (Colo. 1997); Rossi v. Osage Highland Dev., LLC, 219 P.3d 319 (Col. App. 2009) (citing In re Estate of Randall, 441 P.2d 153, 155 (Col. 1968)); 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.,

8 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.").

465 S.E.2d 661 (Ga. 1996); Gov't Employees Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999); Roe v. Doe, 581 P.2d 310 (Haw. 1978); Henderson v. Smith, 915 P.2d 6 (Idaho 1996); Hecla Mining Co. v. Idaho State Tax Comm'n, 697 P.2d 1161 (Idaho 1985); Metro Holding Co. v. Mitchell, 589 N.E.2d 217 (Ind. 1992); Ripley v. Tolbert, 921 P.2d 1210 (Kan. 1996); Shirley v. Reif, 920 P.2d 405 (Kan. 1996); Kienzler v. Dalkon Shield Claimants Trust, 686 N.E.2d 447 (Mass. 1997); Rookledge v. Garwood, 340 Mich. 444 (Mich. 1954); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413 (Minn. 2002); Cosgriffe v. Cosgriffe, 864 P.2d 776 (Mont. 1993); Panzinov. Continental Can Co., 364 A.2d 1043 (N.J. 1976); Alsenz v. Twin Lakes Village, 843 P.2d 834 (Nev. 1992) (open question); Bunton v. Abernathy, 73 P.2d 810 (N.M. 1937); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); In Interest of W.M.V., 268 N.W.2d 781 (N.D. 1978); Pratte v. Stewart, 929 N.E.2d 415 (Ohio 2010); McFadden v. Dryvit Systems, Inc., 112 P.3d 1191, 1195 (Or. 2005); McDonald v. Redevelopment Auth., 952 A.2d 713, 718 (Pa. Commw. Ct. 2008); Bible v. Dep't of Labor and Indus., 696 A.2d 1149 (Pa. 1997); Stratmeyer v. Stratmeyer, 567 N.W.2d 220 (S.D. 1997); Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914 (Wash. 2006) superseded by statute, Wash. Rev. Code 25.15.303, as recognized in Chadwick Farms Owners Ass'n v. FHC, LLC, 160 P.3d 1061 (Wash. 2007); Neiman v. Am. Nat'l Prop. & Cas. Co., 613 N.W.2d 160 (Wis. 2000) (open question); RM v. State Dept. of Family Servs., Div. of Public Servs., 891 P.2d 791, 792 (Wyo. 1995).

Guam operates under the presupposition that is in place in many states, that legislation is not retroactive unless its intended retroactive is explicit. Guam Code Annotated § 702. Bill No. B034-31(COR), is clearly retroactive and, therefore, should be applied accordingly.

Once again, I applaud you for introducing this legislation and the Committee for taking up the cause of child sex abuse victims. Guam's children deserve the passage of Bill No. B034-31(COR), which creates a two-year window of opportunity for Guam's child sex abuse victims to find justice and to identify their perpetrators.

Please do not hesitate to contact me if you have questions regarding window legislation or if I can be of assistance in any other way.

Sincerely,

Marci A. Hamilton
hamilton02@aol.com
212-790-0215 (office)
215-493-1094 (facsimile)