

# CARDOZO

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February 3, 2012

## SUBMITTED VIA WEB DROP/EMAIL

Hon. Sen. Clayton Hee, Chair  
Hon. Sen. Maile Shimabukuro, Vice Chair  
Senate Committee on Judiciary & Labor  
State Capitol  
Conference Room 016  
415 South Beretania Street  
Honolulu, HI 96813-2425

RE: Hearing Before Committee on Judiciary and Labor on S.B.2588 Relative to the Statute of Limitations for Civil Actions Involving Childhood Sexual Abuse (February 3, 2012, 10:00 a.m.)

Dear Senators Hee and Shimabukuro:

I commend you and the Committee for taking up S.B 2588 which would extend and toll the statute of limitations for civil actions brought by minor victims of sexual offenses, and revive for two (2) years some actions for which the statute of limitations had previously lapsed. **If passed, it will put Hawaii in the forefront of child protection.**

There are untold numbers of hidden child predators in Hawaii who are preying on one child after another, because the statutes of limitations have been configured to give them that opportunity. This bill reduces the present danger to Hawaii's children.

**This bill 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 Hawaii 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 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) It identifies previously unknown child predators to the public so children will not be abused in the future;**
- (2) It gives chance child sex abuse survivors a fair chance at justice; and**
- (3) It cures the injustice wreaked by the current unfairly short statute of limitations that protect child predators and silence child sex abuse victims.**

I have been involved in statute of limitations reform in numerous states. This is the only tried and true method of identifying the many 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).

**This is a vibrant national movement to protect our children.** Legislative reform for statutes of limitations for child sex abuse victims is on the rise. Guam's bill removing the statute of limitations and creating a two-year window was signed into law by Governor Calvo on March 10, 2011.<sup>1</sup> Virginia<sup>2</sup> also passed and signed into law legislation extending its statutes of limitations in 2011. Florida<sup>3</sup> and Illinois<sup>4</sup> each extended or eliminated their statute of limitations in 2010. Bills that would eliminate, extend, or create windows for the statutes of limitations covering child sex abuse are pending or have passed in South Dakota,<sup>5</sup> Connecticut,<sup>6</sup> New Jersey,<sup>7</sup> New York,<sup>8</sup> and

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<sup>1</sup> Bills No. B033 & B034-31(COR), Acts 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, removing the statute of limitations and 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, now Public Laws No. 31-06 & 31-07 (2011); Erin Thompson, *Sex Abuse Bills Now Public Law*, PACIFIC DAILY NEWS (Mar. 10, 2011), available at <http://www.guampdn.com/article/20110310/NEWS01/103100301/Sex-abuse-bills-now-public-law>.

<sup>2</sup> VA. CODE ANN. § 8.01-243(D) (2011), formerly H.B. 1476, 2011 Gen. Assemb., 2011 Reg. Sess., (enacted) (extending the limitations period for actions for sexual abuse committed during the infancy or incapacity of the abused person from two years to 20 years from the time of the removal of the infancy or incapacity or from the time the cause of action otherwise accrues).

<sup>3</sup> 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).

<sup>4</sup> 735 ILL. COMP. STAT. 5/13-202.2 (2010) (enacted) (expanding statute of limitations for injury based on childhood sexual abuse to within 20 (previously 10) years of the date the limitation period begins to run or within 20 (previously 5) years of the date the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred and the injury was caused by that abuse).

<sup>5</sup> H.B. 1218, 87th Leg. Sess., 2012 Reg. Sess. (S.D. 2012) (pending) (rescinding the statute of limitations for any civil cause of action arising out of childhood sexual abuse).

Oregon.<sup>9</sup> Bills—including two creating a most important civil “window”—were recently introduced in both houses of the Pennsylvania legislature as well.<sup>10</sup>

Information on the statutes of limitations for child sex abuse can be found on my website, [www.sol-reform.com](http://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. The window 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. Given that most child perpetrators abuse many children over the course of their lives,<sup>11</sup> window legislation does far more than create justice for victims in the past. It also forestalls future abuse of today’s children.

SOL reform has very few detractors other than the Catholic bishops, who have misleadingly argued that window legislation is unconstitutional on the theory that it “targets” the Church. Window legislation does not target any particular perpetrator or organization. A federal trial court in the Ninth Circuit persuasively upheld the California window against such an argument. See *Melanie H. v. Defendant Doe*, No. 04-1596-WQH-(WMc), slip op. (S.D. Cal. Dec. 20, 2005).

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<sup>6</sup> S.B. No. 784, 2011 Gen. Assemb., 2011 Reg. Sess. (Conn. 2011) (pending) (eliminating 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.)

<sup>7</sup> No. S.2405, 214th Legis. Sess., 2010-2011 Reg. Sess. (N.J. 2011) (pending) (eliminating statute of limitations for child sex abuse).

<sup>8</sup> No. A.5488, 234th Gen. Assemb., 2011-2012 Reg. Sess. (N.Y. 2012) (pending) (extending the statute of limitations in criminal and civil actions for certain sex offenses committed against a child less than eighteen years of age, and creating a one year civil “window”).

<sup>9</sup> H.B. 4100, 76th Gen. Assemb., 2011-2012 Reg. Sess. (Or. 2012) (pending) (eliminating criminal statute of limitations for sexual abuse crimes committed against minors). Oregon extended its civil limitations period regarding injuries arising out of child sex abuse in 2009. OR. REV. STAT. §12.117 (2009).

<sup>10</sup> H.B. 832, 220th Gen. Assemb., 2011-2012 Reg. Sess. (Pa. 2012) (pending) (eliminates the statute of limitations for number of enumerated criminal offenses involving child sexual abuse); H.B. 878, 220th Gen. Assemb., 2011-2012 Reg. Sess. (Pa. 2012) (pending) (extends the statute of limitations in all civil cases not encompassed by House Bill 832 by allowing claims to be brought in court up to 32 years after majority; **and** establishes civil “window” which allows any suit that was previously barred from court solely on statute of limitations grounds to commence within the two-year period); S.B. 1392, 220th Gen. Assemb., 2011-2012 Reg. Sess. (Pa. 2012) (pending) (extends statute of limitations from to 32 years from majority; **and** establishes all important 2 year civil “window” to allow for previously procedurally time-barred child sex abuse claims to commence).

<sup>11</sup> KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 5, 37 (4<sup>th</sup> ed. 2001) available at [http://www.cybertipline.com/en\\_US/publications/NC70.pdf](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.”).

Some have argued that retroactive legislation is unconstitutional. While such an implication was true in the nineteenth century, it is no longer true under the federal Constitution, 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).

In a case decided last year, the Delaware Supreme Court, sitting en banc, upheld a two-year window against a due process challenge. Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247 (Del. 2011). The California one-year window also was held to be constitutional. See Deutsch v. Masonic Homes of California, Inc., 80 Cal. Rptr. 3d 368, 378 (Cal. Ct. App. 2008).

The majority of states has 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); Deutsch v. Masonic Homes of California, Inc., 164 Cal. App. 4th 748, 760, 80 Cal. Rptr. 3d 368, 378 (Cal. Ct. App. 2008); 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., 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); 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).

Hawaii law supports the window. The Hawaii Supreme Court has upheld retroactive application of a newly extended statute of limitation to revive claims that previously expired. Roe v. Doe, 581 P.2d 310, 316 (Haw. 1978) (holding that “[t]he right to defeat an action by the statute of limitations has never been regarded as a fundamental or vested right. . . . [W]here lapse of time has not invested a party with title to real or personal property, it does not violate due process to extend the period of limitations even after the right of action has been theretofore barred by the former statute of limitations.”); Gov't Employees Ins. Co. v. Hyman, 975 P.2d 211 (Haw. 1999).

Hawaii does provide for a two-year (2) statute of limitations for repressed memory cases, but victims typically have a difficult time dealing with such memories. Two years is a very short period of time within which to process the information, obtain the needed counseling to be ready to go to court, and then to find an attorney and proceed to the judicial process. The window would help them as well as the vast majority of victims, who do not have repressed memories and simply could not get to court before the statute of limitations expired.

Once again, I applaud you for introducing legislation intended to help childhood sexual abuse victims, and the Committee for taking up the cause of child sex abuse victims in this way. Hawaii's children deserve the passage of statutes of limitations reform to protect children today and in the future, and to achieve justice for the many victims suffering in silence. This bill creates a two-year (2) window of opportunity for Hawaii's child sex abuse victims who were locked out of the courthouse by unfairly short limitations periods. This is a huge step forward for Hawaii's children.

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,

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