

CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law

PHONE: 215-353-8984
FAX: 215-493-1094
E-MAIL: hamilton.marci@gmail.com

TO: The Members of the California Legislature

RE: The Constitutionality of S.B. 131, An Act Relating to Damages: childhood sexual abuse: statute of limitations

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By way of introduction, my name is Marci A. Hamilton, one of the leading church/state scholars in the United States. For the past twenty years, I have been a full-time faculty member at Benjamin N. Cardozo School of Law, Yeshiva University, New York, NY, where I currently hold the title of Paul R. Verkuil Chair in Public Law. My book, *Justice Denied: What America Must Do to Protect Its Children* (Cambridge University Press 2008, 2012), and website, www.sol-reform.com are the leading resources in the field of legislation to protect child sex abuse victims. As an expert in this arena—who has researched, written, and testified regarding the inadequacy of the current statutes of limitations (“SOLs”) to deal with child sex abuse in the United States, and abroad—I feel compelled to write an explanation as to why amending and extending the SOLs for child sex abuse is a necessary tool to provide access to justice for child sex abuse victims and to protect our children.

I write specifically to explain why S.B. 131, relating to childhood sexual abuse SOLs, is constitutional. I will recite several misguided arguments commonly used against such legislation, and provide responses to each.

S.B. 131 contains three key elements: (1) it would prospectively eliminate the SOL for civil actions brought by victims of childhood sexual abuse; (2) extend for thirty (30) years some previously lapsed claims; and (3) retroactively revive for a period of one (1) year all other actions for which the statute of limitations (“SOL”) had previously lapsed. The retroactive revival of an SOL is often called a “window.”

Misguided Argument 1: *All retroactive SOL legislation is unconstitutional.*

Answer 1: In reality, while the United States Supreme Court has closed the door on retroactive criminal SOLs, it has found retroactive *civil* legislation constitutional. Compare Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994), with Stogner v. California, 539 U.S. 607, 610 (2003) (striking retroactive revival of criminal SOL). Under the federal Constitution, retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural. The Supreme Court in Landgraf explained the duty of judicial deference to legislative choice in these matters as follows: “legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments.” Landgraf, 511 U.S. at 272. The Court went on to

observe that “the constitutional impediments to retroactive civil legislation are now modest. . . . Requiring clear intent [of retroactive application] assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.” *Id.* at 272-73. To be sure, there is an “antiretroactivity presumption” but this presumption can be readily overcome by express legislative language. See *Republic of Austria v. Altmann*, 541 U.S. 677, 692-93 (2004); see also *Landgraf*, 511 U.S. at 267-68; *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945). *Stogner v. California*, 539 U.S. 607 (2003), dealt specifically and only with the retroactive application of criminal SOLs. **Under the federal Constitution, retroactive civil legislation is constitutional if the legislative intent is clear and the change is procedural.**

Misguided Argument 2: *Some mistakenly claim—without citing relevant precedent, and while relying on the outdated reasoning that statutes of limitation must provide finality to old claims—that California courts would forbid the revival of a previously procedurally time-barred claim in child sex abuse cases.*

Answer 2: This is simply not true in California. California’s previous one-year retroactive civil window, enacted in 2003, was held constitutional. See *Deutsch v. Masonic Homes of California, Inc.*, 80 Cal. Rptr. 3d 368, 378 (Cal. Ct. App. 2008). A similar window was upheld in Delaware as well. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011).

The child sex abuse window is not a novelty. It has been modeled on other retroactive revival statutes that provided access to justice for victims who also were excluded from justice by unfairly short SOLs, including victims of the Northridge earthquake, *Vu v. Prudential Prop. & Cas. Ins. Co.*, 33 P.3d 487, 113 Cal. Rptr. 2d 70 (Cal. 2001); birth defects caused by the pregnancy drug diethylstilbestrol (DES), *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989); asbestos exposure, *City of Boston v. Keene Corp.*, 406 Mass. 301, 547 N.E.2d 328 (Mass. 1989); HIV-contaminated blood via transfusion, *D.J.L v. Armour Pharmaceutical Company*, 704 A.2d 104 (N.J. Super. Ct. Law Div. 1997); and agent orange exposure, *In Re Agent Orange Product Liability Litigation*, 597 F.Supp. 740 (E.D.N.Y. 1984).

For the calendar year 2003, over 1000 survivors of child sex abuse filed civil lawsuits and alerted the public to the identities of over 300 child predators previously unidentified. *Deutsch*, is a post-*Stogner* decision, and reflects the current law as to retroactive application of civil SOLs in the state of California. Further, the California Supreme Court has long allowed for retroactive application of merely procedural aspects of civil statutes. *Mudd v. McColgan*, 183 P.2d 10, 13 (Cal. 1947) (holding retroactive extension of statute of limitations in tax case permissible). **As under federal law, where the retroactive intent is plain, and the statute applies to a civil, procedural matter rather than a crime, a retroactive statute passes constitutional muster. California follows the same reasoning as the Supreme Court and has permitted the retroactive application of civil statutes. California is in the majority of states, which has NOT found a vested right in the running of SOLs, because they are procedural.** *Liebig v. Superior Court*, 257 Cal. Rptr. 574, 577 (Ct. App. 3d 1989) (affirming constitutionality of child sexual abuse statute’s revival of expired claims).

Misguided Argument 3: *S.B. 131 does not cover public institutions, and thus should not become law solely because it does not cover all possible instances of abuse and institutions.*

Answer 3: Public institutions and private institutions need to be held accountable, but the issues are distinct and should be dealt with in separate bills. Unlike private institutions, public institutions must be addressed in legislation which waives their sovereign immunity in order to consent to suit. Also, as to sovereign immunity, there is generally a damages cap issue which would need to be addressed in all cases of sovereign immunity waiver in the state of California.

Still, abuse in private institutions needs to be further addressed in California, despite the 2003 window. Many victims were not aware of the 2003 window and still deserve justice. It makes sense to pass S.B. 131 into law and then to also take up and pass another bill which addresses public institution liability, as overall, SOL reform will save the taxpayers of California. **Currently, California pays the price of abuse in several ways.** First, the state suffers from reduced productivity from victims, because they have been disabled by the abuse. To the extent that they are not made whole, they are producing less tax-generating income. The fact that California shuts off claims before victims are ready to come forward means that many victims have no chance to achieve justice and, therefore, are more likely to suffer serious depression and illness. Second, California bears the cost of divorces, broken homes, and suffering children, which are a sadly prevalent fact in many survivors' lives. This creates a drag on local school districts that must provide counseling and guidance for troubled youth, the state agencies that deal with troubled families, and local authorities. Third, the survivors' medical bills generated by the abuse, whether it is psychological or physical treatment, are likely to have to be subsidized by state and federal medical programs and funds.

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. Indeed, many of these victims are victims of incest, and others are victims who were subjected to abuse at universities, in day care centers, and anywhere a child can be found. A federal trial court in the Ninth Circuit persuasively upheld the first 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).

Misguided Argument 4: *Retroactive legislation will bankrupt the Catholic Church or other private institutions.*

Answer 4: 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. All of the other diocesan bankruptcies were unrelated to SOL reform, including Davenport, Fairbanks, Portland, Spokane, and Tucson.

Second, only the Wilmington bankruptcy ran a full course. 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 bishop's secrets regarding their role in endangering children. These bankruptcies were not filed because the dioceses were actually indigent. For a fact-based analysis of how American

Catholic dioceses have dealt with their finances and their wealth, see <http://www.economist.com/node/21560536>.

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 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 and to implement better child protective policies. *Bishop Malooly Issues Statement on the Filing of the Amended Plan of Reorganization*, <http://www.cdowreorganization.com/> (last visited Mar. 4, 2013).

Misguided Argument 5: *Insurers will challenge the insurance liability coverage, so there will be no insurance coverage for the claims arising out of reform.*

Answer 5: Insurance companies challenge their liability in nearly every single case arising out of institutional abuse. In the case of the claims during the 2003 California window, insurance funds paid for about half of all settlements. That is true across the country. Even if they challenge coverage, they typically coverage a significant portion of a settlement. That is only fair given the premiums collected during the decades when the issue was kept secret and, therefore, they had few claims to pay.

In any event, the insurance industry should be the leader on child protection. It is the reason our kids wear seatbelts. They need to play a similar role with respect to child sex abuse.

Misguided Argument 6: *Some 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.*

Answer 6: There are very few false claims regarding sexual abuse. See, Delphine Collin-Vezina, et al., *Lessons Learned from Child Sexual Abuse Research: Prevalence, Outcomes, and Preventive Strategies*, CHILD & ADOLESC. PSYCH. & MENTAL HEALTH (2013); Merylyn 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 plaintiff bears the initial burden of proof, and if he or she lacks evidence, the case does not go forward. **No plaintiff can succeed in a claim brought through civil legislation without having the evidence to establish a prima facie case.**

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. False claims in the area of child sex abuse are statistically insignificant.

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. 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). See also, Elliot Nelson, et al., Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study, 59(2) ARCHIVES OF GENERAL PSYCHIATRY, 139-45 (2002); Mic Hunter, Psy.D., Abused Boys (1991); R.C. Summit, The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE NEGL. 2, 177-93 (1983).

Importantly, civil tort claims are often the only way victims can obtain access to justice. In the context of clergy abuse for example, Professor Timothy Lytton has shown that civil tort claims have been the only means by which survivors 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).

Every Californian needs to understand there are few who are opposed to granting sex abuse survivors access to justice. Sadly, the Catholic Bishops are sinking millions of their parishioners' donations into lobbying tactics designed to keep victims out of court. Some members of this legislature have apparently accepted verbatim the substance of the Catholic Bishops' playbook designed to shield them from liability, and have even repeated these stock arguments on the record as their own. In truth, there are no legal or constitutional impediments to victims' access to civil justice. On this issue, the Catholic bishops and their lobbyists have earned no deference.

California does provide for an eight-year (8) statute of limitations, but victims typically have a difficult time dealing with many issues, particularly such as repressed memories. Eight 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; but did not know about California's 2003 window and simply could not get to court before the statute of limitations expired. This was a dramatic improvement in child safety in California, but once the window closed, the existing SOLs blocked many survivors from going forward. I heard from numerous Buddhist and family incest abuse survivors in the years following, who had missed the window and were finally ready, but whose SOLs had expired.

California's children deserve the passage of civil SOL reform to protect children today and in the future, and to provide access to justice for the many victims suffering in silence. If passed, SB 131 would be a huge step forward for California's children. I encourage the California Legislature to fulfill its duty to the children of California and pass S.B. 131, with the civil window.

Sincerely,



Marci A. Hamilton
Paul R. Verkuil Chair in Public Law
Benjamin N. Cardozo School of Law