

Statement of John H. Mansfield

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On Raised Bill No. 6532

**“An Act Concerning the Statute of Limitations for Bringing an Action for Damages for
Sexual Assault of a Minor”**

My name is John Mansfield. I am the John H. Watson, Jr. Professor of Law, Emeritus, at the Harvard Law School, where I have taught courses for many years in Constitutional Law, Evidence and Torts. I am here to testify as an expert on behalf of the Archdiocese of Hartford and the Dioceses of Bridgeport and Norwich.

As the Supreme Court of the United States has said, statutes of limitations are not just a technical matter, but are part of a well-ordered system of civil justice.¹ They represent a compromise between the interests of plaintiffs and defendants. On the plaintiffs' side, they should be allowed a generous amount of time to appreciate that they have been hurt and the cause of their hurt, and to gather evidence and decide if they want to sue. On the defendants' side, at some definite period, their anxiety over being sued should be put to rest, so that they need not continue to gather and preserve evidence of their innocence, and should be allowed to dedicate their resources to the future, rather than husbanding them against potential liability.

As the Supreme Court of the United States has said in a recent criminal case² in which it struck down the retroactive application of a statute of limitations under the Ex post facto clause, there is an unacceptable risk of injustice when witnesses have died,

documents have been lost, memories have faded, and real evidence has been destroyed. In a recent decision of the Supreme Court of Connecticut,³ that court agreed on the importance of not proceeding on the basis of stale evidence. In the case just referred to, the Supreme Court of the United States stated explicitly that such problems can plague child abuse cases.⁴

So far as civil cases are concerned, the seriousness of consequences for the defendant may exceed those in a criminal case, in the case of charitable organizations by driving them into bankruptcy and preventing them from dedicating their resources to charitable uses. Remember that the burden of proof is lower in a civil case than in a criminal case, so that as the Supreme Court of the United States has said, the risk of a miscarriage of justice from loss of evidence is high if the statute of limitations is very long.

At some point it is unjust not to put the defendant on notice of his danger.⁵ For the plaintiff to lie in wait for many years, gathering evidence of the defendant's guilt, while the defendant may know nothing of his peril, and so not gather and preserve evidence of his innocence is unjust. Furthermore, a reasonable statute of limitations will contribute to the stability and tranquility of the community, and enable it to look to the future. Such a statute of limitations expresses a legislative judgment that the time, money and effort to separate the few meritorious cases from the unmeritorious after a long period has elapsed is not worth the effort.

The Connecticut legislature has successively lengthened the period of the statute of limitations in these sex abuse cases of minors from the starting point of 2 years after the minor reached the age of majority, to 17 years, and finally to 30. Thus, under the

present law, he has until he reaches his 48th birthday to file suit, since in Connecticut the age of majority is 18. This must be one of the longest statutes of limitations in any state for these sex abuse cases. Surely this is enough time, even in the case of repressed memory, for the memory to come back and for the person to connect the harm with sexual abuse. It is also enough time for the person to deal with the memory and to decide whether to sue is the best course for him. In the criminal context, in most jurisdictions only murder and treason have no statute of limitations, but in those situations the accused individual will eventually die, whereas in a civil context charitable and religious organizations may live forever, and continue to be subject to liability. At least the 30 year rule from when the plaintiff reaches his majority has a time certain, after which the charitable and religious organization can concentrate on dedicating their resources to the future.

I have studied the raised bill 6532. It adds a clause to the 30 year statute of limitations, which provides: "except that if material evidence is discovered after the expiration of such time period [30 years after the minor reaches his majority] that could not have been discovered in the exercise of reasonable care prior thereto, such action may be brought no later than three years from the date such evidence is discovered or in the exercise of reasonable care should have been discovered."

This provision has none of the marks of a compromise between the interests of the plaintiffs and the defendants. It is wholly on the side of the plaintiffs. The amendment contemplates that if the plaintiff discovers new evidence, it empowers him to bring suit for another three years. If the defendant discovers new evidence of his innocence, he has no such power, for he may not initiate a lawsuit. Furthermore, the "materiality" of the

newly discovered evidence can only be judged in the context of a trial, so that the question of its materiality must remain uncertain, as must the application of the standard that the evidence could not have been discovered in the exercise of reasonable care. The effect of the addition to General Laws 52-577d would be to eliminate any statute of limitations, because evidence could be discovered at any time in the future that might be “material” and which would be judged not to have been discoverable with reasonable care, as these indefinite terms could be applied. At least under 52-577d, as it stands, there is a definite time period after which the defendant can put behind him the fear of liability. A fixed, definite period of time is characteristic of most statutes of limitations.

It should be noted also that there is no mechanism provided in the bill for applying the statute of limitations. Whether the suit has been timely filed will depend upon discovery in the course of the litigation and ultimately may have to await the trial itself to find out whether the suit has been timely filed.

Another point that needs to be emphasized, which I briefly mentioned before, is that the individual alleged perpetrator at some time will die, whereas a religious organization or other charitable corporation or trust may go on forever. Thus the religious organization or other charity will remain forever vulnerable, under the Raised Bill, to the danger of being sued because of newly discovered evidence. Thus it will have to retain a fund indefinitely to guard against this contingency, which otherwise could be devoted to works of charity.

The Massachusetts Discovery Rule has an entirely different character than the Raised Bill.⁶ The Massachusetts Discovery Rule, which was developed by the courts and then codified by the legislature, is limited to the discovery of the plaintiff’s injury and the

cause of the plaintiff's injury. Thus the plaintiff is given an opportunity to realize that he has been hurt and the cause of his hurt, perhaps by sexual abuse, but not as with the Raised Bill, which extends to any material evidence relevant to any issue in the case. The Massachusetts Discovery Rule is merely an application of general principles covering physical injuries, such as cancer, which may take years to manifest itself. Furthermore, in the case of sex abuse of a minor, the Massachusetts Discovery Rule is limited to issues that are subject to the minor's control, as he grows up, and perhaps involved in therapy, whereas the Raised Bill is much more sweeping and covers all issues in the case to which newly discovered evidence may be relevant.

If this bill is passed, it would apply retroactively and would revive a cause of action even if the plaintiff has reached the age of 48, under the usual view that unless the legislature makes it clear, statutes of limitations are procedural and are applied retroactively. In the criminal context, the revival of defunct cause of action would violate the ex post facto clause as the Supreme Court has made clear.⁷ In the civil context, there is a sixty-year old decision by the Supreme Court, which holds that the revival of defunct statutes of limitations do not violate Due Process.⁸ This decision can be narrowly read because in that case defendant conceded that he had not relied upon the expiration of the statute of limitation to discard evidence of his innocence or fail to search for evidence. Furthermore, in the recent criminal case just referred to, although it expressly puts to one side the civil situation, much of its reasoning calls into question the 60-year-old decision.

Apart from the problem of retroactivity, the Raised Bill might violate the Due Process Clause of the United States Constitution, considering that charitable organizations will remain vulnerable into the indefinite future, because of the total failure

to appreciate a charitable organization's predicament. I would put it as a case of the violation of the substantive right to due process,⁹ rather than procedural due process, because of the devastating effect on charitable organizations, to expose them to heavy liabilities for the indefinite future. So far as the Equal Protection Clause is concerned, the Raised Bill may lack a "rational connection" with a legitimate governmental interest, the usual test for an Equal Protection violation.¹⁰ In respect to the Equal Protection Clause, governmental bodies and their employees are immune from civil suit, whereas private charitable organizations and their employees remain liable indefinitely. Doubtless the government may deem its activity of such importance as to grant this immunity, but it would not seem wise legislative policy to grant this immunity and at the same time to enact a provision which, in my opinion, would expose private charitable organizations to liability forever.

Based on these and other concerns, I would respectfully suggest that Bill 6532 should not be passed.

Thank you.

¹ Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980).

² Stogner v. California, 539 U.S. 607 (2003).

³ Neuhaus v. de Chohnoky, 280 Conn. 190, 207 (2006).

⁴ Stogner at 631.

⁵ United States v. Kubrick, 444 U.S. 111, 117 (1979).

⁶ Mass. Gen. L., ch. 260, sect. 4C (2002 ed.). In some jurisdictions the discovery rule is not extended to nonperpetrators, because they often did not know of the incident and so were not in a position to gather evidence.

⁷ Stogner v. California, 539 U.S. 607 (2003).

⁸ Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). It is stated in one state court opinion that the great majority of state courts have taken the view that in a civil case, the retroactive application of a statute of limitations does violate Due Process. Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996).

⁹ Doe v. Fields, 2006 Conn. Super. LEXIS 2396, suggesting that in certain circumstances statutes of limitation go to substance rather than procedure.

¹⁰ See Giordano v. Giordano, 39 Conn. App. 183 (1995) (discussing both the Due Process Clause and the Equal Protection Clause, and in that case holding it survived both, but in that case the statute of limitations was 17 years).