

**STATEMENT OF WILLIAM N. ESKRIDGE JR.
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BEFORE THE JUDICIARY COMMITTEE OF THE CONNECTICUT LEGISLATURE
MARCH 17, 2010**

Senator McDonald, Representative Lawlor, and Members of the Committee, I appreciate the opportunity to submit a statement pertaining to Raised Bill No. 5473, dealing with the statute of limitations in certain sexual abuse civil cases. Since 1998, I have been the John A. Garver Professor of Jurisprudence at the Yale Law School, where I teach Civil Procedure and Legislation.¹ I have also authored a casebook on sexuality, gender, and the law and have taught that course since the early 1990s.² Saint Francis Hospital and Medical Center in Hartford has retained me to address legal issues associated with Raised Bill 5473, but the views presented here are my own.

Connecticut General Statutes (“CGS”) § 52-577d sets forth the statutory limitation period for a civil action “to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault.” In 1991, the Legislature changed the statutory period from two to seventeen years from the date the victim attains the age of majority. 1991 Public Acts No. 91-240. In 2002, the Legislature dramatically increased the limitations period from seventeen years to thirty years from the age of majority; the 2002 amendment was “applicable to any cause of action arising from an incident committed prior to, on or after said date.” 2002 Public Acts No. 02-138. Raised Bill 5473 would allow civil actions for sexual abuse of a minor to be brought “at any time after the date of the act complained of,”

¹ I have also taught Legislation at Stanford, NYU, Columbia, Harvard, Virginia, and Toronto and have published a monograph, several dozen law review articles and a casebook, Eskridge, Frickey & Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West Publishing Co. 4th ed. 2007) (including a detailed treatment of retroactivity issues).

² Eskridge & Hunter, *Sexuality, Gender and the Law* (Foundation Press, 2d ed. 2005) (detailed treatment of sexuality issues, including those pertaining to sexual abuse of minors).

essentially eliminating the statute of limitations for such civil actions. Like the 2002 amendment, Raised Bill 5473 would be “[e]ffective from passage and applicable to any cause of action arising from an act or omission occurring prior to, on or after said date.” Under Raised Bill 5473, any person, business, or institution may be forced to defend against civil lawsuits for alleged sexual abuse occurring many decades earlier.

Assume a case where 70-year-old Jamie Doe now says that Jamie’s father sexually touched 15-year-old Jamie in 1955. The father, Ken Doe, now 97 years old, suffers from Alzheimer’s disease and lives in a nursing home. Jamie also claims to have suffered from sexual fondling at the hands of a staff member of the day care center charged with tending for Jamie in 1944-45. The day care center, a family-owned business is still operating, under the management of Jane and Jack Smith; Jane’s parents managed it from 1940 to 1980. Jamie Doe sues both Ken Doe (the father) and the Smith Care Center (operated by the Smiths). Under the terms of existing § 52-577d, Jamie Doe could not assert such claims because 2010 is well over 30 years after Jamie reached majority. Abolishing the statute of limitations and applying it retroactively could force both the father and the day care center (as well as the accused staff member of the day care center) to defend fifty to sixty year-old claims.

This would constitute a remarkable shift in our State’s law of limitations for bringing legal proceedings. Connecticut has comparatively short statutory limitations periods for tort cases, including those involving adult sexual assault.³ At thirty years after the age of majority (as much as 48 years), Connecticut already has one of the most liberal statutes of limitations for child sexual abuse civil cases in the United States. There is no cogent rationale for creating a

³ E.g., CGS § 52-577 (3-year limitations period for tort cases generally); CGS § 52-577e (action for sexual assault exempted from the 3-year period in tort cases “if the party legally at fault for such injury has been convicted” in criminal proceedings for such assault).

limitless opportunity to assert civil claims, especially in light of our State's limitation period for **criminal** prosecution of child sexual abuse in CGS § 54-193a (30 years after the victim reaches the age of majority or 5 years from notification by the victim, whichever is earlier).

Is this remarkable expansion justified? I would suggest not. The purpose of statutory limitations is to encourage potential plaintiffs to pursue their meritorious claims promptly. The current limitations period is very generous, and abolishing it retroactively would strongly undermine fundamental legal and public policies supporting limitations periods, including: (1) repose and reducing uncertainty; (2) minimizing loss or deterioration of evidence; (3) preserving an equal playing field for plaintiffs and defendants; (4) avoiding excessive litigation; and (5) protecting expectations that facilitate insurance coverage.⁴ Raised Bill 5473 would pose significant problems for individual citizens, small businesses, and nonprofit institutions along each of these dimensions.

1. Repose. Both individuals like Ken Doe and institutions like the Smith Day Care Center benefit from the knowledge that they cannot be forced to defend themselves against legal claims indefinitely. This knowledge offers psychological benefits to families as well as potential defendants. Legislative expansion of opportunities to sue for childhood sexual abuse has created ruptures within many families, as progeny have brought their parents into court decades after alleged abuses occurred.⁵

Repose also allows individuals, businesses small and large, and nonprofit enterprises to have a firm handle on their potential liabilities. That helps them figure out appropriate

⁴ An excellent synthesis can be found in Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997).

⁵ See the scholarly and balanced analysis in Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA Women's L.J. 145 (2003).

document-retention policies, the content of personnel records, and the need for insurance.

Elimination of limitations entirely in child sexual abuse cases would impose nearly impossible burdens on these institutions.

The policy of repose is also being compromised at a broader level. If the Legislature adopts Raised Bill 5473, on the heels of the 1991 and 2002 expansions, it is sending a signal to citizens, small businesses, nonprofit institutions, and others that there is no repose in the State of Connecticut. In less than 20 years, the state limitations policy will have moved from one end of the continuum to the other (*i.e.*, from two years after the age of majority to a lifetime in which alleged victims can sue). Even more troubling, the amendments have been made retroactive, rendering events and eras long past newly ripe for litigation.

2-3. Protecting against Loss or Deterioration of Evidence—Prejudice to Defendants Especially. The longer the limitations period, the more likely it is that evidence will be lost, degraded, or tainted. Specifically, witnesses will have died or lost all memory of the events in question and of the context in which they allegedly occurred. Medical and business documents will have been lost or destroyed. In Jamie Doe's case against Ken Doe, for example, the senile defendant may not be able to assist in his own defense. Most, if not all, family members who might corroborate or refute Jamie's testimony about events in 1955 are themselves deceased or memory-disabled. Even competent witnesses will have faint, if any, memory, or their memory may be unreliable. The family doctor, Jamie's teachers, and the neighbors are probably deceased, disabled, or distantly located. Medical records will likely not be available. Because the plaintiff controls the decision whether there will be a lawsuit, evidence-retention and witness availability are likely to favor the plaintiff.

4. Excessive Litigation. Raised Bill 5473 would open the state's courts to new lawsuits in which individuals, businesses, and nonprofit institutions, among others would be forced to defend themselves against stale claims. When California created a two-year window in which time-barred child sexual abuse lawsuits could be brought, its courts were flooded with more than 1000 lawsuits.⁶

5. Availability of Insurance. The repeated and retroactive expansion of statutory limitations will have an impact on the availability and cost of insurance for small businesses, nonprofit institutions, and other entities in the State of Connecticut. My Yale Law School colleague George Priest has demonstrated that insurers are sensitive to shifts in legal liability—and that expanded tort liability not only contributed to the insurance crisis of the 1980s, but also undermined the interests of poor and working class Americans, precisely those that expansive tort approaches were trying to help.⁷ Moreover, the availability of insurance (at any cost) is a possible problem for nonprofit institutions as well as small businesses (such as the day care center in my hypothetical). Insurers are reluctant to insure many nonprofit institutions to start with,⁸ and so might be especially susceptible to insurer nervousness about ever-expanding statutes of limitations in this State. When state legislatures consider proposals to expand the limitations period for sexual abuse cases, insurers and insureds alike have raised these concerns, and I invite your Committee to investigate this in some detail.

⁶ See Rebecca Dube, *Child Sex Abuse Bill Poised for Vote amid Albany Chaos*, Jewish Daily Forward (NY), June 19, 2009 (describing limitation-elimination or window-creating bills in New York and other jurisdictions).

⁷ George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521 (1987).

⁸ E.g., Charles Robert Tremper, *Compensation for Harm from Charitable Activity*, 76 Cornell L. Rev. 401 (1991).

There is no doubt that child sexual abuse is an important public problem, and one to which this State has devoted a great deal of attention and resources. The existing statute of limitations is exceedingly generous and should not be eliminated, as proposed in Raised Bill 5473. Thank you for your attention.

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