

**TESTIMONY OF  
THOMAS W. MERRILL  
CHARLES EVANS HUGHES PROFESSOR OF LAW  
COLUMBIA LAW SCHOOL  
BEFORE THE JUDICIARY COMMITTEE  
MARCH, 2010**

**RAISED BILL 5473**

Senator McDonald, Representative Lawlor, Members of the Committee: My name is Tom Merrill. I am a Professor of Law at Columbia Law School. I teach and write in the fields of property, administrative law, and constitutional law. Among other subjects, I have written articles on statutes of limitations and retroactive legislation. Last year I testified before this Committee concerning Raised Bill 6532, which proposed to amend Conn. Gen. Stat. § 52-577d by providing a three-year window in which time-barred civil actions alleging sexual abuse, exploitation, or assault against a minor could be brought in circumstances where “material evidence is discovered” after the statute of limitations has run. The present bill before the Committee, Raised Bill 5473, would retroactively abolish the statute of limitations for actions under Conn. Gen. Stat. § 52-577d altogether. I have been retained by Saint Francis Hospital and Medical Center in Hartford to address issues presented by Raised Bill 5473.

The existing law, Conn. Gen. Stat. § 52-577d, prescribes a special statute of limitations for civil actions to recover damages for sexual abuse, exploitation, or assault against a minor. It provides an unusually long statute of limitations of 30 years from the date the plaintiff obtains the age of majority. In other words, potential plaintiffs can wait until they reach the age of 48 to sue for abuse that occurred when they were a minor.

Raised Bill 5473 would amend this already-lengthy statute of limitations by eliminating the statute of limitations altogether. As amended, the statute would provide

that “an action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person *at any time after the act complained of*” (emphasis supplied). Furthermore, the proposed bill would make this change explicitly retroactive. Section one states that the bill will 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*” (emphasis supplied). Raised Bill 5473 is thus a considerably more radical measure than Raised Bill 6532, on which the Committee declined to take action last year.

In this testimony I will address four topics. I will begin by reviewing why we have statutes of limitations. I will then offer some evidence from existing practice which suggests that the proposed Raised Bill 5473 would establish a limitations period that is out of line with the balance the Legislature has struck in other areas, and out of line with the judgment that other legislative bodies have reached about the proper statute of limitations for sexual abuse of minors. Next I will offer some thoughts about why retroactive amendments to statutes of limitations should be avoided by legislatures if at all possible. Finally, I will conclude with a brief consideration of the risk of constitutional challenges to the proposed amendment, especially its retroactive feature.

### **I. WHY WE HAVE STATUTES OF LIMITATIONS**

Statutes of limitations have been around for nearly as long as legal systems have existed. The reasons for such laws are well known, and are usually divided into three headings.

The first reason is the desirability of achieving repose or peace of mind on the part of potential litigants. Uncertainty about whether litigation will be commenced can

be highly unsettling. It can also affect behavior in many ways. Relevant evidence must be preserved, and potential witnesses must be kept in contact. Adequate financial reserves must be retained to fund potential litigation. Investments may have to be deferred if they would be hard to liquidate to satisfy a future judgment. Probably the most important reason why statutes of limitations are fixed in terms of a precise number of years rather than stated in terms of a general standard (such as an admonition to file within a "reasonable time") is to cut off this uncertainty at some point. As the Connecticut Supreme Court has recognized, "even if one has a just claim it is not unjust to put the adversary on notice to defend within the period of limitation" because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *State v. Skakel*, 276 Conn. 633, 682-83 (2006), quoting *United States v. Marion*, 404 U.S. 307, 322-23 n.14 (1971).

The second reason for statutes of limitations is to avoid potential unfairness to defendants. As time passes, evidence that might support defenses to a charge disappears or is lost to the memory of witnesses. A vivid example is provided by a recent New Jersey case, *Bernoskie v. Zarinsky*, 890 A.2d 1013 (Sup. Ct. N.J. 2006), where a wrongful death action was brought against a defendant for a murder committed 40 years earlier. Virtually every witness the defendant might have called to contradict the testimony of the person who had recently come forward to name him as the perpetrator was dead

Individual perpetrators like the defendant in *Bernoskie* at least have the benefit of a kind of natural statute of repose in that future actions against them are abated when they die. Institutions, which have a potentially indefinite life span, are in this respect more vulnerable to long delays in litigation. Institutional defendants are also likely to

experience extensive turnover of personnel over any significant period of time, making identification and location of relevant witnesses even more difficult than in the case of individual defendants, who can at least testify on their own behalf.

It might be thought that the risk of lost evidence is symmetric, in that dying witnesses, lost evidence and fading memories will generally afflict plaintiffs and defendants alike. This is true for the total universe of all possible plaintiffs and defendants. In practice, however, the risk will be asymmetric. This is because the plaintiffs who choose to sue only after significant time has passed will not be a random selection of plaintiffs. They will consist disproportionately of plaintiffs who benefit from new legal rulings or theories of liability that make their claims stronger than they appeared initially. Defendants in such actions, in contrast, will likely be randomly distributed in terms of the quality evidence that remains available to them. Because of the passage of time, the quality of that evidence will likely be significantly deteriorated. The trial of old claims therefore raises the serious prospect of asymmetric unfairness to defendants.

The third reason is to avoid imposing undue burdens on the judicial system. The more time that elapses between an alleged wrong and a trial seeking to redress that wrong, the more difficult it will be to obtain jurisdiction over the relevant parties (people move), the more difficult it will be to locate and compel the testimony of witnesses (primary witnesses may die, move, or disappear, requiring searches for secondary witnesses), the quality of witness testimony will deteriorate (memories fade), and the more difficult it will be to find and compel the production of documents (which get lost or destroyed). As a rule, the longer the lapse of time, the more complicated the proof will

be, on both sides. This means more difficult and time-consuming discovery processes, more evidentiary disputes and rulings, longer and more complicated trials, greater difficulty in comprehending the issues on the part of the fact-finder, and more erroneous or disputable results, generating more appeals.

Courts have crowded dockets with many issues pressing for their attention. The statute of limitations reflects a reasonable principle for allocating scarce judicial resources. Older claims, which typically consume more judicial resources, are cut off, thereby leaving more judicial resources for newer claims, which can be processed more easily. Society benefits by obtaining more dispute resolution from any given level of judicial resources.

## **II. THE NEED FOR BALANCE**

The foregoing rationales for having a statute of limitations, of course, are only part of the picture. It is also important to provide avenues for redress of wrongs, whether it be murder, assault, selling defective products, committing medical malpractice, abuse of minors, or any other type of social harm. Sufficient time must be allowed for potential claimants to gather evidence and consult with attorneys to determine whether to bring an action. Excessively short statutes of limitations would interfere with these objectives, just as an overly-long limitations period would disserve the policies previously considered that support having a statute of limitations.

A number of factors must be balanced in determining the period of time to allow potential claimants to decide whether to prosecute a crime or bring a civil action. One clearly is the nature of the wrong. As far as I am aware, no State today has a statute of limitations for criminal prosecution for murder. This obviously reflects the seriousness

of the crime, as well as the fact that public authorities control prosecutions and can be expected to decline to bring cases where evidence is badly deteriorated and the defendant would be prejudiced in mounting a defense. In contrast, the statute of limitations for ordinary civil damages actions in tort is typically quite short, usually two or three years.

Another factor is the difficulty of discovering that a wrong has been committed. Contract actions typically have longer statutes of limitations than do tort actions, perhaps because it is often more difficult to determine whether someone has failed to perform a promise than to identify a tort. Actions to recover possession of real property typically have even longer limits, again because it may be difficult to detect encroachments on real property, particularly if the land is remotely located. Asbestos cases and similar actions involving long latency periods before injuries manifest themselves may justify longer statutes of limitations, or at the least a tolling of the statute of limitations until the injury is discovered.

For the most part, Connecticut has adopted relatively short statutes of limitations for civil actions, in the interest of encouraging prompt resolution of disputes. For example, Connecticut has a three-year statute of limitations for actions in tort unless otherwise specified, Conn. Gen. Stat. § 52-577; a two-year statute of limitations for actions based on negligence, recklessness, or medical malpractice from discovery of the harm (three years maximum from the date the action complained of occurs), Conn. Gen. Stat. § 52-584; a two-year statute of limitations for exposure to hazardous chemicals (subject to a discovery rule), Conn. Gen. Stat. § 52-577c; a three-year statute of limitations for racial harassment claims, Conn. Gen. Stat. § 52-571c; a three-year statute of limitations for products liability claims, Conn. Gen. Stat. § 52-577a; a five year statute

of limitations for wrongful death claims, Conn. Gen. Stat. § 52-555; a six-year statute of limitations for breach of contract, Conn. Gen. Stat. § 52-576; a seven-year statute of limitations for claims against architects, engineers, and land surveyors, Conn. Gen. Stat. § 52-584a; and a 15-year statute of limitations to recover possession of land, Conn. Gen. Stat. § 52-575.

In contrast to these relatively short statutes of limitations for most civil actions, the current statute of limitations for damages to a minor caused by sexual abuse – 30 years after majority is reached – stands out as unusually long. To be sure, the Legislature had evidence before it in 1991 about the impediments that minors face in bringing such claims before they reach the age of majority, especially if the abuser is a trusted adult. And there was testimony that some minors may not recognize or understand the damage they have sustained until some time after they have reached adulthood. *See Roberts v. Caton*, 224 Conn. 483, 494 n. 8 (1993). Some adjustment to the ordinary tort statute of limitations to account for these factors is appropriate.

Still, allowing 30 years for abuse suits after the victim has reached the age of majority seems disproportionate to the judgments reflected in other areas. For example, any one over the age of 18 when they were sexually abused would have to bring an action within three years of the act of abuse under the general tort statute of limitations, Conn. Gen. Stat. § 52-577. And representatives of a minor who was killed by an adult would have to bring a wrongful death action within five years of the act that caused the death (or two years from the date of death), unless the defendant was convicted of homicide or found innocent of homicide by reason of insanity, Conn. Gen. Stat. § 52-555. Although some differentiation among these cases is understandable, it is difficult to see why sexual

abuse of a minor warrants 30 years after majority while abuse of an adult warrants three years, or why sexual abuse warrants 30 years when wrongful death warrants five.

The Connecticut limitations period for suits based on abuse of a minor is also out of line with the statutes of limitations that have been adopted by other States in recent years to deal with the problem of abuse of minors. If we consider Connecticut's nearest neighbors, for example, we find that all have enacted special statutes of limitations dealing with abuse of minors. New York requires that suit be brought within seven years of the act complained of; Rhode Island requires that suit be brought within seven years of majority; Massachusetts requires that suit be brought within three years of majority; New Hampshire requires that suit be brought within twelve years of majority or three years from discovery of the act complained of; Vermont requires that suit be brought within six years of majority or discovery of the act complained of. These statutes suggest that neighboring States have reached a consensus that some type of postponement of the statute of limitations is appropriate, most typically by tolling the statute until the minor reaches majority. But no other State has adopted anything approaching Connecticut's 30 year limitations period after a minor reaches the age of majority.<sup>1</sup>

Finally, the history of the Connecticut statute of limitations for actions based on abuse of a minor is instructive. The special limitations period for abuse of minor claims was originally adopted in 1986. It provided for a limitations period of two years from the date of majority, but in no event more than seven years from the act complained of. P.A.

---

<sup>1</sup> Delaware recently amended its statutes providing a civil action based on sexual abuse of a minor by an adult by eliminating the statute of limitations, but it did so only *prospectively*, not retroactively. See 10 Delaware Code Ann. § 8145, as added by 76 Laws 2007, ch. 102, § 1, eff. July 10, 2007. The amended statute also extended the statute of limitations by two years for actions previously barred by the statute of limitations, but required that damages could be awarded under this provision against any legal entity only upon proof of gross negligence by that entity. *Id.* § 8145(b).

86-401, § 6, eff. June 9, 1986, as corrected by P.A. 86-403, § 104, eff. June 11, 1986.

This provision was amended in 1991 to dramatically expand the limitations period from two to 17 years from the date of majority, again with an absolute cutoff of seven years from the act complained of. P.A. 91-240. The provision was amended again in 2002, this time by nearly doubling the limitations period from 17 to 30 years from the date of majority, and by deleting the cutoff of seven years from the act complained of. P.A. 02-138, § 2, eff. May 23, 2002. The 2002 amendment also provided that the extension from 17 to 30 years applied retroactively to incidents committed prior to the effective date of the amending Act.

Now, it is proposed to extend the limitations period yet again, by eliminating any statute of limitations altogether, again with a provision for retroactive application. Given that the existing statute of limitations is already extraordinarily long, abolishing the statute of limitations is unwarranted, unless the intent is to affect pending litigation that might otherwise be time barred. Amending the statute of limitations in order to affect pending litigation is not, as I am sure the committee recognizes, a legitimate basis for legislative action.

### III. THE DANGER OF RETROACTIVE STATUTES OF LIMITATIONS

One feature of Raised Bill 5473 warrants special comment, which is that it is expressly made applicable to “any cause of action arising from an act or omission occurring *prior to*, on or after” the date of passage of the proposed amendment. Putting aside the question whether this is constitutional, making extensions of statutes of limitations retroactive presents serious public policy concerns. Three considerations support this conclusion.

First, retroactive extensions of statutes of limitations defeat some of the very purposes of having a statute of limitations. Consider the policy of repose. Statutes of limitations are supposed to eliminate, on a date certain, the uncertainty about the prospect of litigation over past events. If a State adopts a policy of extending statutes of limitations retroactively, the statute of limitations becomes largely worthless as a source of repose. No defendant will ever know for sure that the cloud of litigation has been lifted, because the legislature will have announced its willingness, at least in some circumstances, to extend statutes of limitations retroactively. If the legislature is willing to extend some limitations statutes retroactively, why not others? Insurance based on claims made may become more difficult to obtain in a State that adopts such a policy, or may not be available at all if insurance companies become wary of their ability to calculate the level of risk they face in such a State because of the potential for retroactive liability for past events.

Consider too the concern about burdening the judicial system with cases based on outdated evidence. One purpose of the statute of limitations is to provide clear signals to potential litigants about how long they need to preserve evidence, either to substantiate a

claim or defend against it. Every taxpayer, for example, is familiar with advice to keep all income tax records for three years after the tax filing date (and more limited records thereafter), which is predicated on the statute of limitations. If a State adopts a policy of making retroactive extensions of statutes of limitations, then these signals about appropriate record keeping are blurred. In the short run, cases may be filed in which critical evidence has been destroyed, because parties mistakenly relied on the statute of limitations in structuring their record-keeping activities. This would create an unfair situation for defendants and would increase the burden on courts in attempting to adjudicate these cases. In the long run, as the policy of retroactive extensions becomes known, potential litigants would never throw away any potentially relevant records.

Second, retroactive extensions of statutes of limitations raise serious concerns that the legislature is seeking to affect the outcome of particular cases. This is a concern with any retroactive legislation, and is often cited as a reason why retroactive laws are disfavored. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 266-67 (1994). But it is a matter of particular concern where retroactive extensions of statutes of limitations are at issue. In this context, it is likely that specific cases have already been identified that would be affected by the law: those in which particular types of claims have arisen which are barred (or likely to be barred) by the existing statute of limitations. The legislative act of retroactively extending the statute of limitations breathes new life into these particular cases. Both the appearance and the reality suggest that the legislature is tipping the scales of justice to favor one party to these cases at the expense of the other.

Legislative intervention that appears to favor particular litigants is highly corrosive of separation of powers. A legislature's assigned role is to prescribe general

rules for the governance of society, not to decide particular controversies that have arisen under existing law.

Third, it is not in the Legislature's own interest to embrace a practice that allows particular parties or interest groups to think that they may be able to secure legislation that retroactively changes the rules in their favor. This will only encourage other interests or groups to seek to intervene to obtain comparable or offsetting advantages. The Legislature would soon be beset with a clamor from all sides for targeted rule changes that would tilt the litigation playing field in one direction or another.

#### IV. CONSTITUTIONAL CONSIDERATIONS

I will not attempt to provide a comprehensive analysis of the constitutional issues that might arise in litigation if the legislature adopts Raised Bill 5473. It is virtually certain that constitutional challenges would be mounted, and I believe their result is uncertain.

Two Connecticut appellate courts have adjudicated constitutional challenges to previous expansions of the statute of limitations set forth in Conn. Gen. Stat. § 52-577d. In *Roberts v. Caton*, 224 Conn. 483 (1993), the Connecticut Supreme Court held that the 1991 amendments to Conn. Gen. Stat. § 52-577d, which extended the statute of limitations from two to 17 years, could be applied to events that occurred before the new statute was passed. In *Giordano v. Giordano*, 39 Conn. App. 183 (1995), the Connecticut Appellate Court held that the age of majority plus 17 years statute of limitations adopted in 1991 did not violate equal protection or due process by imposing an unduly long statute of limitations on accused child abusers.

Critical to both courts' conclusions was the premise that statutes of limitations are "procedural" rather than "substantive" in nature, and that newly adopted procedural provisions generally apply to pending litigation. *Roberts, supra*, at 488; *Giordano, supra* at 194. This is a highly debatable premise. For many purposes, statutes of limitations have been classified as substantive in nature rather than procedural. In the context of the *Erie* doctrine, for example, the U.S. Supreme Court has long held that statutes of limitations are "substantive" not "procedural." See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). See also *Doe v. Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207 (2006) (change in age at which individuals reach adulthood affects substantive rights).

Moreover, the method of deciding whether retroactive legislation is permissible based on categorizing laws as either "substantive" or "procedural" is increasingly regarded as outmoded. In its most recent pronouncement on the subject of retroactive statutes of limitations, the Connecticut Supreme Court acknowledged that the distinction "tends to obscure rather than clarify the law." *State v. Skakel*, 276 Conn. 633, 686 n.47 (2006), quoting *State v. Hodgson*, 740 P.2d 848 (Wash. 1987). A more helpful approach, the Court suggested, would "consider the issue in more fundamental terms" by asking what statutes of limitations are and how they function. *Id.*

This potential reorientation of analysis is further confirmed by an important decision of the U.S. Supreme Court subsequent to the Connecticut Supreme Court's ruling in *Roberts*. In *Stogner v. California*, 539 U.S. 607 (2003), the Court held that California's adoption of a new and longer statute of limitations for child abuse cases, which was then applied retroactively to a case in which the prior statute of limitations had expired, violated the Ex Post Facto Clause. The Court's analysis did not advert to the

“substance” versus “procedure” distinction. Instead, it asked whether the imposition of punishment for action that was previously shielded by the passage of the statute of limitations was “manifestly unjust and oppressive” in the way Ex Post Facto laws have historically been regarded. *Id.* at 611. After carefully considering the purposes served by the statute of limitations, the Court, speaking through Justice Breyer, answered in the affirmative. Although the Ex Post Facto Clause applies to criminal cases, not civil cases, the Court’s analysis of the fundamental unfairness of retroactive extensions of statutes of limitations would appear to be equally applicable to retroactive extensions of civil statutes of limitations.

I do not suggest that these developments mean that a statute of limitations that retroactively revives civil actions barred by the existing statute of limitations would necessarily be held unconstitutional under either Connecticut or federal constitutional law. I do believe that the constitutionality of such a measure is not resolved by *Roberts* and *Giordano*, and that litigation challenging such legislation would be virtually inevitable. This provides an additional reason to decline to adopt such a statute.

I thank the committee for the opportunity to address these matters.