

STATEMENT OF REPRESENTATIVE GALE D. CANDARAS
12th HAMPDEN DISTRICT
BEFORE THE JOINT COMMITTEE ON THE JUDICIARY
MARCH 14, 2006

Good afternoon Chairman Creedon, Chairman O'Flaherty, and members of the Joint Committee on the Judiciary. Thank you for the opportunity to speak with you today in support of legislation that would extend the statute of limitations for civil actions involving child abuse. Because of the serious nature of this offense, I support a bill that would provide relief for victims of such abuse.

From a public policy point of view, we must remember that child abuse victims do not really come to grips with the nature of their victimization until well into their adult years. For a variety of reasons, children and young adults repress the offensive conduct of others towards them. Many are in denial about what was done to them. In the vast majority of cases, the abuser is a relative, a neighbor, a friend of the family, or even a parent. Abused children are afraid of being victimized again should they come forward to complain. The psychological trauma is deep and long-lasting; the abused child may not really come to grips with these childhood events until many years later. For these and other reasons, I urge the Committee to report favorably legislation that would extend the statute of limitations in civil actions for victims of child abuse.

The question has arisen whether such legislation would be consistent with the State and Federal Constitutions. The primary objection seems to be that such a law would be impermissible because it is retroactive. That is, the bill would apply to events that occurred before the passage of the legislation extending the limitations period in certain civil actions. In other words, the bill we would enact would give child abuse victims the opportunity to commence a civil suit in circumstances that are

currently foreclosed by existing limitations periods.

The question of the retroactive application of legislation has arisen many times in litigation in both state and federal courts. Our Supreme Judicial Court and the United States Supreme Court have addressed the issue frequently in a wide variety of contexts. Initially a sharp distinction must be drawn between civil and criminal cases. As I will more fully address later, prohibitions against *ex post facto* laws restrict state and federal legislatures from making criminal conduct that was legal at the time of its commission. Increasing penalties for past crimes is also within the proscription against *ex post facto* laws. Thus my support of legislation to modify limitation periods for claims by victims of child abuse is restricted to civil actions for damages and other relief.

Let us begin the discussion with the recognition of established principles. First, the S.J.C. and the U.S. Supreme Court have stated that state legislation designed to advance the health, safety, morals, or general or fundamental welfare of the people comes with a strong presumption of constitutionality. The courts will ask whether any reasonably conceivable statement of facts or policy will support the law.

In addition, the person challenging the law bears a heavy burden of demonstrating that the law is clearly unconstitutional “beyond a reasonable doubt,” as our S.J.C. has held. See *City of Boston v. Keene Corp.*, 406 Mass. 301, 547 N.E.2d 328 (1989). Finally, the Legislature must make clear its intention that the law be applied retroactively, otherwise the courts will apply the rule that retroactive laws are not favored. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 113 S. Ct. 1483 (1994); see also *Leibovich v. Antonellis*, 410 Mass. 568, 574 N.E.2d 978 (1991). Thus in reporting a bill to the House and Senate, this Committee should clearly state that the bill is designed to apply retroactively. Such clarity of statement should appear in the

text of the bill to avoid a constitutional challenge.

With these principles firmly in mind, let us look at applicable S.J.C. cases involving retroactive laws. While our highest Court has addressed this issue on many occasions, its decision in *City of Boston v. Keene Corp.*, *supra*, seems the most instructive. There the General Court had extended the statute of limitations in actions brought by the City to remove asbestos from public buildings. The statute applied to all civil actions to remove asbestos brought by the Commonwealth or any of its political subdivisions.

In *Keene Corp.*, *supra*, Justice Greaney, writing for a unanimous Court, reiterated the three-pronged test to determine the constitutionality of legislation having a retroactive effect. In that case, the Court sustained a state statute that extended the limitations period in certain asbestos cases against a claim of impermissible retroactivity. It identified three criteria to determine the validity of retroactive laws. See also *Leibovich v. Antonellis*, 410 Mass. 568, 574 N.E.2d 978 (1991)(Greaney, J.); *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass. 212, 402 N.E.2d 501 (1980); *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, *supra*.

The first criterion focuses on the reasons the Legislature enacted the statute, including “health, safety, morals, and fundamental welfare.” *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 191, 372 N.E.2d 520 (1978). Second, the Court will examine the “nature of the right” affected by the retroactive statute. *Keene Corp.*, *supra*. Finally, the Court will inquire into the “extent and scope” of the impact of the statute on the right affected. *Id.*

Applying these settled principles to the matter before the Joint Committee, legislation to extend the limitations period in child abuse civil cases is surely within

the authority of the General Court to effect. First, the reasons for enacting the extension are substantial and critical. Child abuse is a serious social problem that knows no boundaries, and exists in all segments of society. Child abuse traumatizes the victim, leaving him or her with serious emotional problems for years to come. It paralyzes the victim with fear, shame, and self-loathing. By the time the victim appreciates it is not her or his fault, it is frequently too late to take legal action against the abuser. These are compelling reasons in the public interest for enacting this legislation.

Second, under the three-part test of the S.J.C., the legislature should also examine the nature of the right affected by the retroactive statute. Here the General Court is not creating any new claim for relief. Assault and battery and rape of a child, for example, have been unlawful in the Commonwealth for a very long time. For ages, the victims of such child abuse have had a damage remedy in tort under our laws. Abusers of children have always known that their conduct is illegal, offensive, and debilitating.

Consequently, extending the limitations period does not affect substantive rights. As the S.J.C. noted in *Keene Corp., supra*, the “limitations defense is procedural rather than substantive.” The Court concluded that the “defendants’ interest in a procedural bar which does not rise to the level of a vested right must yield to the far weightier public interest of remedying the grave public health threat posed by the presence of asbestos.” Here too the state’s interest in extending the period in which a civil action may be brought far outweighs any interest child abusers might have in escaping liability by the passage of time.

The third part of the test for constitutionality is the extent and scope of the impact of the bill extending the limitations period. Since the S.J.C. considers the

alteration of a statute of limitations to be procedural, the nature of the impact of this legislation is minimal. It does not determine who will be sued nor whether the plaintiff will prevail. It says nothing about the size of any damage award that might be entered, nor anything else about the merits of the dispute. Here, as in the asbestos case, the statute “does no more than remove a procedural defense upon which defendants might otherwise rely.” *Keene Corp., supra*.

To be sure, in addition to the three-part test, state and federal courts have identified other limits to the power of the General Court to enact retroactive legislation. For example, we cannot do so in the context of the criminal law because such a bill would be an impermissible *ex post facto* law. The U.S. Supreme Court has suggested that the *ex post facto* limitation in criminal cases might also apply to civil laws that are penal in nature, which might include claims for punitive damages. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 113 S. Ct. 1483 (1994)(Congress cannot impose punitive damages retroactively where none existed prior to the statute).

In addition, the Court has suggested that if the retroactive law imposes liability too far into the distant past and imposes too high a liability burden, such laws might be invalid as a matter of due process. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998)(Congress cannot impose new forms of liability for decades-old conduct that may result in damage judgments in the millions of dollars).

Neither of these limitations applies here. The pending bills affecting periods of limitations do not impose any new forms of liability or any new remedies. Whatever rights and remedies that are currently available for timely filed civil actions would be available to victims filing because of our lifting the bar of limitations. In addition because we are not adding any remedy for punitive damages, which is already a part

of our law, we need not be concerned about the *ex post facto* limitation. Finally, we are not imposing any new liability or excessive remedy for conduct occurring long, long ago. Again we are simply removing the limitations period, a procedural, not a substantive matter, as Justice Greaney noted in *Keene Corp., supra*.

Further, the S.J.C. and the U.S. Supreme Court have cautioned against reopening judgments already made final by court order. That is, once a court has entered judgment in a particular case, the Legislature is not permitted to reopen that judgment for relitigation purposes. *See Keene Corp., supra; Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447 (1995). In *Plaut*, for example, the Supreme Court invalidated an act of Congress that sought to extend the statute of limitations to cases already decided by the judiciary. This is impermissible because the separation of powers doctrine does not permit the legislature to command the federal courts to reopen final judgments. While this decision probably does not apply to state legislation because it rests on the federal doctrine of separation of powers applicable only to federal statutes, our S.J.C. has stated that our State Constitution also has a separation of powers concept. *See Keene Corp., supra*.

In conclusion, I urge the Joint Committee to report favorably legislation to extend the statute of limitations in civil actions for child abuse. Adults who abuse children should not avoid civil liability by taking advantage of the trauma inflicted on the victim, otherwise the child will have been victimized twice without recourse to a legal remedy. Thank you.