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## Access to the Civil Court System for Survivors of Child Sexual Abuse in Georgia: Observations and Recommendations from the Clinical Legal Education Experience

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# GEORGIA LAW REVIEW ONLINE

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ACCESS TO THE CIVIL COURT SYSTEM FOR SURVIVORS OF CHILD  
SEXUAL ABUSE IN GEORGIA: OBSERVATIONS AND  
RECOMMENDATIONS FROM THE CLINICAL LEGAL EDUCATION  
EXPERIENCE

*Emma Hetherington\* and Michael Nunnally\*\**

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### I. INTRODUCTION TO CEASE

Founded in January 2016, the Wilbanks Child Endangerment and Sexual Exploitation Clinic (the CEASE Clinic) represents survivors of child sexual abuse in juvenile court dependency matters and civil litigation and is the first of its kind in the nation. The CEASE Clinic was established through a generous donation by Georgia Law alumnus Marlan Wilbanks (JD '84) in response to a new Georgia law known as the Hidden Predator Act (the HPA)<sup>1</sup> that went into effect on July 1, 2015.<sup>2</sup> The HPA extended the statute of limitations for civil claims arising out of acts of child sexual abuse by providing a two-year retroactive window under which survivors who were previously barred from filing lawsuits could bring claims against their abusers.<sup>3</sup>

The CEASE Clinic's mission is to provide direct legal services to survivors of child sexual abuse in a supportive, professional environment as well as to educate and prepare the next generation of lawyers and social workers to represent survivors. The clinic not only provides direct representation to survivors, but it also serves as a teaching center as part of the University of Georgia School of Law.

Each semester eight law students and one or two master of social work students enroll in the clinic. Students work 10 to 20 hours each

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<sup>1</sup> See generally O.C.G.A. § 9-3-33.1 (2015).

<sup>2</sup> WILBANKS CEASE CLINIC, <http://cease.law.uga.edu/about> (last visited Feb. 11, 2019).

<sup>3</sup> See O.C.G.A. § 9-3-33.1(d)(1) (2015) ("For a period of two years following July 1, 2015, plaintiffs of any age who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in effect on June 30, 2015, shall be permitted to file such actions against the individual alleged to have committed such abuse before July 1, 2017, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2015.").

week providing direct representation to clients under attorney and social worker supervision. Students also participate in a weekly seminar where they learn about child sexual abuse, related laws, and trauma-informed practices.

When CEASE opened in January 2016, the clinic focused on civil lawsuits that could be brought under the HPA's open window provision, also commonly referred to as a "look-back" provision.<sup>4</sup> The clinic filed six lawsuits under the look-back provision. Three of the cases were settled, one was successfully litigated at a bench trial, one was voluntarily dismissed by the survivor, and one is still pending. CEASE has also conducted dozens of intakes of survivors, many of whom continue to be barred from filing claims, despite the passage of the HPA.

With the closing of the HPA's open window on June 30, 2017,<sup>5</sup> the CEASE Clinic actively follows legislative efforts in the state of Georgia to improve access to the courts for survivors of child sexual abuse. Although the scope of the problem is broad, access to the civil justice system remains narrow for survivors and further improvements should be made to Georgia's civil statute of limitations. Section II of this Article discusses the scope of the issue of child sexual abuse, including its prevalence, effects on survivors, repressed memory and delayed discovery, and financial consequences. Section III discusses the history of the statute of limitations in the state of Georgia for civil claims arising out of acts of child sexual abuse. Section IV explores the impact of the HPA in Georgia courts as well as opposition to proposed legislative changes and going forward, such as constitutional challenges and concerns over the floodgates of litigation. Finally, Section V will discuss the possibility of new legislation by looking at model statutes enacted in other states. Section VI concludes.

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<sup>4</sup> *See id.*

<sup>5</sup> *See* O.C.G.A. § 9-3-33.1(d)(3) (2015) ("This subsection shall be repealed effective July 1, 2017.").

## II. THE SCOPE OF THE PROBLEM

### A. PREVALENCE OF CHILD SEXUAL ABUSE

One in five women and one in thirteen men report having been sexually abused as a child.<sup>6</sup> In the United States, approximately one in ten children will be sexually abused before their 18th birthday, which translates to approximately 400,000 children a year.<sup>7</sup> However, this number is likely an underestimate given that only about 38% of children disclose the abuse.<sup>8</sup> At least 90% of children know their abusers,<sup>9</sup> and 30% of children are abused by family members.<sup>10</sup> The other 60% are sexually abused by people the family knows and trusts, such as church clergy, Boy Scout troop leaders, sports coaches, and teachers.<sup>11</sup>

### B. ADVERSE EFFECTS OF CHILD SEXUAL ABUSE

Children who are sexually abused are more likely to have emotional and mental health problems, over-sexualized behavior, academic problems, be involved in the delinquency or criminal system, experience teen pregnancy, and have substance use disorders.<sup>12</sup> As adults, survivors of child sexual abuse are more likely to suffer from depression, report a suicide attempt, have substance use disorders, become obese or develop eating disorders, and become involved in crime.<sup>13</sup> In one study investigating what is known as Adverse Childhood Experiences (ACEs) by the Centers for Disease Control and Kaiser-Permanente, researchers found that ACEs like child sexual abuse increase the risk of a variety of

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<sup>6</sup> *Child Maltreatment*, WORLD HEALTH ORG. (Sept. 30, 2016), <http://www.who.int/mediacentre/factsheets/fs150/en/>.

<sup>7</sup> Catherine Townsend & Alyssa A. Rheingold, *Estimating a Child Sexual Abuse Prevalence Rate for Practitioners: A Review of Child Sexual Abuse Prevalence Studies*, DARKNESS TO LIGHT (Aug. 2013), <https://www.d2l.org/wp-content/uploads/2017/02/PREVALENCE-RATE-WHITE-PAPER-D2L.pdf>.

<sup>8</sup> *Child Sexual Abuse Statistics*, DARKNESS TO LIGHT, [https://www.d2l.org/wp-content/uploads/2017/01/all\\_statistics\\_20150619.pdf](https://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf) (last visited Jan. 20, 2019) (citations omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

negative health, relationship, and psychological outcomes.<sup>14</sup> These outcomes include, but are not limited to, alcoholism and alcohol abuse, depression, ischemic heart disease, liver disease, financial stress, risk for intimate partner violence, sexually transmitted diseases, suicide attempts, unintended pregnancies and poor academic achievement.<sup>15</sup>

### C. REPRESSED MEMORY AND DELAYED DISCOVERY

Several studies have outlined the psychological consequences of child sexual abuse on survivors. Clinical, non-clinical, and random survey studies have shown that individuals who are victims of child sexual abuse experience some degree of delayed discovery that their abuse caused lifetime psychological harm.<sup>16</sup> For example, one clinical study that looked at 53 female victims of incest found that 64% “reported at least some degree of amnesia” and that 28% suffered “severe memory deficits.”<sup>17</sup> In a non-clinical study that surveyed 624 undergraduate students, 21% of those surveyed reported they experienced child sexual abuse, among which 36% reported “experien[ing] no memory of at least one sexual abuse incident for some period.”<sup>18</sup> Studies have also found that childhood trauma such as child sexual abuse can cause neurobiological defects that can affect memory.<sup>19</sup> For example, one study conducted by the Centers for Disease Control found a relationship between “exposure

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<sup>14</sup> *About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Jan. 14, 2016), <https://www.cdc.gov/violenceprevention/acestudy/about.html> (“Study findings repeatedly reveal a graded dose-response relationship between ACEs and negative health and well-being outcomes across the life course.”).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Joseph H. Beitchman et al., *A Review of the Long-Term Effects of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 101, 102 (1992) (“Clinic samples refer to individuals who have attended some type of mental health setting for the assessment or treatment of sexual abuse or for the immediate or long-term sequelae of sexual abuse. Some samples contained patients who were referred because of various psychiatric or psychological symptoms, whose history of abuse was only discovered later . . . . Nonclinical samples may consist of random representative surveys.”).

<sup>17</sup> Judith Lewis Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 4-5 (1987).

<sup>18</sup> Drew P. Von Bargen II, *Nittany Lions, Clergy, and Scouts, Oh My! Harmonizing the Interplay Between Memory Repression and Statutes of Limitations in Child Sexual Abuse Litigation*, 18 MICH. ST. U.J. MED. & L. 51, 79 (2014) (citations omitted).

<sup>19</sup> See, e.g., Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUROPEAN ARCHIVES OF PSYCHIATRY AND CLINICAL NEUROSCIENCE 174 (2005).

of the developing brain to the stress response with resulting impairment in multiple brain structures and functions,” such as memory retention and recall.<sup>20</sup>

#### D. THE FINANCIAL COSTS OF CHILD SEXUAL ABUSE

According to a 2018 study published in the *Child Abuse and Neglect Journal*, the estimated average lifetime cost per victim of nonfatal child maltreatment was \$210,012 in 2010, including \$32,648 in childhood health care costs; \$10,530 in adult medical costs; \$144,360 in productivity losses; \$7,728 in child welfare costs; \$6,747 in criminal justice costs; and \$7,999 in special education costs.<sup>21</sup> The estimated average lifetime cost per death is \$1,272,900, including \$14,100 in medical costs and \$1,258,800 in productivity losses.<sup>22</sup> Insurance does not cover all of the costs stemming from child sexual abuse such as mental health treatment, special education services, child welfare services, medical procedures, or productivity losses. At the end of the day, survivors pay these costs, but providing access to the civil justice system can otherwise place the burden of the costs on the predators who preyed on children and the entities who intentionally, or with conscious indifference, concealed evidence of child sexual abuse.

### III. HISTORY OF STATUTE OF LIMITATIONS FOR CHILD SEXUAL ABUSE CIVIL CLAIMS IN GEORGIA

#### A. PRE-1992

Until the Georgia legislature codified O.C.G.A. § 9-3-33.1 in 1992, survivors of childhood sexual abuse could only bring their claims under a personal injury statute. Prior to 1992, O.C.G.A. § 9-3-33 controlled the statute of limitations for child sexual abuse claims, which gives victims “two years after the right of action accrues” to bring their claims in a civil action.<sup>23</sup> As children, the statute of

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<sup>20</sup> *Id.*

<sup>21</sup> Cora Peterson, Curtis Florence, & Joanne Klevens, *The Economic Burden of Child Maltreatment in the United States, 2015*, 86 *CHILD ABUSE & NEGLECT* 178, 181 (2018).

<sup>22</sup> *Id.*

<sup>23</sup> O.C.G.A. § 9-3-33 (2010) (“Actions for injuries to the person shall be brought within two years after the right of action accrues . . .”).

limitations was tolled until the survivor reached the age of majority, meaning that survivors of child sexual abuse could file their claims up until their twentieth birthday.<sup>24</sup>

B. 1992-2015

In 1992, the Georgia General Assembly passed O.C.G.A. § 9-3-33.1, which increased the statute of limitations for childhood sexual abuse.<sup>25</sup> The new statute gave survivors of childhood sexual abuse five years after they turned eighteen to bring their claims.<sup>26</sup> Although the legislature increased the age of when survivors could bring claims, it remained silent on whether or not the statute of limitations could be tolled upon the delayed discovery that the child sexual abuse not only caused injuries at the time of the abuse, but also well after the abuse occurred.

In 1999, a former high school student filed a lawsuit against a private school and the teacher she alleged abused her claiming that the statute of limitations should be tolled until the time that she discovered the abuse caused her injuries.<sup>27</sup> The court found that although the statute of limitations was tolled until the plaintiff reached the age of majority, the Georgia delayed discovery rule only applied to “continuing torts, where the plaintiff’s injury developed from prolonged exposure to the defendant’s tortious conduct,” such as prolonged lead exposure.<sup>28</sup> The Court characterized the plaintiff’s injuries as occurring on four occasions during a period of a few months, not as injuries caused by a continuing tort.<sup>29</sup> Additionally, the Court found that since the plaintiff knew she was abused, she had already discovered the abuse.<sup>30</sup> As a result, the court declined to extend the delayed discovery rule to cases involving child sexual abuse.<sup>31</sup>

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<sup>24</sup> O.C.G.A. § 9-3-90(b) (2015) (“[I]ndividuals who are less than 18 years of age when a cause of action accrues shall be entitled to the same time after he or she reaches the age of 18 years to bring an action as is prescribed for other persons.”).

<sup>25</sup> O.C.G.A. § 9-3-33.1(b) (2010).

<sup>26</sup> *Id.* (“[A]ny civil action for recovery of damages suffered as a result of childhood sexual abuse shall be commenced within five years of the date the plaintiff attains the age of majority.”).

<sup>27</sup> *See generally* M.H.D. v. Westminster Schools, 172 F.3d 797 (11th Cir. 1999).

<sup>28</sup> *Id.* at 804-05.

<sup>29</sup> *Id.* at 800.

<sup>30</sup> *Id.* at 805.

<sup>31</sup> *Id.* at 806.



## C. HIDDEN PREDATOR ACT OF 2015

The Georgia General Assembly again revised the statute of limitations for childhood sexual abuse when it passed the Hidden Predator Act of 2015.<sup>32</sup> The act had several notable parts, one of which was opening a two-year window for any victim of childhood sexual abuse to bring civil actions against an abuser.<sup>33</sup> However, the open window was limited to claims against the person who committed the acts of child sexual abuse so long as the claim had not been litigated on the merits and no settlement agreement had been entered into.<sup>34</sup> The legislature declined to allow claims under the open window against entities that knew or should have known about the abuse,<sup>35</sup> such as the Catholic Church or Boy Scouts of America.

Although the open window limited retroactive claims and the legislature declined to increase the age when a survivor could bring a claim, the Georgia General Assembly did implement a delayed discovery provision for abuse that occurs on or after July 1, 2015.<sup>36</sup> Under the delayed discovery provision, survivors can bring claims within two years from the date the plaintiff knew or had reason to know that there was abuse and that the abuse caused an injury.<sup>37</sup>

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<sup>32</sup> O.C.G.A. § 9-3-33.1 (2018).

<sup>33</sup> O.C.G.A. § 9-3-33.1 (d)(1) (2018) (“For a period of two years following July 1, 2015, plaintiffs of any age who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in effect on June 30, 2015, shall be permitted to file such actions against the individual alleged to have committed such abuse before July 1, 2017, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2015.”).

<sup>34</sup> O.C.G.A. § 9-3-33.1 (d)(2)(A)-(C) (2018) (“The revival of a claim as provided in paragraph (1) of this subsection shall not apply to: (A) Any claim that has been litigated to finality on the merits in a court of competent jurisdiction prior to July 1, 2015. Termination of a prior civil action on the basis of the expiration of the statute of limitations shall not constitute a claim that has been litigated to finality on the merits; (B) Any written settlement agreement which has been entered into between a plaintiff and a defendant when the plaintiff was represented by an attorney who was admitted to practice law in this state at the time of the settlement, and the plaintiff signed such agreement; and (C) Any claim against an entity, as such term is defined in subsection (c) of this Code section.”).

<sup>35</sup> O.C.G.A. § 9-3-33.1 (b)(2)(A)(ii) (2018).

<sup>36</sup> O.C.G.A. § 9-3-33.1 (b)(2)(A)(i)-(ii) (2018) (“Notwithstanding Code Section 9-3-33, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed on or after July 1, 2015, shall be commenced: (i) On or before the date the plaintiff attains the age of 23 years; or (ii) Within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence.”).

<sup>37</sup> *Id.*

Like the open window provision, the legislature chose to limit the delayed discovery provision of the HPA. First, as stated above, the Act only allows delayed discovery claims for abuse that occurs on or after July 1, 2015.<sup>38</sup> Second, the act requires that the court determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred.<sup>39</sup> The court's finding must be made within six months of the filing of the civil action.<sup>40</sup> Practically speaking, it is unlikely that courts in the state of Georgia will see a delayed discovery claim for several years, if not decades. The pretrial hearing requirement may also serve as an impediment to bringing claims, as the hearing must occur within six months after the filing of the complaint when discovery procedures are unlikely to have been completed. The legislature also left unclear what would constitute "admissible evidence" of when the discovery of the alleged sexual abuse occurred.<sup>41</sup> This lack of guidance from the legislature will likely lead to confusion in the courts and future appellate litigation.

### III. ENACTMENT OF THE HIDDEN PREDATOR ACT AND HOUSE BILL 605 OF THE 2018 LEGISLATIVE SESSION

#### A. IMPACT OF HPA 2015 IN GEORGIA

The CEASE Clinic is aware of thirteen cases that were filed under the open window provision of the HPA, six of which were filed by CEASE. This lack of filed lawsuits is unsurprising. As reported in a study on the costs of civil litigation published by the National Center for State Courts:

Cases that resolve shortly after case initiation range from less than \$1,000 at the 25th percentile to \$7,350 at the 75th percentile per side for attorney fees. As the

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<sup>38</sup> *Id.*

<sup>39</sup> O.C.G.A. § 9-3-33.1 (b)(2)(B) (2018) ("When a plaintiff's civil action is filed after the plaintiff attains the age of 23 years but within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred. The pretrial finding required under this subparagraph shall be made within six months of the filing of the civil action.").

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

case progresses, those costs continue to accumulate. A case that settles after discovery is complete through formal settlement negotiations or [alternative dispute resolution] will range from \$5,000 to \$36,000 in attorney fees. If the case goes to trial, the total costs including expert witness fees can range from \$18,000 to \$109,000 per side. Based on these estimates, it becomes easy to see how litigation costs might affect a litigant's access to the civil justice system.<sup>42</sup>

Given the high costs of litigation, few survivors can afford the costs of litigation and few attorneys are able to represent a survivor of child sexual abuse unless a large settlement or verdict is expected to help cover these costs. While some perpetrators may have the deep pockets necessary to justify the cost of litigation, in most cases a lawsuit against an individual perpetrator would probably cost more to a survivor than it would provide benefits. As a result, while a step in the right direction in protecting the rights of survivors and providing access to the civil justice system, the HPA has had little effect in providing legal remedies to survivors of child sexual abuse.

#### B. HOUSE BILL 605 AND THE 2018 LEGISLATIVE SESSION

During the 2018 legislative session, the Georgia House of Representatives unanimously passed House Bill 605, which would have further extended the statute of limitations for civil claims arising from acts of child sexual abuse.<sup>43</sup> The bill was unable to make it out of committee in the Georgia Senate, mainly as a result of lobbying from groups such as the Roman Catholic Archdiocese of Atlanta and the Boy Scouts of America.<sup>44</sup>

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<sup>42</sup> Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 NAT'L CTR. FOR ST. CTS. 1, 5 (2013), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH\\_online2.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx).

<sup>43</sup> Ty Tagami, *Georgia Bill Extends Deadline for Victims of Child Sex Abuse to Sue*, ATL. J.-CONST. (Feb. 28, 2018), <https://www.ajc.com/news/state--regional-education/georgia-bill-extends-deadline-for-victims-child-sex-abuse-sue/wUpmNjVMBbDPGAgHL5ycal/>.

<sup>44</sup> Ty Tagami, *Georgia Denies Older Survivors of Child Sexual Abuse a Chance to Sue*, ATL. J.-CONST. (Mar. 30, 2018), <https://www.myajc.com/news/state--regional-govt--politics/georgia-denies-older-survivors-child-sexual-abuse-chance-sue/UQLEk7OoU985Atu2h6BOwI/>.

## C. CONSTITUTIONAL OBJECTIONS

Opponents of both the 2015 HPA and the proposed House Bill 605 in 2018 cited constitutional objections to any retroactive provisions proposed. Whether the look-back provision from 2015 is constitutional is currently being litigated on the trial level here in the state of Georgia.<sup>45</sup> However, it is well settled law in the state of Georgia that look-back statutes of limitation provisions in civil cases are constitutional, and it is likely that the look-back provision of the HPA of 2015 and any future legislation would be upheld.

First, look-back provisions do not violate the substantive or procedural due process rights of alleged abusers in Georgia. Under Article I, Section 1, Paragraph I of the Georgia Constitution, “[n]o person shall be deprived of life, liberty, or property except by due process of law.”<sup>46</sup> To succeed on a substantive due process claim, the challenge must involve a fundamental right or a suspect class, otherwise it is evaluated under “the lenient ‘rational basis’ test.”<sup>47</sup> Alleged perpetrators of child sexual abuse do not fall into a suspect class, and while they may claim that this provision violates substantive due process rights, this claim is meritless since “[t]here is no vested right in a statute of limitation.”<sup>48</sup> Similarly, at the federal level, in determining the validity of retroactive legislation, courts apply a variation of the rational basis test that only requires a successful showing that “the retroactive application of the legislation is itself justified by a rational legislative purpose.”<sup>49</sup>

The state of Georgia has a substantial interest in identifying child predators and mending harm caused to their victims. Therefore, it is likely that a court will find that the look-back provision of the HPA is justified by a rational legislative purpose, and that it does not infringe upon an individual’s substantive due process rights.

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<sup>45</sup> See, e.g., Lawson William III v. Boy Scouts of Am. Inc., No. 16105042 (Cobb Cty. Superior Ct. filed June 27, 2016).

<sup>46</sup> GA. CONST. art. I, § 1, para. I.

<sup>47</sup> Zarate-Martinez v. Echemendia, 299 Ga. 301, 309 (2016) (quoting State v. Nankervis, 295 Ga. 406, 409 (2014)).

<sup>48</sup> Huggins v. Powell, 315 Ga. App. 599, 602 (2012) (quoting Vaughn v. Vulcan Materials Co., 266 Ga. 163, 164 (1996)).

<sup>49</sup> Patrick T. Murphy, *Section 27A of the SEA: An Unplugged Lamp Sheds No Constitutional Light*, 78 MINN. L. REV. 197, 203 (1993) (emphasis omitted).

Second, Georgia courts will also likely find that the look-back provisions of the HPA 2015 and proposed legislation do not violate ex post facto laws. While both the United States and Georgia Constitutions forbid the enactment of ex post facto laws,<sup>50</sup> the prohibition only applies to criminal statutes or laws affecting substantive rights. Statutory enactments which solely affect court procedure are unaffected by this limitation.<sup>51</sup> Substantive law creates rights, duties, and obligations while a procedural law proscribes the method of enforcing those rights, duties, and obligations.<sup>52</sup>

Since this constitutional prohibition applies only to criminal laws with substantive effects, the look-back provision, a civil law that is procedural in nature, may be retroactively applied.<sup>53</sup> Thus, there is no violation of an alleged perpetrator's constitutional rights under Article I, Section 9, Paragraph 3 of the United States Constitution.<sup>54</sup>

Lastly, the argument that the look-back provision of House Bill 605 violates equal protection rights under either the United States or Georgia Constitutions will likely fail. Similar to the due process analysis, a successful equal protection challenge must involve a fundamental right or a suspect class.<sup>55</sup> Since there is no fundamental right to a statute of limitation, and alleged child sexual abusers are not a suspect class, courts will use a rational

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<sup>50</sup> U.S. CONST. art. I, § 10, cl. 1; GA. CONST. art. I, § 1, para. X.

<sup>51</sup> See *Murphy v. Murphy*, 295 Ga. 376, 377 (2014) (“[G]enerally when a statute governs only court procedure it is to be applied retroactively in the absence of an express contrary intention.”).

<sup>52</sup> See *Procedural Right & Substantive Right*, BLACK'S LAW DICTIONARY 1437-38 (9th ed. 2009) (defining a procedural right as “a right that derives from legal or administrative procedure” and a substantive right as “an essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection”).

<sup>53</sup> See *Huggins*, 315 Ga. App. at 602-03 (holding that where a statute governs only procedure of the courts, such as statutes of limitation, there is no question of retroactivity); see also *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 105 (1984) (holding that the legislature may enact a new statute of limitation for a workers' compensation claim without violating the constitutional prohibition against retroactive laws).

<sup>54</sup> *Id.*

<sup>55</sup> See *Grissom v. Gleason*, 262 Ga. 374, 377, 418 S.E.2d 27, 30 (1992) (“Because no fundamental right or suspect class was involved, the disparate treatment between motor carriers and other defendants must meet only the rational basis test [under the Georgia Constitution.” (citation omitted)); *Mass. Bd. Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (“[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” (citations omitted)).

basis review test to determine whether the HPA's open window provision violates equal protection.<sup>56</sup>

For legislation to survive an equal protection claim, “the classifications drawn in the statute must bear a rational relationship to a legitimate end of government not prohibited by the Constitution.”<sup>57</sup> Again, based on the State's substantial interest in identifying child predators and mending harm caused to their victims, courts will likely find that the look-back provision of the HPA is justified by a rational legislative purpose and that it does not infringe upon an individual's substantive due process rights. Therefore, an equal protection challenge will likely fail.

#### D. FLOODGATES OF LITIGATION CONCERNS

Opponents to the HPA and recently proposed legislation argue that look-back provisions, especially those that allow for entity liability, will cause a floodgate of litigation. As stated above, the authors are aware of only thirteen civil lawsuits that were filed during the two-year period under the HPA of 2015. Thirteen claims can hardly be described as a floodgate of litigation. Although we do not have a crystal ball to predict whether a new open window would create a floodgate of litigation, examining other states that have enacted similar look-back provisions that include entity liability is helpful to anticipate what may happen here in Georgia if the legislature allows for another open window, but this time one that includes entities.

In 2002, the California legislature passed Section 340.1(c), which allowed victims of child sexual abuse who were previously barred from suing to go forward with their claims against both perpetrators and entities for a period of one year.<sup>58</sup> In that year, approximately 1000 lawsuits were filed against perpetrators and/or entities combined.<sup>59</sup> Similarly, a two-year open window was enacted in Delaware in 2007.<sup>60</sup> During the two-year period, approximately 170

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<sup>56</sup> See *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 309 (2016) (noting how the lenient “rational basis” test is used when the plaintiff's “due process challenges do not involve a fundamental right or suspect class”).

<sup>57</sup> *Id.* at 309 (quoting *State v. Nankervis*, 295 Ga. 406, 409 (2014)).

<sup>58</sup> CA. CIV. PROC. § 340.1(c) (2019).

<sup>59</sup> Jenna Miller, *The Constitutionality of and Need for Retroactive Civil Legislation Relating to Child Sexual Abuse*, 17 *CARDOZO J.L. & GENDER* 599, 609 (2011).

<sup>60</sup> DEL. CODE ANN. tit. 10, § 8145(b) (2009).

lawsuits were filed.<sup>61</sup> Both California and Delaware allowed for perpetrators and entities to be sued during the open window period.<sup>62</sup>

Again, it is impossible to predict the exact outcome of litigation if a new look-back provision were enacted in the state of Georgia. However, much can be learned from legislation passed in California and Delaware, as well as from statistics on civil litigation in general.

State	Population Estimate (as of July 1, 2014)	Number of Claims Filed Where Entities Allowed in One-Year Period
Delaware	932,596 <sup>63</sup>	85 <sup>64</sup>
California	38,625,139 <sup>65</sup>	1000
Georgia	10,069,001 <sup>66</sup>	?

If Georgians pursued claims at a proportional rate to California residents, approximately 260 lawsuits would be filed in a one-year period. When compared to Delaware, approximately 917 lawsuits would be filed in a one-year period. Although these estimations are far from conclusive, they do provide some insight into whether or not the state of Georgia would see a floodgate of litigation.

According to the National Center for State Courts, 711,036 civil cases were filed in the state of Georgia in 2015, of which 17,148 were tort cases.<sup>67</sup> And a 2016 study from the same organization showed

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; CA. CIV. PROC. § 340.1(c) (2019).

<sup>63</sup> *Annual Estimates of the Resident Population Change for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018 (NST-EST2018-01)*, U.S. CENSUS BUREAU (2018), [https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par\\_textimage\\_2011805803](https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html#par_textimage_2011805803).

<sup>64</sup> This assumes that half of the 170 lawsuits filed over the two-year period were filed in the first year.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 8 (2016), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC%202015.ashx>.

that 47% (8,060) of tort cases in Georgia involved automobiles.<sup>68</sup> Therefore, one prediction could be that between 260 and 917 lawsuits would be filed if entities were included in a new look-back provisions, averaging at 589 lawsuits over a one-year period. An additional 589 lawsuits would increase the annual civil tort filing rate in Georgia to 17,737, or a 3.4% increase. While it is true that there may be an increase in lawsuits filed, 589 lawsuits over a year does not constitute a floodgate of litigation.

#### E. CONCERNS WITH ENTITY LIABILITY

As stated above, 60% of children who experience child sexual abuse are not abused by family—they are abused by persons known to the family.<sup>69</sup> Parents across the state of Georgia, and the United States, entrust their children to churches, sports clubs, schools, and other entities that hold themselves out to be safe places for children. Children will always be at risk of child sexual abuse; however, entities can decrease the likelihood of abuse by putting policies and procedures into place to prevent and report abuse. Unfortunately, as seen in cases such as those against the Catholic Church<sup>70</sup> or the Boy Scouts of America,<sup>71</sup> entities with knowledge of children being abused under their care do not always put adequate protections in place and at times turn a blind eye to the abuse in favor of protecting the perpetrator. As a result, Georgia tort law allows for civil lawsuits against entities under certain circumstances to compensate victims and deter future gross negligence.<sup>72</sup>

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<sup>68</sup> NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2016 DATA 7 (2018), [http://www.courtstatistics.org/~media/microsites/files/csp/national-overview-2016/sccd\\_2016.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/national-overview-2016/sccd_2016.ashx).

<sup>69</sup> *Child Sexual Abuse Statistics*, DARKNESS TO LIGHT, [https://www.d2l.org/wp-content/uploads/2017/01/all\\_statistics\\_20150619.pdf](https://www.d2l.org/wp-content/uploads/2017/01/all_statistics_20150619.pdf) (last visited Jan. 20, 2019) (citations omitted).

<sup>70</sup> See Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,000 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html?module=inline> (discussing accusations of the protection of Catholic priests who committed sexual abuse within the Church).

<sup>71</sup> See Kirk Johnson, *Oregon Justices Approve Release of Boy Scouts' 'Perversion Files'*, N.Y. TIMES (June 14, 2012), <https://www.nytimes.com/2012/06/15/us/court-approves-release-of-boy-scouts-perversion-files.html> (discussing the release of the Boy Scouts' documents "detailing accusations and investigations of sexual abuse or other improprieties").

<sup>72</sup> See O.C.G.A. §17-14-3 (2010) (allowing a judge to order an offender to make restitution to a victim when sentencing that offender).



Opponents to a new look-back provision and to extending the age by when a survivor may sue often argue that evidence becomes stale and old claims are fundamentally unfair to defendants. But the entities and perpetrators were the ones who were adults at the time of the abuse while the victims were children. Defendants in child sexual abuse cases are often the ones with control of the evidence, such as the Boy Scouts of America who kept “Ineligible Volunteer” files on troop leaders alleged to have abused scouts.<sup>73</sup> Additionally, plaintiffs bear the burden of proof in civil claims, not the defendant. Once again, the victims have a steeper hill to climb in accessing justice for the harms caused to them, and defendants already have protections in place to shield them from frivolous claims with no evidence to prove the abuse.

#### IV. LOOKING FORWARD

##### A. POSSIBILITY OF NEW LEGISLATION

As mentioned above, in March 2018, the Georgia State House of Representatives unanimously passed House Bill 605, which was an update to the Hidden Predator Act of 2015.<sup>74</sup> The bill would have increased the age to 31 for plaintiffs to bring childhood sexual abuse claims against their perpetrators.<sup>75</sup> It also would have changed the discovery rule from two years to four years, meaning that a plaintiff could bring claims “within four years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in an injury.”<sup>76</sup> However, the Senate Judiciary Committee made several changes to the bill, many of which protected entities

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<sup>73</sup> Paul Duggan, *Boy Scout “Perversion Files” Released*, WASH. POST (Oct. 18, 2012), [https://www.washingtonpost.com/local/crime/boy-scout-perversion-files-released/2012/10/18/62c7a6ec-1940-11e2-b97b-3ae53cdeaf69\\_story.html?noredirect=on&utm\\_term=.aa0d3134d11e](https://www.washingtonpost.com/local/crime/boy-scout-perversion-files-released/2012/10/18/62c7a6ec-1940-11e2-b97b-3ae53cdeaf69_story.html?noredirect=on&utm_term=.aa0d3134d11e) (noting how the documents are “formally called the Ineligible Volunteer Files but commonly known among Boy Scout officials as ‘the perversion files’”).

<sup>74</sup> Hidden Predator Act of 2018, H.R. 605, 154th Gen Assemb., Reg. Sess. (Ga. 2018).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

that failed to protect children from sexual abuse.<sup>77</sup> Ultimately, House Bill 605 did not pass in the Senate.<sup>78</sup>

Given the increased media attention to entity liability in child sexual abuse cases, it is likely that another attempt will be made to revise the Hidden Predator Act, as has been the case in other states. For example, in Pennsylvania, where a 900-page grand jury report was released detailing countless acts of abuse by Catholic priests and a pattern of institutional knowledge and cover-up of the abuse, advocates for survivors are seeking to increase the statute of limitations for civil claims to age 50.<sup>79</sup> In Michigan, which recently saw the conviction and sentencing of USA Gymnastics physician Larry Nassar, the state legislature increased both the civil and criminal statutes of limitation.<sup>80</sup> Entities in the state of Georgia have also received media coverage for incidents of child sexual abuse committed by their members, employees, or volunteers.<sup>81</sup> As an attempt to amend the Hidden Predator Act will likely occur during the next legislative session, watching legislative efforts in other states such as Pennsylvania and Michigan may be instructive in determining how to increase access to the justice system for survivors.

#### B. MODEL LEGISLATION IN OTHER STATES

There are two different models for a potential amendment to the childhood sexual abuse statute of limitations in Georgia. The first is to extend the current statute of limitations for filing of civil actions for childhood sexual abuse. For example, in Connecticut, the statute of limitations for childhood sexual abuse is thirty years after

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<sup>77</sup> Emma Hetherington, *Georgia's Sexual Abuse Law Should Protect Children, Not #EntitiesToo*, PENN L. LLC (Mar. 28, 2018), <http://www.pennlawgroup.com/blog/georgias-sexual-abuse-law-protect-children-not-entities/>.

<sup>78</sup> Ty Tagami, *Georgia Lawmakers Don't Give Sex Abuse Survivors More Time to Sue*, ATL. J.-CONST. (Mar. 30, 2018), <https://www.ajc.com/news/state--regional-education/georgia-lawmakers-refuse-give-sex-abuse-survivors-more-time-sue/uYY0nLkvxifERZDXNHCEmM/>.

<sup>79</sup> Holly Yan, *This is How Sex Abuse Victims are Changing State Laws*, CNN (Sept. 27, 2018), <https://www.cnn.com/2018/09/27/us/sex-abuse-statutes-of-limitations/index.html>.

<sup>80</sup> S. 871, 99th Leg., Reg. Sess. (Mich. 2018) (enacted) (increasing the criminal statute of limitations); S. 872, 99th Leg., Reg. Sess. (Mich. 2018) (enacted) (increasing the civil statute of limitations).

<sup>81</sup> See, e.g., Shelia M. Poole, *Atlanta Archdiocese Releases List of Those 'Credibly' Accused of Abuse*, ATLANTA J.-CONST. (Nov. 7 2018), <https://www.myajc.com/lifestyles/religion/atlanta-archdiocese-releases-list-those-credibly-accused-abuse/5NGG37U5kwvQOc8dWgaG4N/>.

the plaintiff reaches the age of majority, meaning that the plaintiff has until age 48 to bring a claim,<sup>82</sup> while Maryland plaintiffs have twenty years from the age of majority before the statute of limitations forecloses their claims.<sup>83</sup>

The second option for a potential amendment is to completely abolish the statute of limitations. While this seems radical, some states have implemented this kind of legislation in varying degrees. For example, Alaska has no statute of limitations for felony sexual abuse of a minor, felony sexual assault, or unlawful exploitation of a minor.<sup>84</sup> Alaska limits the statute of limitations to three years from the accrual of the claim for other sexual abuse offenses, one of which is “misdemeanor sexual abuse of a minor.”<sup>85</sup>

Maine pushes the envelope even further by eliminating all statute of limitations for childhood sexual abuse.<sup>86</sup> Maine has also broadly defined what sexual acts towards minors encompasses.<sup>87</sup>

Each of these state’s statutes could be integrated by the Georgia General Assembly in an effort to give survivors of childhood sexual abuse more time to understand their rights. Elongating the statute of limitations does pose some issues for the trial court, such as the potential lack of evidence due to it being lost over the years, but the current trend among states is to increase the period in which survivors can bring claims. This trend is consistent with current research on the effects of child sexual abuse such as memory

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<sup>82</sup> CONN. GEN. STAT. ANN. § 52-577d (West 2018) (“Notwithstanding the provisions of section 52-577, no 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 later than thirty years from the date such person attains the age of majority.”).

<sup>83</sup> MD. CODE ANN., CTS. & JUD. PROC. § 5-117(b) (West 2018) (“An action for damages arising out of an alleged incident or incidents of sexual abuse that occurred while the victim was a minor shall be filed: (1) At any time before the victim reaches the age of majority; or (2) Subject to subsections (c) and (d) of this section, within the later of: (i) 20 years after the date that the victim reaches the age of majority . . .”).

<sup>84</sup> ALASKA STAT. ANN. § 09.10.065(a) (West 2018) (“A person may bring an action at any time for conduct that would have, at the time the conduct occurred, violated provisions of any of the following offenses: (1) felony sexual abuse of a minor; (2) felony sexual assault; or (3) unlawful exploitation of a minor.”).

<sup>85</sup> ALASKA STAT. ANN. § 09.10.065(b) (West 2018) (“Unless the action is commenced within three years of the accrual of the claim for relief, a person may not bring an action for conduct that would have, at the time the conduct occurred, violated the provisions of any of the following offenses: (1) misdemeanor sexual abuse of a minor . . .”).

<sup>86</sup> ME. REV. STAT. ANN. tit. 14, § 752-C (1999) (“1. No limitation. Actions based upon sexual acts toward minors may be commenced at any time.”).

<sup>87</sup> ME. REV. STAT. ANN. tit. 17-A, § 251(C)-(D) (2003).

repression and the negative mental and physical health consequences that survivors will experience for the entirety of their lives.

## VI. CONCLUSION

Allowing for a new look-back provision that permits entity liability would increase access to justice for survivors of child sexual abuse in the state of Georgia, as would increasing the age by when a survivor can bring a claim. Given the costs of litigation, very few claims were filed under the HPA's open window, denying access to justice for hundreds or potentially thousands of survivors. But why should we increase access to the civil justice system for survivors of child sexual abuse?

First, it puts the public on notice about child sexual predators who would otherwise go under the radar. Arrests are only made in 29% of child sexual abuse cases, and for children under six, only 19% of sexual abuse incidents result in arrest.<sup>88</sup> This leaves over two-thirds of survivors of child sexual abuse without access to the justice system. Their abusers are not on a registry, they are not known to our communities, and they continue to have access to children. Civil lawsuits in absence of criminal prosecution allows communities to know who the predators are and the need to keep their children safe from them.

Second, the costs of child sexual abuse are high and should be placed on those responsible. Insurance does not cover all of the necessary mental health treatments needed by survivors of child sexual abuse, nor does it cover expensive medical procedures that may stem from the injuries left by abuse, such as high blood pressure, obesity, and diabetes. Insurance does not pay for special education services, the cost of the child welfare system, or the cost of the criminal justice system. At the end of the day, victims, and taxpayers, will pay costs of childhood sexual abuse. Providing access to the civil justice system will place the burden of the costs on the predators and the institutions who turned and looked the other way when they knew or should have known that a child under their care was suffering from abuse.

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<sup>88</sup> HOWARD N. SNYDER, , *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS* 11 (2000).

Finally, access to the civil justice system allows survivors of child sexual abuse a needed space to heal. They have been denied a voice by their abusers. They have been denied a voice in the criminal justice system. They have been denied a voice in our civil justice system. By increasing access to the civil justice system, the state of Georgia can make its communities safer, happier, and healthier places for all Georgians.

The Georgia General Assembly has listed the four main purposes of tort law in the state of Georgia: 1) the alleviation of injury: “Damages are given as compensation for injury . . . .”<sup>89</sup>; 2) the allocation of risk: “Traditionally, the imposition of tort liability has been intimately connected with the idea of blameworthy conduct on the part of the tortfeasor, as manifested either by an intentional act, or the failure to use the requisite degree of care under the circumstances”<sup>90</sup>; 3) the articulation of public policy as established by the State in its “constitution, laws, and judicial decisions”<sup>91</sup>; and 4) the admonition of public duty: Tort law acts to “apprise[] persons of their legal rights and obligations, and it acts to deter them from socially unreasonable behavior.”<sup>92</sup>

If the state of Georgia seeks to aid survivors of child sexual abuse in accessing the civil justice system, it must ensure that they have access to damages to compensate for their injuries, it must place blame on both the intentional and negligent tortfeasor, it must seek to uphold the policies as set forth under the law, and it must deter individuals and entities from directly and indirectly harming children who are victims of child sexual abuse.

The Hidden Predator Act of 2015 was a step in the right direction, but the state of Georgia has a long way to go. No matter the state of the law, the CEASE Clinic will continue to represent survivors, but for others to join in our mission, the laws of the state of Georgia will need to change in order to increase access to the justice system for survivors of child sexual abuse.

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<sup>89</sup> O.C.G.A. § 51-12-4 (2018); *see also* ERIC JAMES HERTZ & MARK D. LINK, GA. LAW OF DAMAGES § 1:2 (2018-2019 ed.) (“ . . . [A]warding damages is generally to compensate the plaintiff for any loss sustained . . . ”).

<sup>90</sup> CHARLES R. ADAMS III, GEORGIA LAW OF TORTS, § 1:5(b) (2018).

<sup>91</sup> *Id.* at 1:5(c).

<sup>92</sup> *Id.* at 1:5(d).