

A Review of Retroactivity: Illinois Should Adopt a Modern Child Victims Act

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INTRODUCTION

In December of 2018, then-Illinois Attorney General Lisa Madigan released a report finding that 690 Catholic priests in Illinois had been accused of sexual misconduct.¹ This scathing report was in direct contrast

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1. See ILL. ATTORNEY GEN.'S OFFICE, PRELIMINARY FINDINGS OF THE INVESTIGATION INTO CATHOLIC CLERGY SEXUAL ABUSE OF MINORS IN ILLINOIS 5 (2018) [hereinafter AG PRELIMINARY FINDINGS], available at <http://www.bishop-accountability.org/>

to the findings of the Catholic Church in Illinois, which had previously disclosed only 140 clergy members of having been “credibly” accused of child sexual abuse prior to Attorney General Madigan’s report.² In response to this report, the Church added an additional 45 clergy members to their list of “credibly accused” abusers bringing the total to 185.³ There are still hundreds of additional clergy members who have not been thoroughly investigated by the Church that Madigan’s office had uncovered as accused child sexual abusers. “By choosing not to thoroughly investigate allegations, the Catholic Church has failed in its moral obligation to provide survivors, parishioners and the public a complete and accurate accounting of all sexually inappropriate behavior involving priests in Illinois,” Madigan said when announcing her findings.⁴ “The failure to investigate also means that the Catholic Church has never made an effort to determine whether the conduct of the accused priests was ignored or covered up by superiors.”⁵

When these findings were announced, Cardinal Blasé Cupich of the Archdiocese of Chicago expressed “the profound regret of the whole church for our failures to address the scourge of clerical sexual abuse.”⁶ Cardinal Cupich highlighted that the Archdiocese of Chicago had been looking into complaints of child sexual abuse by its clergy members since 1991 when then-Cardinal Joseph Bernardin formed a special commission.⁷ However, Madigan’s Office found major flaws in how the Catholic Church handled these accusations. Of all the accusations against clergy members, the Church’s own investigation found only 26 percent credible, meaning that 74 percent of accusations were either not

reports/2018_12_19_IL_AG_Preliminary_Findings.pdf [https://perma.cc/DD2K-2826] (stating that the Illinois Diocese only publicly reported 185 clergy, even though it had received allegations for more than five-hundred clergy members, which was not disclosed to the public).

2. *Id.*

3. *Id.*

4. Press Release, Lisa Madigan, Preliminary Findings Show Illinois Dioceses Have Received at Least 500 Allegations of Clergy Sexual Assault & Abuse Against Children the Church has Never Made Public (Dec. 19, 2018), available at http://www.illinoisattorneygeneral.gov/pressroom/2018_12/20181219.html [https://perma.cc/48ST-3EEQ].

5. *Id.*

6. Cardinal Blasé J. Cupich, Statement of the Archdiocese of Chicago on the Attorney General of Illinois Report on Clergy Sexual Abuse (Dec. 19, 2019); see also Laurie Goodstein & Monica Davey, *Catholic Church in Illinois Withheld Names of at Least 500 Priests Accused of Abuse*, *Attorney General Says*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/illinois-attorney-general-catholic-church-priest-abuse.html> [https://perma.cc/85MT-A4SN] (noting that claims were more frequently found to be unsubstantiated or not credible when there was only one victim, when the clergy member was a member of an order, or when the clergy member was deceased or reassigned).

7. See Cupich, *supra* note 6 (noting that the initiatives started by Cardinal Joseph Bernardin continue in the Archdiocese of Chicago Protection of Children and Youth).

investigated or not believed.⁸ The diocese would not investigate if the accused clergy member was either deceased or no longer with the ministry, even if multiple persons had levied accusations against that clergy member.⁹ The diocese refused to investigate accusations against priests who were members of a particular order—it would simply hand the investigation over to the order from which that priest came, even though the order priest would be ministering with the authority of the bishop.¹⁰ The Church also refused to investigate when victims wanted to remain anonymous, when a lawsuit was filed, or when a criminal investigation was opened.¹¹

The Attorney General’s report highlighted the insufficient transparency of the Church’s procedure, noting its failure to publish the name of every “credibly accused” sexual abuser.¹² Finally, the report also condemned the “flawed processes and practices,” including failures to notify law enforcement or DCFS of accusations of abuse and a failure to determine whether any local archdiocese had engaged in a pattern of cover-ups.¹³ As a whole, Madigan’s report concluded that the Church had failed in achieving “the healing and reconciliation of survivors” and that it “will not resolve the clergy sexual abuse crisis on their own.”¹⁴

In 2013, the Illinois legislature abolished the statutes of limitations on all suits for damages arising from childhood sexual abuse—but only for claims that were not previously time-barred.¹⁵ S.B. 1399 went into effect on January 1, 2014, allowing victims with then-eligible claims for childhood sexual abuse to bring a civil suit against persons and/or private and public entities.¹⁶ It passed unanimously through both houses and was soon thereafter signed by then-Governor Patrick Quinn.¹⁷ The glaring hole in this legislation, however, is its failure to allow for retroactive application of the statute to revive time-barred claims.¹⁸ The effect this has is both arbitrary and enormous. Based on a grouping of amendments and enactments of the statutes of limitations and repose in the 1990s and

8. See AG PRELIMINARY FINDINGS, *supra* note 1, at 5 (noting that there were “dozens” of instances where the dioceses failed to adequately investigate allegations).

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Id.* at 7.

13. *Id.* at 7–8.

14. *Id.* at 10.

15. See 735 ILL. COMP. STAT. 5/13–202.2(f) (2020) (“[T]he changes made by this amendatory Act . . . apply to actions commenced on or after the effective date of this amendatory Act of the 98th General Assembly if the action would not have been time barred . . .”).

16. See P.A. 98-276, § 5 (eff. Jan. 1, 2014).

17. H.R. JOURNAL, 98TH GEN. ASSEMB., 2013 REG. SESS. NO. 55, at 25 (Ill. 2013).

18. 750 ILL. COMP. STAT. 5/13-202.2(f) (2020).

early 2000s, the statutes of limitations in Illinois apply seemingly at random to different victims. This result could not have been the intended effect of the legislature, and it leaves many victims barred from court.

This bar to retroactive application followed consistent holdings by Illinois courts that the legislature cannot revive time-barred claims by retroactive application of expanded statutes of limitations.¹⁹ The Illinois Supreme Court arrived at this holding in 1885, basing its opinion off of the dissent by the United States Supreme Court.²⁰ This Article will take the position that this line of precedent is founded in a flawed perspective and that retroactive application of expanded statutes of limitations is constitutional under the Illinois Constitution. Through an examination of precedent and comparison of other state legislation and case law, this paper will show that common sense principles of justice dictate that withholding claims from victims of childhood sexual abuse in light of the various legislative amendments makes little sense. This Article will culminate in a proposal to the legislature to issue a legislative amendment to its civil statute of limitations, which applies only to certain victims, which would allow for retroactive-revival of these certain victims' claims.

I. BACKGROUND

A. *Illinois State Law*

The Illinois legislature has demonstrated a concerted and consistent effort at opening the courthouse doors to victims of childhood sexual abuse. The civil statute was first amended in 1991 and amendments persisted through 2014,²¹ even later when considering the criminal statute.²² The civil limitations statute that currently governs civil child

19. See, e.g., *Doe A. v. Diocese of Dall. (Diocese of Dall. II)*, 917 N.E.2d 475, 477, 486 (Ill. 2009) (affirming the circuit court's dismissal of the claim because the amendment to the statute of limitations does not apply retroactively); see also *M.E.H. v. L.H.*, 685 N.E.2d 335, 337 (Ill. 1997) (upholding the lower court's dismissal of a claim based on child sexual abuse because the statute of repose, which was repealed prior to the filing of the lawsuit, barred the claim); *Bd. of Educ. v. Blodgett*, 40 N.E. 1025, 1025–26, 1028 (Ill. 1895), *superseded by statute as stated in Sempeyer v. Holman*, 615 N.E.2d 1387, 1390 (Ill. App. 1993).

20. See *Blodgett*, 40 N.E. at 1027 (citing to *Campbell v. Holt*, 115 U.S. 620, 630 (1885) (Bradley, J., dissenting)) (noting that the case relied upon in the lower courts was a split decision where the weight of the authority rested in the dissent).

21. See P.A. 86-1346, § 1 (eff. Jan. 1, 1991) (two year statute of limitation); see also P.A. 88-127, § 5 (eff. Jan. 1, 1994) (same); P.A. 93-0356, § 15 (eff. July 24, 2003) (extending the statute of limitations to ten years); P.A. 96-1093, § 5 (eff. Jan. 1, 2011) (extending the statute of limitations to twenty years); P.A. 96-1551, Art. 2, § 1085 (eff. Jan. 1, 2011) (same); P.A. 98-276, § 5 (eff. Jan. 1, 2014) (abolishing statute of limitations for all future claims).

22. 720 ILL. COMP. STAT. 5/3-6(j)(1) (2020); see also P.A. 100-80, § 5 (eff. Aug. 11, 2017) (extending the statute of limitations for criminal prosecutions when, for example, the victim is a minor or person with legal disability or when the proper person discovers the abuse).

sex abuse cases in Illinois is codified at 735 ILCS § 5/13-202.2(b), which states:

Notwithstanding any other provision of law, an action for damages for personal injury based on childhood sexual abuse must be commenced within twenty years of the date the limitation period begins to run under subsection (d) or within twenty years of the date the person abused discovers or through the use of reasonable diligence should discover both (i) that the act of childhood sexual abuse occurred and (ii) that the injury was caused by the childhood sexual abuse. The fact that the person abused discovers or through the use of reasonable diligence should discover that the act of childhood sexual abuse occurred is not, by itself, sufficient to start the discovery period under this subsection (b). Knowledge of the abuse does not constitute discovery of the injury or the causal relationship between any later-discovered injury and the abuse.²³

Under this statute, the limitations period does not begin to run until the minor reaches the age of majority.²⁴ The limitations period is also tolled where the victim of childhood sexual abuse is being threatened, manipulated, or defrauded from bringing a claim whether it is by the abuser or any person acting in the abuser's interest.²⁵ This subparagraph of section 202.2 became effective in January 2011.²⁶

However, in 2014, the 98th General Assembly added another subsection to Section 202.2, reading in pertinent part that “an action for damages based on childhood sexual abuse may be commenced at any time.”²⁷ The legislature made a historic leap in totally abolishing the statutes of limitations on childhood sexual assault, granting an unimpeded avenue for relief to all victims of future abuse. The greatest shortcoming of this amendment, however, immediately followed this opening line, when the legislature curtailed it to apply only to those actions that “would not have been time barred under any statute of limitations or statute of repose prior to the effective date of this amendatory Act.”²⁸ Two specific groupings of amendments to this statute over the last thirty years demonstrate the devastating effect of this limitation, the first group consisting of amendments in 1991 and 1994, and the next group in 2003 and 2011.

The first major amendment to the civil statute came in 1991, when the Illinois General Assembly passed and applied a twelve-year period of repose to victims seeking to bring civil claims relating to childhood

23. 735 ILL. COMP. STAT. 5/13-202.2(b).

24. *Id.* § 13-202.2(d).

25. *Id.* § 13-202.2(d-1).

26. P.A. 96-1093, § 5 (eff. Jan. 1, 2011).

27. § 13-202.2(f); P.A. 98-276, § 5 (eff. Jan. 1, 2014).

28. § 13-202.2(f).

sexual abuse.²⁹ At the time, the statute of limitations required that victims bring suit within two years of the date of discovery of abuse.³⁰ Neither the statute of limitations nor the statute of repose began to run until the victim turned eighteen.³¹ This repose period did not remain in effect for very long, however, as the legislature eliminated it just three years later, effective January 1, 1994.³² The legislature clearly understood that such a period of repose was a mistake—barring claims unnecessarily and adversely to public policy. However, the Illinois Supreme Court held in *M.E.H. v. L.H.* that, regardless of the repose period's short-lived enactment, the legislature could not take the statutorily-endowed defense away from defendants whose victims had turned thirty by the end of 1993.³³ This effectively armed anyone who committed sexual abuse against a minor in the early 1960s with a foolproof defense, and protected some defendants, based on the age of their victims, that committed child sex abuse as late as 1981. In practice, however, because of the two-year statutory limitations period, most defendants would have a foolproof argument upon their victim turning twenty years old.

The next major amendment came into effect on July 24, 2003, when the legislature expanded the two-year statute of limitations period to ten years.³⁴ This again acted only prospectively, however, and meant that victims who were abused as children, but turned twenty by July 23, 2003, would be totally barred from bringing claims. Those victims would be in their early forties and older today. The key to understanding this legislative framework is to keep in mind that the courts have held that if a claim is expired, then it cannot be revived.³⁵ Therefore, if a legislative amendment expands the statute of limitations, only plaintiffs with claims that are still valid at the time of the amendment's effect will be captured by it. This is particularly important to understand when viewing the 2011 legislative amendment, in which the legislature expanded the limitation period from ten years to twenty years.³⁶ Logistically, this kept then-valid claims alive for an additional ten years, which then extended to the 2013 amendment that eliminated the statute all together. In simple terms, a valid claim as of the amendment of 2011 was no longer subject to any statute of limitations and a suit could be brought at any time.

29. P.A. 86-1346, § 1 (eff. 1991).

30. *See id.*; *see also infra* Section II(b) (clarifying the discovery rule).

31. P.A. 86-1346, § 1.

32. P.A. 88-127, § 5 (eff. Jan. 1, 1994).

33. *See generally* *M.E.H. v. L.H.*, 685 N.E.2d 335 (Ill. 1997).

34. P.A. 93-356, § 15 (eff. Jul. 24, 2003).

35. *See generally* *M.E.H.*, 685 N.E.2d 335.

36. P.A. 96-1093 (eff. Jan. 1, 2011).

As certain as those claims may be, the inability to apply the Act retroactively creates an unusual outcome for certain victims of sexual abuse and acts arbitrarily in who it will and will not cover. Effectively, middle-aged and older adults will have a difficult time bringing a lawsuit unless their case falls within some exception to the statute of limitations. Specifically, if you were sexually abused as a child and born on or before July 23, 1983, then you are automatically barred from bringing a claim under the second group of major amendments in 2003 and 2011.³⁷ Conversely, if you were sexually abused as a child and born on or after July 24, 1983, then you are not subject to *any* statute of limitations and can bring suit whenever you want.³⁸

While the trend in Illinois is moving towards keeping the courts open to victims of sexual abuse, the fact that statutory amendments cannot be applied retroactively to expired claims is troubling for certain classes of people. It is specifically troubling for victims of sexual abuse from the 1960s–1980s, many of whom suffered heinous and well-documented abuse,³⁹ as well as those who were born on prior to July 24, 1983. The only avenues of relief in court for these victims rest in two codified exceptions to the statutes of limitations and repose: the discovery rule and fraudulent concealment.

37. Since the 2003 amendment went into effect on July 24, 2003, a victim was previously subject to the two-year statute of limitations, which would have expired for victims that turned twenty on or before July 23, 2003.

38. It follows from the preceding footnote that all victims who turn twenty after July 23, 2003, will be covered by the expanded statute of limitations—giving them an extra eight years to bring suit. *See supra* note 37 and accompanying text. This means that if you turned twenty on July 24, 2003, your claim would last until July 24, 2011. *See* P.A. 93-356, § 15 (eff. Jul. 24, 2003) (stating that the ten-year statute of limitations begins running when a victim turns eighteen). However, the next amendment raised the statute of limitations to twenty years and went into effect on January 1, 2011, followed by the elimination of the statute of limitations in 2014. *See* P.A. 96-1093, § 5 (eff. Jan. 1, 2011) (“[A]n action for damages for personal injury based on childhood sexual abuse must be commenced within 20 years”); P.A. 98-276, § 5 (eff. Jan. 1, 2014) (“[A]n action for damages for personal injury based on childhood sexual abuse may be commenced at any time”). This means that if your claim was valid as of the 2003 amendment, your claim remains valid until you die.

39. There are several Illinois cases that demonstrate unchecked abuse by clergymen. For example, Father Kownacki was a clergyman in Illinois that, while never successfully prosecuted, has been the target of several civil suits over the years—many of which were unsuccessful. *See, e.g.,* Wisniewski v. Diocese of Belleville, 943 N.E.2d 43 (Ill. App. Ct. 2011) (following a case filed in the 2000s against Father Kownacki in which a document produced by the Church contained several instances of his abuse of minors across Illinois through the 1980s); *see also* Jesse Bogan, *Priest Abuse: No End in Sight for Damages Caused by Illinois Priest*, ST. LOUIS POST-DISPATCH (Oct. 19, 2011), stltoday.com/news/local/crime-and-courts/no-end-in-sight-for-damages-caused-by-illinois-priest/article_08609a17-4bb1-518c-af63-9a42fd036d36.html [<https://perma.cc/L8QC-E2PN>] (detailing Kownacki’s history of abuse as a member of the clergy in Illinois).

B. Discovery Rule

The discovery rule delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he was injured and that his injury was wrongfully caused.⁴⁰ Under this rule, victims in Illinois can toll the statute of limitations by alleging that they repressed the memory of their sexual abuse. However, the allegations of repressed memory must be pled with specificity.

For instance, in *Horn v. Goodman*, a plaintiff successfully alleged that, prior to turning eighteen, he repressed all memories of his sexual abuse between ages thirteen and fifteen.⁴¹ It was not until 2011 that he remembered his abuse, and he filed the next year.⁴² To offer proof of his repression, he offered evidence of a psychiatrist's diagnosis of childhood abuse amnesia that was linked to the priest who abused him.⁴³ The court distinguished this case, in which the victim suffered a full mental block, from *Softcheck v. Imesch*,⁴⁴ in which the victim only alleged that he was unaware that such sexual contact was wrong or injurious.⁴⁵ This comparison itself draws out a problem with the current state of the law: A child may not know that such misconduct is wrong, and even as the victim learns it is wrong as they grow up they may fail to confront the conduct for a multitude of reasons.

As successful as the victim in *Horn* was in the 2000s, the discovery rule fails to adequately protect older victims for two primary reasons. First, the discovery rule cannot defeat the statute of repose that bars claims from victims that turned thirty by 1994.⁴⁶ Second, the discovery rule was dramatically deflated for a period in Illinois precedent by the

40. See *Knox Coll. v. Celotex Corp.*, 430 N.E.2d 976, 980 (Ill. 1981) (distinguishing knowledge of an offense and knowledge of an injury accruing from said offense); but see *Wisniewski*, 943 N.E.2d at 70 (explaining that the statute of repose is not tolled by the discovery rule absent a claim of fraudulent concealment).

41. See generally *Horn v. Goodman*, 60 N.E.3d 922 (Ill. App. Ct. 2016).

42. See *id.* at 925 (discussing the plaintiff's recollection of abuse).

43. See *id.* at 927 ("The complaint lists the psychological disorders with which Horn was diagnosed by a psychiatrist, including childhood abuse amnesia, and alleges that they were caused by Goodman's abuse.").

44. See *Softcheck v. Imesch*, 855 N.E.2d 941, 947 (Ill. App. Ct. 2006) (citing *Clay v. Kuhl*, 727 N.E.2d 217, 217 (Ill. 2000)) (discussing the lack of a requirement that plaintiffs "must know the full extent of his or her injuries" before filing suit).

45. See *Horn*, 60 N.E.3d at 928 ("In contrast [to *Softcheck*], Horn alleged that he was unable to remember the sexual contact occurred. He cannot be charged with knowledge of something he did not remember happened.").

46. *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 70 (Ill. App. Ct. 2011) (citing *Goodman v. Harbor Mkt.*, 663 N.E.2d 13, 18 (Ill. App. Ct. 1995)) ("Statutes of repose do not incorporate the discovery rule and generally terminate claims regardless of a plaintiff's lack of knowledge of his or her cause of action.").

“sudden traumatic event” exception.⁴⁷ This exception essentially held that because of the intense physical nature of sexual assault, a victim would have to “reasonably know” that they were injured by the assault.⁴⁸ It was not until *Clay v. Kuhl* in 1998 that the Illinois Second District Appellate Court loosened the sudden traumatic event exception and expressed the view that the discovery rule should apply to actions involving childhood sexual abuse.⁴⁹ Even there the court still dismissed the victim’s claim on the grounds that failure to learn the “full extent” of the injuries caused by her childhood sexual abuse was insufficient to toll the statute of limitations via the discovery rule.⁵⁰

C. *Fraudulent Concealment*

As mentioned above, the only way for plaintiffs to defeat the statute of repose as an affirmative defense was to successfully allege fraudulent concealment. In this context, if a priest or the clergy as an organization were to fraudulently conceal information that would alert a plaintiff to his claim, “there would be an obvious and gross injustice in a rule that allows a defendant—particularly a defendant who maintains a special relationship with the plaintiff—to conceal the plaintiff’s cause of action and then benefit from the statute of repose.”⁵¹ Normally, if a defendant merely fails to report information to a plaintiff that would give rise to a cause of action, the claim has not been fraudulently concealed.⁵² Therefore, in instances where an employee of the clergy has knowledge that another employee is committing sexual misconduct of any degree, they are under no duty to report it.

The Illinois Legislature crafted an exception to this general rule. To adequately plead fraudulent concealment, a plaintiff must claim (1) that the defendant affirmatively acted or misrepresented information designed

47. See *M.E.H. v. L.H.*, 669 N.E.2d 1228, 1235 (Ill. App. Ct. 1996) (applying the sudden traumatic event exception to hold that the plaintiff’s injury accrued upon attaining majority).

48. See *Golla v. Gen. Motors Corp.*, 657 N.E.2d 894, 899 (Ill. 1995) (“The rationale supporting this rule is that the nature and circumstances surrounding the traumatic event are such that the injured party is thereby put on notice that actionable conduct might be involved.”).

49. See *Clay v. Kuhl*, 696 N.E.2d 1245, 1249–52 (Ill. App. Ct. 1998) (reconsidering its application of the sudden traumatic event exception in cases where the victim can successfully plead repressed memory).

50. *Id.* at 1251. On appeal to the Illinois Supreme Court, the opinion makes no express mention as to whether the court endorses the Second District’s view of the sudden traumatic event exception. See *Clay v. Kuhl*, 727 N.E.2d 217, 217 (Ill. 2000) (“We need not determine in this case whether the instances of childhood sexual abuse alleged here must be considered ‘sudden traumatic events’”).

51. *DeLuna v. Burciaga*, 857 N.E.2d 229, 242 (Ill. 2006).

52. See *Chi. Park Dist. v. Kenroy Inc.*, 402 N.E.2d 181, 185 (Ill. 1980) (first citing *Jackson v. Anderson*, 189 N.E. 924 (Ill. 1934); then citing *Harvey v. Harris Tr. & Savs. Bank*, 391 N.E.2d 461 (Ill. App. Ct. 1979); and then citing *Nogle v. Nogle*, 202 N.E.2d 683 (Ill. App. Ct. 1964)).

to prevent, and actually preventing, the plaintiff from discovering his claim; or (2) that the defendant did not “disclose all material facts concerning the existence of plaintiff’s cause of action against the defendant and there was a special relationship that existed between plaintiff and defendant whereby the plaintiff placed trust and confidence in defendant thereby placing defendant in a position of influence and superiority over plaintiff.”⁵³ The second option essentially creates a duty to report information that would give rise to a cause of action where the defendant has a special relationship to the plaintiff. Courts liken special relationships to fiduciary relationships and analyze them using the same framework.

Only where the victim and the defendant have a fiduciary relationship to one another will mere silence suffice as an affirmative, fraudulent act of concealment.⁵⁴ Illinois courts have not been unanimous in finding a fiduciary relationship between a parish and its parishioners.⁵⁵ While there are undoubtedly similarities between a fiduciary relationship and that of priest and parishioner,⁵⁶ recent precedent would suggest that courts apply fact-intensive inquiry to determine whether or not such a relationship exists.⁵⁷

Wisniewski v. Diocese of Belleville presents a victim-friendly example of the court’s application of the fraudulent concealment exception, but it is by no means the status quo result for victims pleading it. In *Wisniewski*, the victim was abused by his priest, Father Kownacki, in the 1970s and alleged that he did not discover his claim until 2002 following news stories surrounding the Boston scandals.⁵⁸ He presented evidence in

53. Such a finding must be made by clear and convincing evidence for the plaintiff to ultimately prevail. *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 73 (Ill. App. Ct. 2011).

54. See *Kenroy, Inc.*, 402 N.E.2d at 185 (“[T]he person occupying the relation of fiduciary or of confidence is under a duty to reveal the facts to the plaintiff . . . , and that his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation or act; and that mere silence on his part as to a cause of action . . . amounts to a fraudulent concealment.”).

55. Compare *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir. 1994) (declining to find the defendants, “spiritual and religious advisors” to the plaintiff, in the position of fiduciary “under the law of Illinois”), and *Amato v. Greenquist*, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997) (finding that several jurisdictions apply fiduciary duties to sexual relationships between clerics and counselees, but declining that such a fiduciary relationship exists under Illinois law), with *Wisniewski*, 943 N.E.2d at 77 (finding that such a fiduciary relationship existed based on a fact-intensive inquiry).

56. See *Amato*, 679 N.E.2d at 454 (“[W]e agree with the courts in [other] jurisdictions that the relationship between a cleric and parishioner reflects many aspects of a fiduciary one . . .”).

57. See *Wisniewski*, 943 N.E.2d at 77 (distinguishing other Illinois precedent that found no such fiduciary duty from the case at bar because said cases did not interpret a duty for the purpose of finding fraudulent concealment). Ultimately, the court determined that a fiduciary duty in this context exists if the plaintiff “placed his trust and confidence in the Diocese thereby placing the Diocese in a position of influence and superiority over him.” *Id.*

58. *Id.* at 70.

support of his claim that he repressed the memories, and also presented a church-produced document which traced the several instances of Kownacki's abuse to multiple victims across Illinois.⁵⁹

The court focused on the second prong. It noted that the plaintiff's family was very active in the church, the victim served as an altar boy, and he and his siblings were taught to obey agents of the Catholic Church.⁶⁰ The court found the evidence overwhelmingly established that the victim placed his trust and confidence in the Diocese and that the Diocese accepted, encouraged, and promoted it.⁶¹ The court further found that the Church's silence prevented him from discovering his injuries until late in life.⁶²

Despite Wisniewski's success, fraudulent concealment is a very high bar to prove. The plaintiff in *Wisniewski* met this standard with damning evidence presented in a document accounting the several instances of Father Kownacki's abuse in various churches around Illinois. Such a foolproof document might not exist in every case, especially in the case of older victims. If an institution thoroughly conceals the history of its members' abuse, then it will not be uncovered—no matter how fraudulent the concealment.

Unfortunately, many victims of sexual abuse in Illinois have claims that do not fall squarely into the discovery rule or fraudulent concealment exceptions. While recent amendments to the Child Sex Abuse Statute in Illinois show that it is attempting to remove impediments which would prevent victims of abuse to bringing their claims, there is still more work to do in reaching older victims with viable claims.

D. Other States

Several other states have faced the issue of retroactive application of these limitations statutes, some of which were able to overcome it. In recent years, three states—New York, New Jersey, and California—heavily amended their statutes of limitations for childhood sexual abuse. In contrast to Illinois, and prior to their amendment, these laws were self-proclaimed, woefully dated, and their amendments were supported by

59. *Id.* at 55–56 (discussing the existence of a report prepared by someone in the diocese cataloguing Kownacki's behavior).

60. *Id.* at 74–75.

61. *Id.* at 75 (“[T]he Diocese itself fostered, promoted, and encouraged this trusting relationship by urging its parishioners to trust their priests’ ‘knowledge, piety, prudence, experience, and general character.’”).

62. *Id.* at 79–80 (finding that a jury could have concluded that the evidence demonstrated fraudulent concealment by silence).

modern concerns, many of which were of equal concern to the Illinois General Assembly when it passing of the civil statute back in 2013.⁶³

New Jersey had the most out-of-date legislation at the time of its amendment, offering victims only a two-year statute of limitations, though it could be tolled by the discovery exception.⁶⁴ The new law, Senate Measure 477 (S477), allows victims of childhood sexual abuse to file a civil suit by the time they turn fifty-five, or with seven years of discovering an injury from their abuse.⁶⁵ Most notable of New Jersey's Act is that it increased the scope of potentially liable victims. Previously, victims were restricted from filing suit against nonprofit organizations and public entities.⁶⁶ Not only did S477 open such entities up to liability, but it opened them up to retroactive liability in cases of willful, wanton, or grossly negligent acts that resulted in childhood sexual abuse; and for acts of negligence in hiring, supervising, and retaining employees and agents that led to sexual abuse of minors.⁶⁷ S477 also provided for a general "look-back window" of two years, allowing for those whose claims would have been time-barred under previous legislation to bring suit against offenders.⁶⁸

Before New Jersey's amendments, however, New York was first of the three states to make its amendment through passage of the Child Victims Act.⁶⁹ The Act intended to "shift the significant and lasting costs of child sexual abuse to the responsible parties."⁷⁰ The statute of limitations originally restricted victims to bring suit by age twenty-three at the latest but was expanded to allow actions until the victim turned fifty-five.⁷¹ In

63. See H.R. TRAN., 2013 REG. SESS. NO. 55, at 20–21 (Ill. 2013) ("The reality is that it is difficult to determine when a victim may have discovered abuse and injury. Therefore, this Bill gives people impacted by childhood sexual abuse every opportunity to seek redress for the injuries they have suffered.")

64. N.J. STAT. ANN § 2A:14-2 (2019).

65. S.B. 477, 218th Leg., 2d Ann. Sess. (N.J. 2019).

66. See N.J. SENATE JUDICIARY COMM., S.B. NO. 477 REPORT, 218th Leg., 2d Ann. Sess., at § 4 (2019) ("The household limitation would be deleted by the bill, so that passive abuser liability could apply to any individual person, or private or public entity, who takes custody and control of children even on limited, temporary basis . . .").

67. *Id.* ("[A]s amended by the bill . . . organizational liability for an act of negligently hiring, supervising, or retaining a person resulting in abuse against a child could be applied retroactively in lawsuits filed under the new, extended statute of limitations period."). These identified tort claims are the exact same as those available to Illinois victims of childhood sexual abuse seeking to bring civil actions. See, e.g., *Doe v. Coe*, 135 N.E.3d 1, 12 (Ill. 2019) (explaining Illinois tort claims for childhood sexual abuse against public entities).

68. S.B. 477, 218th Leg., 2d Annual Sess. (N.J. 2019).

69. S.B. 2440, 242d Leg., Reg. Sess. (N.Y. 2019).

70. NEW YORK COMMITTEE REPORT ON THE CHILD VICTIMS ACT: S.B. 2440, 242d Leg., Reg. Sess. (N.Y. 2019), *text of the bill available at* <https://www.hbslaw.com/child-sexual-abuse/new-york-child-victims-act-ny-bill-s2440> [<https://perma.cc/2CWF-H226>].

71. N.Y. C.P.L.R. § 208 (McKinney 2019).

Section 2 of the Act, the legislature went on to craft a “look-back window” for victims whose claims were previously time-barred to file suit under the new expanded limitations. The window was set to last one year, starting six months after the Child Victims Act took effect.⁷² Meant to serve as a preparation period, the delay allows victims to build their cases prior to filing suit in the hope that it would expedite litigation.

Finally, California most recently passed Assembly Bill No. 218 on October 13, 2019.⁷³ The law went into effect on January 1, 2020. Under the law, victims of childhood sexual abuse may file civil claims in connection to that abuse until their fortieth birthday, or within three years of discovering their injuries were in connection to the abuse.⁷⁴ Like both New York and New Jersey, the law grants a look-back window allowing victims, regardless of age, to file suit until January 1, 2023.⁷⁵ The law then goes further and provides for treble damages against a defendant(s) who is found to have covered up the sexual abuse⁷⁶—essentially increased damages for fraudulent concealment.

California’s piecemeal progress towards expanding child victims’ rights to file their civil case has been a long and arduous road. In fact, two prior bills, Senate Bill 131 and Assembly Bill 3120, attempted to accomplish nearly identical goals as Assembly Bill 218 in 2013 and 2018 respectively.⁷⁷ Both were passed through the legislature but met their demise by veto from then-Governor Jerry Brown.⁷⁸ The Third Reading of Assembly Bill 218 appears to reveal why California’s path towards creating more liberal pleadings in this area has been so difficult. Powerful entities like private and public schools, religious institutions, insurance companies, and other organizations have opposed changes in this area of the law for decades.

All of the opponents raise the same basic concerns: it is very difficult to defend against old claims when records and witnesses may be unavailable, insurance may no longer be available, and the cost of defending these actions could be astronomical and could prevent the impacted entities from being able to support their main work.⁷⁹

However, the author of Assembly Bill 218, Assemblywoman Lorena Gonzalez, makes clear, “There should not be a reasonable expectation that if simply enough time passes, there will be no accountability for these

72. S.B. 2440, 242d Leg., Reg. Sess. (N.Y. 2019).

73. A.B. 218, Cal. 2019–2020 Reg. Sess. (Cal. 2019).

74. CAL. CIV. PROC. CODE § 340.1 (West 2020).

75. *Id.* § 340.1(q) (imposing a three-year window of retroactive application).

76. *Id.* § 340.1(b)(1).

77. *See generally* S.B. 131, 2013 Leg., Reg. Sess. (Cal. 2013); *see also* A.B. 3120, 2018 Leg., Reg. Sess. (Cal. 2018) (introducing reforms beyond S.B. 131, and nearly identical to A.B. 218).

78. S. RULES COMM., THIRD READING, S. 2019-218, Reg. Sess., at 5–6 (Cal. 2019).

79. ASSEMB., THIRD READING, Assemb. 2019-218, Reg. Sess., at 2 (Cal. 2019).

despicable past acts by individuals and entities. This bill ensures that “time’s up” for the perpetrators of childhood sexual assault, not for victims.”⁸⁰ This sentiment expressed by Gonzalez appears to resonate not only with California residents and politicians but also with other states and local governments around the nation.

Amongst each of the three most recent amendments to state legislation, the prevailing trend is clear: retroactive application of the updated statute of limitations is imperative to allow victims achieve even-handed application and address public policy concerns. Each state already had discovery and fraudulent concealment exceptions within their respective legislation, in fact they went so far as to expand access to damages for these exceptions in their new laws. However, the states’ assemblies clearly concluded that despite these exceptions, victims need more to access meaningful redress. Illinois should follow the same path.

II. DISCUSSION: CASE LAW BARRING RETROACTIVITY

This Part will explore the history of Illinois case law and how its interpretation of statutory retroactivity is rested on flawed precedent. As it moves forward, the Part will narrow its focus to recent Illinois Supreme Court cases on the question of retroactivity more generally, and finally hone in on retroactivity applied to childhood sexual abuse.

A. Ancient Origins

Illinois courts have shown reluctance to apply the updated statutes of limitations to childhood sexual abuse, citing case law that tracks back over one hundred years.⁸¹ A closer look at the referenced precedent shows an inconsistency of opinion between the state and federal supreme courts.

In *Campbell v. Holt*, decided in 1885, the United States Supreme Court addressed the retroactive application of legislation in the context of creditors seeking declaratory judgment against debtors.⁸² The debtor there asserted that he had a right to rely upon the previously enacted statute of limitations which would have barred the creditors action, but the Supreme Court rejected this contention.⁸³ In doing so, the Court found

80. *Id.*

81. *See Diocese of Dall. II*, 917 N.E.2d 475, 484 (Ill. 2009) (citing *Bd. of Educ. v. Blodgett*, 40 N.E.1025, 1026 (Ill. 1895)) (“[W]hen the bar of a statute of limitations has become complete by the running of the full statutory period, the right to plead the statute as a defense is a vested right, which cannot be destroyed by legislation . . .”).

82. *See Campbell v. Holt*, 115 U.S. 620, 620–21 (1885) (detailing facts of the case).

83. *See id.* at 622 (“The defendants . . . insisted that the bar of the statute, being complete and perfect, could not, as a defense, be taken away . . . and that to do so would violate that part of the Fourteenth Amendment to the Constitution of the United States which declares that no state shall ‘deprive any person of life, liberty, or property without due process of law.’”).

a distinction between traditional property rights versus the incorporeal right to a debt owed.⁸⁴ It noted that, in the context of a contract for payment in exchange for property, the “nature and character” of the contract never changed, and that the statute of limitations that controlled it was “a purely arbitrary creation of law[.]”⁸⁵ It went on to explain that “no right is destroyed when the law restores a remedy which had been lost.”⁸⁶

This opinion was 7-2, however, leaving a dissent penned by Justice Bradley and joined by Justice Harlan. It is this dissenting opinion that the Illinois Supreme Court endorsed ten years later in *Board of Education of Normal School District v. Blodgett*.⁸⁷ In *Blodgett*, the Illinois Supreme Court addressed the same defense addressed in *Campbell*, but in the context of the Illinois Constitution. It asked whether the statute of limitations as a defense became a vested right protected by the Illinois Due Process Clause in the context of a then-recently expanded limitations period that offered creditors on certain bonds a cause of action against public entities.⁸⁸ The court began with its own analysis, founded loosely in adverse possession theory of property law.⁸⁹ Under that theory, the court explained that the original right-holder to physical property becomes entirely divested of his right upon the possessor’s claim of right, effectively making the possessor the new and sole owner.⁹⁰ The court then extended this idea to other sorts of actions related to recovering real or personal property, money demands, or damages from torts.⁹¹

84. *See id.* at 623–24 (arguing that it may “very well be held that in an action to recover real or personal property” that a statute of limitations would act as a complete bar, but “that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground”).

85. *Id.* at 628.

86. *Id.*; *see also id.* (citing *Tioga R.R. v. Blossburg & C.R.R.*, 87 U.S. 137, 143–44 (1873)) (“The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power.”).

87. *Bd. of Educ. v. Blodgett*, 40 N.E. 1025, 1027–28 (Ill. 1895).

88. *Id.* at 1025–26.

89. *See id.* at 1026 (discussing vested title in the context of “property”). While the court insists that its understanding is “detached from tangible property,” its analysis makes no reference to how, if at all, it understands tangible property to be different from intangible property. *Id.* However, in citing to secondary sources, the court quotes language that hints the two are different: “Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify.” *Id.* (quoting THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 454 (6th ed. 1890)).

90. This seems to be, though unlabeled in the opinion, a description of adverse possession. *Id.*

91. *See id.* at 1027 (“[T]he bar of a statute of limitations as a defense . . . after the statute has run, is a vested right, and cannot be taken away by legislation . . . and that it is immaterial whether the action is for the recovery of real or personal property, or for the recovery of a money demand, or for the recovery of damages for a tort.” (citations omitted)).

The court next declined to extend the holding in *Campbell* to Illinois precedent, finding the dissent “most in consonance” with Illinois law.⁹² In doing so, the court declared that the right to a prosecution is equal to the right to a defense against it, expressly holding statutes of limitations in much higher regard than the federal majority had.⁹³ It directly quoted that “The words ‘life,’ ‘liberty,’ and ‘property’ are constitutional terms, and are to be taken in their broadest sense.”⁹⁴ The court clearly decided this case within the boundaries of the Illinois Constitution, but it borrowed a substantial portion of the reading and analysis from the Supreme Court’s analysis of the near-identical federal Due Process Clause.⁹⁵

B. Illinois Precedent for Retroactivity Generally

Despite the passing of 125 years, *Blodgett* maintains its vitality as the underpinning to Illinois courts’ understanding of retroactive application of law. However, in the past twenty-five years, Illinois courts went through a shift in its own understanding based on modern applications of retroactive amendments to legislation.⁹⁶ This back-and-forth in the state supreme court resulted in uncertainty as to the reach of retroactively-intended amendments, and, while left untouched since 2003, the court still has work to do.

The first case that the Illinois Supreme Court decided in this line of cases was *First of America Trust Co. v. Armstead*.⁹⁷ In *Armstead*, the plaintiff, title-holder to underground petroleum storage tanks, was inclined to register its out-of-operation tanks with the state’s fire marshal for limited benefits and compensation.⁹⁸ It applied for registration in March 1992, but was rejected based on an amendment, effective September 1992, that prohibited registration of out-of-operation tanks.⁹⁹ Turning to its analysis, the Illinois Supreme Court found that Illinois case law was relatively inconsistent as to retroactive application, and historically applied either the legislative intent approach, or the vested

92. *Id.*

93. *See id.* (quoting *Campbell v. Holt*, 115 U.S. 620, 631 (1885) (Bradley, J., dissenting)) (“Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate . . .”).

94. *Id.* (quoting *Campbell*, 115 U.S. at 630).

95. *See id.* at 1026–28 (quoting substantial portions of Justice Bradley’s *Campbell* dissent).

96. *See* Robert C. Feldmeier, *The Illinois Supreme Court’s Latest Last Word on Statutory Retroactivity*, 92 ILL. B. J., May 2004, at 260, 266 (“*Caveney* marks the third time in the last 10 years that the supreme court has adopted a new standard for determining when new laws apply retroactively.”).

97. *See generally* *First of Am. Tr. Co. v. Armstead*, 664 N.E.2d 36 (Ill. 1996).

98. *Id.* at 37.

99. *Id.* at 38.

rights approach.¹⁰⁰ In the legislative intent approach, the court would look to what the General Assembly intended on the face of the statute as to whether the law applied retroactively.¹⁰¹ Under the vested rights approach, however, the court would ignore the examination of legislative intent and apply the law as it existed at the time of appeal unless it were to interfere with some vested right attached through the Illinois Due Process Clause.¹⁰²

The *Armstead* court endorsed the vested rights approach, focusing entirely on what rights might be taken away from the litigants by application of the amended law and doing away with the legislative intent approach.¹⁰³ It found that a “vested right” is a tricky thing to define and settled on calling it “a complete and unconditional demand or exemption that may be equated with a property interest.”¹⁰⁴ Based on this definition, the court denied the plaintiff its registration. It found that the legislature had the duty to set the parameters for obtaining registration, and until granted such registration, the plaintiff had no vested right to the compensation and benefits that flowed therefrom.¹⁰⁵

Despite the court’s clear endorsement of the vested rights approach in *Armstead*, subsequent opinions leaned heavily on interpretations of legislative intent.¹⁰⁶ This inclination gave way to serious doubts raised in *Commonwealth Edison Co. v. Will County Collector*, just five years later.¹⁰⁷ There, the court all but overruled *Armstead*, and noted that the case provided no clarity to Illinois’ jurisprudence regarding retroactive application of statutory amendments. It opted to remedy the muddled area

100. *See id.* at 39 (“The principles applicable for determining whether a statutory amendment applies to an existing controversy on appeal have not been consistent stated. In numerous cases, this court has focused on determining legislative intent. . . . In yet other cases, this court has largely ignored the examination of legislative intent and simply applied a general rule providing that a court should apply the law as it exists at the time of the appeal.” (citations omitted)).

101. *See id.* (citing *People v. Fiorini*, 574 N.E.2d 612, 617 (Ill. 1991)) (“In order to divine legislative intent, this court has sometimes refused to look past the face of the statute.”).

102. *See id.* (quoting *Bates v. Bd. of Educ.*, 555 N.E.2d 1, 4 (Ill. 1990)) (“Where the legislature changes the law pending an appeal, the case must be disposed of by the reviewing court under the law as it then exists, not as it was when the judgment was entered in the lower court.”).

103. *See id.* (“Of these two approaches, the better approach is to apply the law that applies by its terms at the time of the appeal, unless doing so would interfere with a vested right.”).

104. *See id.* at 40 (citing *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1245 (Ill. 1994)).

105. *See id.* (citing *Envirite Corp. v. Ill. E.P.A.*, 632 N.E.2d 1035, 1037 (Ill. 1994)) (noting that “Plaintiff’s registration process was ongoing at the time of the amendment” and that “there is no vested right in the mere continuance of a law”).

106. *See Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 969 (Ill. 2001) (“Although *Armstead* adopted the vested rights approach to retroactivity, subsequent decisions from this court have continued to focus on legislative intent to resolve questions concerning the retroactive application of newly enacted legislation.”).

107. *Id.*

of law through adoption of the United States Supreme Court's *Landgraf* analysis.¹⁰⁸

In *Landgraf v. USI Film Products*, the Supreme Court crafted its own multi-step analysis to the issue of retroactive applications of statutory amendments, couched in the legislative intent approach, though it involved consideration of vested rights.¹⁰⁹ A court is to first determine whether the legislature clearly indicated the temporal reach of an amended statute.¹¹⁰ If so, that intent must be given effect to the extent it does not violate constitutional maxims.¹¹¹ If there is no clearly indicated intent in the amendment, the court must determine if the amendment applies retroactively by considering "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."¹¹² These latter considerations are founded in due process, which, the *Commonwealth Edison* court stated, is not simply a question of whether rights are or are not vested, rather, it requires a balance of the reasons for and against the application of the statute to the class of individuals to whom it will apply.¹¹³ The *Landgraf* Court states that if there is no legislative intent for retroactive application, but the statute were to have a retroactive impact, then the presumption against retroactive application is made.¹¹⁴ This presumption was raised in *Landgraf*, and that is where the Supreme Court ended its analysis as it was not rebutted by clear legislative intent.¹¹⁵

However, where "clear congressional intent" demonstrated a purposeful, retroactive application, the *Commonwealth Edison* court applied a fairness balancing test that asked if retroactive application

108. *See id.* at 972 ("We have carefully considered the principles discussed in *Landgraf* and conclude that the approach to retroactivity described in that opinion provides the appropriate means of determining when new legislation should be applied to existing controversies.").

109. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (setting forth the two-pronged test prior to the Court's analysis).

110. *Id.*

111. *See id.* ("[T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.").

112. *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 970-71 (Ill. 2001) (citing *Landgraf*, 511 U.S. at 273-74).

113. *See id.* at 976 (quoting *Moore v. Jackson Park Hosp.*, 447 N.E.2d 408, 416 (Ill. 1983) (Ryan, C.J., specially concurring)) ("The determination of whether the application of the statute unreasonably infringes upon the rights of those to whom it applies involves a balancing and discrimination between reasons for and against the application of the statute to this class of individuals.").

114. *See Landgraf*, 511 U.S. at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

115. *See id.* at 293 (Scalia, J., concurring) ("The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice . . .").

would actually violate due process.¹¹⁶ The court asked whether the retroactive application was “so harsh and oppressive as to transgress the constitutional limitation.”¹¹⁷ In making this determination, the court would consider factors such as the legislative purpose in enacting the amendment, the length of time in the period of retroactivity, and whether the party reasonably and detrimentally relied upon the law.¹¹⁸ This created a gray area between two extremes: retroactive application of law and violation of due process.

Only two years later, though, the Illinois Supreme Court made another shift away from settled precedent.¹¹⁹ In *Caveney v. Bower*, the court determined that section 4 of the Statute on Statutes prevented the full application of the *Landgraf* test, necessitating its stop at the first step every time.¹²⁰ Section 4, known as the general savings clause,¹²¹ acts as a legislative directive regarding the interpretation of prospective and retroactive application of Illinois law.¹²² The court had previously determined that the general savings clause could apply matters of procedural law retroactively, but that matters of substantive law could only apply prospectively.¹²³ This, paired with the *Landgraf* test, halted the analysis at the first step every time.¹²⁴

Consistent with *Caveney*, if the Illinois General Assembly passed a legislative amendment that contained its own unequivocal legislative intent, the intent would be effectuated so long as it did not violate constitutional principles. However, if the amendment was silent about retroactive application, the general savings clause would presume that it acted prospectively—thus effectuating legislative intent. Either way, the

116. See *Commonwealth Edison*, 749 N.E.2d at 974 (“A retroactive tax measure does not necessarily violate the due process provisions of either the Illinois or the Federal constitution.” (citations omitted)).

117. *Id.* (quoting *Gen. Tel. Co. v. Johnson*, 469 N.E.2d 1067, 1075 (Ill. 1984)).

118. See *id.* (including also a fourth factor “whether the taxpayer had adequate notice of the change in the law”). The fourth “notice” factor seems specifically applicable to taxpayers rather than litigants in general and was ignored by *Doe A. v. Diocese of Dallas* in its analysis of retroactive application. See *Doe A. v. Diocese of Dall.* (*Diocese of Dall. I.*), 885 N.E.2d 376, 381–86 (Ill. App. Ct. 2008).

119. See generally *Caveney v. Bower*, 797 N.E.2d 596 (Ill. 2003) (modifying the *Landgraf* test).

120. See *id.* at 602 (“Thus, section 4 represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not.”).

121. 5 ILL. COMP. STAT. 70/4 (2020).

122. The statute’s opening line puts it in no uncertain terms: “No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not . . .” *Id.*

123. See *Caveney*, 797 N.E.2d at 602 (citing *People v. Glisson*, 782 N.E.2d 251 (Ill. 2002)) (applying the Statute on Statutes as a limitation to retroactive application in the criminal context).

124. See *id.* at 603 (“Thus, for purposes of *Landgraf*’s first step, the legislature *always* will have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes.”).

enactment of Illinois laws and amendments necessarily entail legislative intent through an underlying presumption towards application prospectively.

Concurring in result, but dissenting in analysis, Justice Freeman found the curtailed *Landgraf* test to be at odds with jurisprudence.¹²⁵ He found a clear distinction between retroactive impact and impermissible retroactive impact.¹²⁶ He noted that each statute prescribes its own specific intent, and that to have a general savings clause as a default seems wholly inconsistent with a proper *Landgraf* analysis.¹²⁷

In the context of this article, the issue is implicated when a party attempts to apply the *Landgraf* test to a statute that would apply an amendment to statutes of limitations or repose to revive expired claims.¹²⁸

C. Retroactivity in Context of Childhood Sexual Abuse

Currently, the law in Illinois bars childhood sexual abuse victims whose claims are time-barred from seeking damages through reliance on the 2014 enactment that struck down the statute of limitations.¹²⁹ This ban was first specifically identified in *M.E.H. v. L.H.* in 1997, prior to *Caveney*. The court there, in the wake of the *Armstead* opinion, demonstrated the effect of the twelve-year period of repose barring the claims of two plaintiffs. The plaintiffs, forty-four and forty-five years old, brought suit in 1995, the year after the repose period was eliminated, and attempted to sue their parents for childhood sexual abuse-related claims.¹³⁰ In barring their claims, the state supreme court held, citing to *Blodgett*, that the time-barred claims could not be revived for due process concerns.¹³¹ It stated that the rights to a defense based on the expiration

125. *See id.* at 606 (Freeman, J., specially concurring) (finding the inquiry into legislative intent different from the “second step of the analysis, which is whether the statute will have an impermissible retroactive impact or effect on past conduct”).

126. *See id.* (“I must point out that just because a newly enacted statute might reach back to antecedent events does not mean that the statute is impermissibly retroactive.”).

127. *See id.* at 608 (“In fact, my independent research has failed to unearth a single case in which a savings statute such as section 4 has been used in the manner advanced by the court today.”); *see also* *INS v. St. Cyr*, 533 U.S. 289, 317–20 (2001) (engaging in a full *Landgraf* analysis despite the existence of a “federal general savings statute”).

128. *See, e.g., Diocese of Dall. II*, 917 N.E.2d 475 (Ill. 2009) (declining to apply the second prong of *Landgraf*).

129. *See* 735 ILL. COMP. STAT. 5/13-202.2(f) (2019) (allowing “at any time” a suit based on childhood sexual abuse except for those which are not valid at the effective date of the statute).

130. *M.E.H. v. L.H.*, 685 N.E.2d 335, 337 (Ill. 1997).

131. *See id.* at 339 (citing *Bd. of Educ. v. Blodgett*, 40 N.E. 1025 (Ill. 1895)) (“More than a hundred years ago, our court held that once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action. That right cannot be taken away by the legislature without offending the due process protections of our state’s constitution.”).

of the statute of repose were just as strong as the plaintiff's rights to bring the suit itself.¹³² The court also rejected the alternative arguments that fairness, equity, and public policy should supersede the defendant's concern to a right to a statutory defense.¹³³

The Illinois Appellate Court for the Fifth District took issue with this holding ten years later,¹³⁴ following the enactment of several amendments that enlarged the periods of limitations against survivors of childhood sexual abuse.¹³⁵ *In Doe A. v. Diocese of Dallas*, the Fifth District set out to determine whether the two-year statute of limitations or the twelve-year statute of repose applied to the victim of childhood sexual abuse that turned eighteen in 1988.¹³⁶ The decision was rendered in 2008, so the court relied on the *Landgraf* test. However, after defining the test the court went on to endorse a *full* application of the test, holding that the Illinois Supreme Court in *Commonwealth Edison* expressly rejected the application of the *Landgraf* test without use of the balancing approach in the second step.¹³⁷

Based on this finding, the Fifth District began its analysis by noting the then-current statute of limitations for childhood sexual abuse, allowing victims ten years to file suit or two years upon discovery of injury, was meant to apply retroactively.¹³⁸ Its next course of action was to determine whether retroactive application would violate due process.

The court first considered the General Assembly's motive for enacting the amendment. It found that all three amendments made between 1994 and 2003 were motivated by the increased awareness that childhood sexual abuse victims often suffered long-repressed memories.¹³⁹ It noted that the legislature saw a deficiency in its previous statutes, and its demonstrated effort to cure that deficiency weights in favor of a

132. *See id.* ("Although the present matter involves a statute of repose rather than a statute of limitations, there is no basis for applying a different rule.")

133. *See id.* at 340 ("They argue that fairness, equity, and public policy demand that L.H. not be permitted to shield himself from liability based on a statutory provision that was in effect for only a short time . . .").

134. *Diocese of Dall. I*, 885 N.E.2d 376, 376 (Ill. App. Ct. 2008).

135. *See supra* note 21 and accompanying text (detailing the various amendments to section 5/13-202.2).

136. *See Diocese of Dall. I*, 885 N.E.2d at 381 (detailing the factual background).

137. *See id.* at 382 (quoting *Galloway v. Diocese of Springfield in Ill.*, 857 N.E.2d 737, 741 (Ill. App. Ct. 2006) (Chapman, J., dissenting)) ("The second step of this inquiry is essentially the same as the vested rights approach to retroactivity. . . . The vested rights approach utilized before *Commonwealth Edison Co.* remains relevant to our consideration . . .").

138. *See id.* at 384 (finding that the statute "evinces a clear legislative intent" to apply retroactively).

139. *See id.* at 385 (citing *Pedigo v. Pedigo*, 686 N.E.2d 1180, 1185 (Ill. App. Ct. 1997)) ("All three amendments the legislature made to the statute were motivated by an increasing awareness of the fact that the type of abuse alleged by the plaintiff is by its very nature subject to long-repressed memories.").

retroactive application.¹⁴⁰ The court next examined the period which retroactive application would cover, noting that it would be thirteen-and-a-half-years—a long time which weighed against retroactive application.¹⁴¹ It finally considered detrimental reliance, the final consideration of the *Landgraf* balance. The Diocese contended that the passage of time, more than twenty-two years “based upon a ‘single 15-minute incident’” would subject the defendants to substantial prejudice.¹⁴² The court, however, rejected the notion that defendants could have detrimentally relied on the statute of limitations, stating that difficulties that may exist in defending against an action like the plaintiff’s do not come from retroactive application of amendments, but instead from the legislature’s judgment to place this burden on the defendants.¹⁴³ Essentially, it held that the legislature made this decision for the express purpose of expanding these claims in favor of victims, and this exact difficulty will exist for defendants against victims of abuse at any point in the future now that the statute of limitations is so dramatically expanded. The court resolved to say that its balance of fairness and reasoning resulted in a finding that retroactive application of the amendment was proper.¹⁴⁴

On appeal to the Illinois Supreme Court, however, the defendants carried the day. The court agreed with the Fifth District in stating that the legislature intended the amendment to apply retroactively; however, it departed from the lower court and rested on the *Caveney* rationale which found no reason to apply the second step of the *Landgraf* test.¹⁴⁵ It then upheld the outcome of *M.E.H. v. L.H.*, that the cause of action was already time-barred under the prior versions of the limitations period, and therefore the 2003 amendment could not revive it.¹⁴⁶ In a crucial footnote, the court swept under the rug its reasoning for not applying the second-

140. *See id.* (citing *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 975 (Ill. 2001)) (“That desire to fix the problems inherent in a previous version of a statute weighs in favor of a retroactive application.”).

141. *See id.* (citing *Commonwealth Edison*, 749 N.E.2d at 975) (noting that lengthy periods of retroactivity weigh against retroactive application).

142. *Id.*

143. *See id.* (discussing the realities of evidentiary problems such as expired evidence—and witnesses—but citing the legislature’s intent that placing the burden on defendants is sufficient to shift these problems out of consideration).

144. *See id.* at 385–86 (citing *Commonwealth Edison*, 749 N.E.2d at 976) (“In balancing fairness considerations and the reasons for and against the retroactive application of the statutory change, we conclude that the retroactive application does not unreasonably infringe on any due process right.”).

145. *See Diocese of Dall. II*, 917 N.E.2d 475, 483 (Ill. 2009) (“[I]n light of section 4 [of the Statute on Statutes], Illinois courts need never go beyond the threshold step of the *Landgraf* test.”).

146. *See id.* at 485 (“Under the line of authorities including *M.E.H. v. L.H.* . . . , the version of section 13-202.2 as amended in 2003 . . . therefore could not be applied to revive plaintiff’s claims.”).

step of the *Landgraf* test—it was unnecessary based on the previously-adjudicated finding that the defense of an expired limitations period is a vested right.¹⁴⁷

III. ANALYSIS

At this point in Illinois jurisprudence, the Illinois Supreme Court, and several appellate districts,¹⁴⁸ have resigned to the view that the expiration of the statute of limitations and/or repose results in an affirmative defense to defendants that is insulated from retroactive legislation by the Illinois Constitution's Due Process Clause. This section will analyze first why there is a legitimate question regarding whether or not the expiration of a statute of limitations creates such a vested right in a defendant. It will challenge the general understanding of why the expiration of the statutory limitations and repose periods create vested rights, and why those underpinnings are inapplicable in the context of limitations statutes relating to childhood sexual abuse actions. Finally, it will explore the understanding of due process in other states and how they came to different results than Illinois.

A. *What Else is Landgraf for?*

As explained, Illinois precedent surrounding retroactivity was less than certain in the late 1990s as the Illinois Supreme Court alternated between the legislative intent and vested rights approaches. *Commonwealth Edison* only momentarily established clarity in the short period before *Caveney* curtailed the former holding, effectively cutting the *Landgraf* analysis off at the legislative intent prong. In the context of the childhood sexual abuse cases, *Caveney* was applied in *Doe v. Diocese of Dallas II* and confirmed the retroactive bar to the expanded statutes of limitations.

Prior to the supreme court's review, however, the Fifth District managed to lodge a persuasive argument for retroactive application of the amended statute. The Fifth District's interpretation of retroactivity precedent in *Doe A. v. Diocese of Dallas I* relied on the original adoption of the *Landgraf* test in *Commonwealth Edison*, which it interpreted to "mandate" the full *Landgraf* test.¹⁴⁹ In doing so, it noted that previously-adjudicated "vested rights" are relevant to the inquiry of whether due

147. See *id.* at 486 n.3 (declining to engage in an analysis of whether due process would consider the right to an affirmative defense in the expired statute of limitations because "[c]ase law already tells us what the answer must be. Under *M.E.H.* and the cases which preceded it, once the time has passed in which a claim may be asserted, due process prohibits legislative action that would resuscitate it.").

148. Including the Fifth District despite its non-unanimity between *Galloway* and *Diocese of Dallas*.

149. See *Diocese of Dall. I.*, 885 N.E.2d at 382 (referencing the "balancing approach mandated by *Landgraf* and *Commonwealth Edison Co*").

process is offended, but that such a determination is not decisive.¹⁵⁰ Instead, upon a finding that a statutory amendment would offend due process, “the court must go further in its analysis and determine if the retroactive application *unreasonably* infringes on the rights implicated.”¹⁵¹ Continuing in this analysis, the court would base its “reasonableness” inquiry in the balancing test set forth in *Landgraf*.¹⁵²

This conclusion is in consonance with *Commonwealth Edison*. It advocates for a thorough examination of what is at the core of a “vested right,” ignoring those rights that were previously “labeled ‘vested’ or ‘non vested.’”¹⁵³ The court argued that such rights were not decisive in jurisprudence because they were yet to be tested under the second prong of the *Landgraf* test¹⁵⁴—a framework that was designed for just such a determination. It maintains and values previously-adjudicated vested rights but subjects them to updated constitutional standards. Among the several cases it cited to, the court specifically referenced *M.E.H. v. L.H.*, questioning the vitality of the vested-right therein without meaningful examination per *Landgraf*.¹⁵⁵ The court pointed to the fact that previously adjudicated vested rights were determined under various formulations due to Illinois courts’ inconsistent stance on retroactive application.¹⁵⁶

150. See *id.* (quoting *Galloway v. Diocese of Springfield in Ill.*, 857 N.E.2d 737, 741 (Ill. App. Ct. 2006) (Chapman, J., dissenting)) (“The retroactivity cases that predate the supreme court’s decision in *Commonwealth Edison Co.* are thus still relevant.”).

151. *Id.*

152. See *id.* (noting that other Illinois courts “failed to utilize the balancing test mandated by *Landgraf* and *Commonwealth Edison Co.*”); see, e.g., *Henrich v. Libertyville High Sch.*, 712 N.E.2d 298, 310 (Ill. 1998) (“It is settled that where the legislature changes the law pending an appeal, a reviewing court should simply apply the law as it exists at the time of the appeal, unless doing so would interfere with a vested right.”); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997) (“More than a hundred years ago, our court held that once a statute of limitations has expired, the defendant has a vested right to invoke the bar of the limitations period as a defense to a cause of action.”); *D.P. v. M.J.O.*, 640 N.E.2d 1323, 1328 (Ill. App. Ct. 1994) (“In Illinois, as in the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute has run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action.”).

153. See *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 976 (Ill. 2001) (quoting *In re Marriage of Semmler*, 481 N.E.2d 716 (1985)) (“In assessing whether the application of a new statutory amendment to an existing controversy violates due process, the question is not simply whether the ‘rights’ allegedly impaired are [labeled] ‘vested’ or ‘non-vested.’” (quotations omitted) (alterations in original)).

154. See *Diocese of Dall. I*, 885 N.E.2d at 383 (citing *Commonwealth Edison*, 749 N.E.2d at 976) (“Concluding the analysis without using the balancing test is an approach expressly rejected by the supreme court.”).

155. *Id.* at 382–83 (citing *M.E.H.*, 685 N.E.2d at 339).

156. See *id.* (citing *Commonwealth Edison*, 749 N.E.2d at 971) (“In shifting to the legislative intent approach, courts have become more deferential to legislative determinations that the benefits of a retroactive application of a statute outweigh these concerns.”).

After a full analysis, the court found the defendants had no vested rights in their defenses.¹⁵⁷

The court closed its opinion by noting a lack of unanimity across all Illinois Courts and even its own District.¹⁵⁸ It specifically referenced *Galloway v. Diocese of Springfield in Illinois*,¹⁵⁹ a case which upheld *M.E.H.*'s determination that the childhood sexual abuse statutes created vested rights in defendants. The distinction between *Galloway* and *Doe v. Diocese of Dallas I* rests in each courts' interpretation of the deference that should be afforded to previously-adjudicated vested rights.¹⁶⁰ *Galloway* gave much stronger deference to the *M.E.H.* court's determination that the statute created an affirmative defense such that the court declined to engage in the fairness inquiry. This is inconsistent with a full *Landgraf* analysis.

Landgraf was not adopted for only its first prong—it was adopted to resolve the tension between inconsistent opinions and apply a unified standard.¹⁶¹ On several occasions throughout the *Commonwealth Edison* opinion, the court references former opinions that confused precedent, but declined to overrule them to the extent that they informed the court moving forward. For instance, it examined *Heinrich v. Libertyville High School* and admitted that its relevance extended “insofar as it defines those interests that are protected from legislative interference,” but the court did not take the vested-right found in *Heinrich* to supersede its own analysis under *Landgraf*.¹⁶² The court rejected the idea that a former decision's “label” was sufficient and instead found that a careful balance founded between the fairness and discrimination of the retroactive application was important to determine “whether the application of the statute unreasonably infringes upon the rights of those to whom it applies”¹⁶³ Without disturbing the findings made in *Heinrich*, the

157. An interesting note is that the court here made no reference to the *Caveney* opinion. *See generally id.* It clearly shared the opinion of Justice Freeman (and the authors) that the legislative intent prong of *Landgraf* does not satisfy the latter prong of whether the amendment violates due process—regardless of section 4 of the Statute on Statutes.

158. *See id.* at 383–86 (detailing the full analysis and conclusion).

159. *See generally* *Galloway v. Diocese of Springfield in Ill.*, 857 N.E.2d 737 (Ill. App. Ct. 2006).

160. *Compare Galloway*, 857 N.E.2d at 739–40 (finding that “*M.E.H.* is still good law, and we are compelled to abide by it” in concluding that the vested right has been predetermined), *with Diocese of Dall. I*, 885 N.E.2d at 383 (“We conclude that we must reconsider the retroactivity of the 1993 amendment under the principles announced in *Commonwealth Edison Co.*”).

161. *See Commonwealth Edison*, 749 N.E.2d at 972 (“We further observe that the *Landgraf* test adequately resolves the ‘tension’ reflected in our case law in decisions such as *Armstead* . . . we hereby adopt the approach to retroactivity set forth in *Landgraf*.”).

162. *Id.* at 976.

163. *Id.* (quoting *Moore v. Jackson Park Hosp.*, 447 N.E.2d 408, 416 (Ill. 1983) (Ryan, C.J., specially concurring)).

court noted that the facts between that case and the one at bar were distinguishable and supported its own analysis into whether its ultimate finding would unreasonably infringe upon due process.

B. Varying Degrees of Vested Rights

In addition to the court's treatment of the *Landgraf* test in *Commonwealth Edison*, the origins of Illinois courts' determination that an expired statute of limitations creates a vested right in a defendant highlights a distinction between this traditional determination and how it applies to the childhood sexual abuse limitations statute.

The *Blodgett* opinion was founded almost entirely in an examination of theories of property law; with a subsequent reliance on Justice Story's dissent in *Campbell v. Holt*.¹⁶⁴ It examined the understanding of property rights in tangible things and real property, and then, without analysis, tied the idea of rights and title in these tangible things to incorporeal rights such as "the recovery of damages for a tort."¹⁶⁵ The list of differences between these theories—that of adverse possession and the idea that a sex-offender has a right to avoid suit after a pre-determined length of time—is endless and not worthy of protracted analysis.

The Supreme Court's opinion recognizes such a distinction. As *Campbell* found, there should be no right in a debtor to rely upon an expired statutory period as a defense against the creditor.¹⁶⁶ There, through examination of contract law, the Court denied this sort of defense, belittling its foundation by calling statutes of limitations "purely arbitrary creation[s] of the law."¹⁶⁷ It went on to determine what exactly a vested right was in its analysis that draws several parallels to the *Commonwealth Edison* and *Landgraf* opinions.

In neither the federal nor Illinois constitutions does the phrase "vested right" appear—the term is entirely a creature of common law.¹⁶⁸ Neither constitution makes "an act of state legislation void merely because it has some retrospective operation."¹⁶⁹ *Commonwealth Edison* is definitive

164. See generally *Bd. of Educ. v. Blodgett*, 40 N.E. 1025 (Ill. 1895).

165. *Id.* at 1027.

166. See *Campbell v. Holt*, 115 U.S. 620, 629 (1885) ("We can understand a right to enforce the payment of a lawful debt. . . . But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations.").

167. *Id.* at 628.

168. See *id.* ("But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.").

169. *Chase Sec. Corp v. Donaldson*, 325 U.S. 304, 315 (1945). In a reevaluation of *Campbell*, the Supreme Court upheld its precedent and has relied upon it without reconsideration since. *Id.*

proof of that. The Court advises that while a “vested right” is understood in a general sense, one must “get beyond” this general understanding and describe them “more exact[ly]” in a given case.¹⁷⁰ There, it did not make logical sense to apply a “vested right” against a creditor where a debtor failed to pay its debt on an otherwise valid contract. To circumvent this contract with something like a limitations period would effectively take “arbitrary enactments” of public policy and create a right in the lapse of time in favor of the debtor and to the detriment of the creditor—stripping away the creditor’s rights.

This discussion, over one hundred years prior to *Landgraf*, is consistent with the balancing test described in the second prong of the test. It considers not the general idea of applying statutes of limitations retroactively, but the application of a specific statute retroactively.¹⁷¹ To over-inclusively apply a bar to retroactive application of statutes of limitations on the basis of its effect in a certain area of law, like adverse possession, will unevenly affect other areas of law, like limitations on childhood sexual abuse, that are founded in entirely different public needs. In some instances “no right is destroyed when the law restores a remedy which has been lost,” where in others due process might be violated and a vested right would be destroyed.¹⁷²

This is all to say that there is room for interpretation of a given statute, and there is a method for interpretation prescribed by *Landgraf* through *Commonwealth Edison*. While the holding in *M.E.H.* remains valid in that its holding is *informative* of what does and does not constitute a vested right in the context of childhood sexual abuse statutes of limitations, it was not adequately tested by the Illinois-endorsed *Landgraf* test, nor is it representative of a thorough analysis of the current statute.

170. See *Campbell*, 115 U.S. at 628 (finding that the bare term “vested right” is not understood to mean “that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case”).

171. Throughout the entire discussion of *Landgraf* in *Commonwealth Edison*, the court references, singularly, “an amended statute” in the context of its analysis. *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 971 (Ill. 2001). At no point does the court suggest that concepts previously tested in different statutes or statutory frameworks are decisive in applying a similar, or even exact concept, in the context of a different statute. Therefore, it makes little sense to say that the affirmative defense to a statute of limitations expiration in one statutory framework applies to every such statutory framework to create a vested right. The legislature is more complex in its ambitions and so the intent behind the statute of limitations in the context of childhood sexual abuse is vastly different than intent behind limitations in the context of, for example, tax-break registration periods for underground fuel tanks.

172. *Campbell*, 115 U.S. at 628; see also *Donaldson*, 325 U.S. at 315–16 (“[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.”).

C. Application of Landgraf

An actual application of *Landgraf*'s second-prong only confirms the need for a second look at *M.E.H.*'s conclusion that the statutes' expirations create vested rights.¹⁷³ In the instances where the second prong has been applied, even though overturned or disagreed with by the majority, courts have convincingly found in favor of plaintiffs and against a declaration that the statutes would create a vested right. This outcome is even more convincing when it is applied to the current statute which eliminated the statute of limitations in 2014.

As *Commonwealth Edison* dictated, after finding that the plain and unambiguous legislative text commands retroactive application, it will be effectuated absent constitutional violations.¹⁷⁴ To determine whether a retroactive application is "so harsh and oppressive as to transgress the constitutional limitation," the court will consider the legislative purpose behind the statute,¹⁷⁵ the length of the period of retroactivity,¹⁷⁶ and whether the opposing party reasonably and detrimentally relied on the prior law.¹⁷⁷

The legislative purpose behind the childhood sexual abuse statute of limitations is informed by the last three decades of reform. Ever since the statute of repose was abolished, the legislature has significantly expanded the statute of limitations and discovery exception periods every time it went to amend it.¹⁷⁸ Each amendment was made with the understanding that these particular injuries are unique in that they subject the plaintiff to long-repressed memories.¹⁷⁹ Each amendment has made it easier to file a claim on this basis, which demonstrates an intent to fix a problem in

173. For a complete example in the context of a previous amendment to the civil statute of limitations in the context of childhood sexual abuse, see *Diocese of Dall. I*, 885 N.E.2d 376, 384–86 (Ill. App. Ct. 2008).

174. See *Commonwealth Edison*, 749 N.E.2d at 971 ("[I]f the legislature has clearly indicated what the temporal reach of an amended statute should be, then, absent a constitutional prohibition, that expression of legislative intent must be given effect.>").

175. See *id.* at 974 (first citing *United States v. Carlton*, 512 U.S. 26, 32 (1994); and then citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266–67 (1994)) (noting the *Landgraf* court's acknowledgment that legislative purpose is relevant to retroactive legislation because the legislature may use retroactive legislation retributively against unpopular groups or individuals).

176. See *id.* (citing *Carlton*, 512 U.S. at 32–33) (explaining that a retroactive measure does not necessarily violate the due process provisions of the Illinois or United States Constitutions but rather that a court must consider the nature of the measure).

177. See *id.* (citing *Gen. Tel. Co. v. Johnson*, 469 N.E.2d 1067, 1075 (Ill. 1984)) (explaining that the reasonableness of a retroactive measure depends on various circumstances).

178. See *supra* note 21 and accompanying text (detailing the various amendments to section 5/13-202.2).

179. See *Diocese of Dall. I*, 885 N.E.2d 376, 385 (Ill. App. Ct. 2008) (citing *Pedigo v. Pedigo*, 686 N.E.2d 1180, 1185 (Ill. App. Ct. 1997)) ("All three amendments the legislature made to the statute were motivated by an increasing awareness of the fact that the type of abuse alleged by the plaintiff is by its very nature subject to long-repressed memories.>").

previous versions of the statute—a factor that weighs in favor of retroactive application.¹⁸⁰

The period of retroactivity is uncertain in this instance, as this analysis is not based off of a particular pattern of facts.¹⁸¹ However, even if the fact pattern uncovered a fifty-year window of retroactivity, a period that would ordinarily weigh heavily against retroactive application, the current state of the law undercuts the weight of such a long retroactivity period. In all cases moving forward, the length of time passed since the injury is entirely irrelevant because there is no statute of limitations to apply.¹⁸² Long periods of retroactivity weigh against application because of common-sense reasons like difficulty in obtaining evidence, contacting relevant persons, detrimental reliance by opposing parties,¹⁸³ and other practical requirements of informing a fair trial.¹⁸⁴ These are logical considerations in barring retroactive claims of fifty years in normal circumstances, but because the legislature eliminated any temporal bar on claims moving forward, these are issues that can and will be faced in the future with the legislature's express blessing.¹⁸⁵ The legislature has made the affirmative decision to disregard the practical realities involved in childhood sexual abuse survivors bringing claims against their abusers because they may not confront their injuries themselves until much later in life. To prevent those who suffered abuse in the 1970s–1980s from bringing a claim today would be no different than barring someone who suffered abuse in the 2000s–2010s from bringing a claim in 2050. This arbitrary result should hold no weight against retroactive application.

180. See *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 975 (Ill. 2001) (approving the legislative motive to correct previously existing law).

181. Though, normally, a lengthy period of retroactivity weighs against retroactive application. *Id.*

182. See *Diocese of Dall. I.*, 885 N.E.2d at 385 (discussing the legislature's conscious choices to lengthen statutory limitations periods which would naturally impose burdens on defendants seeking to defend against causes of action based on older events).

183. This factor will be addressed more thoroughly below. See *infra* notes 188–90 and accompanying text.

184. See *Chase Sec. Corp v. Donaldson*, 325 U.S. 304, 314 (1945) (“Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles.”).

185. See *id.* (citing *Order of R.R. Tels. V. Ry. Express Agency*, 321 U.S. 342, 349 (1944)) (“They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.”). The fact that the legislature has eliminated such statutes moving forward means that these realities can and will be faced by courts and defendants. See 735 ILL. COMP. STAT. 5/13-202.2(f) (2019) (declaring that “an action for damages based on childhood sexual abuse may be commenced at any time”). This underlying rationale, ignored by the legislature, is the same rationale that defends against expired claims. If the legislature is numbed to these arguments, why are they still applicable retroactively, despite that the legislature made this amendment to then-valid claims based on actions years in advance of the amendments?

Finally, it makes little sense to allege that defendants in such an action could have detrimentally relied upon the statute of limitations expiration for several reasons. First, under the constantly amended and changing statutes in the last three decades, it would be difficult to rely upon any one statute successfully for any defendant. Even if a defendant guessed successfully and relied on one of the amendments, then, also successfully, waited-out his period of limitations, the results are wholly arbitrary. Fifth District Justice Chapman compellingly demonstrated this through her own example. In her dissent in *Galloway*, she found that the defendant could not have detrimentally relied upon the statute of repose when he committed the abuse because it was not yet in existence.¹⁸⁶ The defendant only happened to fall into the only three-year window in which the statute of repose existed, and lucked out with a foolproof defense before it was eliminated in 1994. To demonstrate the illogical effect, she noted that were the plaintiff born in 1964, she would have turned thirty after the statute of repose was eliminated and the claim would never have been barred.¹⁸⁷

Justice Chapman also recognized that there are two sides to the coin in measuring reliance on the statutes of repose and limitations.¹⁸⁸ Clearly, the legislature sought to amend its own actions by expanding the statutes of limitations for childhood sexual abuse because it sought to offer plaintiffs a meaningful opportunity to bring suit. To limit certain plaintiffs, especially those that were exposed to the two-year limitations period or twelve-year repose period, is harsh when compared to plaintiffs who have faced lesser to zero limits upon bringing suit.¹⁸⁹ A defendant's claim to detrimental reliance, especially reliance on such a constantly-shifting statutory schema, can have no heavier weight than a plaintiff's interest in pursuing his or her claim.¹⁹⁰

186. *See Galloway v. Diocese of Springfield in Ill.*, 857 N.E.2d 737, 743 (Ill. App. Ct. 2006) (Chapman, J., dissenting) ("The events at issue occurred decades before the statute of repose was enacted.")

187. *See id.* (detailing her example and concluding that the "difficulties flow, rather, from the legislature's judgment that placing this burden on defendants is an acceptable price to pay for tailoring procedural limitations to provide victims of childhood sexual abuse a reasonable opportunity to seek redress").

188. *See id.* ("The retroactive application of the statute of repose interferes with the plaintiff's interest in pursuing a cause of action against the defendants, just as a retroactive application of the legislation removing the statute of repose interferes with the defendants' interest in an absolute defense.")

189. *See id.* (noting that courts have previously found this statute of repose included intent to be applied retroactively); *see, e.g., M.E.H. v. L.H.*, 685 N.E.2d 335, 340 (Ill. 1997) (noting that legislative intent when enacting the repose period informs what is a reasonable time for filing suit); *Phillips v. Johnson*, 599 N.E.2d 4, 7-8 (Ill. App. Ct. 1992) (explaining that concepts of justice, fairness, and equity weigh for or against retroactive application of a statute).

190. *See Galloway*, 857 N.E.2d at 743 (Chapman, J., dissenting) ("In other words, the

In sum, there is value in the independent analysis of retroactive application in the context of a given statute of limitations. Under Illinois courts' current treatment of this issue, all statutes of limitation are similar in that they create a vested right in defendants when the statute expires. However, were courts to actually embark on the full *Landgraf* analysis mandated by *Commonwealth Edison*, it would easily conclude that the current legislation weighs heavily in favor of retroactive application of the statute of limitations, opening the courts evenly to all afflicted by injuries related to childhood sexual abuse.

IV. OTHER STATE COURT TREATMENT AND PUBLIC POLICY

This Part will briefly cover other states' treatments of the retroactivity issue, as well as public policy. The brevity of these points is not meant to belittle their magnitude; rather, it is to avoid belaboring them for two reasons: (1) other state constitutional law is different from Illinois, despite the several similarities, and (2) the public policy considerations have been discussed to great extent already in this article and are mostly obvious.

A. State Treatments

To the extent that one is skeptical that the Illinois Supreme Court would overturn its unequivocal statement on retroactive application, one might consider the actions of other states' high courts. An exhaustive analysis by the Connecticut Supreme Court provides a strong example of its own state's civil statute of limitations for childhood sexual abuse. In *Doe v. Hartford Roman Catholic Diocesan Corp.*, the court recognized that retroactive application of amended statutes was not unanimously practiced across all states since *Campbell*.¹⁹¹ In fact, it noted that among the fifty states, forty-four of them considered the issue of whether an extended statute of limitations could constitutionally apply retroactively.¹⁹² Of those forty-four states, eighteen follow the federal approach announced in *Campbell*—though Connecticut would become the nineteenth by then end of the opinion.¹⁹³

difficulties inherent in defending an action such as the plaintiff's do not stem from a retroactive application of the statute itself.”).

191. See *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 508–14 (Conn. 2015) (mentioning and citing to forty-four states which have analyzed *Campbell* in the context of their own state constitutions).

192. *Id.*

193. See *id.* at 513–14 (first citing *Campbell v. Holt*, 115 U.S. 620 (1885); and then citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945)) (“The decisions that follow the federal approach embodied in *Campbell v. Holt* . . . and *Chase Securities Corp. v. Donaldson* . . . are most consistent with our body of case law in this area . . . and our constitutional history.”).

The court found no per se right to the expiration of a statute of limitation as an affirmative defense under its own due process precedent¹⁹⁴—a stark contrast to Illinois case law. However, the court’s conclusion relied heavily on public policy consideration in addition to this ruling.¹⁹⁵ The court relied on “considerations of good sense and justice” to inform its decision;¹⁹⁶ it specifically explained that the danger of defendants being exposed to delayed or unexpected liability was sufficiently outweighed by recognizing that victims often repress memories and are unaware of all who are responsible at the time their injuries manifest years later.¹⁹⁷

Again, Connecticut case law lacks the affirmative statement that a vested right can be created in the expiration of a statute of limitations. The bodies of Connecticut and Illinois case law differ substantially in that respect, a factor that would lessen the impact of *Hartford Roman Catholic Diocesan Corp.* on Illinois jurisprudence. However, the court there also cited to New York’s interpretation of the revival of personal causes of action, which relies more heavily on public policy concerns and common-sense interpretations of justice.¹⁹⁸

Specifically, New York Courts have held that the state legislature may revive a cause of action that would otherwise have expired if it is reasonably determined that “the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the [l]egislature were not effectuated.”¹⁹⁹ This rule seems more palatable to Illinois courts. It provides an exception to the general rule that a statute of limitation or repose would provide for an affirmative defense, but only in instances

194. *See id.* at 508 (citing *Goshen v. Stonington*, 4 Conn. 209, 222 (1822)) (recognizing that Connecticut case law affords some protection to defendants alleging a defense in an expired statute of limitation, but finding that its case law “nevertheless embraces the constitutional permissibility of ‘manifestly just’ retroactive legislation affecting legal rights and obligations”).

195. *See id.* at 514–16 (quoting Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397, 404 (2014)) (discussing public policy considerations and recognizing various psychological research studies that generally assert “a child who seemed unharmed by childhood abuse can develop crippling symptoms years later”).

196. *Id.* at 504 (quoting *Roberts v. Canton*, 619 A.2d 844, 849 (Conn. 1993)).

197. *See id.* (quoting *Roberts*, 619 A.2d at 849) (agreeing with plaintiff’s emphasis on the “legitimate legislative purpose . . . to afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action” even if it would surprise a defendant, which the court notes was “an express purpose of the statute.”); *see also Roberts*, 619 A.2d at 849 n.8 (quoting Sen. Anthony Avallone’s testimony before the Judiciary Committee, couching much of the rationale in a concern for child-victims’ memory repression).

198. *See Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 512–13 (citing *Gallewski v. H. Hentz & Co.*, 93 N.E.2d 620 (1950)) (explaining the New York court’s approach of reviving a cause of action when serious injury would otherwise result to plaintiffs).

199. *Gallewski*, 93 N.E.2d at 624.

that public policy concerns render that rule unjust or arbitrary.²⁰⁰ It would provide a stronger exception than the discovery rule,²⁰¹ an exception founded in similar logic, which bars victims from overcoming the statute of repose.²⁰² There are several instances of Illinois courts recognizing that survivors of childhood sexual abuse were victim to serious injustice,²⁰³ and it cannot be reasonably argued that children could share in the fault of such a heinous act. At bottom, Illinois should at least reconsider and give weight to the underlying public policy considerations that justify such an exception for the sake of justice to victims. The most appropriate method of reconsidering these concerns would be through the court-provided balancing test set forth by *Landgraf* and endorsed by *Commonwealth Edison*.²⁰⁴

The outcome of this New York procedure is just such justice. The Child Victims Act went through the New York legislature successfully, invoking the one-year look-back window that retroactively opens the courts to victims.²⁰⁵ The more than four hundred lawsuits filed on opening day demonstrate the efficacy of the rule in action²⁰⁶—so much

200. Again, the authors do not contest the validity of the general assertion that there is a *per se* rule against retroactive implication. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (“Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will *generally* coincide with legislative and public expectations.” (emphasis added)).

201. *See supra* Section II.B (describing the rule and its specific pleading requirements).

202. *See Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 70 (Ill. App. Ct. 2011) (citing *Goodman v. Harbor Mkt., Ltd.*, 663 N.E.2d 13, 18 (Ill. App. Ct. 1995)) (“Statutes of repose do not incorporate the discovery rule and generally terminate claims regardless of a plaintiff’s lack of knowledge of his or her cause of action.”).

203. *See, e.g., M.E.H. v. L.H.*, 685 N.E.2d 335, 340 (Ill. 1997) (“Although we are not unsympathetic to plaintiffs’ position, it fails to take into account that there are other interests at stake here.”). In some instances, the court seems to go so far as to deflect blame for an adverse judgment to plaintiffs to demonstrate some level of sympathy to victims on record. *See, e.g., Diocese of Dall. II*, 917 N.E.2d 475, 487 (Ill. 2009) (“Defendants in this case have elected to invoke the defense, and they alone are responsible for that decision and its impact on plaintiff’s ability to seek relief through the courts. Our function, as a court of review, is simply to insure that the law is applied correctly.”). The authors harbor no resentment towards the courts for applying what they believe to be sound principles of legal judgment—we simply disagree with the courts’ outcomes.

204. *See Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 976 (Ill. 2001) (quoting *In re Marriage of Semmler*, 481 N.E.2d 716, (Ill. 1985)) (“In assessing whether the application of a new statutory amendment to an existing controversy violates due process, the question is not simply whether the rights allegedly impaired are [labeled] vested or non-vested.” (alterations in original)); *see also id.* (quoting *Moore v. Jackson Park Hosp.*, 447 N.E.2d 408 (Ill. 1983) (Ryan, C.J., specially concurring)) (“The determination of whether the application of the statute unreasonably infringes upon the rights of those to whom it applies involves a balancing and discrimination between reasons for and against application of the statute to the class of individuals.”).

205. *See* N.Y. C.P.L.R. § 214-g (McKinney 2019).

206. *See* Priscilla DeGregory et al., *Child Victims Act Brings ‘Hope’ to Formerly Abused Kids: Lawyer*, N.Y. POST (Aug. 14, 2019), <https://nypost.com/2019/08/14/hundreds-of-lawsuits-filed->

so that the legislature recently moved to expand the window by an additional year.²⁰⁷ If the intended effect of the legislature is truly to open the courts to victims of childhood sexual abuse, such a rule moves towards effectuating that intent.

V. PROPOSAL AND IMPACT

The legislature should draft and pass a new bill that seeks to amend section 5/13-202.2 and insert a finite window that would allow expired claims arising out of childhood sexual abuse to proceed under the current infinite statute of limitations. Upon likely challenge and appeal by relevant litigants, the Illinois Supreme Court should reevaluate its determination that such defendants have a vested right to the defense of expired statutes of limitations and repose through application of *Landgraf*. Between a properly executed *Landgraf* test and considerations of legislative intent, public policy, and common principles of justice, the court should find that the retroactive window in section 5/13-202.2 is constitutional under the Illinois Due Process Clause.²⁰⁸

A. The Legislature

Historical treatment of this issue by the Illinois General Assembly intimates that such a proposal is not out of the question. It is undeniable that the trend in amendments to section 5/13-202.2 weigh decisively in favor of plaintiffs since 1994. The statute of repose that went effective in 1991 lasted only three years before it was totally repealed.²⁰⁹ Its short life strongly indicates that it was viewed nearly immediately as a mistake, something that the courts have recognized in their analyses of this statute

on-first-day-child-victims-act-takes-effect/ [https://perma.cc/6SJY-6NPL]; see also Steve Orr, *Hundreds of Child Sex Abuse Claims Filed on First Day of New York's Child Victims Act*, USA TODAY (Aug. 14, 2019) <https://www.usatoday.com/story/news/nation/2019/08/14/new-york-child-victims-act-lawsuits/2007257001/> [https://perma.cc/V7G9-HDFT] (asserting that 385 of the 400-plus cases were filed by noon).

207. New York is not the only state that rests between acceptance and rejection of *Campbell*. Wisconsin recognizes that there is a vested right in the lapse of statutes, but nevertheless has utilized the rational basis standard to analyze the constitutionality of a revival statute by balancing (1) private interests that are overturned by retroactivity; and (2) the public interest served by retroactivity. See *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 786 N.W.2d 385, 396 (Wis. 2010) (quoting *Matthies v. Positive Safety Mfg. Co.*, 628 N.W.2d 842, 855 (Wis. 2001)) (“Whether there exists a rational basis involves weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect.”).

208. The authors take no opinion as to what, if any, prior cases need to be overturned. Only to the extent that this proposed course of action is wholly inconsistent with previous decisions should any be expressly overruled—a decision soundly and rightly in the Illinois Supreme Court’s discretion.

209. See P.A. 88-127, § 5 (eff. Jan. 1, 1994) (eliminating the statute of repose).

moving forward.²¹⁰ This plaintiff-friendly trend is only strengthened when examining the legislature's treatment of the statute of limitations, which raised from two, to ten, and then to twenty years before it too was done away with in 2014.²¹¹

Such an amendment would likely gain public support for obvious reasons. It would implicate those guilty, to any degree, of child sexual abuse and ensure that their participation would be on public record.²¹² At the same time, it would ensure that only those who want to pursue their claims may do so, leaving prosecutorial discretion outside the bounds of consideration. The unique nature of civil remedies in this context cannot be understated as it allows plaintiffs to control entirely the course of action in handling a most-personal issue.

Aside from general notions of plaintiff-friendly factors, the legislature has attempted to apply this statute retroactively in the past.²¹³ This exact intent has been at the heart of several appeals to the various appellate districts and the supreme court.²¹⁴ As discussed at length, the back-and-forth history of Illinois courts' treatment of retroactive application gave the legislature reason to be uncertain in how its retroactive proposals would be received. Ultimately this attempt to apply the amendment retroactively was received poorly and rejected. The sting of this rejection led sponsors of the bill to outwardly deny the suggestion that the newly eliminated statute of limitations could affect expired claims based on *Doe v. Diocese of Dallas II*.²¹⁵ Based on the recent amendments in California, New Jersey, and New York—all of which employ a retroactive look-back

210. See, e.g., *Diocese of Dall. I*, 885 N.E.2d 376, 385 (Ill. App. Ct. 2008) (citing *Commonwealth Edison Co. v. Will Cty. Collector*, 749 N.E.2d 964, 975 (Ill. 2001)) (“That desire to fix the problems inherent in a previous version of a statute weighs in favor of a retroactive application.”).

211. See *supra* note 21 and accompanying text (detailing the various amendments to section 5/13-202.2).

212. See *supra* note 70 (discussing that the passage of the Child Victims Act would help the public identify hidden child predators through the civil discovery process).

213. Even the Illinois Supreme Court in *Diocese of Dallas* recognized that the clear legislative intent of the statute was for it to be applied retroactively, though the court ultimately ruled against that intent. See generally *Diocese of Dall. II*, 917 N.E.2d 475 (Ill. 2009).

214. See, e.g., *Diocese of Dall. II*, 917 N.E.2d 475 (Ill. 2009) (discussing the legislative intent of the statute); *M.E.H. v. L.H.*, 685 N.E.2d 335 (Ill. 1997) (finding retroactive intent but declining to apply it); *Galloway v. Diocese of Springfield in Ill.*, 857 N.E.2d 737 (Ill. App. Ct. 2006) (discussing, though not independently analyzing, this argument lodged by the plaintiff and instead relying on *M.E.H.* to reject the contention).

215. See Ill. S. Tran., 2013 Reg. Sess. No. 41 (Apr. 25, 2013) (“Sen. Harmon: So my first question is this: Is the intent of this bill to circumvent the Illinois Supreme Court’s ruling in *Doe* against *Diocese*, regarding revival of time-barred cases? . . . Sen. Link: No. this bill does not disrupt the Illinois Supreme Court ruling in *Doe* versus *Diocese* . . .”).

window²¹⁶—the Illinois General Assembly could stomach a direct challenge to this precedent on such a specific and limited scale.

B. The Courts

Were the legislature to issue such a pointed amendment, it would be likely that the court would see it as a direct challenge to the idea that the sex abuse limitations statute creates a vested right in an affirmative defense. Hopefully, this understanding would spark thorough reconsideration.

The fact that the court read into the *Landgraf* test that the Statute on Statutes would forbid progressing to the second-step of the analysis could be circumvented by sufficient legislative intent. It is questionable that the presumption of legislative intent in the general savings clause of the Statute on Statutes applies to all statutes to void even plainly stated legislative intent,²¹⁷ but the existence of this presumption should not mean that the underpinnings of the latter half of the *Landgraf* analysis is rendered useless.²¹⁸ Because the first step of *Landgraf* requires that clear legislative intent be effectuated absent constitutional violation, and because the second step provides a format to analyze what constitutes a vested right, this analysis should apply to determine whether an individual statute creates a vested right or not.²¹⁹ Such a narrowly-tailored retroactive look-back window would not entirely uproot the idea that a statute of limitations' expiration provides a vested right to an affirmative defense—it would only apply to this specific statute based on overwhelming concerns founded in public policy and common principles of justice.²²⁰ Additionally, the structure of the retroactive look-back window that would be unique to this proposed legislative amendment

216. See N.Y. C.P.L.R. § 214-g (McKinney 2019) (employing a one-year window that began six months after the act's effective date); see also N.J. STAT. ANN. § 2A:14-2a (2019) (employing a two-year window upon the act's effective date); A.B. 218. 2019 Cal. Legis. Serv., ch. 861 (employing a three-year window upon the act's effective date).

217. See generally *Caveney v. Bower*, 797 N.E.2d 596 (Ill. 2003) (invalidating the second step of *Landgraf* based on the Statute on Statutes).

218. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 317–20 (2001) (engaging in a full *Landgraf* analysis ignoring and despite the existence of a “federal general savings statute” 1 U.S.C. § 109 (2000)); see also *Caveney*, 797 N.E.2d at 607 (Freeman, J., specially concurring) (arguing, through partial reliance on *St. Cyr*, that a general savings clause to be applied in such a broad manner is inappropriate and inconsistent with the Illinois Supreme Court's treatment of the *Landgraf* analysis).

219. The application of this balancing analysis in *Diocese of Dallas* provides an example of this idea. See generally *Diocese of Dall. I*, 885 N.E.2d 376 (Ill. App. Ct. 2008).

220. See *supra* note 171 and accompanying text (discussing why depriving a vested right in this specific statute of limitation's expiration should not deprive the foundation of vested rights in other statutes of limitation that are created in furtherance of difference objectives).

would assist in underlining that this statute really is an exception to the rule.

Upon engaging in the actual analysis of this statute which (1) contains no statute of limitations moving forward and (2) contains a retroactive look-back window, the question of whether the right to an affirmative defense is vested in the plaintiff's expired claims under previous versions of the statute would be decisively weaker. The courts, as well as the legislature,²²¹ have recognized on numerous occasions that repressed memory of childhood sexual abuse is a unique consideration.²²² While the discovery rule partially covers those with specifically diagnosed mental conditions that repress such memories, it absolutely fails to cover those that were barred by the long-extinct statute of repose.²²³ The arbitrary nature of this reality is compounded by the fact that there is no limit of any kind on recent claims regardless of the plaintiff's delay in filing.²²⁴ The legislature has already actively ignored the reasons that normally justify statutes of limitations and repose—judicial economy and undue burden or surprise to defendants—and so arguments founded in this rationale could hardly defend those seeking to close the retroactive look-back window. Even those without mental health conditions contributing to memory repression have no limits to when they file their claims moving forward, so why should older plaintiffs suffer from such a limitation? No defendant could reasonably rely on such a defense anyway, as the intricacies of mental health bar prediction from defendants as to whether their victims would repress memory. They would be no more burdened or surprised by their victim's delayed lawsuit than they would be if the victim filed a successful suit pursuant to the discovery rule.

To avoid arbitrary application of the otherwise operational and constitutional statute, to further public policy concerns, and to uphold common sense principles of fairness and justice, the Illinois Supreme Court should uphold such a statute that would allow victims of childhood

221. Aside from the civil statute, the legislature has used similar rationale in support of the more-recently expanded statute of limitations for criminal prosecution of childhood sexual abuse. *See* Ill. H.R. Tran. 2017 Reg. Sess. No. 49 (“[Representative] Mussman: . . . This will allow our victims more access to the Criminal Justice System and recognition of the fact that most child victims are abused by people they know and trust and are vulnerable to coercion, intimidation and guilt tactics that reduce the likelihood that they would report in a timely manner.”).

222. *See* *Clay v. Kuhl*, 696 N.E.2d 1245, 1249–52 (Ill. App. Ct. 1998) (reconsidering its application of the sudden traumatic event exception in cases where the victim can successfully plead repressed memory).

223. *See* *Wisniewski v. Diocese of Belleville*, 943 N.E.2d 43, 70 (Ill. App. Ct. 2011) (quoting *Goodman v. Harbor Mkt., Ltd.*, 663 N.E.2d 13, 18 (Ill. App. Ct. 1995)) (“Statutes of repose do not incorporate the discovery rule and generally terminate claims regardless of a plaintiff's lack of knowledge of his or her cause of action.”).

224. *See* 735 ILL. COMP. STAT. 5/13-202.2(f) (2019).

sexual abuse whose claims have expired to file suit under a limited retroactive look-back window.

C. Impact

In general, the impact would be wholly positive. As former Attorney General Lisa Madigan's report stated, hundreds of cases of childhood sexual abuse have gone unreported and unaddressed.²²⁵ That report came out years following the statute of limitation's deletion. Clearly, more can be done, and a retroactive window would encourage efforts towards that end.

For the sake of example, New York demonstrates a positive outcome in applying this window. New York applied its retroactivity window in a realistic manner and yielded an overall efficient outcome in implementing it. Upon signing the bill into law the window was delayed by six months.²²⁶ This delay served plaintiffs in that it allowed them time to consider their options, build a case, and file in a timely manner, but it also offered the courts a reprieve to prepare for the upcoming rush of litigation. On the litigant's side of things, everything ran relatively smoothly. On opening day, over four hundred suits were filed, followed up by hundreds more in the upcoming months.²²⁷

Predictably, however, the courts were the ones burdened by this window, but not to such an extreme as to render it ineffective or inappropriate. To lessen the upcoming burden, the state courts issued a memorandum on how it would go about handling the increased caseloads, as well as inviting comment on procedure that might assist in the transition.²²⁸ The window proved successful and has been considered for an additional year to allow for the filing of valid cases to continue on unimpeded.²²⁹ The legislature also catered to this concern by providing

225. See generally AG PRELIMINARY FINDINGS, *supra* note 1.

226. See N.Y. C.P.L.R. § 214-g (McKinney 2019).

227. See Joseph Spector, *Child Victims Act in New York: The Window to Sue Expires in 2020. Why it May Get Extended*, DEMOCRAT & CHRON. (Jan. 3, 2020), <https://www.democratandchronicle.com/story/news/politics/albany/2020/01/03/child-victims-act-new-york-why-one-year-window-sue-may-get-extended/2805834001/> [https://perma.cc/4AR9-2RWD] (alleging approximately 1300 lawsuits were filed in the opening year).

228. See, e.g., Memorandum from John W. McConnell on behalf of NY State Unified Court System, Request for Public Comment on Proposed Rules to Facilitate the Prompt Disposition of Matters Revived Under the Child Victims Act of 2019, <http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/RPC-ChildVictimsActRules%205-10.pdf> [https://perma.cc/UDN3-3G8K] (providing opportunity to comment on the proposed rules).

229. Cayla Harris, *Bill Would Give Survivors Another Year to File Child Victims Act Claims*, TIMES UNION (Jan. 5, 2020), <https://www.timesunion.com/news/article/Bill-would-give-survivors-another-year-to-file-14951408.php> [https://perma.cc/A9TX-LD2B] (reporting that the original sponsor of the Child Victims Act is proposing to extend the retroactivity window by at least one year).

for increased training for a set of forty-five judges to take on these claims.²³⁰ Ultimately, judicial economy is a back-seat concern to furthering the legislation's overall purpose, but it is still a consideration that can be catered to in a meaningful way.

CONCLUSION

In conclusion, the Illinois General Assembly would further common-sense understandings of justice should it apply a retroactivity window for victims of childhood sexual abuse to file suit on claims that would otherwise have expired. In tandem, courts should reconsider and disregard, on a narrow and individually tailored basis, their holdings that amendments to the childhood sexual abuse statutes of limitations and repose that prevent, at least, hundreds of plaintiffs from seeking remuneration against those responsible for their injuries. This most sensitive of issues is one best left to the victims to determine how to seek justice. The legislature and courts have echoed this general understanding. Rather than impede these efforts, our government should encourage them through even-handed treatment of all who suffered from the terrible consequences of others' unforgiveable acts.

230. See S.B. 2440, 242d Leg., Reg. Sess. (N.Y. 2019); Julie Zauzmer & Sarah Pulliam Bailey, *New York Braces for a Flood of Lawsuits, as One-Year Window Opens for Child Sexual Abuse Victims to Bring Cases*, WASH. POST (Aug. 14, 2019), <https://www.washingtonpost.com/religion/2019/08/14/new-york-braces-flood-lawsuits-one-year-window-opens-child-sex-abuse-victims-bring-cases/> [<https://perma.cc/ZWG7-LAEE>].