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A New Wound for Old Scars: Why Act 1036 of 2021 is Unconstitutional and Why the Arkansas Retroactive-Legislation Doctrine Should Change

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A NEW WOUND FOR OLD SCARS: WHY ACT 1036 OF 2021 IS UNCONSTITUTIONAL AND WHY THE ARKANSAS RETROACTIVE-LEGISLATION DOCTRINE SHOULD CHANGE

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I. INTRODUCTION

In 1981, an impoverished, underprivileged, and abused teenage girl had the opportunity to be the star witness in the trial against the murderer of her two friends.[1] Just as everything seemed to be going wrong in her life, a federal prosecutor gave her a glimmer of hope.[2] At first, the prosecutor seemed caring and empathetic, but soon, he started becoming a little too friendly.[3] Only in retrospect is it clear that he was grooming his underage witness.[4] By the time the teenage girl knew what was happening, there was nothing she could do to stop it.[5] The prosecutor made it clear that if the girl came forward with allegations against him, there would be a mistrial, and her friends' murderer would likely walk free.[6] Under this threat, the prosecutor successfully silenced his victim.[7]

The prosecutor was also successful in the courtroom.[8] He secured the death penalty for the murderer.[9] In 2013, Utah executed the murderer.[10] Finally, free from the threat of the

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1. Complaint at 2-4, Mitchell v. Roberts, No. 2:16-cv-00843-DBP, 2016 WL 4087773 (D. Utah July 29, 2016).
2. *Id.* at 5.
3. *Id.* at 5-7.
4. *Id.* at 6.
5. *Id.* at 8.
6. Complaint, *supra* note 1, at 9.
7. *Id.*
8. *Id.* at 10.
9. *Id.* at 11.
10. *Id.*

murderer's release, the girl—now a grown woman—could come forward with her claim against the prosecutor—by then a federal judge.[11]

The threat of release, however, was not her only obstacle for holding her assailant accountable. She then had to contend with the judicial lock, a statute of limitations.[12] Fortunately, the Utah legislature recognized her injustice and all others with similar stories when it amended the statute of limitations.[13] The law created a period of time in which victims could bring previously time-barred child sexual abuse claims.[14] Finally, the girl could have some faith in the justice system. Unfortunately for her, the Utah Supreme Court found the law unconstitutional under the state constitution.[15]

Arkansas recently passed a law similar to the Utah law, the "Justice for Vulnerable Victims of Sexual Abuse Act" (Act 1036 of 2021).[16] If Arkansas courts do not take note of the unique circumstances of survivors of childhood sexual assault, Arkansas will repeat the injustice created by the Utah Supreme Court. Legislatures have recognized the need to allow claims of child sexual abuse to go forward,[17] but for a variety of reasons discussed in detail below, these claims are often not discovered or brought until after the statute of limitations has expired.[18] Many state legislatures have addressed this issue by extending the statute of limitations.[19] In addition to extending the limitations period, legislatures addressing these issues often incorporate revival periods—clauses that temporarily create a window of time where victims can bring previously time-barred claims.[20] In

11. Biography of Richard W. Roberts, FED. JUD. CTR., [https://perma.cc/S9SH-AP95] (last visited Dec. 10, 2021); *see also* Marisa M. Kashino, *How One of DC's Most Powerful Judges Got Accused of Rape*, WASHINGTONIAN (Sept. 8, 2016), [https://perma.cc/392L-9QPZ].

12. Complaint, *supra* note 1, at 12.

13. *Id.*; *accord* Act of May 10, 2016, ch. 379, 2016 Utah Laws 2233 (codified as amended at UTAH CODE ANN. § 78B-2-308 (West 2022)).

14. UTAH CODE ANN. § 78B-2-308(7).

15. Mitchell v. Roberts, 469 P.3d 901, 914 (Utah 2020).

16. Justice for Vulnerable Victims of Sexual Abuse Act, No. 1036, 2021 Ark. Acts 5122 (codified as amended at ARK. CODE ANN. § 16-118-118).

17. MARCI A. HAMILTON ET AL., HISTORY OF U.S. CHILD SEX ABUSE STATUTES OF LIMITATION REFORM: 2002 TO 2020, at 9, 11 (2021); *see infra* Section II.C.

18. *See infra* Section II.B.

19. HAMILTON ET AL., *supra* note 17, at 11.

20. *Id.* at 65-67.

essence, a legislative revival period retroactively amends the statute of limitations.[21]

State courts are split on how they deal with retroactive legislation, including legislative revival periods.[22] The difference depends on whether the state classifies a statute-of-limitations defense as a property right.[23] In states that follow the property approach, courts treat retroactive legislation that changes the limitation period as if the legislature is taking the property from the defendant and giving it to the plaintiff.[24] Because such a transfer of property is unconstitutional, the elimination of a statute-of-limitations defense is equally unconstitutional.[25] States that do not view statutes-of-limitation defenses as a property right determine retroactivity based on legislative intent.[26] Because a statute-of-limitations defense is not property under this approach, there is no constitutional issue when the legislature eliminates the defense.[27]

Arkansas courts generally follow the property approach, disfavoring retroactive legislation, but Arkansas courts often cite legislative intent.[28] Fortunately, Arkansas courts need not drastically alter their retroactive-legislation doctrine to allow the retroactive effect of statutes of limitation. Arkansas already allows retroactive legislation in some instances.[29] Additionally, the legislative-intent approach adopted by many states provides a clear guide for how Arkansas can alter its approach to retroactive legislation as applied to statutes of limitation.[30]

This Note argues that, due to the nature of statutes of limitation, Arkansas should alter its approach to retroactive legislation for statutes of limitation to effectuate the policy goals of Act 1036.[31] Sections II.A and II.B will begin with a brief

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21. *See* Mitchell v. Roberts, 469 P.3d 901, 909-10 (Utah 2020).

22. *See infra* Section II.E.

23. *See infra* Section II.E.

24. *See infra* Section II.E.2.

25. *See infra* Section II.E.2.

26. *See infra* Section II.E.1.

27. *See infra* Section II.E.1.

28. *See infra* Section II.E.3.

29. *See* J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 2014 Ark. 282, at 12, 436 S.W.3d 458, 467.

30. *See infra* Section II.E.1.

31. The legislature prominently showed the policy goals of Act 1036 with the name of the Act: "Justice for Vulnerable Victims of Sexual Abuse Act." *See* Justice for Vulnerable

background, explaining the purpose of statutes of limitation and the reasons why people may wait to bring childhood sexual assault claims.[32] Then, Sections II.C, II.D, and II.E will give a brief history of states' legislative responses, give an overview of Arkansas's response, and explain the different jurisdictional approaches to retroactive legislation.[33] Part III will then explain how the current state of the Arkansas retroactive-legislation doctrine applies to Act 1036 and argue that the Supreme Court of Arkansas should alter its retroactive-legislation doctrine because (1) the property framework is incompatible with the nature of a statute-of-limitations defense; (2) legislative intent should govern; and (3) the important interests at stake justify altering precedent.[34]

II. BACKGROUND

Statutes of limitation serve legitimate purposes to prevent stale claims.[35] However, there are many valid reasons why victims of childhood sexual assault may wait to bring their claims.[36] Unfortunately, statutes of limitation often prevent child sexual abuse claims.[37] In response, states have begun reviving these previously time-barred claims.[38] In 2021, Arkansas joined the states that have enacted legislation reviving time-barred child sexual abuse claims with Act 1036.[39] Revival legislation is essentially retroactive legislation.[40] There are a few different approaches to retroactive legislation, and the approach that Arkansas applies will determine the validity of Act 1036.[41]

A. Statutes of Limitation

Victims of Sexual Abuse Act, No. 1036, 2021 Ark. Acts 5122 (codified as amended at ARK. CODE ANN. § 16-118-118).

32. *See infra* Sections II.A., II.B.
33. *See infra* Sections II.C., II.D., II.E.
34. *See infra* Part III.
35. *See infra* Section II.A.
36. *See infra* Section II.B.
37. *See infra* Section II.A.
38. *See infra* Section II.C.
39. *See infra* Section II.D.
40. *See* Mitchell v. Roberts, 469 P.3d 901, 910-11 (Utah 2020).
41. *See infra* Section II.E.

A statute of limitations sets out a period of time after an injury where the injured party may bring a claim.[42] State legislatures establish the length of the statutory period for different types of claims.[43] After the running of the limitations period, a defendant can typically successfully assert a statute-of-limitations defense.[44] This results in the dismissal of the plaintiff's claim.

The traditional justifications for statutes of limitations are well known. The longer the period between the injury and the action, the more likely evidence will become stale.[45] Stale evidence is necessarily less reliable, and less reliable evidence leads to errors.[46] However, longer statutes of limitation have their benefits too. For example, a longer period allows claimants an opportunity to be heard, and with extra time, claimants are better able to investigate the likelihood of success in bringing claims.[47] In an ideal world, statutes of limitation would be just long enough for the plaintiff to bring a claim.[48] However, as discussed in the following sections, in child sexual abuse situations, plaintiffs often need more time to bring claims than the statute of limitations provides.[49]

B. Impact of Child Sexual Abuse and Why Victims May Wait to Bring Claims

Children who experience sexual abuse often suffer negative consequences for their entire lives.[50] Aside from the immediate physical consequences arising from childhood sexual assault—physical injuries and the potential for sexually transmitted

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42. *See, e.g.*, *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter *Statute of Limitations*, BLACK'S LAW DICTIONARY].

43. George Rutherglen, *Statutes of Limitations: Claims Forgotten, Forgiven, or Foregone?*, 72 RUTGERS U. L. REV. 1, 5 (2019).

44. *Statute of Limitations*, BLACK'S LAW DICTIONARY, *supra* note 42.

45. Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1181 (1986).

46. *Id.*

47. Rutherglen, *supra* note 43, at 13-14.

48. *Id.* at 10.

49. *See infra* Section II.B.

50. *Fast Facts: Preventing Child Sexual Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 6, 2022), [https://perma.cc/2CKU-V9HZ].

infections—there are also long-lasting consequences including depression, PTSD, and substance abuse.[51]

Victims of sexual assault may have many reasons to be reluctant to come forward.[52] In many situations, communities lack sufficient resources to help victims.[53] Also, victims who report must necessarily recount the assault.[54] Retelling may lead to a feeling of "re-victimization," especially where the victim is accused of lying or is blamed for the events.[55] Furthermore, until fairly recently, society deemed child sexual abuse a taboo subject.[56] Historically, even when people did discuss these claims, they thought child sexual abuse was uncommon and not harmful.[57] Additionally, children and their mothers were often thought responsible for the child's victimization.[58] Other factors influencing disclosure include the culture and gender of the victim.[59]

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51. *Id.*; *see also* JON R. CONTE & VIOLA VAUGHAN-EDEN, *Child Sexual Abuse*, *in* THE APSAC HANDBOOK ON CHILD MALTREATMENT 95, 103 (J. Bart Klika & Jon R. Conte eds., 4th ed. 2018).

52. *See generally* Theresa C. Kelly & Lana Stermac, *Underreporting in Sexual Assault: A Review of Explanatory Factors*, 9 BALTIC J. OF PSYCH. 30, 31 (2008); *see also* CONTE & VAUGHAN-EDEN, *supra* note 51, at 102 ("Children and adult survivors abused in childhood often explain that they were reluctant to disclose or never disclosed in childhood due to fear of consequences to self or others, being misunderstood or blamed, embarrassed, stigmatized, and the act of disclosing requires the child to reveal painful experiences."); Laura K. Murray et al., *Child Sexual Abuse*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 321, 324-26 (2014).

53. Kelly & Stermac, *supra* note 52, at 36.

54. *Id.* at 37.

55. *Id.*

56. Marci A. Hamilton, *Child Sex Abuse in Institutional Settings: What Is Next*, 89 U. DET. MERCY L. REV. 421, 421 (2012) (noting that there have traditionally been two taboos about child sexual abuse). The first taboo is speaking of child sexual abuse generally. *Id.* at 421. Traditionally, society considered children unreliable sources, and the possibility of false claims foreclosed any meaningful reform. *Id.* at 422. The media would also limit coverage or water down reports of child sexual abuse, making the abuse seem less common. *Id.* ("It is very different to read that a child has been 'molested' or 'inappropriately touched' rather than 'raped' or subject to 'deviant involuntary intercourse.'"). The second taboo is speaking negatively of esteemed institutions. *Id.* at 424. These institutions have a history of hiding abuse with the cooperation of the media. Hamilton, *supra*, at 424. Moreover, there is often public backlash against victims who come out against these institutions. *Id.* at 427 (noting attacks, accusations, and even riots).

57. CONTE & VAUGHAN-EDEN, *supra* note 51, at 96.

58. *Id.*

59. Murray et al., *supra* note 52, at 325. In many cultures, society expects men to want sex. *Id.* As such, some cultures expect girls to avoid "tempting a man." *See id.* Subsequently, when an abuser victimizes a girl, it is her fault for causing the temptation. *Id.* If a society is likely to blame the victim, the victim is less likely to come forward. *See id.*

Even if a victim does report abuse, most child victims do not do so until adulthood.[60] This is true even if there is physical, medical evidence of sexual abuse, such as a sexually transmitted infection.[61] One theory for delayed reporting is that victims may not believe that others will take their claims seriously.[62] Other factors that may lead to delayed reporting include a desire for secrecy, a feeling of helplessness, peer pressure, and a lack of severe consequences for previous assailants.[63] Additionally, delayed reporting is often more prevalent when the victim knows the assailant.[64] This is especially true with child victims because their assailants are often authority figures.[65] Even when children report abuse, especially in adolescence, they may report only to

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Many cultures also equate a girl's virginity with her honor in the community. Murray et al., *supra* note 52, at 325. When an abuser victimizes a girl, she may lose her virgin status in the community. *See id.* The gender of the victim is also relevant to the likelihood of disclosure. *Id.* People often believe that perpetrators of child sexual abuse target girls. *Id.* At 321. However, many abusers target boys. *Id.* At 321-22. The social stigma of homosexuality works to silence these victims. Murray et al., *supra* note 52, at 325-26. Specifically, male victims may believe that by coming forward, they are admitting their own homosexuality. *Id.*

60. CONTE & VAUGHAN-EDEN, *supra* note 51, at 101.

61. *Id.* ("[T]he remaining studies demonstrated only a 42% disclosure rate even when there was medical evidence of sexual abuse." (citing Thomas D. Lyon, *False Denials: Overcoming Methodological Biases in Abuse Disclosure Research*, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 41, 48 (Margaret-Ellen Pipe et al. eds., 2007))).

62. Kelly & Stermac, *supra* note 52, at 38 (citing Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 J. PERSONALITY & SOC. PSYCH. 111, 112-13 (2003)); CONTE & VAUGHAN-EDEN, *supra* note 51, at 97 (Adult defendants accused of child sexual abuse often argue "that dissociative amnesia (aka repressed memory) is unreliable, that young children cannot provide reliable and valid testimony about their own experiences, that professionals with their own trauma histories over diagnosed sexual abuse, that anatomically correct dolls sexually stimulated children thereby increasing the likelihood of a false report, and a host of other ideas").

63. NINA SPRÖBER ET AL., CHILD SEXUAL ABUSE IN RELIGIOUSLY AFFILIATED AND SECULAR INSTITUTIONS: A RETROSPECTIVE DESCRIPTIVE ANALYSIS OF DATA PROVIDED BY VICTIMS IN A GOVERNMENT-SPONSORED REAPPRAISAL PROGRAM IN GERMANY 2 (2014).

64. Kelly & Stermac, *supra* note 52, at 38.

65. *See generally* Emily R. Siegel, *Boy Scouts Reach $850 Million Settlement with Tens of Thousands of Sexual Abuse Victims*, NBC NEWS (July 1, 2021, 7:54 PM), [https://perma.cc/CG6J-WHR4] (noting the Boy Scouts of America settled thousands of claims arising from sexual abuse by volunteers and leaders); Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012, 6:01 PM), [https://perma.cc/SJ7F-PVVX] (chronicling the actions of a defensive coordinator at Penn State who founded a foster home and sexually abused multiple boys over a fifteen-year period); Alex Sundby, *In Six Months, Abuse Allegations Against over 2,600 Priests and Church Workers Have Been Revealed*, CBS NEWS (Feb. 21, 2019, 11:45 AM), [https://perma.cc/7A5H-6ASX].

peers.[66] In one study, forty-two percent of children who disclosed abuse did so only to their peers.[67] The many reasons for delayed reporting or underreporting emphasize the need for change.

C. The Rise of Revival Statutes

Although there are many valid reasons why disclosure of a child sexual assault claim may be delayed, the law does not necessarily afford a remedy for childhood sexual assault claims brought after the statutory period.[68] As society has begun to recognize the injustice of barred claims, state legislatures have begun addressing the issue.[69] One of the primary ways for dealing with the issue has been to extend the statute-of-limitations period.[70] Extending the statutory period protects claims arising after enactment.[71] However, merely extending the statute of limitations does not address the many claims already barred by the previous limitation period.[72] Some legislatures have addressed the secondary issue of previously time-barred claims through revival laws, which allow victims to bring previously time-barred claims.[73]

Between 2002 and 2020, eighteen states created revival laws for child sexual assault claims.[74] These laws either revive all previously time-barred claims forever or create a brief period of time during which victims may bring claims.[75] Under the latter approach, once the statutory revival period ends, the previously time-barred claims once again become time-barred.[76] Although

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66. Gisela Priebe & Carl Göran Svedin, *Child Sexual Abuse is Largely Hidden from the Adult Society: An Epidemiological Study of Adolescents' Disclosures*, 32 CHILD ABUSE & NEGLECT 1095, 1106 (2008) ("[F]ew sexually abused children seek help from professionals or other adults . . . .").

67. *Id.* at 1104.

68. *See supra* Section II.B.

69. HAMILTON ET AL., *supra* note 17, at 4.

70. *See id.* at 9.

71. *See id.* at 6.

72. *See id.* at 60.

73. *See id.* at 62.

74. HAMILTON ET AL., *supra* note 17, at 54 & n.359 (These states are Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, Oregon, Rhode Island, Utah, Vermont, and West Virginia).

75. *Id.* at 62-63.

76. *Id.* at 63.

this approach is unlikely to fix the problem completely, it does give some people a remedy who otherwise would not have one.[77] In 2021, through Act 1036, Arkansas became one of the states to enact revival legislation to address this issue.[78]

D. Act 1036

Until 2021, Arkansas had not amended its statute of limitations for child sexual abuse claims since 1993.[79] During this time, the statute of limitations was three years and was tolled until the child reached eighteen.[80] Thus, a sexually abused child could only bring claims until the child reached twenty-one.[81]

In 2021, the Arkansas Legislature approved Act 1036.[82] The Act received overwhelming bipartisan support, with only one nay vote in both the House and Senate.[83] This Act amends the statute of limitations for "vulnerable victims" of sexual abuse.[84] Under the Act, victims have until they turn fifty-five years old to bring a civil action against alleged abusers and parties whose tortious conduct caused the abuse.[85] Further, the Act revives previously time-barred claims for a period beginning six months after the Act's effective date and extending to thirty months after the effective date.[86] However, the Act does not revive claims

77. *See id.* at 9-10 (noting that Guam initially created a revival window that no victims took advantage of, but that when Guam eliminated the statute of limitation completely, victims came forward). It is easy to imagine a scenario where an individual's claim was time-barred right before the enactment of the revival statute, but for all the reasons laid out in Section II.B., the individual does not take advantage of the revival period. Under such a scenario, after the revival period has run, the individual's claim is once again barred. Thus, even if a state enacts a revival law, the law may not resolve every claim.

78. *See* ARK. CODE ANN. § 16-118-118(b)(2) (West 2021).

79. HAMILTON ET AL., *supra* note 17, at 16.

80. *Id.*

81. *Id.*

82. Justice for Vulnerable Victims of Sexual Abuse Act, No. 1036, 2021 Ark. Acts 5122 (codified as amended at ARK. CODE ANN. § 16-118-118).

83. Archive of House Votes in the Arkansas General Assembly, ARK. STATE LEG., [https://perma.cc/CL4N-QZCR] (last visited Oct. 1, 2022); Archive of Senate Votes in the Arkansas General Assembly, ARK. STATE LEG., [https://perma.cc/58E4-X78K] (last visited Oct. 2, 2022).

84. ARK. CODE ANN. § 16-118-118(a)(6) (West 2021) (defining "[v]ulnerable victim" as "a person who was either disabled, a minor, or both at the time he or she was a victim of sexual abuse").

85. ARK. CODE ANN. § 16-118-118(b)(1).

86. ARK. CODE ANN. § 16-118-118(b)(2).

previously "litigated to finality on the merits."[87] This law is similar to revival laws enacted in other jurisdictions.[88]

E. Different Jurisdictional Approaches to Retroactivity of Child Sexual Assault Claims

There are two major approaches to retroactive legislation: the legislative-intent approach and the property approach.[89] The first approach allows retroactive statutes of limitation when there is legislative intent.[90] The second approach classifies statutes of limitation similarly to property and does not allow retroactive statutes of limitation.[91] In its approach to retroactive legislation, Arkansas case law has hints of the legislative-intent approach but aligns with the property approach in practice.[92]

1. Legislative-Intent Approach

As the name implies, the primary focus of this approach is legislative intent. When the legislature intends for a statute to have retroactive effect, the courts will interpret the statute as having retroactive effect.[93] Minnesota and Delaware provide good examples of the legislative-intent approach.

Minnesota law requires a presumption against retroactive legislation unless the legislature clearly intends otherwise.[94] However, clear intent is not a strict standard.[95] The legislature can show its intent by applying the statute to causes of action

87. ARK. CODE ANN. § 16-118-118(c).

88. *See generally* Child Victims Act, ch. 89, 2013 Minn. Laws 728 (codified as amended at MINN. STAT. ANN. § 541.073 (West 2021)) (eliminating the statute of limitations for child sexual abuse claims; the applicability of the law allows victims to bring previously time-barred claims for a period of three years following the effective date of the law); DEL. CODE ANN. tit. 10, § 8145 (West 2009) (eliminating the statute of limitations for child sexual abuse claims and allowing victims to bring previously time-barred claims for a period of two years).

89. *See infra* Sections II.E.1. to II.E.2.

90. *See* discussion *infra* Section II.E.1.

91. *See* discussion *infra* Section II.E.2.

92. *See* discussion *infra* Section II.E.3.

93. *See, e.g.*, Lickteig v. Kolar, 782 N.W.2d 810, 818 (Minn. 2010).

94. MINN. STAT. ANN. § 645.02 (West 1987).

95. *See Lickteig*, 782 N.W.2d at 818-19.

commenced, not arising, on or after the effective date of the statute.[96]

In 1991, Minnesota amended its statute of limitation for sexual abuse to allow victims to bring claims within six years of discovering the injury.[97] The legislature applied the new law to claims commenced on or after the effective date of the statute.[98] The Minnesota Supreme Court explained which laws will apply retroactively in *Lickteig v. Kolar*.[99] There, a victim sued her assailant brother in 2007 for assaults that occurred while she was a minor between 1974 and 1977.[100] The victim alleged a repressed memory that prevented discovery of the abuse until 2005.[101] Because the legislature applied the statute to claims *commenced* on or after the effective date instead of claims *arising* on or after the effective date, the legislature intended the statute to apply retroactively.[102] After a finding of legislative intent, no further analysis was needed to validate the constitutionality of the statute.[103]

Before 2007, the statute of limitations for child victims of sexual abuse in Delaware was two years.[104] In 2007, the Delaware Legislature enacted its version of a child victim statute.[105] This statute eliminated the statute of limitations for child victims of sexual abuse and created a revival period for two years.[106] During the two-year period, a victim could bring previously time-barred claims.[107]

The question surrounding the law was whether it violated due process by interfering with vested rights.[108] The Supreme Court of Delaware addressed this issue in *Sheehan v. Oblates of St. Francis de Sales*.[109] In *Sheehan*, an individual took advantage

96. *Id.* at 819.
97. Act of May 28, 1991, ch. 232, § 1, 1991 Minn. Laws 629, 629.
98. *Id.* § 4, 1991 Minn. Laws at 631.
99. *Lickteig*, 782 N.W.2d at 818.
100. *Id.* at 811.
101. *Id.*
102. *Id.* at 818-19.
103. *See id.* at 818-20.
104. DEL. CODE ANN. tit. 10, § 8119 (West 1970).
105. DEL. CODE ANN. tit. 10, § 8145 (West 2009).
106. tit. 10, § 8145.
107. tit. 10 § 8145.
108. Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1258-59 (Del. 2011).
109. *Id.* at 1251.

of the statute's revival period.[110] The Oblates argued that the expiration of the statute of limitations had vested with them a right to be free from claims.[111] However, the court rejected this argument, instead finding that statutes of limitation only create vested rights when dealing with prescriptive property rights, such as adverse possession.[112] The statute of limitation in question was more akin to a remedy.[113] Essentially, statutes of limitations "are by definition arbitrary" and subject to change at any time by the legislature, and the legislature is the proper branch of government to determine the length of the statute of limitation.[114] As such, there can be no fundamental right to a statute of limitation.[115]

2. Property Approach

Unlike Delaware, which specifically found that there is not a vested right to a statute-of-limitations defense,[116] some states take the opposite approach.[117] The property approach classifies a statute of limitation as a vested right.[118] This classification affords holders of a statute-of-limitations defense due process protections similar to that of property.[119]

In 2016, Utah passed a revival law for child sexual assault claims.[120] The law allowed minor victims to bring previously time-barred claims within the longer of three years of the effective

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110. *Id.*

111. *Id.* at 1259.

112. *Id.* (citing Campbell v. Holt, 115 U.S. 620, 627-28 (1885)).

113. *Sheehan,* 15 A.3d at 1259 ("As a matter of constitutional law, statutes of limitation go to matters of remedy, not destruction of fundamental rights.").

114. *Id.* (quoting Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945)) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.").

115. *Id.*

116. *Id.* ("Under Delaware law, the CVA can be applied retroactively because it affects matters of procedure and remedies, not substantive or vested rights.").

117. *See* Mitchell v. Roberts, 469 P.3d 901, 903 (Utah 2020) ("[T]he founding-era understanding of 'due process' and 'legislative power' forecloses legislative enactments that vitiate a 'vested right' in a statute of limitations defense.").

118. *Id.* at 912 (explaining that "vested rights were a well-established class of property" around the time of the framing of the Utah Constitution, and "early Utahns viewed revival of a time-barred claim as an impermissible interference with a vested right").

119. *Id.* at 912-13.

120. Act of May 10, 2016, ch. 379, 2016 Utah Laws 2233 (codified as amended at UTAH CODE ANN. § 78B-2-308 (West 2022)).

date of the law or until the victim reached fifty-three.[121] Acting pursuant to the revival law, a victim whose suit was previously time-barred brought suit against her assailant.[122] The assailant challenged the validity of the revival law.[123] The court determined that because a statute-of-limitations defense is a vested right, due process rendered the revival period invalid.[124]

The Utah court equated vested rights with property rights.[125] The court defined a vested right as "title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment of a demand or a legal exemption from a demand."[126] Because a statute of limitation is "a legal exemption from a demand," a statute of limitation is a vested right.[127] Once the court classified a statute-of-limitations defense as a vested right, the State could not take the defense away without the same due process afforded to property.[128] Here, the due process violation was a legislative infringement on judicial power.[129] According to the Utah court, legislatures can change rights going forward, but retroactive legislation effectively confiscates from individuals previously vested rights—a role constitutionally left for the judiciary.[130]

3. Arkansas Approach

Because Arkansas has yet to decide the validity of Act 1036, this Note focuses on Arkansas's approach to retroactive legislation in general.[131] Arkansas has vast case law beginning in

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121. *Id.* § 7, 2016 Utah Laws at 2234.

122. *Mitchell*, 469 P.3d at 902 (The facts of this case are the basis for the story in Part I).

123. *Id.* at 903.

124. *Id.* at 912-13.

125. *Id.*

126. *Id.* at 912 (quoting Toronto v. Salt Lake City, 37 P. 587, 588 (Utah 1894)).

127. *Mitchell*, 469 P.3d at 912.

128. *Id.*

129. *Id.* at 909-10.

130. *Id.*

131. The retroactive portion of Act 1036 went into effect six months after the effective date of the law itself. ARK. CODE ANN. § 16-118-118(b)(2) (West 2021). The effective date of the law was July 28, 2021, so the effective date of the retroactive provision was January 28, 2022. *See* Ark. Att'y Gen., Opinion No. 2021-029 (May 20, 2021). At the time of writing this Note, neither the Arkansas Court of Appeals nor the Supreme Court of Arkansas has addressed the retroactive portion of Act 1036.

1846 outlining an approach that describes when statutes may be given retroactive effect.[132] Like Minnesota and Delaware, Arkansas courts cite legislative intent as an important factor when determining retroactivity of statutes of limitation.[133] Arkansas is also similar to Minnesota in that courts presume only prospective application of statutes of limitation unless the legislative intent shows otherwise.[134] However, in Arkansas, legislative intent is not dispositive.[135] Procedural or remedial legislation may apply retroactively, but legislation affecting substantive rights cannot apply retroactively.[136] Thus, an act that affects substantive rights can only apply prospectively, even if the legislature explicitly intends for the act to apply retroactively.[137]

Put simply, in Arkansas, even though legislative intent is "[t]he first principle of retroactivity of legislation,"[138] courts often decide cases on the procedural or substantive nature of an act as applied to the parties.[139] Substantive laws "create[], define[], and regulate[] the rights, duties, and powers of parties."[140] On the other hand, "there is no vested right in any particular mode of

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132. *See* Couch v. McKee, 6 Ark. 484, 493 (1846); Brandon J. Harrison & Hans J. Hacker, *Arkansas's Retroactive-Legislation Doctrine*, 64 ARK. L. REV. 903, 908-09 (2011).

133. *Compare* English v. Robbins, 2014 Ark. 511, at 7, 452 S.W.3d 566, 571 ("The first principle of retroactivity of legislation is that retroactivity is a matter of legislative intent. Unless it expressly states otherwise, this court presumes the legislature intends for its laws to apply only prospectively." (citing Archer v. Sisters of Mercy Health Sys., St. Louis, Inc., 375 Ark. 523, 528, 294 S.W.3d 414, 417 (2009))), *with* Lickteig v. Kolar, 782 N.W.2d 810, 818 (Minn. 2010) ("Newly enacted laws are not given retroactive effect 'unless clearly and manifestly so intended by the legislature.'" (quoting MINN. STAT. ANN. § 645.21 (2008))), *and* Sheehan v. Oblates of St. Frances de Sales, 15 A.3d 1247,1259 (Del. 2011) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law."). *See also* Harrison & Hacker, *supra* note 132, at 930-31.

134. *See English*, 2014 Ark. 511, at 7, 452 S.W.3d at 571; *accord* MINN. STAT. ANN. § 645.21 (West 2022).

135. *See* Rhodes v. Kroger Co., 2019 Ark. 174, at 5, 575 S.W.3d 387, 390 ("[T]he plain language of an act is not the only consideration in determining whether a statute can be applied retroactively . . . .").

136. J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 2014 Ark. 282, at 11-12, 436 S.W.3d 458, 466-67; *see also* Harrison & Hacker, *supra* note 132, at 905 ("[W]hen our appellate courts have characterized a legislative act as being 'remedial' or 'procedural' in nature, they apply the legislation retroactively—even if the Arkansas General Assembly has provided no indicia of intent on the question."); Harrison & Hacker, *supra* note 132, at 945 ("[O]ur courts do not retroactively apply those laws that affect substantive rights.").

137. *Rhodes*, 2019 Ark. 174, at 5-6, 575 S.W.3d at 390.

138. *English*, 2014 Ark. 511, at 7, 452 S.W.3d at 571.

139. *See id.* at 7-8, 452 S.W.3d at 571-72; *J-McDaniel*, 2014 Ark. 282, at 11-12, 436 S.W.3d at 466-67.

140. *English*, 2014 Ark. 511, at 7-8, 452 S.W.3d at 571.

procedure or remedy."[141] For example, in 2013, the Arkansas General Assembly passed Act 1116, which specifically stated that its provisions should apply retroactively.[142] This Act did two things. First, the Act *clarified* the right of contribution between joint tortfeasors.[143] Second, it *created* the right to allocate fault between joint tortfeasors.[144] Subsequently, the Supreme Court of Arkansas heard and decided two cases—*J-McDaniel Const. Co. v. Dale E. Peters Plumbing Ltd.* and *English v. Robbins*—involving the Act and came to different conclusions about retroactivity depending on the nature of the rights affected.[145]

In *J-McDaniel*, homeowners sued a construction company, and the construction company filed many third-party complaints for contribution under Act 1116—enacted after the relevant events—against its sub-contractors.[146] After the homeowners settled, the issue became whether the construction company had a valid contribution claim under Act 1116.[147] The court held that because the substantive right to contribution remained essentially unchanged under Act 1116, the procedure established by Act 1116 applies retroactively.[148]

English involved a medical-malpractice suit where the injured patient reached a settlement agreement with one of the doctors.[149] The patient then sued other hospital staff members that were potentially involved in the injury.[150] The staff members then added a third-party complaint against the original doctor.[151] A jury found the original doctor solely liable for the patient's injuries, but the judge vacated the judgment pursuant to new case

141. *J-McDaniel*, 2014 Ark. 282, at 11, 436 S.W.3d at 467.

142. Act of Apr. 11, 2013, No. 1116, § 8, 2013 Ark. Acts 4345, 4349; *see also J-McDaniel*, 2014 Ark. 282, at 12, 436 S.W.3d at 467 ("[I]t is clear that Act 1116 was intended by the General Assembly to have retroactive effect.").

143. No. 1116, § 3, 2013 Ark. Acts at 4346-47.

144. *Id.*

145. *Compare J-McDaniel*, 2014 Ark. 282, at 12, 436 S.W.3d at 467 (holding that the Act's provisions "provid[ing] for a right to contribution" were "only procedural in nature," and thus, "retroactive"), *with English*, 2014 Ark. 511, at 7-8, 452 S.W.3d at 572 ("[T]he Act creates a new, substantive right to allocation of fault that cannot be constitutionally applied retroactively.").

146. *J-McDaniel*, 2014 Ark. 282, at 2-3, 436 S.W.3d at 461-62.

147. *Id.* at 5-6, 436 S.W.3d at 463-64.

148. *Id.* at 12, 436 S.W.3d at 467.

149. *English*, 2014 Ark. 511, at 2, 452 S.W.3d at 568-69.

150. *Id.*, 452 S.W.3d at 569.

151. *Id.*, 452 S.W.3d at 569.

law.[152] The staff members argued that the judge should set aside the order vacating judgment because newly enacted Act 1116 allowed claims for contribution to allocate fault.[153] However, the court held that the allocation of fault under Act 1116 is a substantive right that did not exist before Act 1116.[154] Accordingly, Act 1116 could only apply prospectively to this case.[155]

At first glance, reconciling these two cases seems impossible: the same court—ruling on the same act in the same year—reached different conclusions as to the Act's constitutionality.[156] The court in *J-McDaniel* held that Act 1116 changed only the procedure for contribution claims, but the substantive right to contribution did not change.[157] On the other hand, the court in *English* held that the portions of Act 1116 that changed the substantive right to a certain method of allocating fault, which had previously vested under the old law, could not constitutionally apply retroactively.[158] The differing conclusions demonstrate that Arkansas will apply an act retroactively only if it does not interfere with vested rights.[159]

Much of the language discussing vested rights sounds similar to Utah's property approach, but there are differences in the Arkansas and Utah approaches. Under the Utah approach, retroactive legislation that interferes with vested rights is a due process violation.[160] Likewise, although Arkansas courts rarely point to a constitutional provision in these decisions,[161] the courts appear to hold retroactive legislation unconstitutional because it violates due process.[162] Even though both Utah and Arkansas rely

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152. *Id.* at 3, 452 S.W.3d at 569.

153. *Id.* at 4, 452 S.W.3d at 570.

154. *English,* 2014 Ark. 511, at 8, 452 S.W.3d at 572.

155. *Id.*, 452 S.W.3d at 572.

156. *Id.* at 8-9, 452 S.W.3d at 572; J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 2014 Ark. 282, at 12, 436 S.W.3d 458, 467.

157. *J-McDaniel*, 2014 Ark. 282, at 12, 436 S.W.3d at 467.

158. *English*, 2014 Ark. 511, at 8, 452 S.W.3d at 572.

159. *Id.* at 7, 452 S.W.3d at 571.

160. Mitchell v. Roberts, 469 P.3d 901, 909-10 (Utah 2020).

161. *See* Couch v. McKee, 6 Ark. 484, 495 (1846); Vaughan v. Bowie, 30 Ark. 278, 283 (1875); Rhodes v. Kroger Co., 2019 Ark. 174, at 5-6, 575 S.W.3d 387, 390; *J-McDaniel*, 2014 Ark. 282, at 12, 436 S.W.3d at 467; *English*, 2014 Ark. 511, at 7-8, 452 S.W.3d at 571-72.

162. Coco v. Miller, 193 Ark. 999, 1003, 104 S.W.2d 209, 211 (1937).

on due process to prohibit retroactive statutes of limitation, the due process analysis that each state applies is different.

Under the Utah approach, the due process violation partially implicates the underlying structure of government.[163] The approach treats retroactive legislation as a legislative encroachment into the exclusive domain of the judiciary.[164] The legislature's job is to establish what the law is going forward, and the judiciary's job is to establish what the law is and was.[165] When a legislature enacts retroactive legislation, it attempts to establish what the law was—a "function[] relegated to the judiciary."[166] This legislative trespass deprives individuals of previously vested rights without judicial due process.[167]

The Arkansas approach does not deal with structural limitations on the branches of government.[168] Instead, the focus is solely on the individual substantive rights obtained and subsequently altered by retroactive legislation.[169] When the altered right is substantive, retroactive legislation is invalid,[170] but when the altered right is remedial or procedural, retroactive legislation is valid.[171] Because the Arkansas approach does not alter the balance of governing power between the branches of government, the consequences of changing the approach are less severe in Arkansas than in Utah.

III. ARGUMENT

Act 1036 establishes a new statute of limitations for child sexual abuse claims, and the legislature specifically intended the statute to apply retroactively.[172] However, retroactive legislative

163. *Mitchell*, 469 P.3d at 909.

164. *Id.*

165. *Id.* at 909-10.

166. *Id.* at 910.

167. *Id.* ("Because divestment statutes operated to confiscate or vitiate previously vested rights, the nineteenth-century public viewed these laws as 'judicial decrees in disguise.'" (quoting Nathan N. Frost et al., *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 382 (2004))).

168. *See* Rhodes v. Kroger Co., 2019 Ark. 174, at 5-6, 575 S.W.3d 387, 390.

169. *Id.*, 575 S.W.3d at 390.

170. *Id.*, 575 S.W.3d at 390.

171. J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 2014 Ark. 282, at 11-12, 436 S.W.3d at 466-67.

172. ARK. CODE ANN. § 16-118-118(b)(2) (West 2021).

intent is not the end of the analysis. Instead, the validity of Act 1036 depends on whether it affects procedural or substantive rights.[173] In its current form, the Arkansas retroactive-legislation doctrine likely invalidates the revival period within Act 1036 because Arkansas classifies a statute-of-limitations defense as a substantive, vested property right.[174]

A statute-of-limitations defense does not have the traditional characteristics of property.[175] Accordingly, classification of a statute-of-limitations defense as property is odd, and most likely, misguided. By rejecting the notion that a statute-of-limitations defense is property and reclassifying the defense as a mode of procedure, Arkansas can allow the revival period to stand without changing the framework of the retroactive-legislation doctrine. While this would technically alter precedent,[176] the compelling interests of victims of childhood sexual abuse substantially justifies the change.

A. Rebutting the Property Framework

Arkansas courts have equated retroactive statutes of limitation to taking property from one person and giving it to another.[177] However, a statute-of-limitations defense does not have the characteristics of property.[178] Thus, classifying a statute-of-limitations defense as property is misguided.

Inherent in the ownership of property are the rights to use, possess, and transfer the property.[179] The "owner" of a statute-of-limitations defense cannot freely use the defense. The "owner" can only use the defense in response to suit. Such a conditional

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173. *See* Harrison & Hacker, *supra* note 132, at 905, 945.

174. Arkansas courts have classified statutes of limitation as substantive by concluding that the defense is a vested right. *See* Couch v. McKee, 6 Ark. 484, 494-95 (1846). Despite the arbitrary nature of a statute of limitation, once the time period runs, a potential defendant has a vested right in the statute-of-limitations defense. *Id.* Applying a change in the statute of limitations retroactively would have the effect of giving a plaintiff a right previously not owed and taking from a defendant a valid defense. *Id.* at 495.

175. *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019) [hereinafter *Property*, BLACK'S LAW DICTIONARY].

176. *See supra* note 174 and accompanying text.

177. *Couch*, 6 Ark. at 495.

178. *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY, *supra* note 175.

179. *See, e.g.*, *id.*

use is not the type of use associated with traditional property ownership.[180]

Likewise, the "owner" of a statute-of-limitations defense likely does not possess the defense similar to the way an owner possesses property. Often, a defendant is unaware of a statute-of-limitations defense until sued. Again, this reactionary possession of the defense does not align with typical property possession.[181] Even assuming that active, rather than reactive, possession of the defense was possible, the use and possession would necessarily be more similar to intangible rather than tangible property.[182] Notably, owners of intangible property ordinarily may actively use the intangible property. For example, the owner of a trademark has the right to actively use the mark;[183] the owner of a patent can actively use the patent and actively sue others for infringement;[184] and the owner of a business that has goodwill can actively use the goodwill to command a higher sale price for the business.[185] In each of these examples, the owner uses the property without initial outside interference.

Additionally, ownership over property implies the power to transfer the property.[186] Even assuming the "owner" of a statute-of-limitations defense can use and possess the defense as property, the "owner" cannot transfer the defense. The "owner" cannot sell the defense, and no one can buy a statute-of-limitations defense.

The characteristic of transferability is the most significant in the context of due process and a statute-of-limitations defense. Proponents of the property approach equate the revival of a statute-of-limitations defense with transferring the defense from the defendant to the plaintiff.[187] Even assuming that a statute-of-

180. *See, e.g.*, *id.* ("Property . . . signifies, in a strict sense, one's exclusive right of ownership of a thing.").

181. *See, e.g.*, *id.*

182. Real property is "[l]and and anything growing on, attached to, or erected on it." *Id.* Tangible personal property is "personal property that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses." *Id.* If a defense is not real property nor tangible personal property, the only thing left is intangible property. *See, e.g.*, *id.* (defining "intangible property" as "[p]roperty that lacks a physical existence").

183. *See, e.g.*, *Intellectual Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

184. *See, e.g.*, *id.*

185. *See, e.g.*, *Goodwill*, BLACK'S LAW DICTIONARY (11th ed. 2019).

186. *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY, *supra* note 175.

187. Couch v. McKee, 6 Ark. 484, 494-95 (1846).

limitations defense can be transferred, proponents of the property approach fail to adequately describe the nature of the transaction. In reality, there are two transfers of a statute-of-limitations defense under the property approach. Once an injury occurs, a plaintiff has a cause of action. This cause of action exists until there is a settlement, a final adjudication, or the statutory period takes the cause of action away. The running of the statutory period—the first transfer—takes away from the plaintiff a cause of action and gives to the defendant a complete defense for which the defendant is not otherwise entitled. The initial transfer from plaintiff to defendant does not upset notions of due process under the property approach. However, the subsequent transfer from defendant to plaintiff does upset due process under the property approach even though the thing being transferred in both cases is the same.

Proponents of the property approach most likely rebut this argument by noting that when a defendant injures a plaintiff, the plaintiff has a cause of action only for the amount of time within the statute-of-limitations period. Thus, the State is not taking anything from the plaintiff, and there is no due process violation. In other words, there is no transfer. Instead, when a defendant injures a plaintiff, the plaintiff has a cause of action up to the last day of the statutory period. At the same moment the cause of action arises, the defendant has a future expected right to a statute-of-limitations defense accruing the day following the statutory period. Put simply, after a defendant injures a plaintiff, the plaintiff has a present right to sue, and the defendant has a future right to a defense. The parties' rights are static, only changing due to the passage of time. Viewing the parties' rights as static complies with due process as long as the State cannot change the statutory period once the cause of action arises. However, Arkansas courts allow the legislature to change a statute of limitations while the limitations period is running.[188]

Notably, a defendant does not have a vested right to a statute of limitations until the time period fully runs.[189] For example,

188. *See* Morton v. Tullgren, 263 Ark. 69, 72, 563 S.W.2d 422, 424 (1978) ("[T]he General Assembly may validly enlarge the period of limitations and make the new statute, rather than the old, apply to any cause of action which has not been barred at the time the new statute becomes effective.").

189. *Id.*, 563 S.W.2d at 424.

suppose the statute of limitations for some cause of action is three years. Then, suppose that after one year into the limitations period, the legislature changes the statute of limitations to five years. Under Arkansas case law, if the legislative intent is for the act to apply retroactively, the defendant does not have a vested right in the shorter statutory period that was in effect when the cause of action accrued.[190] This position appears to be contrary to Arkansas's vested-rights approach.[191] By extending the statutory period after the cause of action accrues, the legislature has taken from the defendant a future statute-of-limitations defense from the time of the original statutory period to the new statutory period. In sum, under current Arkansas case law, the legislature can already take an expected statute-of-limitations defense from a defendant and give to a plaintiff a longer statutory period.[192] Even assuming that revival legislation transfers something between a plaintiff and a defendant, the due process justification for preventing such a transfer is underinclusive. If there is no due process issue with taking an *expected* statute-of-limitations defense, there should be no due process issue with taking a statute-of-limitations defense.

As the American poet James Whitcomb Riley once said, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."[193] The opposite is also likely true. A bird that does not walk like a duck, swim like a duck, nor quack like a duck is probably not a duck. Likewise, something that cannot be used like property, possessed like property, nor transferred like property is probably not property. The "owner" of a statute-of-limitations defense cannot use, possess, or transfer the defense in a way that resembles property ownership.[194] Classifying something as property that does not have the characteristics of property is misguided. As such, Arkansas courts should reclassify a statute-of-limitations defense as something other than property.

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190. *Id.*, 563 S.W.2d at 424.

191. *See* discussion *supra* Section II.E.3.

192. *See Morton*, 263 Ark. at 72, 563 S.W.2d at 424.

193. MAX CRYER, WHO SAID THAT FIRST?: THE CURIOUS ORIGINS OF COMMON WORDS AND PHRASES 139-40 (1st ed. 2010).

194. *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY, *supra* note 175.

B. Reclassification of the Defense as a Mode of Procedure to Allow Intent to Govern

Arkansas courts have been less than clear throughout the creation of the retroactive-legislation doctrine but are still adamant "[t]he first principle of retroactivity of legislation is that retroactivity is a matter of legislative intent."[195] If legislation affecting substantive rights cannot apply retroactively even with legislative intent,[196] and legislation affecting procedures and remedies can apply retroactively in the absence of legislative intent,[197] legislative intent is certainly not the first principle of retroactivity. If Arkansas courts were to focus on legislative intent as much as they claim,[198] the revival provision of Act 1036 would survive. However, Arkansas courts need not adopt a wholly intent-based approach in order to uphold the revival provision of Act 1036.

Instead, the more logical approach of classifying a statute of limitations as a mode of procedure or a remedy would allow Arkansas courts to uphold the revival provision of Act 1036 without abandoning the established retroactive-legislation doctrine. Statutes of limitation more resemble remedies than substantive rights. A remedy is "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief."[199] A statute-of-limitations defense is merely the method a defendant uses to *prevent* the plaintiff from obtaining *relief*.[200] Thus, a statute-of-limitations defense is nothing more than a defensive

195. English v. Robbins, 2014 Ark. 511, at 7, 452 S.W.3d 566, 571.

196. *See id.*, 452 S.W.3d at 571.

197. McMickle v. Griffin, 369 Ark. 318, 338, 254 S.W.3d 729, 746 (2007); Bean v. Off. of Child Support Enf't, 340 Ark. 286, 296-97, 9 S.W.3d 520, 526 (2000) ("In determining legislative intent, we have observed a strict rule of construction against retroactive operation and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. However, this rule does not ordinarily apply to procedural or remedial legislation." (citations omitted)); *see also* Harrison & Hacker, *supra* note 132, at 960 ("An essentially unwritten, per se rule has thus emerged: regardless of whether the Arkansas General Assembly expressly states that an act should be applied retroactively, our appellate courts may do so, especially if they determine legislation is procedural or remedial.").

198. *English*, 2014 Ark. 511, at 7, 452 S.W.3d at 571 ("The first principle of retroactivity of legislation is that retroactivity is a matter of legislative intent.").

199. *Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

200. *See* John J. Watkins, *A Guide to Choice of Law in Arkansas*, 2005 ARK. L. NOTES 151, 153 (2005).

remedy. Because the legislature may retroactively change remedies under the current interpretation of the retroactive-legislation doctrine,[201] the legislature should likewise be able to retroactively change a statute of limitations. Under this proposed approach, Arkansas courts can still claim to follow—but ultimately ignore—legislative intent.

C. Applying Act 1036 Retroactively will not Drastically Alter Precedent

Changing established case law is not popular. The Arkansas Supreme Court presumes the validity of prior decisions and follows precedent until prior decisions create results so wrong and unjust that a break with precedent is unavoidable.[202] Following precedent creates "uniformity" and "predictability."[203] In light of the compelling interests of child sexual abuse victims, the manifestly unjust result of following precedent, and the divergence from Arkansas's stated principles, changing course is appropriate here.

For a variety of reasons, victims of childhood sexual assault are prevented from bringing timely claims.[204] The Arkansas retroactive-legislation doctrine likely thwarts the legislature's attempt at solving the problem.[205] Applying precedent denies victims their day in court.[206] Preventing access to the justice system to redress a legal harm is the antithesis of justice.[207] Arkansas courts could slightly alter precedent to prevent this injustice. In this instance, changing precedent would result in

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201. J-McDaniel Constr. Co. v. Dale E. Peters Plumbing Ltd., 2014 Ark. 282, at 11-12, 436 S.W.3d 458, 467.

202. Council of Co-Owners for Lakeshore Resort & Yacht Club Horizontal Prop. Regime v. Glyneu, LLC, 367 Ark. 397, 402, 240 S.W.3d 600, 605 (2006).

203. *Id.*, 240 S.W.3d at 605 (quoting Union Pac. R.R. Co. v. Barber, 356 Ark. 268, 287-88, 149 S.W.3d 325, 337 (2004)).

204. *See* discussion *supra* Section II.B.

205. *See supra* note 174 and accompanying text.

206. *See, e.g.*, Mitchell v. Roberts, 469 P.3d 901, 914 (Utah 2020) ("The problems presented in a case like this one are heart-wrenching.").

207. *See, e.g.*, *Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "justice" as "[t]he legal system by which people and their causes are judged"); Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 182 (1978) ("The words 'access to justice' . . . focus on two basic purposes of the legal system . . . . First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.").

Arkansas courts more closely following their own stated principles.[208]

Under the current retroactive-legislation doctrine, the court claims that legislative intent is the "first principle," but the court often ignores legislative intent.[209] Essentially, the court says it is doing one thing, but it does something different. Applying the principle that the court so often recites would result in a de facto change in precedent, but the standard would remain the same. Most decisions under the retroactive-legislation doctrine would survive, and the court would be applying instead of ignoring its stated principles.[210]

IV. CONCLUSION

A wide range of circumstances prevent victims of child sexual abuse from coming forward within the statute-of-limitations period.[211] There is an ongoing national trend of extending and reviving previously time-barred child sexual abuse claims.[212] Arkansas recently joined the national trend, but the legislature's attempt to grant a remedy for those sexually abused as children is likely unconstitutional retroactive legislation.[213] However, a slight alteration of the retroactive-legislation doctrine to follow legislative intent and declassify a statute-of-limitations defense as a substantive right would allow the law to stand. If Arkansas courts fail to acknowledge the important interests at stake, victims of childhood sexual abuse will continue to suffer a new wound for old scars.

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208. English v. Robbins, 2014 Ark. 511, at 7, 452 S.W.3d 566, 571 ("The first principle of retroactivity of legislation is that retroactivity is a matter of legislative intent.").

209. *Id.*, 452 S.W.3d at 571.

210. *See id.*, 452 S.W.3d at 571.

211. *See* discussion *supra* Section II.B.

212. *See* discussion *supra* Section II.C.

213. *See* Coco v. Miller, 193 Ark. 999, 1003, 104 S.W.2d 209, 211 (1937); s*ee also* discussion *supra* Section II.E.3.