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Limitation of Actions and Equal Protection in Paternity Cases

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LIMITATION OF ACTIONS AND EQUAL PROTECTION IN PATERNITY CASES

I. THE CONSTITUTIONAL FRAMEWORK

Prior to 1968, statutory classifications based on illegitimacy were not viewed by the Supreme Court as falling within that group of classifications triggering an intensified equal protection scrutiny. In that year, the Court in *Levy v. Louisiana*[1] found an equal protection violation in a Louisiana statute which denied illegitimate children the right to seek recovery for the wrongful death of their mother. Justice Douglas' opinion, while invoking rationality review in form, strongly suggested that a closer fit between the legislative intent and the means selected to execute that intent was appropriate where illegitimacy was involved.[2] Subsequently, the Court extended the equal protection rights of illegitimate children. Thus, it has been held that the equal protection clause protects the rights of illegitimate children to share equally with legitimate children in matters of recovery of workmen's compensation benefits upon the death of a parent,[3] receipt of state public assistance funds,[4] Social Security disability benefits,[5] and inheritance by intestate succession.[6]

The basic standard of review applied by the Court in reviewing such classifications has rested on the premise that illegitimacy is not a "suspect" classification. Thus, the strict scrutiny test, which is applied where a fundamental right or existence of a suspect class is in issue, has not been applied.[7] The Court's reasoning was expressed by the majority in *Mathews v. Lucas*:[8] although illegitimacy was a characteristic of birth dictated by factors not within an individual's control, such

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1. 391 U.S. 68 (1968).
2. *Id.* at 71-72.
3. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).
4. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973).
5. Jimenez v. Weinberger, 417 U.S. 628 (1974).
6. Trimble v. Gordon, 430 U.S. 762 (1977), *but see* Lalli v. Lalli, 439 U.S. 259 (1978), which upheld a New York statute permitting inheritance where the decedent had died intestate only where a court of competent jurisdiction had entered an order of filiation.
7. *See* Mathews v. Lucas, 427 U.S. 495 (1976).
8. *Id.*

as race or national origin, discrimination against illegitimates had not reached the degree or pervasiveness of the discrimination directed at, for example, certain racial or ethnic groups. Therefore, distinctions based on illegitimacy did not merit the type of protection from the majoritarian political process that would trigger strict judicial scrutiny.[9] The Court has instead applied what it terms a "heightened level of scrutiny."[10] Briefly stated, this particular level of scrutiny falls in between the strict scrutiny test and the minimal scrutiny, or rational basis test,[11] which is typically employed to examine equal protection challenges to economic legislation.[12] This note will examine the present status of statutes of limitation as they relate to equal protection guarantees in paternity litigation.

While all states and uniform acts impose a statutory duty on parents to support their children,[13] the Supreme Court did not have the occasion to review the equal protection aspect of a statutory scheme which granted differing legal rights to legitimate and illegitimate children with respect to enforcement of that duty until 1973. In that year, the Court, in *Gomez v. Perez*,[14] struck down a Texas statute barring illegitimate children from seeking any support from their natural fathers while according such rights to legitimate children until they reached their majority. In its opinion, the Court stated that a state could not "invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[15] It went on to hold that where "a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its

9. *Id.* at 503-06. *See also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

10. Pickett v. Brown, 103 S. Ct. 2199, 2204 (1983).

11. The Court's attempts to define intermediate scrutiny in the context of illegitimacy have failed thus far to produce a uniform standard. To date, the Court has defined intermediate scrutiny in negative as well as positive terms. *See Pickett*, 103 S. Ct. at 2204 (and citations therein).

12. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955), Railway Express Agency v. New York, 336 U.S. 106 (1949).

13. *See, e.g.*, UNIF. PATERNITY ACT, §§ 1,2 (1960).

14. 409 U.S. 535 (1973).

15. *Id.* at 538.

natural father has not married its mother."[16] Although the Court was sensitive to the additional evidentiary requirement existing for illegitimate children seeking support, namely, the additional step of proving paternity, it stated that that additional requirement could not form the basis for "an impenetrable barrier that works to shield otherwise invidious discrimination."[17] Nine years later, in *Mills v. Habluetzel*,[18] the Court formulated a test taking into account the concerns voiced in its holding in *Gomez* and the state's interest in avoiding stale and fraudulent claims. The latter is frequently cited as a motivating factor in imposing a limitations period for paternity claims.

In *Mills*, the Court resolved the equal protection analysis into a two-part test. In order to survive equal protection scrutiny, a statutory scheme limiting paternity actions has to "be sufficiently long in duration to present a reasonable opportunity for those with an interest in such [illegitimate] children to assert claims on their behalf" and "any time limitation placed on that opportunity must be substantially related to the state's interest in avoiding stale and fraudulent claims."[19] Measured against this test, the Court held that Texas' enactment of a statute of limitations requiring that a suit to establish paternity be brought prior to the child's first birthday, enacted in response to the Court's decision in *Gomez*,[20] failed to satisfy either of the two criteria.[21]

Justice Rehnquist, writing for the Court,[22] stated that the economic, social, and psychological disruption in a mother's life during the year following the birth of an illegitimate child would present too great a burden on the mother to allow so brief a time period in which to file a paternity claim.[23] Additionally, no satisfactory relationship could be found between a one-year limitations period and the state's interest. As the Court stated, "[w]e

16. *Id.*

17. *Id.*

18. 456 U.S. 91 (1982).

19. *Id.* at 99-100.

20. *See* Texas Department of Human Resources v. Hernandez, 595 S.W.2d 189 (Tex. Civ. App. 1980).

21. 456 U.S. at 100.

22. All of the justices except for Justice Powell, who concurred separately in the judgment, joined in the Court's opinion. Justice Powell did, however, join Justice O'Connor's concurrence. For a discussion of Justice O'Connor's concurrence, see text accompanying *infra* notes 26-31.

23. 456 U.S. at 100.

can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of 12 months will appreciably increase the likelihood of fraudulent claims."[24] The Court declined, however, to extend complete equality to illegitimate children seeking support, citing the additional requirements of proof.[25]

In a concurring opinion, Justice O'Connor suggested that, given the criteria upon which the Court invalidated the one-year statute of limitations, longer limitations periods might also be unconstitutional.[26] Although the state had argued that it had an interest in avoiding the litigation of stale and fraudulent claims, Justice O'Connor believed that this argument was outweighed by another interest unique to the state itself—the interest of the state in seeing that all genuine claims for child support are resolved. This interest springs from two concerns: first, in ensuring that judicial process is available to all of its citizens, and second, the desire of the state to reduce the number of its citizens forced to become dependent on public assistance.[27] A one-year limitations period for establishing paternity as a prerequisite for obtaining support, Justice O'Connor contended, would actually increase the burden on a state welfare program.[28] An additional factor militating against the state's interest was that Texas did not toll the statute of limitations during the child's minority in paternity cases, as it did in the vast majority of all civil actions. While the Texas legislature saw no overriding evidentiary problems in allowing an extended time lapse in other types of actions, paternity was placed in a special category.[29] Taken cumulatively, Justice O'Connor expressed grave doubt as to whether the resulting burden placed on the illegitimate plaintiff seeking support had any relation to the advancement of a state interest within constitutional bounds.

In addition, Justice O'Connor noted that certain personal obstacles preventing the filing of a paternity claim could well exist several years after the child's birth. She posited two situa-

24. *Id.* at 101.
25. *Id.* at 97.
26. *Id.* at 106 (O'Connor, J., concurring).
27. *Id.* at 103.
28. *Id.* at 104.
29. *Id.*

tions in which these obstacles would bar any judicially enforceable right of support under the challenged statute: first, if the mother and the natural father continued their relationship and the father supported the child, the mother might be reluctant to file a paternity claim in order to protect her child's right to future support if it would endanger her relationship with the child's father. In the alternative, where the child resided with and was supported by the father or his family, the child would be unable to file a paternity claim against him. Justice O'Connor concluded that "[t]he risk that the child will find himself without financial support from his natural father seems as likely throughout his minority as during the first year of his life."[30] In sum, the state had failed to show any qualities inherent in the one-year statute of limitations which would demand a different result were the period longer.[31]

In *Pickett v. Brown*,[32] the Court affirmed its decision in *Mills*. The Tennessee statute challenged in *Pickett* was distinguishable from the statute invalidated in *Mills* in two respects. First, it provided for a two-year limitations period, running from the date of the child's birth, for the filing of a paternity claim. Second, the Tennessee statute contained two saving clauses reviving a paternity action. The first clause provided for a revival where the natural father had acknowledged paternity either in writing or by furnishing support for the child; the second clause permitted an action to be brought by an appropriate state agency, or by any person, provided that the child had not reached the age of eighteen and was, or was liable to become, a public charge.[33]

Writing for a unanimous Court, Justice Brennan found the Tennessee plan to be violative of equal protection guarantees under both prongs of the *Mills* test. Relying on Justice O'Connor's concurring opinion in *Mills*, Justice Brennan noted that while Tennessee had alleviated some of the personal obstacles to bringing suit discussed in *Mills, supra*, the class of illegitimate children not covered by either of the two saving clauses

30. *Id.* at 106.
31. *Id.*
32. 103 S. Ct. 2199 (1983).
33. TENN. CODE ANN. § 36-224(2) (1977).

still faced substantial barriers in resolving support claims.[34] In addition, the Court concluded that the emotional and financial factors present during the first year of an illegitimate child's life, which were noted in *Mills* as possibly deterring the filing of a paternity claim, would most likely still be present after two years. Thus, a two-year limitations period would not provide the "reasonable opportunity" to bring suit under the first prong of the *Mills* test.[35]

Turning to the second prong of the *Mills* test, Justice Brennan was similarly able to refute Tennessee's argument that the two-year period was substantially related to the avoidance of litigating stale or fraudulent claims. Echoing the language in *Mills*, Justice Brennan found no evidentiary problems inherent in the passage of an additional year that would either hamper judicial process or justify the termination of an illegitimate child's right to seek support.[36] Similarly, Justice Brennan pointed out a fundamental inconsistency in Tennessee's argument that its limitations period satisfied the second portion of the *Mills* criteria. Tennessee had argued that the second saving clause in its statute, which permitted suit to be brought until the child's eighteenth birthday where the child is, or is likely to become, a public charge, justified a distinction between illegitimate children receiving public assistance funds and those who did not on grounds of protection of state revenue. In effect, however, Tennessee had placed illegitimate children receiving public assistance on an equal footing with legitimate children, but had relegated illegitimate children not receiving state funds to an inferior position. As Justice Brennan concluded:

> [A]s the exception for children receiving public assistance demonstrates, the State perceives no prohibitive problem in litigating paternity claims throughout a child's minority. There is no apparent reason why claims filed on behalf of illegitimate children who are receiving public assistance when they are more than two years old would not be just as stale, or as vulnerable to fraud, as claims filed on behalf of illegitimate children who are not public

34. 103 S. Ct. at 2206.
35. *Id.* at 2206-07.
36. *Id.* at 2207.

> charges at the same age. The exception in the statute, therefore, seriously undermines the State's argument . . . and compels a conclusion that the two-year limitations period is not substantially related to a legitimate state interest.[37]

A second point undercutting Tennessee's argument was put forward by the appellant in his brief. According to this argument, the statutory plan actually contained a strong incentive which would have the opposite result from what the legislature had intended. If a non-welfare mother found her claim barred by the statute of limitations, she could easily revive that claim by leaving her job and filing for welfare. Thus, the statute not only provided a means by which the welfare rolls could be increased, but also provided a legal mechanism through which "staler" claims could be tried: whereas a non-welfare child would have only two years in which to have a claim filed on his behalf, a welfare child would have up to an additional sixteen years, during which that claim would undoubtedly become staler.[38]

In addition to the foregoing, the Court next considered the impact of Tennessee's policy of not tolling the statute of limitations in paternity actions despite a general policy to the contrary in most civil actions.[39] Once again, an inconsistency was found in the Tennessee scheme: while problems of proof may exist with the passage of time where most civil actions are concerned, Tennessee had "chosen to overlook these problems in favor of protecting the interests of minors. In paternity and child support actions brought on behalf of certain illegitimate children, however, the State instead has chosen to focus on the problems of proof and to impose on these suits a short limitations period."[40] Drawing on Justice O'Connor's concurrence in *Mills,* the Court found that the cumulative effect of the statute failed to demonstrate that a legitimate state interest was being served.[41]

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37. *Id.* at 2207-08.

38. *See* Brief for the Appellant on the Merits (available on LEXIS, Genfed library, Sup. Ct. Briefs file).

39. 103 S. Ct. at 2208. *See also* TENN. CODE ANN. § 28-1-106 (1980).

40. *Id.*

41. *Id.*

II. State Approaches to Longer Limitations Periods

Given that the Supreme Court has found equal protection violations in one- and two-year statutes of limitation, the question of equal protection in paternity litigation resolves itself into a consideration of whether any distinctions between legitimate and illegitimate children may be possible, and if so, to what extent the *Mills* criteria may permit a distinction. The balance of this note will examine the responses of state courts to equal protection challenges to longer limitations periods, and the impact that advances in the quantity and quality of evidence have had on state arguments in favor of retaining limitations periods.

A. Oregon and Massachusetts

The courts of Oregon and Massachusetts have recently offered strong arguments in favor of the abolition of any classification based on illegitimacy where child support is sought. The Oregon case, *State ex. rel. Adult & Family Services Division v. Bradley*,[42] involved an equal protection challenge to a six-year statute of limitations. Applying the *Mills* criteria, the Supreme Court of Oregon found that it did not have to consider the first prong of the test, as under Oregon law no distinction based on illegitimacy is possible where a right or enforceable obligation between parent and child exists.[43] Under the second prong of the *Mills* test, the court noted that whereas Oregon permitted the establishment of paternity without regard to the child's age in estate proceedings,[44] it imposed a limitation in support proceedings. Turning to the argument that problems of proof justified the regulation of paternity proceedings, the Oregon court replied that the statutory plan comprised a "heavy-handed substitute for particularized requirements of proof."[45]

The court began this portion of its analysis by focusing on a

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42. 295 Or. 216, 666 P.2d 249 (1983). The limitations period challenged in *Bradley* was amended after the initial action was filed to provide for a ten-year limitations period, but the amendment was not made retroactive. The ten-year period was later repealed by the Oregon Legislative Assembly. 1983 Or. Laws ch. 762, § 3 (repealing Or. Rev. Stat. § 109.135(3) (1981)).

43. *See* Or. Rev. Stat. § 109.060 (1981).

44. *See* Or. Rev. Stat. § 112.105 (1981).

45. 295 Or. at 225, 666 P.2d at 254.

section of its own state constitution.[46] While the language of this section is not identical with that of the fourteenth amendment, its provision that no law may be passed granting unequal privileges or immunities to any individual or group of its citizens comports well with the modern view of equal protection under the federal Constitution in that a legislature cannot sanction disparate treatment of persons or groups based solely on immutable characteristics.[47]

The court pointed out a basic inconsistency in the manner in which Oregon had allocated rights to illegitimate children. While legitimate and illegitimate children were treated alike under Oregon law when seeking to establish paternity for purposes of inheritance, the illegitimate child attempting to accomplish the same thing for purposes of obtaining support fell into a birth-related class whose rights were circumscribed by statute.[48] Next, the court considered what weight it should accord the obvious evidentiary distinction between legitimate and illegitimate children seeking support, namely, the need to prove paternity. Expanding on its reading of Oregon's constitution, the court ruled that any restrictions on an illegitimate child's ability to establish paternity "must be imposed only for reasons relating specifically to the proof problems encountered in paternity determinations."[49] Viewed under this additional inquiry, the court concluded that a discrete time period was more arbitrary and burdensome than it was specifically related to ensuring either fairness or accuracy in paternity suits, and was therefore unconstitutional.[50] In support of this conclusion, the court reiterated the inconsistent dichotomy existing in Oregon's statutory approach to filiation rights, discussed *supra,* and observed that a finite period for asserting paternity was unrelated to the ongoing duty of parental support. This portion of the court's reasoning drew on the statement of the Supreme Court of Florida in *State Department of Health v. West,*[51] which suggested that a time

46. *Id.* at 223, 666 P.2d at 253 (citing OR. CONST. art. I, § 20). *See also* Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981).

47. *See, e.g.,* University of California Regents v. Bakke, 438 U.S. 265 (1978).

48. 295 Or. at 223-24, 666 P.2d at 253.

49. *Id.*

50. *Id.*

51. 378 So.2d 1220 (Fla. 1979), *See also* County of Lenoir ex. rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (N.C. Ct. App. 1980).

limitation on the right of an illegitimate child to determine paternity as a prerequisite to obtaining support was illogical because the right to support is self-renewing until the child reaches its majority. Therefore, the claim cannot become stale and subject to limitation by the state.

The rule announced in *Bradley* departs somewhat from the degree and scope of the equal protection inquiry under *Mills* and *Pickett*. The narrow focus of the Oregon court on the evidentiary problems distinctive to paternity proceedings, and its conclusion that a discrete time limit was unrelated to either accuracy or fairness, suggests that where paternity is sought to enforce a support obligation, any limitation on the ability to bring a paternity claim should be subject to strict judicial scrutiny insofar as it infringes on the arguably fundamental right of a child to receive parental support. It can thus be argued that under the Oregon approach, no statute of limitations in paternity actions would pass constitutional muster.

Unlike Oregon, Massachusetts has a well-developed body of law favoring the absence of any statute of limitations in paternity actions. In *Commonwealth v. Gruttner*,[52] the Supreme Judicial Court re-examined its policy in the context of a criminal nonsupport complaint. The defendants in *Gruttner* had argued that the applicable statute of limitations had already run, and thus the prosecution was barred. The court responded that Massachusetts had not recognized a limitations period in paternity cases since 1865, and had made nonsupport a criminal offense since 1913.[53]

Turning to the narrow question of whether any limitation should apply in the situation where paternity was the first step towards obtaining support, the court reaffirmed its position that no statute of limitations should apply to paternity proceedings.[54] Supporting this view, the court reasoned that it "was extremely reluctant . . . to visit upon such a person a time bar which results in loss of support, largely due to inaction or neglect by others."[55] Adopting the same logic employed in the *West* and *Bradley* cases, *supra*, the court stated that the passage of time

52. 385 Mass. 474, 432 N.E.2d 518 (1982).
53. *Id.* at 478, 432 N.E.2d at 520.
54. *Id.* at 479, 432 N.E.2d at 521.
55. *Id.*

was not related to the adjudication of paternity, and that the applicable rules of evidence amply protected the putative father's rights. The court's holding on the issue of nonsupport, however, took the *West* and *Bradley* analysis one step further: because the support obligation is deemed to be continuous throughout a child's minority, and Massachusetts' criminal nonsupport statute of limitations had previously been interpreted as running from the date of the last violation of the statute,[56] any nonsupport claim alleging continuous nonsupport may be brought at "any time during the child's minority, and during the period six years thereafter."[57]

B. Michigan and Pennsylvania

While Oregon and Massachusetts have demonstrated a more liberal interpretation of their respective statutes of limitations in paternity cases, other courts have upheld their statutes in the face of post-*Mills* and *Pickett* equal protection challenges.The courts of Michigan and Pennsylvania fall into this category, as each has upheld its respective six-year statute both prior and subsequent to *Mills*.

One of the earlier cases, *McFetridge v. Chiado*,[58] which did not consider *Mills*, held that the Michigan six-year limitations period did not "work an unfairness of constitutional magnitude."[59] The six-year period, the majority believed, was substantially related to the state's interest in avoiding stale and fraudulent claims and thus justified unequal treatment. The majority further stated that the statute did not create an unreasonable barrier to adjudication, as an action could be maintained by a child's mother, the putative father or the state department of social services. The court, however, refused to recognize the child's right to seek a declaratory judgment on its own behalf.[60] The dissenting opinion reiterated the view that limiting an illegitimate child's right to seek support was both a clear violation

56. *See* Commonwealth v. MacKenzie, 368 Mass. 613, 334 N.E.2d 613 (1975).
57. *Gruttner*, 385 Mass. at 481, 432 N.E.2d at 522.
58. 116 Mich. App. 528, 323 N.W.2d 470 (Mich. Ct. App. 1982).
59. *Id.* at 531, 323 N.W.2d at 471.
60. *Id.*

and not so substantially related to any state interest as to justify disparate treatment.[61]

The majority view in *McFetridge* has been upheld by the Michigan Court of Appeals in light of both *Mills* and *Pickett*. In *Shifter v. Wolf*,[62] a post-*Mills* decision, the court repeated its view that Michigan's statute was substantially related to a permissible state interest.[63] More recently, in *Daniel v. Collier*,[64] the court of appeals clarified its position. The original judgment in *Daniel*,[65] relied upon in both *McFetridge* and *Shifter*, was appealed to the Supreme Court, which vacated the judgment for reconsideration in light of *Pickett*.[66] On remand, the Michigan court again declined to find any equal protection violation in the six-year limitations statute.[67] It contended that a six-year period, unlike the one- and two-year periods reviewed by the Supreme Court, is long enough for the economic and social disruptions surrounding the birth of an illegitimate child to have been overcome or to have sufficiently subsided to allow suit to be brought either by the child's mother or guardian.[68] Rejecting the view that an action by an illegitimate child seeking support could be maintained at any time during a child's minority, the court found that the limitations period was substantially related to the evidentiary problems inherent in paternity cases.

In support of its position, the court cited Justice Rehnquist's statement in *Mills* that "[p]aternal support suits on behalf of illegitimate children contain an element that such suits for the legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses."[69] It concluded that since the equal protection clause did not mandate that legitimate and illegitimate children have co-extensive

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61. *Id.* at 531-39, 323 N.W.2d at 471-75.

62. 120 Mich. App. 182, 327 N.W.2d 429 (Mich. Ct. App. 1983). *See also* Wolfe v. Geno, 122 Mich. App. 252, 332 N.W.2d 457 (Mich. Ct. App. 1983).

63. *Id.* at 184, 327 N.W.2d at 430-31.

64. 130 Mich. App. 345, 343 N.W.2d 16 (Mich. Ct. App. 1983).

65. 113 Mich. App. 74, 317 N.W.2d 293 (Mich. Ct. App. 1982).

66. Daniel v. Collier, 104 S. Ct. 53 (1983).

67. 130 Mich. App. at 346, 343 N.W.2d at 16. *Accord*, Wolfe v. Geno, 134 Mich. App. 433, 351 N.W.2d 316 (Mich. Ct. App. 1984).

68. 130 Mich. App. at 348, 343 N.W.2d at 17. *Contra* District of Columbia ex. rel. W.J.D. v. E.M., 467 A.2d 457 (D.C. 1983).

69. 130 Mich. App. at 348, 343 N.W.2d at 17-18 (quoting *Mills*, 456 U.S. at 97).

rights to paternal support,[70] the six-year statute thus satisfied the *Mills* and *Pickett* criteria.[71]

In accord with Michigan's view, the Supreme Court of Pennsylvania upheld its six-year statute in *Astemborski v. Susmarski*.[72] In its reading of *Mills*, the Pennsylvania court stressed Justice Rehnquist's observation, quoted *supra*, that while the state must provide adequate opportunities for illegitimate children to seek support, evidentiary problems justified a limitation of actions when related to the state's interest.[73] The court then asserted that its six-year period was "of such greater duration as to negate birth-related circumstances" as elaborated on in *Mills*.[74] Turning to the second prong of the *Mills* test, while the court relied on Justice Rehnquist's analysis, its conclusion appears to contradict the thrust of that analysis. Justice Rehnquist's observation turned on the realization that in paternity cases, testimony was typically available from only two witnesses.[75] Yet, the Pennsylvania court declared its limitations period to be substantially related to the deterrence of stale and fraudulent claims, arguing that "a lapse of more than six years may reasonably be expected to coincide with prejudice to the defense through loss of evidence, the death or disappearance of witnesses, and the fading of memories."[76] While such arguments are more appropriate in other civil cases, in a paternity case the loss of evidence would make it more difficult for the petitioner to meet the burden of proof. The problem with witnesses seems slight where paternity is in question, and, given Justice Rehnquist's analysis, any diminution of memory appears to be relatively minor where third parties are not generally involved.

The decision in *Astemborski*, like the *Daniel v. Collier* decision, was vacated and remanded upon appeal to the Supreme Court.[77] In accord with the reasoning advanced in *Daniel* and in its first decision in *Astemborski*, the Supreme Court of Pennsylvania found sufficient distinctions between its position and that

70. *Id.* at 349, 343 N.W.2d at 17-18.
71. *Id.*
72. 499 Pa. 99, 451 A.2d 1012 (1982).
73. *Id.* at 104-05, 451 A.2d at 1013-14.
74. *Id.* at 104, 451 A.2d at 1014.
75. *See Mills*, 456 U.S. at 97.
76. *Id.*
77. 103 S. Ct. 3105 (1983).

of the Supreme Court in *Pickett* to reinstate its previous order.[78]

C. *New York*

While New York has historically been among the more progressive states in the area of protecting the rights of children,[79] the recent reaction of its courts and legislature illustrates the type of revisions in the law that stem from *Mills* and *Pickett*. Prior to the Court's decision in *Mills*, New York had a statute of limitations for instituting paternity proceedings which was substantially similar to the Tennessee statute challenged in *Pickett;* both provided for a two-year limitations period, and both contained a saving clause extending this period where public assistance funds are involved.[80] In February of 1983, however, legislation was introduced in the state senate extending the period to five years, but making no other alterations.[81] The memorandum in support of the amendment stated the bill's purpose as establishing "a constitutional statute of limitations for the initiation of paternity proceedings,"[82] and justified its provisions by arguing that, based on *Mills*, the Supreme Court might find the existing New York statute unconstitutional. The memorandum further contended that the proposed limitations period would be able to meet the *Mills* criteria.[83] On June 17, 1983, eleven days after the *Pickett* case was decided, a New York family court judge ruled that *Pickett* mandated invalidation of the existing statute.[84] On June 21, the amendment to section 517(a) of the New York Family Court Act was signed into law.[85] Almost immediately, the amendment was challenged on equal protection grounds in a pending paternity suit. The decision in that case,

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78. 502 Pa. 409, 466 A.2d 1018 (1983).

79. *See generally* Application of Gault, 387 U.S. 1 (1967).

80. N.Y. FAM. CT. ACT § 517 (McKinney 1982). Unlike Tennessee, New York tolled the statute where the mother was under the age of eighteen, and only permitted suit by a public welfare official prior to the child's tenth birthday.

81. The original draft of the bill had provided for a six-year limitations period.

82. Memorandum in support obtained from the Office of Court Administration, Unified Court System, State of New York.

83. *Id.*

84. Matter of Esther W. v. Melvin H., 119 Misc.2d 690, 464 N.Y.S.2d 667 (N.Y. Fam. Ct. 1983).

85. 1983 N.Y. Laws ch. 305.

Matter of Patricia R.,[86] invalidated the amendment. The family court judge found that five years was generally an adequate period in which the mother could overcome the pressures attendant upon the birth of an illegitimate child,[87] but also found that the amendment did not satisfy the second prong of the *Mills* test.[88] Based on its interpretation of *Pickett*, the court noted two basic similarities between the New York and Tennessee statutes which compelled the conclusion that the amended statute was not substantially related to the state's interest in avoiding stale and fraudulent claims. First, the amended statute still retained in one of its saving clauses an extension of the limitations period where suit was brought by the Commissioner of Social Services, a scheme flatly rejected in *Pickett*.[89] Second, New York, like Tennessee, had chosen to exempt paternity actions from its general rule of tolling actions during a child's minority. Although New York provided an additional saving clause tolling the statute during the period, if any, that the mother was still a minor, this did not eliminate the tolling defect present under *Pickett*.[90]

III. The Role of Genetic Testing

Perhaps the single most important development in paternity litigation has not been legal, but medical. Advances in blood testing, specifically the Human Leucocyte Antigen (HLA) test, have provided what may be the necessary evidentiary supplement to paternity cases that can eliminate their traditional distinction from other civil actions. Briefly stated, the HLA test differs from other standard tests in that it is not a blood test, but rather is a tissue typing test. While the genetic loci for which HLA tests are present in many body tissues, the most convenient medium by which a tissue sample can be obtained is a blood sample, as these genetic markers are present on white blood cells, or leucocytes. In contrast, other blood tests focus on genetic markers present on red blood cells.[91] Whereas the famil-

86. 120 Misc.2d 986, 466 N.Y.S.2d 994 (N.Y. Fam. Ct. 1983).
87. *Id.* at 990-91, 466 N.Y.S.2d at 998.
88. *Id.*, 466 N.Y.S.2d at 998.
89. *Id.* at 991, 466 N.Y.S.2d at 998.
90. *Id.*
91. *See* Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. Fam. L. 543 (1982), and Miale, Jennings, Rettberg, Sell & Krause,

iar ABO and Rh tests yield a cumulative probability of exclusion of between 33% and 37%, depending on racial group, and the six most common red cell tests yield a cumulative probability of between 63% and 72%, the addition of the HLA test raises this figure to between 91% and 93%.[92] Through further serological testing, sometimes combined with electrophoretic techniques, which isolate specific blood proteins, the exclusion rate can exceed 98%.[93] In practice, once a court orders a series of blood tests to be made, a testing laboratory or the court's own blood testing unit will take samples from the mother, child, and putative father. The samples are then typed according to the six most common red cell tests (ABO, Rh, MNS, Kell, Duffy, and Kidd).[94] If the red cell series do not exclude the putative father, HLA tests for specific blood protein systems are then performed.

Historically, blood test results were only received into evidence for the purpose of excluding paternity. The rationale for doing so was to prevent potentially prejudicial use of test results that resulted in non-exclusion of paternity.[95] At present, however, only three states—Connecticut, Mississippi and West Virginia—still follow this rule.[96] In contrast, thirty-four states have approved, by statute, procedures that permit introduction of blood test results into evidence as proof of paternity.[97]

Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 FAM. L.Q. 247 (1976) [hereinafter cited as *Joint AMA-ABA Guidelines*].

92. *See Joint AMA-ABA Guidelines, supra* note 91, at 257-58. Individually, HLA can only yield a mean probability of exclusion of between 78% and 80%.

93. *See* Lauter, *Paternity: The Final Word*, Natl. L.J., Sept. 12, 1983.

94. *See Joint AMA-ABA Guidelines, supra* note 91, at 257-63.

95. Perhaps the most famous example of the abuse of early blood tests occurred in the case of Berry v. Chaplin, 74 Cal. App.2d 652, 169 P.2d 442 (1946), in which Charlie Chaplin lost a paternity suit although he had type O blood, the plaintiff had type A blood, and the child had type B blood. For the child to have type B blood, at least one parent had to have type B blood. Nevertheless, the California District Court of Appeal upheld the judgment of Chaplin's paternity.

96. *See* Lauter, *supra* note 93, p.28, cols. 3 & 4. *See also infra* note 97.

97. *See e.g.*, ALA. CODE § 26-17-3 (Cum. Supp. 1984); ARIZ. REV. STAT. ANN. § 12-847 (1982); CAL. EVID. CODE § 895 (West Supp. 1983); COLO. REV. STAT. § 13-25-126 (Cum. Supp. 1983); GA. CODE ANN. § 19-7-45 (Cum. Supp. 1984); IDAHO CODE §§ 7-1115, 1116 (Cum. Supp. 1982); ILL. ANN. STAT. Ch. 40, Par. 1401, § 1 (Cum. Supp. 1984-5); IND. CODE § 31-6-6.1-8 (Cum. Supp. 1983); IOWA CODE ANN. § 675.41 (West Supp. 1984-5); KY. REV. STAT. ANN. § 406.111 (Bobbs-Merrill 1984); LA. REV. STAT. ANN. § 9:396 (West Cum. Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 280 (Cum. Supp. 1983-84); MD. FAM. LAW CODE ANN. § 66 G (Cum. Supp. 1983); MICH. COMP. LAWS § 25.496 (1984); MINN. STAT.

To date, the Supreme Court has recognized the highly probative value of HLA testing when combined with the six red cell systems as suggested by the Joint AMA-ABA Study. In *Little v. Streater*,[98] the Court found the blood test procedure, discussed *supra*, to be so important to the adjudication of paternity that it held that a Connecticut statute imposing the costs of those tests on the moving party constituted a denial of due process where that party was indigent.[99] Although the Court in *Little* agreed that the blood tests suggested by the Joint AMA-ABA guidelines were highly effective in excluding falsely accused putative fathers, in *Mills* it declined to hold that modern testing techniques negated the state's interest in avoiding stale and fraudulent claims.[100] In *Pickett*, however, the Court softened its position, concluding that "advances in blood testing render more attenuated the relationship between a statute of limitations and the State's interest in preventing the prosecution of stale or fraudulent paternity claims."[101] In reaching this conclusion, the Court placed great emphasis on the ability of modern blood tests to alleviate the problems of proof existing in paternity cases.[102]

Although approving of the use of HLA testing when combined with red cell tests, the Court left to the states the task of determining the proper evidentiary weight to be assigned to blood test results. At the state level, once admissibility of HLA test results has been established,[103] it is typically argued that because the results are expressed in terms of probability, undue prejudice against the putative father is likely to result. The

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ANN. § 257.62 (West Supp. 1983); MONT. CODE ANN. §§ 40-6-112, 113 (1983); NEV. REV. STAT. § 126.131 (1979); N.J. STAT. ANN. § 9:17-52 (West Cum. Supp. 1984-85); N.Y. FAM. CT. ACT § 532 (McKinney 1983); N.D. CENT. CODE § 14-17-11 (Supp. 1983); OHIO REV. CODE ANN. §§ 3111.09, 3111.10 (Page 1983); ORE. REV. STAT. § 109.258 (1977-78 Repl.); 42 PA. CONS. STAT. ANN. § 6131 et. seq. (Purdon Cum. Supp. 1984); TENN. CODE ANN. § 24-7-112 (Repl. 1983); TEX. FAM. CODE ANN. §§ 13.02-06 (Vernon Cum. Supp. 1983); UTAH CODE ANN. § 78-45a-10 (Repl. 1977); VA. CODE § 20.61.2 (Cum. Supp. 1984); WASH. REV. CODE § 26.26.110 (Cum. Supp. 1984-85); WIS. STAT. ANN. § 767.48 (West 1981); WYO. STAT. § 14-2-110 (a)(iii) (1977). *See also* Lauter, *supra* note 93.

98. 452 U.S. 1 (1981).

99. *Id.* at 16.

100. 456 U.S. 91, 98 n.4 (1982).

101. 103 S. Ct. 2199, 2208 (1983).

102. *Id.*

103. *See, e.g.*, Owens v. Bell, 6 Ohio St.3d 46, 451 N.E.2d 241 (1983), Cutchember v. Payne, 466 A.2d 1240 (D.C. 1983).

question of what weight should be given to this statistical evidence in paternity cases has been addressed by several courts. In *Cramer v. Morrison,*[104] one of the earliest cases in this area, the California Court of Appeal ruled that HLA test results, which indicated a 98.3% probability of paternity, constituted highly probative and admissible evidence on the issue of paternity and that its inclusion would not result in undue prejudice toward the putative father.[105]

The court based its ruling in part on the holding of the California Supreme Court in *People v. Collins.*[106] In *Collins,* the defendant's robbery conviction was reversed due to the prejudicial use of statistical data presented by the prosecution, which had concluded that the probability of any two individuals with the two defendants' six identifying characteristics was one in twelve million. The error in *Collins* was that the prosecution failed to establish a basis for the individual probabilities of the specific characteristics in question, and also failed to establish that any of the characteristics were mutually independent of each other, an indispensible prerequisite for the resulting probability to be considered reliable. Turning to the facts in *Cramer,* the court noted in that case that HLA test results "are not based on arbitrarily assigned numerical probabilities or on a statistical theory unsupported by the evidence. Instead, they are based on objectively ascertainable data and a statistical theory based on scientific research and experiment."[107] As to the potential for error, the court contended that it was not "possible to exclude all pos-

104. 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (1979).

105. *Id.* at 884-85, 153 Cal. Rptr. at 871-72.

106. 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968).

107. 88 Cal. App. 3d at 884, 153 Cal. Rptr. at 872. When the *Joint AMA-ABA Guidelines* were first promulgated, statistical data for certain genetic markers was provided only for the white, black, and Japanese populations. The objectivity of the available data has not gone unchallenged. For example, in Alicia C. v. Evaristo G., 115 Misc. 2d 564, 454 N.Y.S. 2d 395 (N.Y. Fam. Ct. 1982), the family court judge ruled that the HLA test results could not be admitted into evidence on the basis that the selected criteria were too arbitrary. The putative father, who was of Hispanic origin, had been classified by the expert who performed the test as Caucasian, because reliable data had yet to be developed for the Hispanic population. The expert admitted in his testimony that the Hispanic population was far more heterogeneous than the Caucasian population. On appeal, the decision was reversed on the ground that racial characteristics went only to the weight, rather than the admissibility, of the evidence. 93 A.D. 2d 820, 460 N.Y.S. 2d 616 (N.Y. App. Div. 1983).

sible chance for error . . . . [b]ut there is no requirement in our law that the admissibility of scientific test evidence must be predicated on a 100 percent degree of accuracy."[108]

The approach in *Cramer*, while clearly the majority view on this point,[109] has been subsequently refined. An example of this refinement, and how it relates to a determination of paternity, was demonstrated in a recent New York case, *Matter of Sara H. v. Bart D.*[110] In *Sara H.*, the petitioner testified that she had had sexual relations with the respondent approximately nine months prior to the birth of her child, and had not had sexual relations with any other man during the three months prior to the claimed date of conception, or during the following month. The respondent admitted to having engaged in sexual relations once with the petitioner, but maintained that the act had occurred approximately one year before the birth of the child. In support of his contentions, the respondent, a police sergeant, introduced police records indicating that he could not have been present at the place of conception at the time and date that the petitioner claimed. The court discounted the probative value of the police records on the grounds that there was little evidence to support their accuracy, and because the respondent's testimony indicated that he had had sufficient access to the records to be able to alter them.

The results of the blood tests ordered by the court estimated the probability of the respondent's paternity at 99.2%. The respondent challenged the probative value of the test results, arguing that they could only demonstrate the "likelihood that a man with the [genetic] phenotype of the respondent would contribute the required genes compared with the likelihood that a random man of the same ethnic group would do so," but could not demonstrate paternity.[111] The upshot of this argument would be that the statistical expression of the blood test results would have to be applied as part of quantification of all the evidence in the case by application of Bayes' Theorem, a statistical test that estimates the conditional probability that a given combination of events will occur where one event has oc-

108. 88 Cal. App. 3d at 884, 153 Cal. Rptr. at 872.
109. *See* Crain v. Crain, 104 Idaho 666, 662 P.2d 538 (1983).
110. 121 Misc. 2d 425, 467 N.Y.S. 2d 1001 (N.Y. Fam. Ct. 1983).
111. *Id.* at 429, 467 N.Y.S. 2d at 1003.

curred and the other potential events are mutually exclusive.

The court rejected the respondent's argument, which would have severely restricted the application of the blood test results. The court's premise was that it could not accept the respondent's contention, as it had to rule according to a non-quantifiable standard of proof.[112] Application of complex statistical tests would be worthless to a determination of paternity, because it would require the trier of fact to ascertain the individual probabilities of all the elements of proof.[113] An order of filiation was entered. The court explained that while the ultimate probability of paternity could not be calculated with exactitude, all judicial determinations must involve the consideration of multiple conditional probabilities, whether or not they are quantifiable.[114] In the instant case, the court found that the combination of the blood test results, which indicated a strong probability of paternity, the respondent's testimony that he had had sexual relations with the petitioner at the approximate time of conception, and the court's finding that the petitioner was the more credible witness, while not amounting to an ultimate probability of paternity, did meet the burden of proof that the evidence be "clear, convincing, and entirely satisfactory."[115]

The reasoning advanced in both *Cramer* and *Sara H.* has particular significance for both legislatures and courts seeking to determine whether paternity actions should be limited, and if so, to what extent. While HLA test results cannot independently provide sufficient proof of paternity, their probative value is of such weight that the imposition of an arbitrary limitations period counteracts much of their ability to further the asserted state interests of avoiding stale and fraudulent claims. HLA testing goes directly to the question of avoiding stale claims by providing a court with access to probative evidence which remains unaltered over any time period and is based on objective scientific data. In addition, it goes to the question of avoiding fraudulent claims by providing an accurate and efficient method

112. *Id.* at 430, 467 N.Y.S. 2d at 1004.

113. *Id.* at 430-32, 467 N.Y.S. 2d at 1004-05.

114. *Id.*

115. *Id.* at 433, 467 N.Y.S. 2d at 1005. *See also* Matter of Dorn HH v. Lawrence II, 31 N.Y. 2d 154, 286 N.E. 2d 717, 335 N.Y.S. 2d 274 (1972), Matter of Patricia A. v. Philip DeG., 88 A.D. 2d 911, 450 N.Y.S. 2d 567 (N.Y. App. Div. 1982).

by which a meritless claim may either be deterred or dismissed prior to trial.

IV. Conclusion

In light of the foregoing, the asserted state justifications for limiting paternity actions beyond the two-year period invalidated in *Pickett* raise serious equal protection questions. While illegitimacy has yet to be deemed a "suspect" classification, application of intermediate or middle-tier scrutiny has provided an analytical framework which presents a formidable challenge to any defense of a limitations period. The establishment of paternity is the establishment of legal rights and obligations. As has been shown, many states have already made legislative determinations that it is possible to litigate paternity claims over extended periods where public revenue is being protected. Several states have also advanced the view that the establishment of paternity is the establishment of, *inter alia,* the legal duty to support a child; as this duty is continuous throughout the minority of a legitimate child, equal protection demands nothing less when the child is illegitimate. Finally, the availability of accurate and objective evidence in the form of blood tests operates to extend the time period after which a claim may be deemed to be stale or prejudicial to a defendant. Although states may contend that limitations periods help deter stale and fraudulent claims, this interest cannot be deemed a substantial one, as it is eclipsed by the state interests in seeing that justice is done, that legal duties of support are enforced, and that the public revenue be protected. As such, extension of existing limitations periods can only serve state interests; their retention fails to satisfy intermediate scrutiny.

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