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## FOREWORD: A HARD CASE AND AN INTRACTABLE PROBLEM

Matthew S. Steffey\*

As Justice Oliver Wendall Holmes is often said to have remarked, “the line is difficult to draw.” In *M.L.B. v. S.L.J.*, the only line that was easy to draw proved too difficult for adherence. Does *M.L.B.* illustrate that hard facts make bad law, or that the Supreme Court has taken one step toward justice and away from an indefensible and unjust line? The answer depends on whether one shares the perspective of Rick Moore, who argued against a right to appeal *in forma pauperis* the termination of parental rights,<sup>1</sup> or of Robert McDuff, who argued successfully in favor of the right.<sup>2</sup>

Precedent seemed to run against recognition of a right to appeal *in forma pauperis* in any civil case. The Supreme Court has never read the Constitution, particularly the due process clause of the Fourteenth Amendment, to require that States establish appellate review of lower court decisions, even in criminal cases.<sup>3</sup> Moreover, *only* in criminal cases had the Court held that a State which chooses to provide appellate review “cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons.”<sup>4</sup>

In contrast, the logical extension of precedent seemed to run in favor of recognition of a right to appeal *in forma pauperis* the termination of parental rights. In *Mayer v. Chicago*,<sup>5</sup> the Court held that an indigent defendant convicted of misdemeanor violations of city ordinances and fined \$250 per offense had a right to a free transcript. It is not difficult to argue that a mother whose relationship with her children is terminated, permanently and involuntarily, loses at least as much.

As the articles that follow explain in detail, a majority of the Court concluded “that the *Mayer* decision points to the disposition proper,” based on an amalgamation of equal protection and due process principles.<sup>6</sup> The Court accordingly “inspected the character and intensity of the individual interest at stake,” namely *M.L.B.*’s interest in her relationship with her children, and concluded it outweighed Mississippi’s “justification for its exaction,” namely offsetting some of the costs of its court system.<sup>7</sup>

Rick Moore and the dissenting Justices in *M.L.B.*, Chief Justice Rehnquist and Justices Scalia and Thomas, find the decision worrisome. By letting *Mayer* loose from its criminal moorings, they fear, *M.L.B.* “has eliminated the last meaningful limit on the free-floating right to appellate assistance.”<sup>8</sup> The one line that was

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1. Rick Moore, *M.L.B. v. S.L.J.: Extension of in forma pauperis Appeals to the Civil Arena in Termination of Parental Rights Cases*, 18 MISS. C. L. REV. 19 (1998).

2. Robert B. McDuff, *M.L.B. v. S.L.J. and the Right of Poor People to Go to Court*, 18 MISS. C. L. REV. 5 (1998).

3. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 560 (1996).

4. *Id.* (citations omitted).

5. 404 U.S. 189 (1971).

6. *M.L.B.*, 117 S. Ct. at 566.

7. *Id.*

8. *Id.* at 577-78 (Thomas, J., dissenting).

easy to draw — the one which separates criminal from civil cases — has been replaced, in the words of Justice Thomas, by one

far more ephemeral. If all that is required to trigger the right to a free appellate transcript is that the interest at stake appear to us to be as fundamental as the interest of a convicted misdemeanant, several kinds of civil suits involving interests that seem fundamental enough leap to mind. Will the Court, for example, now extend the right to a free transcript to an indigent seeking to appeal the outcome of a paternity suit? To those who wish to appeal custody determinations? How about persons against whom divorce decrees are entered? Civil suits that arise out of challenges to zoning ordinances with an impact on families? Why not foreclosure actions — or at least foreclosure actions seeking to oust persons from their homes of many years?<sup>9</sup>

These possibilities embody the hopes of Rob McDuff, despite the majority's assurances that *M.L.B.* will be limited to its facts.<sup>10</sup> As McDuff writes, "even though *M.L.B.* is limited by its terms to the arena of parental termination, it did breach the civil-criminal barrier . . . . In that sense, it provides a starting point for those impoverished litigants who are kept out of the appellate courthouse in other types of civil cases."<sup>11</sup>

Mr. McDuff's preparation for oral argument, which he describes in his paper, included a visit to my Supreme Court Roleplaying class during the fall semester of 1996. Before a panel of students playing the roles of the Supreme Court Justices, Mr. McDuff argued on behalf of his client while I played the role of counsel for the State. This exercise left me with a very definite sense of what became the defining theme of the case: while Constitutional text and precedent supported rejecting a right to appeal *in forma pauperis* the termination of parental rights, there was a strong sense that justice required its recognition. To their credit, the students (who each prepared for the case, heard argument, and voted in the role of a particular justice) predicted the outcome exactly: 6-3 in petitioner's favor, with Chief Justice Rehnquist and Justices Scalia and Thomas dissenting.<sup>12</sup>

While it remains uncertain whether *M.L.B. v. S.L.J.* is just the first volley in an coming exchange over the rights of indigent appellants, *Young v. Fordice* resolves what is almost surely just the first in a series of legal challenges to Mississippi's response to the NVRA. In *Young*, the Supreme Court unanimously held that section 5 of the Voting Rights Act of 1965 requires Department of Justice preclearance of Mississippi's implementation of the federal "motor voter" law. While the Court held that the NVRA does not forbid separate federal and state registration systems, the discretionary elements of the new federal system must be examined in the context of any decision to maintain (as no other state has) dual registration systems. Hence the Supreme Court has ensured that the Department of Justice,

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9. *Id.* at 576-77.

10. *Id.* at 569-70.

11. McDuff, *supra* note 2, at 14.

12. Indeed, the student playing the role of Justice Thomas wrote the dissenting opinion. Gerry Bufkin sat as Chief Justice Rehnquist; Robert Torbett as Justice Stevens; Melissa Harper as Justice Scalia; Harry McCumber as Justice O'Connor; Jeffrey Blackwood as Justice Kennedy; Chad Shook as Justice Souter; Charles Jones as Justice Thomas; Shelly Gunn as Justice Ginsberg; and James Murrell as Justice Breyer.

and ultimately the federal courts, will help shape Mississippi's response to the NVRA. The apparent ease with which the Supreme Court reached this unanimous conclusion belies the broiling legal and political controversy to come.

Ironically, *M.L.B. v. S.L.J.*, which presented by far the knottier legal question<sup>13</sup> of the two Mississippi Cases decided by the United States Supreme Court last term, is likely to lay dormant. In contrast, *Young v. Fordice*, which produced a rare unanimous decision on a rare "easy" legal question, lurks in the immediate background of a matter likely to grab headlines for some time to come.

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13. The question of whether the 'greater power,' that is to eliminate appellate review of lower court decisions entirely, necessarily includes the 'lesser power,' that is to require all appellants to pay for transcripts, has been described by Justice Stevens in another context as "an elegant question of constitutional law." See *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986) (Stevens, J., dissenting).

