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There is an old *New Yorker* cartoon where a man is sitting in a lawyer's office. The lawyer looks across the desk and says, "How much justice can you afford?"

In American society and American law, we have long told ourselves that our legal system provides, or at least aspires to provide, equal justice under the law. Of course, the reality is quite different. Discrimination on the basis of race and sex has long played a part in the operation of our courts and laws, and while efforts to overcome that have changed things to some extent, serious vestiges remain. But beyond that, money has always been a major factor in terms of access to the courts and the ability of a litigant to obtain a better or worse shot at winning a case or achieving a desired result. Although there are exceptions to the rule, a person generally has to have a fair amount of money to obtain good lawyers, investigators, and expert witnesses, to post bail where bail is not minimal, to pay for depositions and scientific tests, and to pay filing fees to get into court.

Beginning in the 1950s and going into the 1970s, there was something of an effort to ameliorate the disadvantages of the poor in the legal system—through constitutional decisions of the Supreme Court under the Fourteenth Amendment, through the actions of Congress in establishing a legal services program, through state and local efforts to fund and improve public defender programs, and through public interest organizations devoted to helping the poor and the outcast. But the momentum in that direction has since dissipated. While the legal services program remains, its scope and funding have been cut, and it serves fewer and fewer people. Public defender programs in many places suffer from increasing caseloads and decreasing funds. The number of public interest law organizations has dropped. The Warren Court became the Burger Court and then the Renquist Court, and the growing conservative majority through the 1980s issued few decisions addressing the rights of access to the poor in the court system. Indeed, not much occurred in that arena after the mid-1980s until the 1996 opinion in *M.L.B. v. S.L.J.*,[1] which is the subject of this article.

I am one of the lawyers who represented the petitioner in *M.L.B.* and I argued her case in the United States Supreme Court. The question before the Court was whether the Mississippi Supreme Court had acted consistently with the Fourteenth Amendment in refusing, pursuant to its longstanding practice, to permit an *in forma pauperis* civil appeal to the petitioner, who wanted to appeal the trial court's termination of her parental rights but could not afford to pay transcript and record preparation fees in excess of two thousand dollars.

Of course, the ability of a poor person to participate in a fair way in the court system goes far beyond the question of fees such as filing and transcript fees that

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1. 117 S. Ct. 555 (1996).

are antecedents to bringing a case or taking an appeal. In most cases, the availability of counsel to navigate the legal and procedural intricacies of the system, as well as the availability of investigators, expert witnesses, scientific tests, and money for litigation expenses such as deposition costs, are key components in presenting a coherent case to the judge, the jury, and the appellate courts. But the filing and transcript fee cases are nevertheless of prime importance, both symbolically and practically. Whether a person has an attorney or not, he or she cannot present his or her case even on a rudimentary level if the courthouse door is closed due to inability to pay a filing or appeal fee. By contrast, once a person is allowed in court, there is something to the notion that judges and juries can at least consider the case—certainly, this is true in some types of cases—even if an attorney is unavailable to portray the person's position in the most artful fashion. Independent of issues regarding counsel and other resources, something very important about a legal system is revealed by the answer to the question of whether the courts are at least open to people who cannot afford the entry fees normally charged to those who can pay them.

M.L.B. is discussed here in the context of this question of constitutional law and the access of poor people to the courts when confronted by filing and transcript fees. The article first reviews Supreme Court decisions during prior years regarding this access—developments which set the stage for *M.L.B.* Second, it discusses *M.L.B.* itself and the Supreme Court's decision in that case. Third, it considers the possible impact of *M.L.B.* and the outlook for the future in this area. Finally, the article discusses the oral argument before the United States Supreme Court in *M.L.B.*

I. HISTORICAL DEVELOPMENTS

Prior to the 1956 decision in *Griffin v. Illinois*,[2] criminal defendants in many states who could not afford transcript fees were precluded from taking appeals from felony convictions. In *Griffin*, the Court noted that a state is not required by the Constitution to provide an appeal in a criminal case. But where a state does so, the Court held, it also must provide indigent persons a transcript, or its equivalent, at state expense so they can take advantage of the appeal option irrespective of their financial poverty. This result, said the plurality opinion in *Griffin*, is compelled by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] As stated by the plurality opinion, "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor the adequate appellate review accorded to all who have money enough to pay the costs in advance."[4] The four-justice plurality in *Griffin* was joined in the result by Justice Frankfurter, who said in his concurrence:

2. 351 U.S. 12 (1956).
3. *Id.* at 18-20.
4. *Id.* at 18.

> [W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such a review . . . .
>
> If [a State] has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.[5]

In cases after *Griffin*, a majority of the Court has reaffirmed *Griffin* and held that its reasoning is predicated both on the Due Process and the Equal Protection Clauses.[6] In several cases decided in the wake of *Griffin*, the Court invalidated a number of state practices and statutes that denied indigent criminal defendants access to effective appeals because of their inability to pay for transcripts. Among these was *Mayer v. Chicago*,[7] which held that an indigent had the right to provision of a transcript for appeal in a case where he was faced not with imprisonment, but merely with a $500 total fine for two misdemeanor offenses.

Griffin and the cases following immediately in its wake were criminal cases. In terms of civil matters, citizens who want to bring cases as plaintiffs face filing fees in the trial court, and those who lose in the trial court and want to take appeals face both filing fees and transcript fees. In some states, the courthouse doors are closed to those who cannot afford the fees. The Supreme Court first confronted a civil filing fee with the 1971 decision in *Boddie v. Connecticut*.[8] There, the Court held that a $60 Connecticut filing fee was unconstitutional where it precluded an impoverished couple from obtaining a divorce. As Justice Harlan's opinion for the Court in *Boddie* explained: "In *Griffin* it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process."[9] Connecticut's $60 divorce filing fee does the same thing, said the Court in *Boddie*, adding that "the rationale of *Griffin* covers this case."[10] While *Griffin* was predicated both upon the Due Process and Equal Protection Clauses, *Boddie* specifically relied upon the Due Process Clause. In doing so, the majority hinged its opinion upon the importance of marriage and the fact that resort to the civil courts was the only means by which people could lawfully dissolve a marriage:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[11]

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5. *Id.* at 23-24 (Frankfurter, J., concurring).
6. *See*, Mayer v. Chicago, 404 U.S. 189, 193 (1971); Evitts v. Lucey, 469 U.S. 387, 403-405 (1985).
7. 404 U.S. 189 (1971).
8. 401 U.S. 371 (1971).
9. *Id.* at 382.
10. *Id.*
11. *Id.* at 374.

Approximately two months after the decision in *Boddie*, Justices Black and Douglas dissented from the denial of *certiorari* in a number of cases, with the dissents issued under the case name of *Meltzer v. C. Buck LeCraw & Co.*[12] These cases involved a variety of barriers faced by poor people in the civil justice system. Justice Black stated:

> I dissented in *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971), but now believe that if the decision in that case is to continue to be the law, it cannot and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases. Persons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes.[13]

He added:

> In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.[14]

In his dissent, Justice Douglas said:

> Today's decisions underscore the difficulties with the *Boddie* approach. In *Boddie*, the majority found marriage and its dissolution to be so fundamental as to require allowing indigents access to divorce courts without costs. When indigency is involved, I do not think there is a hierarchy of interests. Marriage and its dissolution are of course fundamental. But the parent-child relationship is also of sufficient importance to require appointment of counsel when the State initiates and maintains proceedings to destroy it. Similarly, obtaining a fresh start in life through bankruptcy proceedings or securing adequate housing and the other procedures in these cases seemingly come within the Equal Protection Clause, as suggested by my separate opinion in *Boddie*.[15]

One year after *Boddie*, the Court's decision in *Lindsey v. Normet*,[16] suggested that the relevant principles from *Griffin* might encompass not only civil cases at the trial level, but also those on appeal. *Lindsey* struck down, as violative of the Equal Protection Clause, an Oregon statutory provision requiring a double appeal bond for tenants who appeal eviction cases.[17] Although *Lindsey* did not involve a transcript fee, the Court's decision in *Lindsey* cited *Griffin* in support of the principle that "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."[18] While the Court declared the Oregon statute unconstitu-

12. 402 U.S. 954 (1971).
13. *Id.* at 954 n.1. (Black, J., dissenting from denial of certiorari).
14. *Id.* at 955-956.
15. *Id.* at 961 (Douglas, J., dissenting from denial of certiorari).
16. 405 U.S. 56 (1972).
17. *Id.* at 79.
18. *Id.* at 77, (citing Griffin v. Illinois, 351 U.S. 12, 18 (1956).

tional because of its imposition of special burdens on tenants in eviction cases that were imposed on no other civil litigants, the Court also mentioned the impact of the statute on poor people: "[T]he discrimination against the poor, who can pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be."[19]

In cases after *Lindsey*, the Supreme Court did not adopt the more expansive interpretation of the Fourteenth Amendment suggested by Justices Black and Douglas in their *Meltzer* dissents.[20] Instead, the Court's 1973 decisions in *United States v. Kras*,[21] and *Ortwein v. Schwab*,[22] upheld civil filing fees where no fundamental rights were involved. *Kras* dealt with a $50 filing fee for a bankruptcy case, which could be paid in installments of as little as $1.28 per week,[23] and *Ortwein* involved a $25 filing fee for judicial review of an administrative reduction in old-age assistance.[24] In both cases, the Court specifically relied upon its conclusion that the interests involved were not of the same constitutional magnitude as the marriage interest implicated in *Boddie*.[25]

After *Ortwein*, the Supreme Court took no other filing or appeal fee cases until *M.L.B.*, although there were intervening cases dealing with the availability of counsel, expert witnesses, and scientific tests, and with the payment of fines imposed by the judicial system.[26] Of particular importance—given the hierarchy of interests set up by *Boddie*, *Kras*, and *Ortwein*—was the Court's decision in *Lassiter v. Department of Social Services*.[27] There, the Court said that a parent has a "commanding" interest in resisting a forced termination of parental rights.[28] At the same time, the Court concluded that due process does not require appointed counsel for indigent parents in every case where the State seeks to terminate parental rights, but it will require counsel in at least some of these cases, particularly the complicated ones.[29]

Thus, when the Supreme Court granted certiorari in *M.L.B.*, it did so against a background in which *Griffin* and its progeny had held that the Due Process and Equal Protection Clauses are violated where access is precluded to state court criminal appeals, even in misdemeanors with no prison terms, because an indigent person cannot afford a transcript.[30] *Boddie* applied that rationale under the Due Process Clause to filing fees in civil cases involving fundamental rights at the trial level,[31] and *Lindsey* suggested that a similar rationale applies as part of

19. *Lindsey*, 405 U.S. at 79.
20. *See Meltzer*, 402 U.S. at 954.
21. 409 U.S. 434 (1973).
22. 410 U.S. 656 (1973).
23. *Kras*, 409 U.S. at 449.
24. *Ortwein*, 410 U.S. at 658.
25. *Ortwein*, 410 U.S. at 659; *Kras*, 409 U.S. at 445.
26. *See, e.g.* Little v. Streater, 452 U.S. 1 (1981); Bearden v. Georgia, 461 U.S. 660 (1983); Evitts v. Lucey, 469 U.S. 387 (1985); Ake v. Oklahoma, 470 U.S. 68 (1985).
27. 452 U.S. 18 (1981).
28. *Id.* at 18.
29. *Id.* at 25-27.
30. Griffin v. Illinois, 351 U.S. 12, 13-26 (1956).
31. Boddie v. Connecticut, 401 U.S. at 371.

the Equal Protection Clause in civil appeals.[32] While *Kras* and *Ortwein* concluded that the rationale does not control with respect to small filing fees in cases where no fundamental rights are involved,[33] *Lassiter* held that the termination of a parent's relationship with his or her child clearly implicates fundamental rights.[34]

II. THE *M.L.B.* CASE AND THE SUPREME COURT'S DECISION

After having been married for nearly eight years, M.L.B. and her then-husband, S.L.J., were divorced in 1992, with their two children remaining in the custody of S.L.J., their father. Less than three months later, S.L.J. remarried. Just over one year later, S.L.J. and his new wife filed a case in the Chancery Court of Benton County, Mississippi, seeking to terminate the parental rights of M.L.B., the natural mother of the children, and to have the new wife take her place by adopting the children. The complaint did not allege any sort of abuse by M.L.B. toward the children or any type of criminal conduct on her part, but instead it contended that she had not maintained reasonable visitation and was in arrears on child support payments.

Under Mississippi law, a person's parental rights cannot be terminated absent clear and convincing evidence that the parent either abandoned or abused the child or is so unfit as to warrant termination.[35] Despite this high burden of proof, the Chancery Judge, after a contested trial spanning three trial days, issued an order in December of 1994, terminating the parental rights of M.L.B. and in her stead allowing the new wife to adopt the children. In the order, the Chancellor cited no specific grounds for the termination and, despite a vigorously contested trial, cited no specific evidence relating to or supporting his decision. Instead, he simply issued a conclusory statement repeating word for word the language of the Mississippi termination statute.[36] At the time of the termination, M.L.B.'s children were nine and seven years old.

In Mississippi, an appeal of right can be taken from all lower court final judgments in parental termination cases, as well as in other civil cases.[37] M.L.B. filed her appeal and paid the $100 filing fee, but she then was informed that preparation of the transcript and the record, which were prerequisites for the appeal,[38] would cost another $2,352.36. Because she could not afford to pay that amount, her appeal was dismissed by the Mississippi Supreme Court, which was acting consistent with its long-standing precedent holding that the right to proceed *in forma pauperis* in Mississippi does not exist in civil appeals.[39]

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32. Lindsey v. Normet, 405 U.S. 56 (1972).
33. United States v. Kras, 409 U.S. 434, 443-50 (1973); Ortwein v. Schwab, 410 U.S. 656, 658 (1973).
34. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).
35. MISS. CODE ANN., §§ 93-15-103,—15-109 (1994 & 1997 Supp.).
36. MISS. CODE ANN., § 93-15-103(3)(e).
37. MISS. CODE ANN., § 11-51-3 (1972).
38. Miss. R. App. Proc. 10(b)(2) & 11(b)(1).
39. *See* Moreno v. State, 637 So. 2d 200 (Miss. 1994); Nelson v. Bank of Mississippi, 498 So. 2d 365 (Miss. 1986); Life & Cas. Ins. Co. v. Walters, 200 So. 732 (Miss. 1941).

In a six to three decision, the United States Supreme Court reversed. According to the Court, a person cannot be precluded because of indigency from an appeal that is available to all others from the termination of parental rights.[40] Both the majority opinion of Justice Ginsburg, speaking for herself and four others,[41] and the concurrence of Justice Kennedy, relied upon the importance of the constitutional interest at stake when parental rights are threatened with termination.[42]

Justice Ginsburg first canvassed the filing fee precedents, beginning with *Griffin* and its criminal-case progeny, focusing particularly on *Mayer v. Chicago*.[43] Justice Ginsburg noted that the right of access by the poor, irrespective of transcript costs, to appeals open to others has been interpreted by the Supreme Court to be broader than the right to counsel at state expense.[44] The opinion also reviewed the civil cases, particularly *Boddie*.[45] As the Court stated: "We have also recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees."[46] After also discussing *Kras* and *Ortwein*, the Court added:

> [A]s *Ortwein* underscored, this Court has not extended *Griffin* to the broad array of civil cases. But tellingly, the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion.[47]

The Court then reviewed the precedents requiring special solicitude when family matters are involved, with specific emphasis on *Lassiter* and *Santosky v. Kramer*,[48] the latter of which held that a "clear and convincing" standard of proof is required by the Fourteenth Amendment before parental rights are terminated in a proceeding initiated by the State.[49] The *M.L.B.* Court pointed to language from both *Lassiter* and *Santosky* saying that a parent facing a termination proceeding possesses a "commanding" constitutional interest which is, in the words of *Santosky*, "far more precious than any property right."[50] As explained in *Santosky* and reiterated in *M.L.B.*, a termination decree is "*final* and irrevocable."[51]

Having outlined these precedents, the Court then applied them to the case at hand, noting that the *Griffin* line of cases relied both on the Equal Protection and

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40. M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996).
41. She was joined by Justices Stevens, O'Connor, Souter, and Breyer.
42. *M.L.B.*, 117 S. Ct. at 570.
43. 404 U.S. 189 (1971).
44. *M.L.B.*, 117 S. Ct. at 562.
45. Boddie v. Connecticut, 401 U.S. 371 (1971).
46. *M.L.B.*, 117 S. Ct. at 562.
47. *Id.* at 564.
48. 455 U.S. 745 (1982).
49. *Id.* at 769.
50. *M.L.B.*, 117 S. Ct. at 565 (quoting Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981), and *Santosky*, 455 U.S. at 758-759).
51. *M.L.B.*, 117 S. Ct. at 565 (quoting *Santosky*, 455 U.S. at 759 (emphasis in original)).

Due Process clauses.[52] "We place this case within the framework established by our past decisions in this area,"[53] said the *M.L.B.* opinion, adding that "[i]n line with those decisions, we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[54] The Court then compared the interests at stake in a parental termination case with those at issue in *Mayer*, where the Court held a transcript is required for an impecunious defendant fined $500 and given no jail time for misdemeanor offenses.[55] Certainly, said the *M.L.B.* Court, the interest of a parent facing termination is at least similar in gravity to that of the misdemeanor defendant in *Mayer*.[56] The Court added that "[t]he risk of error . . . is considerable" in the termination cases, pointing out that of the eight reported appellate challenges to Mississippi trial court termination orders from 1980 through May of 1996, three were reversed for failing to meet the standard of proof.[57] As for the State's countervailing interest in offsetting the costs of the state court system, the Court said that interest was not sufficient to justify exclusion of the poor in *Mayer* and similarly is not sufficient to justify denial of an appeal in the parental termination context.[58]

The Court added this:

> [W]e do not question the general rule, stated in *Ortwein*, that fee requirements ordinarily are examined only for rationality [citation omitted]. The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement [citation omitted]; States are not forced by the Constitution to adjust all tolls to account for "disparity in material circumstances." *Griffin*, 351 U.S., at 23 (Frankfurter, J., concurring in judgment).
>
> But our cases solidly establish two exceptions to that general rule. The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license [footnote omitted]. Nor may access to judicial processes in cases criminal or "quasi criminal in nature," *Mayer*, 404 U.S., at 196 (citation and internal quotation marks omitted), turn on ability to pay. In accord with the substance and sense of our decisions in *Lassiter* and *Santosky*, [citation omitted], we place decrees forever terminating parental rights in the category of cases in which the State may not "bolt the door to equal justice," *Griffin*, 351 U.S., at 24 . . . (Frankfurter, J., concurring in judgment)[.][59]

The opinion's concluding section distinguished several prior Supreme Court decisions in which the Court rejected claims of—as the *M.L.B.* Court put it—"[c]omplainants [who] . . . sought state aid to subsidize their privately initiated

52. *M.L.B.*, 117 S. Ct. at 566.
53. *Id.*
54. *Id.*
55. Mayer v. Chicago, 404 U.S. 189, 196 (1971).
56. *M.L.B.*, 117 S. Ct. at 566.
57. *Id.* at 560 n.3, 566.
58. *Id.* at 566.
59. *Id.* at 567-568.

action or to alleviate the consequences of differences in economic circumstances that existed apart from state action."[60] By contrast, the Court said:

> M.L.B.'s complaint is of a different order. She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action. That is the very reason we have paired her case with *Mayer*, not with *Ortwein* or *Kras* [citation ommitted].[61]

Finally, the Court, in responding to the "floodgates" argument of the dissenters and the respondent, emphasized that its decision was limited to civil cases with the magnitude of interests involved in a parental termination case.

> Respondents and the dissenters urge that we will open floodgates if we do not rigidly restrict *Griffin* to cases typed "criminal." [citations omitted]. But we have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. [citation omitted]. To recapitulate, termination decrees "wor[k] a unique kind of deprivation." *Lassiter*, 452 U.S., at 27. . . . In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State "to destroy permanently all legal recognition of the parental relationship." *Rivera* [*v. Minnich*], 483 U.S. [574,] at 580 [(1987)] [citation omitted]. Our *Lassiter* and *Santosky* decisions, recognizing that parental termination decrees are among the most severe forms of state action, *Santosky*, 455 U.S., at 759, [citation omitted], have not served as precedent in other areas. . . . We are therefore satisfied that the label "civil" should not entice us to leave undisturbed the Mississippi courts' disposition of this case.[62]

Justice Kennedy concurred, stating that while the *Griffin* line of cases relied upon both equal protection and due process principles, he believed due process by itself was a sufficient basis for the Court's holding in *M.L.B.*[63]

> I acknowledge the authorities do not hold that an appeal is required, even in a criminal case; but given the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake in this particular proceeding, the State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means.[64]

Justice Thomas dissented, joined by Justice Scalia in full and Chief Justice Rehnquist in part. Because of the Court's prior statements that due process does not require states to provide appeals in the first place, said Justice Thomas, certainly states are not precluded by due process from charging a fee for the ap-

60. *Id.* at 568.
61. *Id.*
62. *Id.* at 569-570.
63. *Id.* at 570 (Kennedy, J., concurring).
64. *Id.*

peals, even if some people cannot afford it.[65] As for the equal protection argument, Justice Thomas said the *Griffin* line of cases should not be extended from criminal to civil matters.[66] He also reiterated his belief that the equal protection theory underlying *Griffin* no longer remains viable[67] and, in a portion of the opinion that the Chief Justice did not join, said that *Griffin* should be overruled.[68]

III. THE POSSIBLE IMPACT OF *M.L.B.* AND THE OUTLOOK FOR THE FUTURE

By its own terms, the *M.L.B.* holding is limited to parental termination cases. The majority of the present Court is likely to address questions of access to courts for poor people on an issue-by-issue basis, looking—as in *M.L.B.*—to the importance of the underlying right being litigated rather than holding across the board that financial barriers which preclude access are unconstitutional.

Parental termination cases involve interests probably more important than in any other type of civil case, with the possible exception of involuntary civil commitment for mental illness.[69] With respect to other types of civil cases where the interests are of a lesser magnitude, it is unclear whether *M.L.B.* will lay the groundwork for future decisions requiring, as a federal constitutional matter, appeals for those who otherwise would be shut out because they cannot afford transcripts. But even though *M.L.B.* is limited by its terms to the arena of parental termination, it did breach the civil-criminal barrier that previously had existed in the transcript cases. 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 because of high transcript and appeal fees.

Indeed, it seems that an argument could be made, both under the Equal Protection and Due Process Clauses, that where a state believes appeals are sufficiently important to provide for them as a matter of right in all civil cases—or to provide for them in certain types of civil cases—citizens should not be prohibited from taking the appeals simply because they cannot pay hundreds or thousands of dollars in transcript fees.

Of course, the five to four decision in *Ortwein* could be said to counter that argument since it held that the Constitution permits a $25 appeal fee as a condition for obtaining judicial review of an administrative reduction in old-age and welfare benefits.[70] But a $25 fee is not quite as high a barrier as one imposed by hundreds or thousands of dollars in transcript fees. Moreover, in *Ortwein*, as the Court there noted, no argument was made that the $25 fee was disproportionate.[71]

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65. *Id.* at 571 (Thomas, J., dissenting).
66. *Id.* at 576-578.
67. *Id.* at 572.
68. *Id.* at 575; *M.L.B.*, 117 S. Ct. at 570 (Rehnquist, C.J., dissenting).
69. In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court held that the interests implicated by involuntary civil commitment are sufficiently important to require a "clear and convincing" standard of evidence—a ruling later mirrored in the parental termination context by *Santosky v. Kramer*, 455 U.S. 745 (1982). *See In Re* L.G., 603 A.2d 381 (Vt. 1992) (holding that the Fourteenth Amendment requires that indigent litigants be provided a transcript without cost so they can appeal an involuntary civil commitment); *See also* Shuman v. State, 358 So. 2d 1333 (Fla. 1978) (holding the same).
70. Ortwein v. Scwab, 410 U.S. 656, 656-61 (1973).
71. *Ortwein*, 410 U.S. 656, 660 (1973).

By contrast, transcript fees in most states are set by statute or rule at two dollars per page or higher and are paid to court reporters who are state employees receiving significant income from their salaries and the many transcripts for which they are already paid. These sorts of fees not only are unnecessary in pauper cases, but they are disproportionate and irrational, and when they fence poor people out of appeals available to others, it is hard to justify them. States could easily do as Texas and West Virginia have done, paying salaries to court reporters and also paying them for indigent transcripts in criminal cases, but requiring them—as state employees and officers of the court—to provide transcripts without additional pay for indigents in civil cases.[72]

The more important arena, at least for the short run, may be not in the interpretation of the federal constitution, but in the interpretation of state constitutions in those states yet to address certain questions of access to courts. While a number of states already permit *in forma pauperis* civil appeals and provide free transcripts to the indigent in all types of civil cases,[73] others have not addressed the issue or permit them only in certain types of civil cases.[74] The holding of *M.L.B.* as a matter of federal constitutional law does not control the outcome under a state constitution, but state courts may be moved by *M.L.B.* to address broader questions of the right of access for impoverished litigants under state law.

IV. THE ORAL ARGUMENT

Along with my co-counsel and various lawyers who provided advice about the upcoming oral argument, I had decided early in my preparation to pitch the merits part of our case in a narrow fashion. We knew, first, that the only issue before the Court involved the right of access to an appeal of a poor person whose parental rights were terminated, and there was no call for the Court to decide or pronounce a broader principle that would extend to other civil cases. Second, we knew that the majority of the current Court is fairly conservative and no combination of five justices was likely to buy an argument set out in terms of broader rights of access for the poor.[75]

Near the beginning of the argument, Chief Justice Rehnquist asked if the State would have to pay the court reporters for the transcripts in these sorts of cases should we prevail. I responded that the legislature could—if it wished—change state law so that the court reporters were not paid two dollars per page in these cases. I referenced Texas and West Virginia, which, as we had pointed out in our reply brief, allow for payments of two dollars per page to court reporters in all cases except *in forma pauperis* civil cases. In those cases, court reporters are to

72. TEX. R. APP. P. 53(j); W. VA. CODE §§ 51-7-7, 59-2-1(a)(3).

73. *M.L.B.*, 117 S. Ct. at 567 n. 13.

74. *Id.*

75. Even the current Justices who might be described as relatively liberal would seem not to be as inclined as some before them, such as Justices Douglas, Brennan, and Marshall, to speak in broad terms of the rights of access of the poor. *See*, Jeffrey Rosen, *The New Look of Liberalism on the Court*, NEW YORK TIMES MAGAZINE, Oct. 5, 1997, at 62 (describing Justice Ginsburg as having "an affinity for resolving cases on narrow procedural grounds rather than appealing to broad principles of social justice; a preference for small steps over sweeping gestures; and an aversion to bold assertions of judicial power.").

prepare transcripts without charge as part of the yearly salary they receive from the state.[76]

Justice Scalia then pointed out that the state could, consistent with the Constitution, abolish appeals entirely, and if it could do that, he asked, why could it not restrict appeals to those who could pay for the transcript.[77] I replied: "[F]or the same reason expressed in the majority opinions in *Griffin* and the long line of cases that have followed *Griffin*."[78] The Chief Justice pointed out that those were criminal cases, and I responded that the Court had expressed the same principle in, for example, *Lindsey v. Normet*, which was a civil case.[79]

The questioning then turned to what I expected would be a key point—whether a principled line could be drawn between parental termination cases and other civil cases. I was asked: "How about a custody proceeding, a child custody proceeding? Would you be here making the same argument if she had lost in a custody battle?"[80] I responded by saying the argument would not have the same weight in a custody case because the consequences are not as tragic or final as in a case involving parental termination. In most custody cases, a parent has a right of visitation. Even if no visitation is allowed, there is usually an ability to communicate, to play a role in the child's life, and in the future, if conditions change, the aggrieved parent can petition for visitation or even a change in custody.[81]

A key question was then asked by Justice O'Connor: "So you think a principled line can be drawn between this case and a custody case?"[82] Yes, I responded, pointing out that the Supreme Court had held in *Santosky v. Kramer* that because of the finality involved, a clear and convincing evidentiary standard must be met under the Fourteenth Amendment before terminating a parent's rights, but no court or state had since required a similar standard before a state takes custody of children from parents without terminating their rights.[83]

As is often the case in appellate arguments, a series of questions followed testing our position. How about foreclosure of a home—can you distinguish that from parental termination? What about being dismissed from employment because of alleged sexual abuse of a child? What about paying millions of dollars in damages in a civil suit for that abuse? What about paternity cases? For the most part, in responding I fell back on the Supreme Court's own precedents holding that parental termination cases involved "compelling" and "fundamental" rights, while—for example—housing did not involve rights of that constitutional magnitude. I continued to emphasize the Court's decision in *Santosky v. Kramer*, which had not been extended to other types of cases.[84]

The next question asked whether a ruling in our favor would require the state to pay for attorneys in these cases: "Why not counsel? Why shouldn't she be

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76. Trans. of oral arg. at 4-5, M.L.B. v. S.L.J., 117 S. Ct. 555(1996)(No. 95-853).
77. *Id.* at 5.
78. *Id.*
79. *Id.* at 5-6.
80. *Id.* at 7.
81. *Id.*
82. *Id.* at 7-8.
83. *Id.* at 8.
84. *Id.* at 9-14.

entitled, if this is that significant, to have counsel on the appeal?"[85] I responded by citing the majority opinion in *Ross v. Moffitt*,[86] and paraphrased it as follows: "[T]he Equal Protection Clause does not give a person the right to duplicate the legal arsenal of a wealthier person in presenting the case, but it does—the Fourteenth Amendment does—give a right to present the case in the first place where the interest is important and where the State has set up these mechanisms for promoting accuracy and for correcting injustices."[87] Later in the argument, the question of the right to counsel arose again, and I noted that the right to a transcript and the right to counsel were not coextensive under the Court's decisions, pointing to *Mayer v. Chicago*, where the Court held that a transcript was required so a poor person could appeal a misdemeanor conviction with no jail time, while in *Scott v. Illinois*[88] the Court held that state-paid counsel was not required in such a case.[89]

The questioning returned to custody cases, and I was asked the practical difference between this case and one in which there was an order depriving a parent of custody and visitation. The main difference, I said, was that a parent denied custody and visitation could later petition to regain those things if conditions change, while a termination order is final and irrevocable. To illustrate the point, I noted that the Chancery Court's order in this case required that the name of M.L.B., the natural mother, be taken off the birth certificate and replaced by the name of the new mother.[90]

Justice Scalia continued questioning about how the line is drawn between parental termination cases and those of a purported lesser magnitude. I answered that the Court should go through the same process it utilized in its prior cases, such as the cases imposing the "clear and convincing" evidentiary requirement. "I wasn't here then, so I don't know what they did," he responded with a note of sarcasm. "I thought maybe you could help me out as to how we came to those conclusions." When I began to respond, "I think it's the traditional sort of Fourteenth Amendment analysis where you—," he interrupted me and said, "How I feel about it, essentially." Justice Stevens, waiting to ask a question, turned to Justice Scalia and said, "Read the opinions."[91]

Justice Kennedy earlier had asked a question about our equal protection contentions, and I circled back near the end of my argument to emphasize our position that, given the fundamental nature of the interests at issue here, intermediate scrutiny rather than minimal scrutiny was required in examining the State's justifications for these fees. When I stated that there was not a persuasive justification for the two dollar per page transcript and record charge, the Chief Justice asked if courts would be able to employ court reporters without allowing them to make this money. I responded that I thought they could, even if court reporters

85. *Id.* at 14-15.
86. 417 U.S. 600 (1974).
87. Trans. of oral arg. at 15.
88. 440 U.S. 367 (1979).
89. *Id.* at 373-374.
90. Trans. of oral arg. at 19-21.
91. *Id.* at 22-23.

earn no money for the *in forma pauperis* transcripts, particularly since they earn a yearly salary and are additionally paid by the page for the many transcripts they prepare for litigants who can afford them.[92]

With that I reserved the remainder of my time for rebuttal, and my opponent began. After some initial questions about Mississippi procedure, he was asked by Justice O'Connor if he conceded that "a fundamental right is at issue here."[93] He responded by saying "that the parent-child relationship in the past has been held by this Court to be a fundamental interest," but that since the parent's rights had been terminated by the trial court, "we question whether or not there is a fundamental right at this point in the proceedings."[94] Justice O'Connor then said: "Well, I don't know why the interest wouldn't remain the same throughout the proceeding. It's either fundamental or it isn't, and maybe some heightened scrutiny is required of procedures that the State invokes."[95]

Justice Ginsburg followed with a number of questions regarding the fundamental nature of the interest at issue.[96] When my opponent contended that we "seem to be making a purely wealth disparity argument, which would potentially bring in all cases of a civil nature,"[97] Justice Ginsburg disagreed, correctly noting that we had presented our argument in a narrow fashion with a focus on the extreme nature of parental termination cases.[98] When my opponent argued that a ruling in our favor would also logically encompass paternity cases, he was met with questioning on that issue by Justices Ginsburg and Stevens.[99] Much of the remainder of his argument was taken up by questions about when a transcript would and would not be required under Mississippi appellate practice.[100]

I had saved four minutes for rebuttal. I started by clarifying a statistical point made during my opponent's argument, and the rest of my time was taken up in an exchange with Justice Scalia, the Chief Justice, Justice Kennedy, and Justice Ginsburg about the difference between a divorce case and a termination case.[101]

V. CONCLUSION

We will long be dealing with what the Supreme Court in *Griffin* called the "age-old problem" of "[p]roviding equal justice for poor and rich, weak and powerful alike."[102] *M.L.B.* marked the first time in several years that the Court addressed that problem. While it is a significant decision in that respect, it deals only with one corner of the issue, leaving much for the future in terms of trying to ensure that our courts are open to all and not just those with plenty of money.

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92. *Id.* at 25-26.
93. *Id.* at 31.
94. *Id.*
95. *Id.* at 32.
96. *Id.* at 32-35.
97. *Id.* at 35.
98. *Id.* at 35-36.
99. *Id.* at 37-39.
100. *Id.* at 40-44.
101. *Id.* at 49-53.
102. Griffin v. Illinois, 351 U.S. 12,16 (1956).