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M.L.B. v. S.L.J.: Extension of in forma pauperis Appeals to the Civil Arena in Termination of Parental Rights Cases - Creation of a Vast New Constitutional Right or Limited Exception to the General Rule

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M.L.B. v. S.L.J.: EXTENSION OF *in forma pauperis* APPEALS TO THE CIVIL ARENA IN TERMINATION OF PARENTAL RIGHTS CASES

Creation of a vast new constitutional right or limited exception to the general rule?

*Rick Moore**

This Article discusses the decision by the United States Supreme Court in *M.L.B. v. S.L.J.*[1] holding that an indigent, appealing a termination of parental rights decree, is entitled to an *in forma pauperis* appeal at state expense.[2] Section I of this Article discusses the factual background of the case. Section II focuses on the opinion of the Court. Section III addresses the anticipated implications of the decision, and Section IV is a personal account of the experience of preparing and arguing a case before the highest court in the land.

I. FACTS

M.L.B. and S.L.J. were divorced on June 9, 1992, with S.L.J. being granted the paramount physical and legal custody of their minor children, ages seven and nine.[3] While the final decree of divorce allowed M.L.B. reasonable and liberal visitation rights with the minor children, it also specifically provided that "in no event and under no circumstances shall the wife exercise her visitation with said minor children in the presence of" a specifically named individual.[4] Additionally, M.L.B. was ordered to pay $40.00 a week child support beginning May 1, 1992, to maintain medical insurance on the children and to pay half of all medical bills not covered by the insurance policy.[5]

Seventeen months later, on November 15, 1993, S.L.J. and his new wife, J.P.J., filed a complaint for adoption in the Chancery Court of Benton County, Mississippi, seeking to terminate the parental rights of petitioner, M.L.B., and to allow J.P.J. to adopt the minor children.[6] The complaint alleged that M.L.B. had abandoned and deserted the children, was mentally and physically unfit to train and rear the children, had refused to offer any means of support for the children since the divorce, and had failed to exercise any reasonable visitation rights, even though they were available to her.[7]

The chancery judge, after hearing testimony and evidence on August 18, November 2, and December 12, 1994, ruled that the adoption should be granted.[8]

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

2. This Article is limited to a discussion of the constitutional basis for the opinion in M.L.B. v. S.L.J. and should not be construed as addressing or taking any position on the propriety of legislative enactment in this area.

3. Respondent's Brief at 1, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

The judge found that it had been established by clear and convincing evidence that there existed "a substantial erosion of the relationship between the natural mother and the minor children" which had been caused, at least in part, by petitioner's "serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with the minor children."[9] M.L.B. filed a notice of appeal to the Supreme Court of Mississippi on January 11, 1995.[10]

Civil appeals, which are authorized pursuant to state statutes,[11] are subject to prerequisites such as the requirement of timely notice,[12] prepayment of cost,[13] and in some cases, posting of bond.[14] The per page costs of the transcript and the papers from the record are set by statute.[15] A notice of appeal is filed with the Supreme Court of Mississippi, which thereafter determines whether to retain the case or send it to the intermediate Mississippi Court of Appeals for decision.[16] A decision of the court of appeals is a final decision unless the Supreme Court of Mississippi grants review pursuant to a writ of certiorari.[17]

The clerk of the chancery court estimated the cost of preparing and transmitting the record to be $2,352.36, which included $1,900.00 for the transcript, $438.00 for the other papers in the record, $4.36 for binders, and $10.00 for mailing.[18] A transcript must be prepared if the appellant "intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence."[19] The transcript is prepared by the court reporter who is paid two dollars per page.[20]

On July 10, 1995, the Supreme Court of Mississippi issued an order requiring M.L.B., within fourteen days, to correct certain deficiencies or face dismissal of her appeal.[21] On July 24, 1995, M.L.B. filed a motion for leave to appeal *in forma pauperis* in the Chancery Court of Benton County, Mississippi.[22] Thereafter, on July 27, 1995, M.L.B. filed in the Supreme Court of Mississippi a motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals.[23]

On August 18, 1995, the Supreme Court of Mississippi issued an order denying the motion to suspend rules, for leave to appeal *in forma pauperis*, and to brief the issue of *in forma pauperis* appeals.[24] The decision was based on prior cases which concluded that the right to proceed *in forma pauperis* in civil cases

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9. M.L.B. v. S.L.J., 117 S. Ct. 555, 559 (1996). *See* MISS. CODE ANN. §§ 93-15-103, -17-7 (1972).
10. *M.L.B.*, 117 S. Ct. at 560.
11. MISS. CODE ANN. § 11-51-3 (1972).
12. MISS. R. APP. P. 4.
13. MISS. CODE ANN. § 11-51-29 (1972); MISS. R. APP. P. 11(b)(1).
14. MISS. CODE ANN. § 11-51-31 (1972).
15. MISS. CODE ANN. §§ 25-7-1, -7-13(6) (1972).
16. MISS. R. APP. P. 16.
17. MISS. R. APP. P. 17.
18. M.L.B. v. S.L.J., 117 S. Ct. 555, 560 (1996).
19. MISS. R. APP. P. 10(b)(2).
20. MISS. CODE ANN. § 25-7-89 (Supp. 1997).
21. Respondent's Brief at 3, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853).
22. *Id.*
23. *Id.*
24. *Id.*

exists only at the trial level.[25] An order of final dismissal was entered on August 31, 1995.[26] M.L.B. then filed a petition for writ of certiorari, and on April 1, 1996, the United States Supreme Court granted the writ.[27]

II. THE OPINION OF THE COURT

On December 16, 1996, the United States Supreme Court, in a six to three decision, held that an indigent seeking to appeal a termination of parental rights decree is entitled to have the costs of the appeal paid with public funds.[28] The majority opinion was based upon an amalgamation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and an extension to the civil arena of a line of criminal cases beginning with *Griffin v. Illinois*,[29] and including *Mayer v. Chicago*.[30]

The majority opinion in *Griffin* held that an indigent criminal defendant must be provided with a free transcript when an appeal of right exists.[31] The Court based its decision on both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, refusing to choose between them. The reasoning of *Griffin* was used in several later cases to invalidate various state statutes and practices which were deemed to impede or deny indigent criminal defendants' effective appeals.[32] This line of cases culminated with the decision in *Mayer v. City of Chicago*[33] holding that an indigent faced only with a $500 misdemeanor fine and no jail time was entitled to a free transcript for appeal purposes. The Court distinguished *Mayer* from a civil case by acknowledging that the practical effect of conviction of even a petty offense could be as detrimental to the accused as forced confinement.[34]

Like the opinions in *Griffin* and *Mayer*, the majority in *M.L.B.* noted that the requirement imposed on the State was limited to a record of sufficient complete-

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25. M.L.B. v. S.L.J., 117 S. Ct. 555, 560 (1996). *See* Ortwein v. Schwab, 410 U.S. 656 (1973); Moreno v. State, 637 So. 2d 200 (Miss. 1994); Nelson v. Bank of Miss., 498 So. 2d 365 (Miss. 1986); Life and Cas. Ins. Co. v. Walters, 200 So. 732 (Miss. 1941).

26. Respondent's Brief at 3, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853).

27. *Id.*

28. *M.L.B.*, 117 S. Ct. at 570.

29. 351 U.S. 12 (1956).

30. 404 U.S. 189 (1971).

31. *Griffin*, 351 U.S. at 18. The Court concluded that "[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 an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Id.*

32. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (requiring prison law libraries or legal assistance); Williams v. Oklahoma City, 395 U.S. 458, 458-59 (1969) (per curiam) (requiring the provision of a transcript in a case involving an appeal of a sentence of 90 days in jail and a $50 fine for drunk driving); Long v. District Court of Iowa, Lee County, 385 U.S. 192, 192-94 (1966) (per curiam) (requiring the provision of a transcript for indigent state habeas corpus petitioner who appeals denial of relief); Douglas v. California, 372 U.S. 353, 356-58 (1963) (requiring free appellate counsel indigents on first appeal); Smith v. Bennett, 365 U.S. 708, 708-09 (1961) (requiring waiver of filing fee for state habeas corpus application of indigents); Burns v. Ohio, 360 U.S. 252, 253, 257-58 (1959) (requiring waiver of appeal filing fee from state intermediate appellate court to state supreme court).

33. 404 U.S. 189 (1971).

34. *Id.* at 197.

ness to allow proper appellate consideration of the grounds for appeal.[35] However, since a transcript is necessary in those appeals urging that "a finding or conclusion is unsupported by the evidence or is contrary to the evidence,"[36] this exception is an illusion as a practical matter.[37] Furthermore, past attempts by states to find a balance between an indigent appellant's rights and the expenditure of public funds have been invalidated by the Court.[38]

The Court accorded M.L.B. a free appellate transcript because the interest she sought to preserve on appeal was deemed to be as important as the misdemeanor charge sought to be appealed in *Mayer*. The majority attempted to assure that its holding in this case would not extend beyond termination of parental rights, noting that the decisions in *Santosky v. Kramer*[39] and *Lassiter v. Department of Social Services of Durham County*[40] have not been applied to other areas of the law.[41] However, as pointed out by the dissent, if the right to a free appellate transcript is based upon having an interest equivalent to that of a convicted misdemeanant, then many other interests involved in civil litigation appear to meet the standard.[42] Those cases include paternity suits,[43] divorce actions,[44] child custody determinations,[45] challenges to zoning ordinances that impact families,[46] and foreclosure actions seeking to oust families from their homes.[47]

The majority relied on an amalgamation of the Due Process and Equal Protection Clauses for its opinion despite its acknowledgment that "[a] 'precise

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35. M.L.B. v. S.L.J., 117 S. Ct. 555, 561 n.5 (1996). *See Griffin*, 351 U.S. at 20 (holding that transcript may not have to be provided by the State if "adequate and effective appellate review to indigent defendants" can be afforded by other means); *Mayer*, 404 U.S. at 194 ("'A record of sufficient completeness' does not translate automatically into a complete verbatim transcript.").

36. MISS. R. APP. P. 10(b)(2).

37. It is inconceivable that any appeal of a termination of parental rights decree would fail to allege that the finding or conclusions are unsupported by the evidence or are contrary to the evidence.

38. *See, e.g.*, Draper v. Washington, 372 U.S. 487, 498-500 (1963) (invalidating a state rule that conditioned an indigent appellant's right to obtain a free transcript on the trial judge's finding that the appeal would not be frivolous).

39. 455 U.S. 745 (1982). *Santosky* held that a "clear and convincing" standard of proof must be used in a termination of parental rights case. "Unlike a constitutional requirement of hearings . . . or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Id.* at 767 (citing Mathews v. Eldridge, 424 U.S. 319, 347 (1976)).

40. 452 U.S. 18 (1981). *Lassiter* addressed the question of when an indigent might be entitled to court appointed counsel in a termination of parental rights case. The Court concluded that each case would have to be considered on its own merit. *Id.* at 31-32.

41. M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996).

42. *M.L.B.*, 117 S. Ct. at 576-77 (Thomas, J., dissenting).

43. In *Little v. Streater*, 452 U.S. 1 (1981), the Supreme Court held that the State had to provide a free blood grouping test to an indigent defendant in a paternity action. The Court based its decision on the conclusion that:

> Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition.

Id. at 13 (citations omitted).

44. *See* Zakrewski v. Fox, 87 F.3d 1011, 1013-14 (8th Cir. 1996) (holding that the father's "liberty interest in the care, custody and management of his son has been substantially reduced by the terms of the divorce decree and Nebraska law").

45. *See* Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (stating that divorce is an "adjustment of a fundamental human relationship").

46. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

47. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 89 (1972) (Douglas, J., dissenting in part) ("Where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing.").

rationale' has not been composed because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.'"[48] However, as pointed out by the dissent, if neither clause individually affords the requested relief, it is assumed that no combination of the two can afford the requested relief.[49]

A. Due Process

The United States Supreme Court has repeatedly held that due process does not require an appeal process, even in criminal cases.[50] This conclusion was reaffirmed in *M.L.B.*[51] The majority, relying on the theory developed in *Griffin*, held that a combination of the Due Process and Equal Protection Clauses of the Fourteenth Amendment creates a right to an *in forma pauperis* appeal in termination of parental rights cases.[52] The majority in *Griffin* relied on this theory for its conclusion that when a state creates an appeal process it cannot deny access to those appealing a criminal conviction who are unable to pay.[53] To the contrary, the dissent in *M.L.B.*[54] argued that the *Griffin* line of cases is actually grounded in equal protection rather than a combination of equal protection and due process.[55]

Prior to the decision in *M.L.B.*, appellate rights accorded to criminal defendants had not been extended to civil cases. In fact, such rights were denied to civil appellants in *Ortwein v. Schwab*,[56] the only previous case to address the right of an indigent to an appeal in a civil case. In *Ortwein*, the Court held that Oregon's $25 appellate court filing fee: (1) was not a denial of due process, because the petitioners received agency pre-termination evidentiary hearings;[57] (2) did not violate the Equal Protection Clause, as unconstitutionally discriminating against the poor, because the fee was rationally justified to meet court expenses;[58] and (3) did not violate the Equal Protection Clause as arbitrary and capricious in allowing others to appeal *in forma pauperis*.[59] The Court specifically rejected reliance on *Boddie v. Connecticut*,[60] noting that *Boddie* "was not

48. M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996) (citations omitted), (quoting, Ross v. Moffitt, 417 U.S. 600, 608 (1974)).

49. *Id.* (Thomas, J., dissenting).

50. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956) (holding that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937) ("Due process does not comprehend the right of appeal."); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80 (1930) ("[T]he right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance.").

51. *M.L.B.*, 117 S. Ct. at 560-61.

52. *Id.*

53. *Griffin*, 351 U.S. at 18-20.

54. *M.L.B.*, 117 S. Ct. at 571 (Thomas, J., dissenting).

55. *See also* Lewis v. Casey, 116 S. Ct. 2174 (1996) (Thomas, J., concurring).

56. 410 U.S. 656 (1973).

57. *Id.* at 659-60.

58. *Id.* at 660.

59. *Id.* at 661.

60. 401 U.S. 371 (1971). The Court held that indigents seeking a divorce must be allowed access to the trial court without payment of filing fees. The decision was based primarily on the principle that due process requires that those persons who are forced into the judicial process "must be given a meaningful opportunity to be heard." *Id.* at 377.

concerned with post-hearing review."[61] Subsequent cases confirmed the different treatment between civil and criminal cases. For example, in *United States v. Kras*, the Court rejected a challenge to a filing fee by an indigent debtor who sought access to bankruptcy court.[62]

Two subsequent cases, *Lassiter v. Department of Social Services*[63] and *Santosky v. Kramer*,[64] dealt specifically with termination of parental rights. The decisions in both of those cases implicitly recognized that the magnitude of personal interests in a criminal case is much greater than in a termination of parental rights case. In *Lassiter*, the Court considered and rejected the contention that termination of parental rights cases should be treated like criminal cases for due process purposes.[65] Plaintiff, an indigent, argued that she had been denied Fourteenth Amendment Due Process when the State failed to provide counsel in her termination of parental rights case.[66] The Court pursued a two-step inquiry. First, it held that prior criminal and civil due process decisions establish a presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[67] This presumption was balanced against the *Mathews v. Eldridge*[68] factors of state interest, private interest, and risk of error in existing procedures.[69] The majority concluded that a parent's interest in the custody and care of his or her child is a compelling one, the termination of which "work[s] a unique kind of deprivation."[70] However, it was concluded that the absence of counsel did not render the hearing "fundamentally unfair" and did not deprive Lassiter of due process.[71]

In *Santosky*, the Court held that a "clear and convincing" standard of proof must be used in termination of parental rights cases.[72] It was concluded that "a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State."[73] By requiring an intermediate standard of proof between "preponderance of the evidence," normally used in civil cases, and "beyond a reasonable doubt" required in criminal cases, the only reasonable interpretation is that the Court concluded that the magnitude of the interests in a termination of parental rights case is greater than in civil cases but less than in criminal cases. The greater magnitude of interest involved in criminal cases is acknowledged by the Court in *Santosky*. It provides that:

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61. *Ortwein*, 410 U.S. at 659.
62. United States v. Kras, 409 U.S. 434, 440 (1973).
63. 452 U.S. 18 (1981).
64. 455 U.S. 745 (1982).
65. *Lassiter*, 452 U.S. at 26-27.
66. *Id.* at 24.
67. *Id.* at 27. This presumption was derived from *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), in which the Court declined to grant indigent probationers an absolute right to counsel at probation revocation proceedings and from *Scott v. Illinois*, 440 U.S. 367 (1979), in which the Court refused to require counsel for an indigent criminal defendant whose conviction did not result in imprisonment.
68. 424 U.S. 319 (1976).
69. *Lassiter*, 452 U.S. at 27.
70. *Id.*
71. *Id.* at 33.
72. Santosky v. Kramer, 455 U.S. 745, 769 (1982).
73. *Id.* at 767.

> When the State brings a criminal action to deny a defendant liberty or life, however, the "interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."[74]

Such a conclusion also finds support in a concurring opinion in *Griffin*, which pointed out:

> This Court would have to be wilfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for the cost of a bill of exceptions is not so negligible as to invoke whatever truth there may be in the maxim *de minimis*.[75]

Both the Constitution and the history of legal aspects of the parent-child relationship support the conclusion that the magnitude of personal interests involved in criminal cases is much greater than the interests involved in termination of parental rights cases. Specifically, the Constitution provides numerous express protections to criminal defendants that are not available to civil litigants. These include grand jury indictment and protection against double jeopardy and self-incrimination as guaranteed by the Fifth Amendment; speedy and public jury trial, ability to confront witnesses, and compulsory process and assistance of counsel as guaranteed by the Sixth Amendment; and protections against excessive bail and fines, and against cruel and unusual punishment as guaranteed by the Eighth Amendment.[76]

The Constitutional guarantees accorded a criminal defendant are in stark contrast to the history of the legal relationship between parents and their children. For example, in Colonial America the parent was considered an agent of the community given the job of raising desirable and productive citizens.[77] Widely varied laws were passed by different communities to ensure that the parents performed their obligations. If the parents failed in their responsibilities, the child was removed from the home.[78] The parent-child relationship was not mentioned in the Constitution because the diversity of values on the issue could not be encompassed in one simple formula.[79]

The proper analysis for due process challenges to state civil statutes and procedures, at least at the trial court level, was established in *Mathews v. Eldridge*.[80] This case required a two-step analysis to determine if "fundamental fairness" was met in a particular situation. First, a court must determine whether the chal-

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74. *Id.* at 755 (citation omitted).
75. Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).
76. M.L.B. v. S.L.J., 117 S. Ct. 555, 575 (1996) (Thomas, J., dissenting).
77. JEANNE M. GIOVANNONI & ROSINA M. BECERRA, DEFINING CHILD ABUSE 38 (1979).
78. *Id.*
79. See *Id.* at 31-75 (for an extensive discussion of the legal relationship between parents, their children, and the state).
80. 424 U.S. 319 (1976).

lenged state action implicates a protected property or liberty interest.[81] If such a protected interest is involved, the court must then determine what process is due before an individual may be deprived of that interest.[82] The second determination may be made by applying the four-part test established in *Mathews*.[83] The court must first assess "the private interest that will be affected by the official action"; second, determine "the risk of an erroneous deprivation of such interest through the procedures used"; third, determine "the probable value, if any, of additional or substitute procedural safeguards"; and fourth, consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[84]

This process requires the "fairness and reliability of the existing procedures" be considered before a determination can be made that the Constitution requires more.[85] This broad inquiry is necessary to determine whether the procedure used satisfies the "fundamental fairness" requirement of due process.[86] In that regard, Mississippi law provides extensive safeguards to assure accurate decisions at the trial court level. A petition for termination of parental rights may be filed only in "the county in which a defendant or the child resides, or in the county where an agency or institution holding custody of the child is located."[87] "[T]he mother of the child, the legal father of the child, and/or the putative father of the child, when known, must be made parties defendant."[88] A guardian ad litem must be appointed to represent the interests of the child.[89] The petition is not triable by the chancery court until thirty days after service of process is complete.[90] Findings of fact are made by a chancery judge sitting without a jury and must be based on clear and convincing evidence showing that one of the grounds for termination exists.[91] Chancery courts are courts of record subject to the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence, which are modeled after the Federal Rules of Civil Procedure and Federal Rules of Evidence.

It is undisputed that M.L.B. was accorded procedural protections beyond those required by previous decisions of the United States Supreme Court. Petitioner received notice and a hearing in front of an unbiased decision maker trained in the law. She was represented by an attorney, even though the Due Process Clause does not require this in every case.[92] Through her attorney, she was allowed to submit testimony and documentation on her own behalf and to cross-examine adverse witnesses. Finally, her rights were terminated only after a find-

81. *Id.* at 332. *See also* Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972).
82. *Mathews*, 424 U.S. at 333.
83. *Id.* at 335.
84. *Id.* (citation omitted).
85. *Id.* at 343.
86. *See* Santosky v. Kramer, 455 U.S. 745, 775 (1982).
87. MISS. CODE ANN. § 93-15-105(1) (1972).
88. MISS. CODE ANN. § 93-15-107 (1972).
89. *Id.*
90. MISS. CODE ANN. § 93-15-105 (1) (1972).
91. MISS. CODE ANN. § 93-15-109 (1972).
92. Lassiter v. Department of Social Servs. of Durham County, 452 U.S. 18, 24 (1981).

ing by the Chancellor that the statutory requirements had been met by clear and convincing evidence, as required by *Santosky*.[93]

In *M.L.B.*, the underlying dispute was between two private litigants. The State did not initiate the termination proceedings but only provided the adjudicatory forum and the substantive standard to be applied by the chancery judge. Despite this fact, the majority treated this case like a criminal prosecution by the State, holding that M.L.B. was "endeavoring to defend against the State's destruction of her family bonds."[94] *M.L.B.* was paired with *Mayer* because "[l]ike a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action."[95]

The fact that the State was not involved in the prosecution of this case was simply ignored in this part of the Court's analysis. Perhaps this is because the actions of the State in *M.L.B.* were substantially different from the actions of the State in a criminal prosecution. In any criminal prosecution the State is a party to the action and is seeking to take "devastatingly adverse action" against the defendant.[96] No such role was played by the State in *M.L.B.*. The only state actor in this case was the chancery judge. Therefore, to reach the conclusion that it did, the majority must have concluded that the chancery judge was in the position of the prosecuting attorney in a criminal action and, thus, not an unbiased decision maker. However, there were no allegations, evidence, or finding by the Court that the judge acted as anything other than a fair and impartial decision maker. Nor did the majority make any distinction between termination proceedings initiated by private persons versus those brought by the State. This means that in the future when petitioners attempt to extend the rights granted in *M.L.B.* to other actions involving "important" rights, the Court will begin with the presumption that the trial judge is not an impartial decisionmaker, even in those cases initiated by private parties. Furthermore, it will make no difference that more safeguards are in place to reduce the risk of error when the State initiates an action versus when a private individual brings the action.

The majority did not distinguish between termination proceedings initiated by the State and those initiated by private individuals, despite the substantial difference in the two kinds of actions. When the State initiates a termination proceeding there are numerous additional procedures in place which are designed to further limit the risk of error.[97] These procedures include four hearings and administrative efforts by the Department of Human Services to reunite the parent and child.[98]

The process begins when the Department receives a report of an abused or neglected child.[99] An investigation is done, and a recommendation is made.[100] If

93. Santosky v. Kramer, 455 U.S. 745, 769 (1982).
94. M.L.B. v. S.L.J., 117 S. Ct. 555, 568 (1996).
95. *Id.*
96. *Id.*
97. *See* MISS. CODE ANN. §§ 43-21-301 to -701 (1972).
98. *Id.* §§ 43-21-309, -557, -603.
99. *Id.* § 43-21-353.
100. *Id.* § 43-21-357.

there is an emergency situation, the youth court may issue an order allowing the Department to take custody of the child.[101] Within forty-eight hours, a shelter hearing is held to determine whether there is probable cause.[102] Verbal or written notice of this hearing is given to the parent, who may attend and participate in the hearing.[103] If the court determines that continued custody is necessary, a petition to adjudicate the status of the child is filed within five days.[104] The hearing is a trial on the merits.[105] A summons is served on the parents, and they are allowed to fully participate in the trial.[106] If it is determined that a child is neglected or abused a dispositional hearing is held to determine what to do with the child.[107] The statutes provide that a continuing effort be made to reunite the child and parent.[108] A permanent case plan is then prepared by the Department in an attempt to reunite parent and child. All case plans are reviewed annually by the Foster Care Review Board, which is judicial in nature. The parent is informed in writing of this review.

A termination proceeding is considered only after all efforts to return the child to the parent have failed and it is determined to be in the best interest of the child. This determination is made only after the case plan is reviewed by a social worker, his or her supervisor, the youth court or the Foster Care Review Board, and the administration of the Department with input from the Office of the Attorney General. Generally, the State initiates a termination proceeding only after all efforts by the agency have failed and only after the child has been out of the custody of the parent for at least a year. The net result of these proceedings is an assurance that the risk of error in a termination proceeding is minimal.[109]

Since the issues in *M.L.B.* do not arise until after a court of competent jurisdiction has decreed that a petitioner's parental rights should be terminated, the principles established in the paternity cases previously decided by the Court should have been deemed relevant. These cases establish that substantive family rights depend, in part, on parental conduct. As stated in *Caban v. Mohammed*, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[110] In

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101. *Id.* § 43-21-307.
102. *Id.* § 43-21-309.
103. *Id.* § 43-21-309(2).
104. *Id.* § 43-21-451.
105. *Id.* § 43-21-603.
106. *Id.* § 43-21-501.
107. *Id.* §§ 43-21-601, -603.
108. *See Id.* §§ 43-21-601 to -701.
109. With the addition of the rights granted in *M.L.B.*, it is arguable that when the State brings a termination action there are as many procedural protections in place to lessen the risk of error as in a criminal case.
110. Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting). Caban also provides that:

> Although some Members of the Court have concluded that greater protection is due the "private realm of family life," this appeal does not fall within that realm because whatever family life once surrounded appellant, his children, and appellee . . . has long since dissolved through no fault of the State's. In fact, it is the State, rather than appellant, that may rely in this case on the importance of the family insofar as it is the State that is attempting to foster the establishment and privacy of new and legitimate adoptive families.

Id. at 414 n.27 (citations omitted).

Quillion v. Walcott, the Court held that neither the consent nor a showing of unfitness of the natural father was necessary for adoption in a situation where the father had not raised or legitimatized his children.[111] As stated in *Lehr v. Robertson*, "the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."[112] Furthermore, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."[113]

M.L.B. did not allege that she was a good parent. Instead, she alleged that the evidence was not clear and convincing as to establish that her parental rights should be terminated.[114] If this case had been treated like the biological father cases, M.L.B.'s property rights arguably would have been something less than fundamental, thus requiring less constitutional protection because they would have been balanced against the best interests of the children. However, the majority in *M.L.B.* rejected a comparison to the paternity cases.[115] Thus, it would appear that these standards apply only to biological fathers and that a biological mother retains a fundamental interest in her relationship to her children regardless of her actions.

Although not relying on due process alone, the majority did use parts of the *Mathews* analysis to justify its decision.[116] For example, the majority noted that "in the tightly circumscribed category of parental status termination cases, appeals are few, and not likely to impose an undue burden on the State."[117] Additionally, the majority analyzed the risk of error based on the procedures used when it pointed out that of the eight reported challenges to termination orders made on the merits, three were reversed.[118]

From a *Mathews* point of view, there are at least two problems with this analogy. First, rates of reversal and statistics are not necessarily relevant to an assessment of the risk of an erroneous deprivation based on the procedures used. As stated in *Mathews*, "[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process."[119] Second, if it is determined that statistics are relevant, it would seem that the more appropriate comparison is between the number of cases handled by the court system and the number that are eventually reversed by an appellate court. While there are no statistics showing the

111. Quillion v. Walcott, 434 U.S. 246, 255 (1978).
112. Lehr v. Robertson, 463 U.S. 248, 257 (1983).
113. *Id.* at 261 (citation omitted). *See also* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.").
114. Respondent's Brief at 24, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853).
115. M.L.B. v. S.L.J., 117 S. Ct. 555, 557 (1996).
116. *Id.*
117. *Id.*
118. *Id.* at 560 n.3.
119. Mathews v. Eldridge, 424 U.S. 319, 346 (1976).

exact number of termination of parental rights cases filed in the lower courts of the State of Mississippi over the last sixteen years, the reports show that 194 such cases were filed in the lower courts in 1995.[120] If it is assumed that this number is consistent over the last sixteen years, that would mean that a little over 3,100 cases were filed during that time with only three reversals on the merits. Thus, the more relevant statistics would be a reversal rate of approximately one in one thousand.

The states that either provide for *in forma pauperis* appeals, including transcripts, in civil cases generally,[121] or that specifically provide for *in forma pauperis* appeals, including transcripts, in termination of parental rights cases are cited by the majority in support of its opinion.[122] However, the fact that some states have provided for *in forma pauperis* civil appeals through legislative enactment does not have any relevance to constitutional entitlement, nor should it require the Mississippi Legislature to prioritize its budget in the same manner. To the contrary, the only conclusion to be derived from these facts is that the decision to fund *in forma pauperis* civil appeals should be left to the discretion of the legislative bodies of each state.

Although the majority rejected a purely due process foundation for its conclusions, Justice Kennedy, in a concurring opinion, argued that the case should be reversed solely on that basis.[123] He stated that this conclusion was based on "the decisions addressing procedures involving the rights and privileges inherent in family and personal relations."[124] However, these decisions only establish that the parent-child relationship is of a fundamental nature and do not address "fundamental fairness" for appellate due process purposes. Further, these cases establish that the magnitude of interests in termination of parental rights cases is much less than in criminal cases.

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120. Respondent's Brief at 28, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853) (derived from a printout provided by the Court Administrator's Office which provides a breakdown by county of the various types of cases).

121. *See, e.g.*, ALASKA R. APP. P. 209(a)(3) (1996); CONN. R. APP. P. 4017 (1996); D.C. CODE ANN. § 15-712 (1995); IDAHO CODE § 31-3220(5) (1996); ILL. ANN. STAT., ch. 735, § 5/5-105.5(b) (Supp. 1996); KY. REV. STAT. ANN. § 453.190 (Banks-Baldwin 1991); LA. CODE CIV. P. ANN., art. 5185 (Supp. 1996); ME. R. CIV. P. 91(f) (1996); MINN. STAT. § 563.01, subd. 3 (1994); MO. REV. STAT. § 512.150 (1994); NEB. REV. STAT. § 25-2306 (1995); NEV. REV. STAT. § 12.015 (1995); N.M. STAT. ANN. § 39-3-12 (Michie 1991); N.Y. C.P.L.R. § 1102(b) (McKinney 1976); OR. REV. STAT. § 21.605(3)(a) (1991); PA. R. JUD. ADMIN. 5000.2(h) (1996); TEX. R. APP. P. 53(j)(1) (1996); VT. R. APP. P. 10(b)(4) (1996); WASH. R. APP. P. 15.4 (1996); W. VA. CODE § 59-2-1(a) (Supp. 1996); Girouard v. Circuit Court for Jackson County, 454 N.W.2d 792 (Wis. 1990).

122. *See, e.g.*, CAL. FAMILY CODE ANN. § 7895(c) (West 1994); COLO. REV. STAT. § 19-3-609 (Supp. 1996); KAN. STAT. ANN. § 38-1593 (1986); MICH. R. P. CT. 5.974(H)(3) (1996); Appeal in Pima County v. Howard, 540 P.2d 642 (Ariz. 1975); Nix v. Department of Human Resources, 225 S.E.2d 306 (1976); Chambers v. District Court of Dubuque County, 152 N.W.2d 818 (Iowa 1967); Karren v. Hennepin County Welfare Dep't, 159 N.W.2d 402 (Minn. 1968); *In re* Dotson, 367 A.2d 1160 (N.J. 1976); State *ex rel.* Heller v. Miller, 399 N.E.2d 66 (Ohio 1980); *Ex parte* Cauthen, 354 S.E.2d 381 (S.C. 1987).

123. M.L.B. v. S.L.J., 117 S.Ct. 555, 570 (1996) (Kennedy, J., concurring) (citing *Mathews*, 424 U.S. at 335.

124. *Id.* at 570 (citing Boddie v. Connecticut, 401 U.S. 371 (1971); Lassiter v. Department of Social Servs. of Durham County, 452 U.S. 18 (1981); and Santosky v. Kramer, 455 U.S. 745 (1982)). Justice Kennedy reached the same result as Justice Harlan's dissent in *Griffin* and subsequent cases that appellate review of criminal convictions were mandated by procedural due process. *See, e.g.*, Douglas v. California, 372 U.S. 353, 361, 363-64 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting). This interpretation was subsequently accepted as to civil access fees in *Boddie*, 401 U.S. 371, when Justice Harlan wrote the majority opinion invalidating the fee requirement on due process grounds.

The concurring opinion also concluded that "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."[125] Thus, Justice Kennedy would extend the decision in *Boddie* to require appellate court access to indigents whenever a fundamental right is impinged.[126] However, the fundamental nature of the marriage relationship was not discussed at any length and was not directly relevant to the analysis used by the *Boddie* majority. Instead, the decision was based on the requirements of *Mathews* and the conclusion that persons who are forced into the judicial process to vindicate fundamental rights must be given a meaningful opportunity to be heard.[127] Thus, the only question is whether the State has provided a process that is "fundamentally fair" under the circumstances of each particular situation. Therefore, Justice Kennedy apparently concluded that the procedures used in the chancery courts of the State of Mississippi do not provide a hearing that meets the "fundamental fairness" requirement of *Mathews*. However, no such allegations were made by petitioner in this case.

Petitioner in *M.L.B.* did not allege that she was denied a meaningful opportunity to be heard, nor did she allege that the process was not "fundamentally fair." Further, she did not allege that the chancery judge applied the wrong standard of law or that he was an unbiased decisionmaker. Finally, she did not allege that, like criminal law, termination of parental rights cases were being used or historically had been used for improper means such as suppression of speech or other protected activities. Instead, she took the position that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that she be accorded the same appeal available to those who can afford it.[128] Prior to termination of her parental rights, M.L.B., with the assistance of counsel, was accorded a full evidentiary hearing on the merits in front of a judge trained in the law. She was allowed to testify, to call witnesses on her behalf and to cross-examine adverse witnesses. Her parental rights were terminated only after the hearing and a finding by the chancery judge that there was clear and convincing evidence that the statutory requirements for termination had been shown.[129]

Why was the majority opinion based upon an amalgamation of due process and equal protection rather than Justice Kennedy's due process argument? After all, this case can be viewed as an attempt by petitioner to extend the decision in *Boddie*, requiring trial court access based solely on due process grounds, to the

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125. *M.L.B.*, 117 S. Ct. at 570 (Kennedy, J., concurring).

126. A second requirement for trial court access in *Boddie* was that there be no effective alternative to court access. *Boddie*, 401 U.S. at 376. Therefore, it can be concluded that if there are effective alternatives to court access then there is no impingement. Thus, court access was required in *Boddie* because of the presence of a fundamental right and the fact that there was no effective alternative to access. *Id.* Whereas, in *United States v. Kras*, 409 U.S. 434, 445 (1973), and *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973), access was denied because there were alternatives to access and thus no impingement.

127. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

128. *M.L.B.*, 117 S. Ct. at 559.

129. *Id.* at 559-60.

appellate level. Moreover, any problems with the opinion in *Boddie* could have been resolved by simply interpreting *Boddie* to require court access whenever a fundamental right is implicated. Perhaps the majority accepted Justice Douglas' warning in *Boddie* regarding due process: "I do not see the length of the road we must follow if we accept my Brother Harlan's invitation."[130] The length of this road would most certainly include appellate court access for all indigents appealing adverse decisions implicating fundamental rights. In any event, this case illustrates the problems of extending court access solely on the basis of procedural due process.

The decision in *Boddie* was a logical application of the requirements of *Mathews* because the appellants had been denied any hearing and there was no alternative to a court proceeding. The decision was based on the "two important principles" of due process: (1) persons who are forced into the judicial process must be given a meaningful opportunity to be heard,[131] and (2) a facially valid law may be invalid as applied to a particular person.[132] However, the majority in *Boddie* also adopted a no-effective-alternative approach. This approach provided that access claims should be rejected "where recognized, effective alternatives for the adjustment of differences remain."[133] The later decision by the *Kras* Court addressing waiver of bankruptcy filing fees, however, would waive fees only where the indigent had no alternative at all because "[h]owever unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors."[134] Therefore, it can be concluded that a successful trial court access challenge based solely on due process must involve a fundamental right,[135] which cannot be vindicated except through the courts, and the complete denial of access to the court system.

There is no dispute that the decision in *Boddie* would be controlling if the issue in *M.L.B.* involved access to the trial court. Both cases implicate fundamental rights which can be vindicated only through the courts. The problem from a due process point of view in *M.L.B.* is that petitioner therein was accorded all process and rights that she was entitled to under *Boddie*. Therefore, to have based its decision solely on due process, as contemplated by the decision in *Mathews*, the Court would have had to conclude that the hearing in the chancery court not only failed to meet the requirements of "fundamental fairness" but also that a fundamentally

130. *Boddie*, 401 U.S. at 385 (Douglas, J., concurring in result). Justice Douglas concurred in the result but would have based the decision on the Equal Protection Clause and the decision in Griffin v. Illinois, 351 U.S. 12 (1956).

131. *Boddie*, 401 U.S. at 377.

132. *Id.* at 379.

133. *Id.* at 375-76.

134. United States v. Kras, 409 U.S. 434, 445 (1973).

135. The majority in *Boddie* acknowledged that a fundamental right was implicated when it stated: "As this court on more than one occasion has recognized, marriage involves interests of basic importance in our society." *Boddie*, 401 U.S. at 376.

fair hearing could not be obtained in that court.[136] However, petitioner in *M.L.B.* did not allege that the proceeding in the chancery court was not "fundamentally fair." Moreover, Mississippi law provides extensive safeguards in all termination of parental rights cases to assure accurate decisions at the trial court level.[137]

An extension of the decision in *Boddie* to the appellate level would have far-reaching consequences. It would inevitably mean that appellate court access would be necessary for due process purposes to meet "fundamental fairness" in all cases wherein fundamental rights are implicated. This would most certainly include all domestic relations cases. As pointed out in the dissent, this could include paternity suits,[138] custody determinations,[139] divorce,[140] challenges to zoning ordinances with impact on families,[141] and foreclosure actions.[142] For substantive due process purposes, various interests involving freedom of choice in sexual and family matters have been recognized by the Court as fundamental. This general interest has been termed the right of privacy and includes the right to use and to distribute contraceptives,[143] the right to seek an abortion,[144] the right to view obscene material in the privacy of one's home,[145] and the right to live in an extended family.[146] Moreover, a situation would be created wherein a defendant with the ability to pay, whose rights were being taken away, would be forced to pay thousands of dollars in order to receive minimum due process. Such a holding would have created a vast new constitutional right potentially increasing the costs and administrative burdens on the court system. The Court was obviously not prepared to take that leap in 1996.

B. Equal Protection

The Equal Protection Clause forbids statutes and regulations from distinguishing between individuals on the basis of arbitrary or invidious classifications.[147] Unless a statute provokes "strict judicial scrutiny" by interfering with a "fundamental right" or discriminating against a "suspect class," it will ordinarily sur-

136. This would be contrary to the logical assumption from *Mathews v. Eldridge*, 424 U.S. 319 (1976), that a "fundamentally fair" hearing can be had in the Court of first instance. Of course, achieving "fundamental fairness" may require the institution of additional safeguards. *See* Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (requiring court appointed counsel in some termination of parental rights cases), and Santosky v. Kramer, 455 U.S. 745 (1982) (requiring "clear and convincing" standard of proof in termination of parental rights cases).

137. *See* MISS. CODE ANN. §§ 43-21-301 to -701 (1972).

138. *See* Little v. Streater, 452 U.S. 1, 13 (1981).

139. *See* Zakrewski v. Fox, 87 F.3d 1011, 1013-14 (8th Cir. 1996).

140. *See Boddie*, 401 U.S. at 382-83.

141. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

142. *See* Lindsey v. Normet, 405 U.S. 56, 89-90 (1972) (Douglas, J., dissenting in part).

143. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

144. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

145. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

146. *See Moore*, 431 U.S. at 499.

147. Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

vive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.[148]

Four classifications are currently recognized by the United States Supreme Court as suspect or semi-suspect: (1) classifications based on race, ethnicity, or national origin;[149] (2) state classifications based on resident alienage;[150] (3) classifications based on gender;[151] and (4) classifications based on illegitimacy.[152] Those unable to pay access fees are not a suspect class.[153] Thus, unless it implicates a fundamental interest, an access fee will be upheld for equal protection purposes as long as it is rationally related to a legitimate state interest.[154]

Courts have developed numerous tests to determine whether a right is fundamental. Most courts apply one of the following tests: (1) whether the alleged right is "deeply rooted in this Nation's history and tradition";[155] (2) whether it is "explicitly or implicitly protected by the Constitution";[156] or (3) whether the alleged right is "implicit in the concept of ordered liberty."[157]

While the decision in this case was said to be based upon an amalgamation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the majority also apparently concluded that the fundamental right of maintaining the parent-child relationship had been impinged.[158] However, there is no suggestion that the State does not have the power and duty to terminate a parent's rights in the appropriate circumstances. Indeed, the State has a compelling interest in this regard which would survive any level of scrutiny. To conclude otherwise would be contrary to numerous cases holding that reasonable regulations on fundamen-

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148. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); *Plyler*, 457 U.S. at 216-17; Lyng v. International Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW, 485 U.S. 360, 370 (1988); and Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988).

149. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

150. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

151. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

152. *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 505 (1976).

153. Harris v. McRae, 448 U.S. 297, 323 (1980); Maher v. Roe, 432 U.S. 464, 470-71 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

154. *See, e.g.*, United States v. Kras, 409 U.S. 434, 447-48 (1973); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) (if no strict scrutiny, the legislation will be upheld unless it is "without any reasonable basis and . . . is purely arbitrary").

155. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (holding invalid an Ohio housing ordinance that limited occupancy of a dwelling to members of only a few categories of related individuals).

156. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (upholding Texas system of financing public education through property taxes to the detriment of the schools in less wealthy neighborhoods). This case also addressed wealth disparity as follows: "[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24 (citing Bullock v. Carter, 405 U.S. 134, 137, 149 (1972); Mayer v. City of Chicago, 404 U.S.189, 194 (1971); Draper v. Washington, 372 U.S. 487, 495-96 (1963); Douglas v. California, 372 U.S. 353, 357 (1963)).

157. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (discussing constitutional right to certain privileges and immunities), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784 (1969).

158. Otherwise, prepayment of appeal costs should have been upheld as rationally related to a legitimate state interest.

tal rights are permissible.[159] Therefore, if the chancery court had the power to terminate petitioner's parental rights in this case, then there could not possibly be an impingement of that relationship unless it were concluded that the hearing in the tribunal of first instance was not "fundamentally fair" as required by *Mathews*.[160] On the other hand, if the trial was "fundamentally fair" then the only right at issue would be the right to a civil appeal. However, the majority made no finding that the right to a civil appeal is a fundamental right.[161] Moreover, the majority reaffirmed that due process does not require an appeal process, even in criminal cases.[162] Therefore, unlike the decisions in *Williams v. Illinois*,[163] and *Harper v. Virginia Board of Elections*,[164] there was no direct impingement of a fundamental right in this case.

The actions of the State in this case consist of providing a discretionary appeal after all process, required in termination of parental rights cases, has been accorded in the trial court. The statute at issue is facially neutral and applies to all civil appeals and all parties. Therefore, it does not, on its face, penalize the exercise of particular rights or penalize the petitioner while subsidizing others.[165] However, it was necessary to conclude that a fundamental right had been penalized in order to avoid the well-established principle that the State is not required to subsidize the exercise of even fundamental rights.

For example, in *Harris v. McRae* the Court held that medicaid need not fund abortions even though abortion is a constitutionally protected alternative.[166] Another example is that offered by Justice Harlan, dissenting in *Griffin*, of conditioning an education on the payment of tuition.[167] If conditioning an education on the payment of tuition did not create a discriminatory classification, then discriminatory classifications could not be created by any other reasonable charges by the State for the services it provides, otherwise "[t]he resulting *classification*

159. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding that federal food stamp program amendments narrowing the definition of household did not burden a fundamental right because it did not directly and substantially interfere with family living arrangements); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (noting that reasonable regulations of the fundamental right to marry may legitimately be imposed); Califano v. Jobst, 434 U.S. 47, 52-54 (1977) (upholding regulation terminating benefits upon marriage as rationally related to governmental interest).

160. Mathews v. Eldridge, 424 U.S. 319 (1976). However, as previously noted, petitioner did not allege that the proceeding in the chancery court was not "fundamentally fair."

161. Indeed, such a finding would have resulted in a vast new constitutional right implicating all cases, both civil and criminal.

162. M.L.B. v. S.L.J., 117 S. Ct. 555, 560-561 (1996).

163. 399 U.S. 235 (1970) (invalidating law that required continued incarceration beyond the statutory maximum for those who could not pay their fines).

164. 383 U.S. 663 (1966) (striking down a poll tax which directly interfered with the fundamental right to vote in state elections).

165. *Cf.* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983) (holding that state tax exemption statute, which effectively eliminated the tax burden of smaller newspapers, "begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that state unemployment compensation statute, by denying benefits to those unemployed for religious, rather than economic reasons, "effectively penalizes the free exercise of . . . constitutional liberties.").

166. Harris v. McRae, 448 U.S. 297, 326 (1980). *See also* Lyng v. International Union, 485 U.S. 360, 368 (1988) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); and Regan v. Taxation with Representation of Wash., 461 U.S. 540, 551 (1983) (rejecting the argument that the exercise of constitutional rights includes an affirmative government funding obligation).

167. Griffin v. Illinois, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting).

would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences."[168] Relying on the long-held view that the Constitution is a negative document, the Court has also held that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."[169] Finally, in *DeShaney v. Winnebago County Department of Social Services*, the Court stated that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[170]

The majority opinion in *M.L.B.* relied, at least in part, on the disparate impact theory of equal protection. The Court's action in distinguishing *Washington v. Davis*,[171] based upon the fact that not all blacks were impacted in Davis, as opposed to all indigents in the present case, illustrates at least some reliance on disparate impact theory.[172] The Court in *Davis* rejected the claim that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[173] Thus, the Fourteenth Amendment was not violated, in the absence of discriminatory intent, "*solely* because it has a racially disparate impact."[174] The opinion quoted Justice Harlan's dissents in *Griffin* and *Douglas* as to the serious consequences that would result from a different conclusion. As stated therein, subjecting a neutral statute to strict scrutiny because it benefits one race more than another "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[175] This is in accord with the holding in *Harris v. McRae* that:

> The equal protection component of the Fifth Amendment prohibits only purposeful discrimination, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress "selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group."[176]

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168. *Id.* Justice Harlan also addressed the "disparate impact" theory of equal protection as follows: "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional." *Id.*

169. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 549 (1983).

170. Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989).

171. 426 U.S. 229 (1976).

172. M.L.B. v. S.L.J., 117 S. Ct. 555, 569 (1996).

173. *Davis*, 426 U.S. at 242.

174. *Id.* at 239.

175. *Id.* at 248 (footnote omitted).

176. Harris v. McRae, 448 U.S. 297, 323-24 n.26 (citations omitted).

As stated by the dissent in *M.L.B.*, "[t]he lesson of *Davis* is that the Equal Protection Clause shields only against purposeful discrimination: A disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection."[177] Such a conclusion is also supported by various cases, ignored by the majority in their analysis, wherein the Court had rejected challenges to statutes affecting poor persons receiving food stamps;[178] regulations affecting poor persons getting married;[179] and regulations affecting poor persons seeking a medically necessary abortion.[180] As concluded by the dissent, there is no reasoned distinction between the cases which have rejected disparate impact equal protection challenges and state subsidies for poor persons seeking to exercise fundamental rights versus state funding for a discretionary appeal.[181]

To put this case in an Equal Protection Clause framework certain conclusions have to be drawn. As previously discussed, prior equal protection decisions in the civil area required a direct impingement of a fundamental right to evoke strict scrutiny. However, the majority does not discuss either a direct impingement or the level of scrutiny to be applied in this case.[182] Therefore, if this is an equal protection case then it has to be assumed that the majority concluded that denial of appellate court access because of inability to pay costs is a direct impingement of whatever right is sought to be preserved and that the actions of the State are to be strictly construed.[183] Consequently, the decision in this case would be applicable to all cases wherein fundamental rights are involved. However, the majority expends significant effort emphasizing the conclusion in *Lassiter v. Department of Social Services of Durham County*[184] that termination decrees "work[ ] a unique kind of deprivation."[185] The majority also attempts to assure that its hold-

177. *M.L.B.*,117 S. Ct. at 573 (Thomas, J., dissenting). The dissent also cites *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) for the proposition that "[t]he Clause is not a panacea for perceived social or economic inequity; it seeks to 'guarante[e] equal laws, not equal results.'" *Id.*

178. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding that federal food stamp program amendments narrowing the definition of household did not burden a fundamental right because it did not directly and substantially interfere with family living arrangements).

179. Califano v. Jobst, 434 U.S. 47, 52-54 (1977) (upholding regulation terminating benefits upon marriage as rationally related to governmental interest).

180. Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that Medicaid need not fund abortions even though abortion is a constitutionally protected alternative).

181. *M.L.B.*, 117 S. Ct. at 574. As stated in the dissent:

> I see no principled difference between a facially neutral rule that serves in some cases to prevent persons from availing themselves of state employment, or a state-funded education, or a state-funded abortion—each of which the State may, but is not required to, provide—and a facially neutral rule that prevents a person from taking an appeal that is available only because the State chooses to provide it.

Id. at 574 (Thomas, J., dissenting).

182. The majority agrees that the State has a legitimate interest in offsetting the costs of its court system but concludes that paying the costs of termination of parental rights appeals would not likely "impose an undue burden on the State." 117 S. Ct. at 567. It would thus appear that the level of scrutiny applied in this case was greater than rational basis. However, the opinion in *Mayer*, on which the Court relied in this case, did not address the level of scrutiny either.

183. An intermediate level of scrutiny is also possible and logical based on the holding in *Santosky v. Kramer*, 455 U.S. 745 (1982) that an intermediate standard of proof is applicable to termination of parental rights cases.

184. 452 U.S. 18, 27 (1981).

185. *M.L.B.*,117 S. Ct. at 565-67, 569-70.

ing in this case will not extend beyond termination of parental rights, noting that the decisions in *Santosky*[186] and *Lassiter*[187] have not been applied to other areas of the law. Nevertheless, as pointed out by the dissent, if the right to a free appellate transcript is based upon having an interest equivalent to that of a convicted misdemeanant, then many other interests involved in civil litigation appear to meet the standard.[188] Those cases include paternity suits,[189] divorce actions,[190] child custody determinations,[191] challenges to zoning ordinances that impact families,[192] and foreclosure actions seeking to oust families from their homes.[193]

A more limited interpretation of the majority opinion starts with the conclusion that denial of appellate court access because of inability to pay costs is a direct impingement of whatever right is sought to be preserved and then adds a sliding scale of rights.[194] Of course, this requires a case-by-case review and an arbitrary cutoff of rights protected versus those not protected. The net result is that the Court will review future challenges on a case-by-case basis and make a determination as to whether the particular right is deemed to be important enough to require appellate review prior to its deprivation.[195]

C. Conclusion

The United States Supreme Court has now extended the right to an *in forma pauperis* appeal to the civil arena, at least in termination of parental rights cases. Like the decision in *Griffin*,[196] this right is said to be based upon an amalgamation of the Due Process and Equal Protection Clauses of the Fourteenth

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186. Santosky v. Kramer, 455 U.S. 745 (1982). This case held that a "clear and convincing" standard of proof must be used in termination of parental rights case. "Unlike a constitutional requirement of hearings . . . or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." *Id.* at 767 (citing Mathews v. Eldridge, 424 U.S. 319, 347 (1976)).

187. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981). This case addressed the question of when an indigent might be entitled to court appointed counsel in a termination of parental rights case. The Court concluded that each case would have to be considered on its own merit. *Id.* at 31-32.

188. *M.L.B.*, 117 S. Ct. at 576-77 (Thomas, J., dissenting).

189. In *Little v. Streater*, 452 U.S. 1 (1981), the Supreme Court held that the State had to provide a free blood grouping test to an indigent defendant in a paternity action. The Court based its decision on the conclusion that:

> Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition.

Id. at 13 (citations omitted).

190. *See* Zakrewski v. Fox, 87 F.3d 1011, 1013-14 (8th Cir. 1996) (holding that the father's "liberty interest in the care, custody and management of his son has been substantially reduced by the terms of the divorce decree and Nebraska law").

191. *See* Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (stating that divorce is an "adjustment of a fundamental human relationship").

192. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

193. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 89-90 (1972) (Douglas, J., dissenting in part) ("[W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing.").

194. In effect, some "fundamental rights" are more "fundamental" than others.

195. Of course, the actual analysis will involve a comparison of the rights under consideration to those of the misdemeanant in *Mayer* or those of the petitioner in *M.L.B.*

196. Griffin v. Illinois, 351 U.S. 12 (1956).

Amendment, presumably because it cannot be reconciled with long-standing interpretations of either clause individually. This raises numerous questions for possible resolution in the future. For example, can this right be made to fit within the framework of traditional analysis of either due process or equal protection? From an equal protection point of view, is this an exception to the general rule that wealth is not a suspect class? That is, wealth becomes a suspect class subjecting the state rule to strict scrutiny if the interest implicated is sufficiently important.[197] Maybe this is more properly referred to as substantive equal protection. Or, from a due process point of view, is this an exception to the concept that minimum due process can be accorded in the court of first instance? That is, the combination of wealth disparity and a right of sufficient importance requires appellate court review in order to meet "fundamental fairness" under due process. Or will this right eventually result in a new species with a new name, such as Equal Due Process or Due Equal Protection? If that happens then it would be logical and practical to also establish fundamental rights which apply only to that new species.

The more logical basis for the holding in this case is some form of fundamental rights equal protection. This would be in accord with the acknowledgment by the majority that most of the criminal cases in this area were based on an equal protection framework.[198] Of course, this would either require the creation of a new set of rights to which this rule would have application or a narrowly defined set of fundamental rights applicable only to indigent petitioners attempting to appeal adverse decisions. This would also allow the Court to limit the impact of its holding without having to overrule prior decisions.[199] Otherwise, the entire civil arena would be encompassed by the new rule. This is not what the Court wants to do. The problem is that the Court has not been able to articulate a coherent theoretical framework for the rights that the majority wants protected without creating a vast new constitutional right with far reaching implications. Consequently, the result in appellate access challenges is ambiguous opinions which have application only to the facts of each individual case.

III. IMPACT OF THIS DECISION

The impact of the decision in *M.L.B.* is divided into two parts: (1) immediate impact of the decision, and (2) potential impact of the decision. Of course, which impact ultimately prevails depends upon subsequent conclusions by the Court as to what services and benefits must be provided by the State to those

197. This views the problem based on the right involved rather than the parties involved and thus is distinguished from the disparate impact theory of equal protection addressed in *Washington v. Davis*, 426 U.S. 229 (1976).

198. M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996).

199. If the decision in *M.L.B.* relied on disparate impact equal protection theory for its conclusions, then it would appear that *Washington v. Davis*, 426 U.S. 229 (1976) and *Harris v. McRae*, 448 U.S. 297 (1980) were wrongly decided.

who cannot afford them.[200] However, most of those decisions are not likely to be reached by the Court in the near future.

The immediate impact of the decision on the State will be having to absorb the administrative burdens and costs of appeals in terminations of parental rights decrees. This is based on the fact that the decision is limited to consideration of parental rights cases only and the assurance by the Court that this decision does not go beyond the area of termination of parental rights. If the decision is so limited, the actual costs to the State of Mississippi will probably not be significant. Of the 39,475 domestic relations cases filed in the chancery courts in 1995 only 194 involved termination of parental rights.[201] Furthermore, there are only sixteen reported appeals of termination of parental rights from 1980 to 1996, with twelve addressing the merits of a grant or denial of termination.[202] Of course, once these appeals are available at public expense it is presumed that the numbers will increase. While we can only speculate as to the number of appeals and their associated costs in the future, it is assumed that both will increase. As previously observed by the Court, "[w]e only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."[203]

The potential impact of this decision is much greater than the immediate impact. Now that the barrier between criminal and civil cases has been partially removed, it can safely be assumed that litigants will spare no time in contending that their interests are "fundamental" and of a similar nature as those of the petitioners in *Mayer* and *M.L.B.*, thereby entitling them to the same process.[204] Moreover, acceptance of these arguments would result in the opening of a Pandora's box without principled basis for distinction. Such appeals could include all domestic relations matters such as divorce, paternity, and child custody, as well as other cases where "important" interests are litigated.

The quantity of such subsidized cases would be significant. In 1995, there were 63,765 civil actions filed in the chancery courts of the State of Mis-

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200. Perhaps this is the reason one commentator on Court Television referred to this case as raising issues of socialism versus capitalism with which the Court has struggled over the years.

201. Respondent's Brief at 28, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853) (derived from a printout provided by the Court Administrator's Office which provides a breakdown by county of the various types of cases).

202. *M.L.B.*, 117 S. Ct. at 567. *See* Carson v. Natchez Children's Home, 580 So. 2d 1248 (Miss. 1991); Natural Mother v. Paternal Aunt, 583 So. 2d 614 (Miss. 1991); Vance v. Lincoln County Dep't of Pub. Welfare, 582 So. 2d 414 (Miss. 1991); In re J.D., 512 So. 2d 684 (Miss. 1987); G.M.R., Sr. v. H.E.S., 489 So. 2d 498 (Miss. 1986); Adams v. Powe, 469 So. 2d 76 (Miss. 1985); Bryant v. Cameron, 473 So. 2d 174 (Miss. 1985); Petit v. Holifield, 443 So. 2d 874 (Miss. 1984); Ainsworth v. Natural Father, 414 So. 2d 417 (Miss. 1982); De La Oliva v. Lowndes County Dep't of Pub. Welfare, 423 So. 2d 1328 (Miss. 1982); Doe v. Attorney W., 410 So. 2d 1312 (Miss. 1982); *In re* Adoption of a Female Child, 412 So. 2d 1175 (Miss. 1982).

203. Mathews v. Eldridge, 424 U.S. 319, 347 (1976).

204. The majority opinion points out that MISS. CODE ANN. §§ 41-21-83, -85 provide coverage for transcript fees and other costs for indigents in civil commitment appeals. *M.L.B.*, 117 S. Ct. at 560 n.2. However, this fact should not have had any relevance to the issues before the Court because: (1) this was pursuant to statutory enactment, not constitutional requirement; and (2) like criminal conviction and imprisonment, civil commitment involves involuntary confinement.

sissippi.[205] Of those, 39,475 were domestic relations cases.[206] This compares to 15,487 criminal dispositions and 22,476 civil filings in the circuit courts of the State of Mississippi.[207] A breakdown of the chancery court statistics reveals that of the 63,765 civil actions filed, 194 involved termination of parental rights, 1,027 involved custody or visitation, and 6,080 were paternity cases.[208] Of the cases decided on the merits by the Supreme Court of Mississippi in 1995, 194 were first appeals of criminal convictions, 40 involved domestic relations, and 10 involved custody.[209] Of the cases disposed of by the court of appeals in 1995, 298 were first appeals of criminal convictions, 27 involved domestic relations, and 6 involved custody.[210] The 1996 statistics show that the Mississippi Supreme Court issued 797 decisions,[211] and the court of appeals issued 663 decisions.[212]

These statistics indicate that if indigent appeal rights were expanded to include just domestic relation cases, the appellate courts could be overwhelmed and the costs to the system increased by several million dollars. For example, with approximately 40,000 domestic relations cases having been filed in the chancery courts in 1995, an increase of 3% in the appeal rate (1,200 cases) would almost double the work load of the appellate courts (1,460). Consequently, it is assumed that a corresponding increase in personnel to handle the increased work load would be required. Additionally, if it is assumed that the appeal costs of each of these additional cases averaged $2,500.00 (the clerk's estimated costs for preparation of the record in *M.L.B.*) an additional $3 million per year would have to be expended.

Other potential impacts of the Court's ruling include: (1) there will no longer be any deterrents to appeals filed for the purpose of harassment of the opposing side; and (2) the delay may result in some children not being adopted. As noted by the Court in *Lassiter*, the State has an interest in concluding child custody litigation as rapidly as is consistent with fairness.[213] Moreover, the State has an interest in "foster[ing] the establishment and privacy of new and legitimate adoptive" parents where the biological parent has abandoned the relationship.[214] Because a younger child has a greater chance of adoption, a delay of two or more years for appellate review of a termination proceeding could determine whether the child is adopted.

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205. SUPREME COURT OF MISSISSIPPI, 1995 ANNUAL REPORT 55 (1995).

206. Respondent's Brief at 28, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853) (derived from a printout provided by the Court Administrator's Office which provides a breakdown by county of the various types of cases).

207. SUPREME COURT OF MISSISSIPPI, 1995 ANNUAL REPORT 48 (1995).

208. Respondent's Brief at 28, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (No. 95-853) (derived from a printout provided by the Court Administrator's Office which provides a breakdown by county of the various types of cases).

209. SUPREME COURT OF MISSISSIPPI, 1995 ANNUAL REPORT 23 (1995).

210. *Id.* at 42.

211. SUPREME COURT OF MISSISSIPPI, 1996 ANNUAL REPORT 23 (1996). These decisions are broken down as follows: 225 published written opinions, 117 per curiam decisions, 297 cases dismissed, and 158 unpublished written opinions *Id.*

212. *Id.* at 42. These decisions are broken down as follows: 620 unpublished comprehensive opinions, 23 unpublished memorandum affirmances, and 20 cases dismissed.

213. Lassiter v. Department of Social Servs., 452 U.S. 18, 32 (1981).

214. *See* Caban v. Mohammed, 441 U.S. 380, 389, 414 n.27 (1979).

IV. A MYTHIC JOURNEY OR A DESCENT INTO THE ABYSS?

The second hand on the clock moved like molasses on a cold winter day and the minute hand raced like a fan blade around the dial as I sat in the attorney room of the United States Supreme Court hurriedly reviewing my notes and wondering if I had adequately prepared for the barrage of probable questions in the oral argument scheduled to begin in a few minutes. It was October 6, the first day of the Court term, and the culmination of a long process that began in January. This was also the end of an experience that combined mythological symbolism with the practical realities of partisan politics.

This case originated in the Chancery Court of Tippah County where M.L.B. was represented by a legal services attorney and S.L.J. was represented by local counsel. After M.L.B.'s petition to appeal *in forma pauperis* was rejected by the Mississippi Supreme Court, the ACLU filed the petition for certiorari with the United States Supreme Court. Later, the clerk requested that the Office of the Attorney General respond to the petition. This is the normal procedure when a state statute, rule, or regulation is being challenged. The State submitted a response within the time allowed by the rules.

On April 1, 1996, (a coincidence or an omen?) the Court granted the petition. Shortly thereafter, a scheduling order was issued, and a three step process was begun in preparation for drafting the brief on the merits. First, it was necessary to assimilate the pertinent cases and other legal authority that might be relevant to the issues in the case. Organizing, labeling, and arranging the material so that it could be found and incorporated into the brief at a later date constituted one of the most time consuming aspects of the process. Second, it was necessary to identify and contact persons who could provide relevant facts and identify pertinent documents that might be applicable to the issues under consideration. Third, as I had never prepared a brief on the merits in this forum, I reviewed various treatises for opinions in that regard.

Preparation included reviewing from fifty to one hundred law review articles that touched upon some aspect of the case. Unfortunately, I found no articles that had considered the particular issues raised in this case. This was not unexpected, since the Supreme Court generally grants certiorari only in those cases raising important questions which have not previously been addressed and are deemed, by at least five members of the Court, to be in need of resolution. Nevertheless, reading a few thousand pages of legal text on the Fourteenth Amendment and fundamental rights may be the dictionary definition of a combination of tedium and confusion. In any event, there were parts of some articles that provided enlightenment.

My preparation also included reviewing Supreme Court briefs submitted in previous cases addressing termination of parental rights. Copies that could not be found in bound volumes in the state law library were retrieved by a representative of the National Association of Attorneys General directly from the Clerk of the Court. Although the issues raised in these briefs were not directly on point, they were helpful in two ways. First, it was possible to review the various arguments made by others in similar circumstances and make an assessment of which argu-

ments were germane and persuasive as to the issues in *M.L.B.* Second, the fact that these briefs did not cite any line of cases or make any major arguments that I had not already identified as pertinent to the issues relieved a certain amount of anxiety. The foreboding that is associated with this form of anxiety has its origin in the nightmare that all attorneys occasionally have of missing an important case or issue and not becoming aware of this shortcoming until pointed out by the judge in the middle of oral arguments. Such a faux pas would be especially disconcerting if made in the middle of a United States Supreme Court argument.

Petitioner's brief relied on a combination of the opinion in the *Mayer*[215] case and a sympathy appeal. This meant that the legal foundation on which petitioner based her right to an *in forma pauperis* appeal was founded upon the product of judicial activism whereby the Court reached the result desired by the majority without establishing or articulating any discernable principals of law. Therefore, petitioner was asking the Court to extend to the civil arena the result reached in a criminal case which had been an aberration when it was decided and which had obviously been one of the more extreme examples of judicial activism.

Since it is difficult to make a logical argument in response to an illogical premise, the State's brief was based upon an analysis of prior opinions addressing due process, equal protection, and fundamental rights in the civil arena. Application of the legal principles on which those decisions were based would either dictate denial of the relief requested or the creation of a vast new constitutional right that would swallow the entire civil field. Because of the second possibility, it was necessary to point out the dire consequences of the creation of a vast new constitutional right. In light of the fact that almost 40,000 domestic relations cases are filed in the chancery courts of the State of Mississippi each year, that argument was not difficult. However, as we know from the majority opinion, the Court was not willing to create any vast new constitutional rights but, instead, chose to craft a narrow exception to the general rule.

The next problem was to organize and prepare the brief in a logical, coherent manner. After numerous rewrites, a final version was completed and sent to the printer. The printer prepared all copies, delivered the appropriate number of copies to the Court, served opposing counsel, and returned file stamped copies. Needless to say, this service was both necessary and expensive.

Briefing in this case was completed at the end of July. At approximately the same time, we received a notice setting the case for oral argument on October 6, 1996. Preparing for oral argument was more difficult than preparing the brief. This required being ready to answer any question that could be asked. It was also logical to assume that there would only be a short amount of time to present a prepared statement before questions began to be asked by members of the Court. Needless to say, I changed the outline for this part of the case several times prior to presentation of the actual argument.

Since this case was set for the first day of the term, there was no opportunity to watch another argument prior to my own. However, the National Association of

215. Mayer v. City of Chicago, 440 U.S. 173, 189 (1979).

Attorneys General has an office in Washington that assists Attorneys General throughout the nation, including preparation for Supreme Court arguments. Part of this assistance includes setting up a moot court to hear and make suggestions regarding oral arguments. The members of these moot courts are generally made up of local attorneys who practice before the Supreme Court. This proved to be beneficial in the organization and presentation of the argument, as well as from a confidence building point of view.

Attending a lecture on the Supreme Court also proved to be both interesting and beneficial. Lectures are given in the courtroom every hour on the half hour from 9:30 a.m. to 3:30 p.m., Monday through Friday, when the Court is not in session. The courtroom, completed in 1935, is impressive with its high ceilings, friezes, large columns, and abundance of mahogany wood. These lectures provide information on both historical and practical aspects of the Court. The proceedings in the Court are formal and involve certain established rituals. Examples include the wearing of black robes, simultaneous appearance of the justices from curtains behind the bench, and the traditional beginning of each argument with "Mr. Chief Justice, and may it please the Court." Seating in the courtroom is also strictly controlled. Counsel for petitioner sits to the left of the podium and counsel for respondent to the right. The attorneys waiting for the next case to be called for argument sit at the backup tables. There are also a number of seats inside the bar which are reserved for attorneys who have been admitted to practice before the Court. Additionally, there are reserved seats parallel to the bench on each end. Those on the right side of the courtroom are reserved for family and friends of the justices, and visiting dignitaries, such as the President or Attorney General of the United States. Those on the left side of the courtroom are reserved for the members of the news media who cover the Court. Finally, there is unreserved seating in the courtroom for members of the public, although each attorney arguing before the Court can reserve seats for friends and family members.

A large part of the weekend was spent in final preparation for the argument on Monday afternoon. When I reached the limits of review tolerance on Sunday afternoon, I put aside my notes and spent the rest of the evening watching one of the baseball playoff games. Surprisingly, I slept soundly for eight hours that night.

On the morning of the argument, I walked to the Court and checked in with the Office of the Clerk. All attorneys must meet with the Clerk of the Court at approximately 9:00 a.m. on the morning of their argument. Part of the reason for this meeting is for the clerk to remind the attorneys of various procedural matters. Additionally, written information and the argument cards are handed out. The argument card lists the name of the attorney, the style of the case, and instructions, including the previously mentioned traditional beginning of every argument. The argument card also serves as a pass to gain access to the courtroom.

When the briefing by the clerk was completed, I went to the courtroom. The usher seated me in the last chair available behind the bar. The first question of the day, from a trivia point of view, was whether Justice Scalia would be the first justice since the 1940's to begin a term wearing a full beard. When the members of the Court emerged through the curtain behind the bench Justice Scalia was, in

fact, wearing a full beard. This one fact made as many newspaper headlines as any of the cases argued that day.

Arguments started promptly at 10:00 a.m., beginning with *Turner v. FCC*[216] dealing with cable rights. While a very important case from a financial point of view, it was an otherwise dry subject that evoked only information questions from the members of the Court. When those arguments were completed both opposing counsel and myself moved to the backup tables. Even though *M.L.B.* was the third argument of the day, the Court rules require that counsel for the next case be at the backup table in the event the prior argument ends early. At the completion of the second argument, the Court adjourned promptly at 12:00 p.m. I chose to skip lunch rather than take advantage of the express lunch service available in the cafeteria to those attorneys arguing cases in the afternoon. It seemed prudent to avoid eating a meal just prior to making my first argument in front of the United States Supreme Court.

The Court reconvened promptly at 1:00 p.m., and the argument began. Opposing counsel made a short opening statement before Chief Justice Rehnquist and Justice Scalia began a barrage of questions. These and other inquiries by different members of the Court continued until the white light on the podium indicated that five minutes were left for argument. At that point, opposing counsel reserved the remaining five minutes for rebuttal and sat down.

I got up and moved toward the podium, having reached the point of no return. From this vantage point, the nearness to the Justices is arresting. This is not like the United States Court of Appeals for the Fifth Circuit where the judges, metaphorically speaking, sit up in the clouds. The Chief Justice of the United States Supreme Court sits directly in front of the arguing attorney, approximately six to ten feet away. Moreover, I felt surrounded because the bench has a half-hexagonal shape that allows the Justices seated on the wings to hear and see both counsel and each other. Thus, to address one of the Justices on the end counsel must turn almost sideways. The actual seating of the Justices is based on seniority with the most senior sitting to the right of the Chief Justice, the second most senior to the left of the Chief Justice, and continuing in that manner so that the two most junior Justices sit at opposite ends of the bench.

As with opposing counsel, I was allowed to make a short opening statement before the questions began. In the first ten minutes, questions were asked by all Justices, with the exception of Justice Thomas. The only unanticipated question was an inquiry as to the number of chancery judges in the State of Mississippi. Having never had the occasion to need to know this, I had to admit that I did not know. The last fifteen minutes of the allotted time consisted of responding to a barrage of questions from Justice Ginsburg. During this time, I found myself viewing this verbal sparring from a spectator's point of view, a sort of out-of-body experience. Since Justice Ginsburg has a decidedly New York dialect and I have somewhat of a southern dialect, it entered my mind that a third party might view the sound of this discussion as slightly amusing. While no glaring errors

216. 117 S. Ct. 1174 (1997).

were made in the responses, the argument reminded me of the description penned by a United States Solicitor General of the 1950's. He stated that he made three arguments in every case: (1) the logical, well-organized, and thoroughly prepared argument that he intended to present; (2) the illogical, unorganized, and confused argument actually presented to the Court, and; (3) the absolutely devastating arguments that he thought of while lying in bed the night after the argument.

It was obvious that there was a serious ideological split in the Court on the issues raised in this case. Chief Justice Rehnquist and Justice Scalia were clearly against extending access rights and Justices Ginsburg, Stevens and Breyer obviously felt otherwise. Based on their questions, it was difficult to anticipate how Justices O'Connor, Kennedy and Souter were leaning. However, it was assumed that Justice Souter would vote with Justices Ginsburg, Stevens and Breyer and that the case would be decided by Justices Kennedy and O'Connor. Therefore, the decision would be either 5-4 in favor of the State or 6-3 against the State.

The argument finally ended and I emerged into the light of day on the front steps. The news media had converged on the petitioner, and every reporter was vieing for the opportunity to interview her. This case drew an unusual amount of attention from the news media presumably because of its soap opera nature. Indeed, after returning to Jackson, I received calls from such media sources as the *Washington Times* and the *Washington Post*. Additionally, there were calls from *People Magazine*, the *Oliver North Radio Show*, the *Montel Williams Show*, and a California producer.

On December 16, 1996, the Court issued its opinion, ruling against the State in a six to three decision. This result apparently contradicts the general consensus, by those who have published opinions on the subject, that a majority of the Court has an idea of federalism that reduces federal power vis-a-vis the states. These conclusions are supported by the fact that the Court, during the 1996 term, preserved state's rights by rejecting a constitutional challenge to statutes banning doctor-assisted suicide, rejecting challenges to a state law that allowed violent sexual predators to be committed to mental institutions after completion of their prison term, and striking provisions from federal law contained in the Religious Restoration Act and the Brady gun control law which imposed requirements on the states. Perhaps *M.L.B.* is not comparable to the cases upon which that opinion relied, or maybe this is an application of some "Mississippi Rule." After all, the opinion of the Court in *M.L.B.* relied upon an undefined amalgamation of due process and equal protection which, arguably, established no usable principles and which cannot be justified under either clause. Based on this premise, the logical conclusion is that payment of appeal costs in termination of parental rights cases was prioritized in the State's budget because the majority felt that it was the "right thing to do." In any event, the decision is an aberration from the other cases raising federalism issues which were decided during the 1996 term.

The process of preparing and arguing a case in the United States Supreme Court was an unforgettable series of events. The experience, like most things, had both positive and negative aspects. Nevertheless, I feel fortunate to have had an opportunity that comes to only a very small number of attorneys.