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## MLB v. SLJ: "Equal Justice" for Indigent Parents

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## CASENOTE

### *M.L.B. V. S.L.J.*: "EQUAL JUSTICE" FOR INDIGENT PARENTS

*Any and every child born into the world deserves all the dignity and respect there is—in short love, which is not a privilege, but a natural right.\**

#### I. INTRODUCTION

The United States Supreme Court recently decided that a state may not, consistent with the Due Process and Equal Protection clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees.<sup>1</sup> In *M.L.B. v. S.L.J.*,<sup>2</sup> the Supreme Court found that, just as a state may not block an indigent petty offender's access to an appeal afforded others,<sup>3</sup> Mississippi may not deny *M.L.B.*, because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.<sup>4</sup>

This decision comes from a line of cases in which the Supreme Court has struggled with the question of what process is due in non-criminal proceedings and how indigents are affected

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\* Keorapetse Kgositsile, *The Impulse Is Simple* NEGRO DIG., July 1968, reprinted in *MY SOUL LOOKS BACK, 'LESS I FORGET* 55 (Dorothy W. Riley ed., 1993).

1. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996).

2. *Id.*

3. See *Mayer v. Chicago*, 404 U.S. 189, 195 (1971).

4. See *M.L.B.*, 117 S. Ct. at 559.

by such process. Indigent litigants are problematic because their particular disadvantages may require the removal of procedural obstacles, such as the payment or waiver of transcript costs or docket fees, that may block access to appellate review.<sup>5</sup> In criminal proceedings, states must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.<sup>6</sup> This principle of "equal justice"<sup>7</sup> secures transcripts for appeals of habeas corpus hearings,<sup>8</sup> transcripts of preliminary hearings to prepare

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5. See generally *id.* at 561 n.4 (noting various procedural obstacles that were removed).

6. See *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); see also *Draper v. Washington*, 372 U.S. 487 (1963); *Eskridge v. Washington Prison Terms and Paroles*, 357 U.S. 214 (1958); *Griffin v. Illinois*, 351 U.S. 12 (1956). These cases involved a direct appeal from a trial court decision. The rationale used in deciding these cases was that the appellant would have serious disadvantages in overcoming the presumption that his trial was free of prejudicial error. For example, it would be very difficult to prove possible mistakes without a record of the prior proceeding. Note that the Court in each of these cases emphasized the idea that substitutes used in place of the transcript may be sufficient. Possible substitutes included statements of the facts agreed to by both parties or a full narrative statement prepared from the judge's minutes. See, e.g., *M.L.B.*, 117 S. Ct. at 561-62 n.5 (citing possible substitutes).

7. According to this principle, states are not required to establish a system for criminal appeals. However, once a state establishes such a system, it must not unreasonably distinguish litigants in a manner that will impede equal access to the courts. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."). For transcript cases, see *Wade v. Wilson*, 396 U.S. 282 (1970); *Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court*, 385 U.S. 192 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Eskridge v. Washington Prison Terms and Paroles*, 357 U.S. 214 (1958); *Ross v. Schreckloth*, 357 U.S. 575 (1958); *Griffin v. Illinois*, 351 U.S. 12 (1956), and *People v. Montgomery*, 224 N.E.2d 730 (1966). For docket fee cases, see *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Smith v. Bennett*, 365 U.S. 252 (1961), and *Burns v. Ohio*, 360 U.S. 252 (1959). See generally Note, *Indigent Access to Civil Courts: The Tiger is at the Gates*, 26 VAND. L. REV. 25 (1973); Note, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461 (1985); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

8. See *Long*, 385 U.S. at 195. In habeas corpus appeals, the appellant has to overcome the just imprisonment presumption. The appellant must prove specific errors to free himself. Also, in habeas corpus appeals more time has generally elapsed between a trial and a post-conviction hearing than in the situation of a trial followed by a direct appeal. Thus, it is even more difficult to proceed without a record. In *Long*, the Court diminished the alternative principle saying it need not consider possible situations where transcripts cannot reasonably be made available by the state. See *id.* at 195. However, this was a per curiam opinion and may best be understood

for criminal trials,<sup>9</sup> trial transcripts for appeals of petty offenses,<sup>10</sup> and trial transcripts for non-felony appeals.<sup>11</sup>

In termination of parental rights cases,<sup>12</sup> the Supreme Court has held that indigent parents do not have a per se right to state-appointed counsel and has endorsed a case-by-case approach in making this determination.<sup>13</sup> However, the Court in *M.L.B.* held that under the Due Process Clause and Equal Protection Clause, a state may not terminate a parental right and then deny the parent appellate review of the sufficiency of the evidence because of her poverty.<sup>14</sup>

In a decree terminating petitioner M.L.B.'s parental rights to her two children, a Mississippi Chancery Court cited the governing Mississippi statute and stated that respondents, the children's natural father and his second wife, had met their burden of proof by "clear and convincing evidence."<sup>15</sup> M.L.B.

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as applied to the specific facts of the case.

9. See *Roberts*, 389 U.S. at 42-43 (ignoring the idea of alternatives to a transcript in the direct review of the preliminary hearing); see also *Gardner*, 393 U.S. at 370-71 (finding that the conduct and decision of the first proceeding was very important to a de novo post-conviction hearing). But see *Britt*, where the Court found no right to a free transcript of a mistrial in an entirely new trial. See 404 U.S. at 230. The North Carolina Court of Appeals reasoned that the defendant is still presumed innocent and nothing from the first hearing is binding on the subsequent proceeding, that is, the subsequent proceeding is independent of the first proceeding. See *Britt v. North Carolina*, 174 S.E.2d 69 (N.C. Ct. App. 1970), *aff'd* 404 U.S. 226 (1971). However, because there were alternatives available, the United States Supreme Court did not find on any of these grounds. See *Britt*, 404 U.S. at 230.

10. See *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969).

11. See *Mayer v. Chicago*, 404 U.S. 189 (1971). This case reversed the trend of ignoring alternatives to transcripts. See E. Graham McGoogan, Jr., *Criminal Procedure—Free Transcripts for Indigents*, 51 N.C. L. REV. 621, 622 (1973).

12. Termination of parental rights proceedings have been recognized as among the most severe forms of action a state can take. See Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 230 (1978).

13. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 34-35 (1981); cf. *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981) (holding that where prolonged or indefinite deprivation of parental custody is threatened, due process requires that the indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver is made).

14. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 559 (1996).

15. See *id.* at 559-60. Clear and convincing evidence is defined in a number of ways. For example, "to establish a fact or an element by clear and convincing evidence a party must persuade the jury that the proposition is highly probable or must produce in the mind of the factfinder a firm belief or conviction that the allegations in question are true." 29 AM. JUR. 2D *Evidence* § 157 (1994) (citations omitted).

filed a timely appeal, but Mississippi law conditioned her right to appeal on prepayment of record preparation fees.<sup>16</sup> Lacking funds to pay the fees, M.L.B. sought leave to appeal in forma pauperis.<sup>17</sup> The Supreme Court of Mississippi found no right to proceed in forma pauperis in civil appeals and denied her application.<sup>18</sup>

Justice Ginsburg, writing for the majority, first established that a line of precedent exists recognizing the principle of "equal justice"—a doctrine created by the convergence of due process and equal protection concerns.<sup>19</sup> This principle of "equal justice" applies to both civil and criminal proceedings and is relevant when considering problems indigents may have accessing courts.<sup>20</sup> Though the waiving of court fees in civil cases is the exception rather than the rule, the Court noted that it has consistently set apart cases involving state controls or intrusions on family relationships from ordinary civil cases.<sup>21</sup> Since parental status termination is "irretrievably destructive" of the fundamental liberty interest a parent has in having a relationship with her child and the risk of error is considerable, these cases are treated like cases that are criminal or quasi-criminal in nature.<sup>22</sup> Accordingly, access to judicial processes may not turn on the ability to pay,<sup>23</sup> and in this case, Mississippi may not withhold the transcript that M.L.B. needed for her appeal.<sup>24</sup>

This Note will analyze how the facts of *M.L.B.* required the Court to merge a fundamental right recognized under the Due Process Clause with an equal protection analysis to determine the rights of an indigent parent in parental rights termination proceedings. It will look briefly at the evolution of the right of access to judicial proceedings for indigents in order to illustrate

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16. See *M.L.B.*, 117 S. Ct. at 560.

17. See *id.*; see also *infra* note 86 (discussing "in forma pauperis").

18. See *M.L.B.*, 117 S. Ct., at 560 (citation omitted).

19. See *id.*; see also discussion *supra* note 7.

20. See *M.L.B.*, 117 S. Ct. at 560-64.

21. See *id.* at 563-64.

22. See *id.* at 566-68.

23. See *id.* at 568.

24. See *id.* at 578. The transcript was "needed" because the Mississippi statute required appellants in these cases to order them for the appeal. See sources cited *infra* notes 84 and 86.

the significance of this decision. This Note will delineate how the result reached by the Court is a natural extension of prior transcripts cases when viewed in terms of the interests involved. Finally, it will examine the implications of *M.L.B.* on future indigent civil litigants.

## II. THE *GRIFFIN* PRINCIPLE OF EQUAL JUSTICE

### A. *Griffin v. Illinois*

The landmark case of *Griffin v. Illinois*<sup>25</sup> involved an Illinois rule that conditioned appeals from criminal convictions on the defendant's obtaining a transcript of trial proceedings.<sup>26</sup> Indigent defendants, other than those sentenced to death, were not excepted from the rule, and in most cases defendants without means to pay for a transcript did not have access to any appellate review.<sup>27</sup>

Justice Black, writing the plurality opinion in *Griffin*, held that the state has to provide a criminal defendant with a stenographic transcript of the criminal trial when it is necessary to his appeal.<sup>28</sup> A state is not required to provide the criminal defendant with an opportunity to appeal. But once the state has established an appellate system of review, it must grant access to that system ensuring the fair treatment of all individuals seeking such review.<sup>29</sup> The state cannot provide these transcripts to only a select class of defendants or, only to those who offer to pay for them.<sup>30</sup>

Though resting mostly on an equal protection analysis, the Court explained that the "equal justice" principle is actually supported by both due process and equal protection concerns.

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25. 351 U.S. 12 (1956).

26. See *M.L.B.*, 117 S. Ct. at 560 (citing *Griffin*, 351 U.S. at 13-14 & nn.2-3).

27. See *Griffin*, 351 U.S. at 14.

28. See *id.* at 19-20.

29. See *id.* at 18.

30. *Griffin* was the first time the Court used an equal protection analysis to require the government to provide a guaranteed minimum form of fairness to all criminal defendants, regardless of whether the claim related to a right with specific recognition in the first eight amendments. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.41, at 943 (5th ed. 1995).

When taken together, these constitutional clauses “emphasize the central aim of our entire judicial system—all people charged with a crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”<sup>31</sup> Denying a criminal defendant a transcript because of his inability to pay for it, in a state where such a transcript is necessary to appeal, means *only* those who can afford the transcript can appeal their convictions. The Court declared that if a state found it important to correct adjudications of guilt or innocence through appellate review, poor people should not lose “life, liberty or property because of unjust convictions which appellate courts would set aside,”<sup>32</sup> merely because they cannot afford the appeal. The effect works an invidious discrimination against indigents and thus, is invalid.<sup>33</sup>

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31. *Griffin*, 351 U.S. at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). The dissent argued that the Illinois law should be upheld since, by its terms, it applied to rich and poor alike. *See id.* at 30-39 (Harlan, J., dissenting). But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, the Supreme Court struck down the so-called “grandfather clause” of the Oklahoma Constitution as discriminatory against African-Americans although that clause was nondiscriminatory on its face. *See Guinn v. United States*, 238 U.S. 347 (1915); *see also Evitts v. Lucey*, 469 U.S. 387 (1984); *Lane v. Wilson*, 307 U.S. 268 (1939).

32. *Griffin*, 351 U.S. at 19.

33. Litigation expenses are required of both the rich and the poor. Thus, technically there is no overt discrimination against those who are not wealthy. The concern is with the disproportionate impact of the requirement of payment on the poor. *See David Medine, The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 349 n.81 (1990).

The *Griffin* Court’s reasoning seems to contradict its later holdings regarding the effect of disproportionate impact on equal protection analysis. In later cases, disproportionate effect, standing alone, was not enough to trigger heightened equal protection review, even in the context of race. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977) (noting that disproportionate impact is not irrelevant, but it is not the only test of racial discrimination, and, standing alone, does not qualify the impact of strictest scrutiny); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (holding that disproportionate impact alone does not violate the Fourteenth Amendment). In fact, these cases do not forbid discrimination by the government; they seem to require it by giving preferential treatment to indigents. The idea that the Court was requiring discrimination by giving such preferential treatment to indigents concerned Justice Harlan in his dissenting opinion in *Griffin*. *See* 351 U.S. at 34-35. This apparent discrepancy seems to have been overlooked by the Court in *M.L.B.* Justice Thomas, in his dissent, clearly recognized this contradiction. *See M.L.B.*, 117 S. Ct. at 572-74 (Thomas, J., dissenting).

The importance of appellate review to the correct adjudication of guilt or innocence was also noted. *See Griffin*, 351 U.S. at 18.

According to the Court, the appellant must receive "as adequate review" as other, more affluent appellants.<sup>34</sup> The state does not have to equalize economic conditions.<sup>35</sup> Nonetheless, when a state allows for appeals of convictions, "it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review . . . ."<sup>36</sup>

Justice Harlan, in his dissent, noted that the Court ought solely to use a due process analysis in which it considers the "fundamental fairness" of the law.<sup>37</sup> Otherwise, the floodgates of litigation will open because an equal protection claim could be brought for any sort of wealth discrimination assertion. Justice Harlan's concerns were later recognized and the Court had, until *M.L.B.*, shifted its reliance from equal protection almost completely to due process.<sup>38</sup>

### B. *Griffin Extended*: Mayer v. Chicago

*Griffin's* progeny further establish that a state cannot arbitrarily cut off appellate rights for indigents while leaving open

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34. See *Griffin*, 351 U.S. at 19-20.

35. See *id.* at 23 (Frankfurter, J., concurring).

36. *Id.*

37. See *id.* at 38 (Harlan, J., dissenting). Judicial determination of what is fundamental fairness has evoked strong criticism from those who have favored the incorporation theory of the Bill of Rights. This theory was adopted by Justice Reed in *Adamson v. California*, 332 U.S. 46, 47 (1947). For Justice Reed, the issue in *Adamson* was whether the Fifth Amendment privilege against self-incrimination as applied against the state by the Due Process Clause of the Fourteenth Amendment permitted the court and counsel to comment on the failure of a defendant to explain or deny evidence against him, and whether this failure may be considered by court and jury. See *id.* The majority looked at the state practice in terms of its overall fairness or, as Justice Frankfurter's concurring opinion stated, "[whether such practice] offends those canons of decency and fairness which express the notions of justice of English-speaking peoples . . ." *Id.* at 67 (Frankfurter, J., concurring). This "natural law" theory later evolved into Justice Harlan's fundamental fairness test. For Justice Harlan, due process is a test of "fundamental fairness"; the inquiry in each case must be "whether a state trial process was a fair one." *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968). This inquiry requires a case by case evaluation of state procedures. See Michael Klimpl, *Indigent's Access to Civil Court*, 4 COLUM. HUM. RTS. L. REV., 267, 270-71 n.20 (1972).

*M.L.B.* involved the relationship between a parent and a child. This was held to be a fundamental liberty interest. See *M.L.B.*, 117 S. Ct. at 568.

38. See Medine, *supra* note 33, at 299-300.



avenues of appeal for more affluent persons.<sup>39</sup> While typically such fee requirements are examined only for rationality, there are exceptions made by the Court for particular situations.

In *Mayer v. City of Chicago*<sup>40</sup> the Court explained that *Griffin's* principle is not confined to cases in which imprisonment is at stake. *Mayer* dealt with an indigent who had allegedly committed a petty offense. He was convicted of two misdemeanors and sentenced to pay \$250 for each offense. The Court held that criminal or quasi-criminal proceedings would be excepted from the general rule that fee requirements are examined only for rationality.<sup>41</sup> The Court held that felony-nonfelony distinctions are "unreasoned" and "impermissible" as a means of impeding indigents' access to the courts.<sup>42</sup> According to the Court, the *Griffin* principle "is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."<sup>43</sup>

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39. See, e.g., *Williams v. Oklahoma City*, 395 U.S. 458, 458-59 (1969) (per curiam) (holding that transcript needed to perfect appeal must be furnished at state expense to indigent defendant sentenced to 90 days in jail and a \$50 fine for drunk driving); *Long v. District Court*, 385 U.S. 192, 192-94 (1966) (per curiam) (holding that transcript must be furnished at state expense to enable indigent state habeas corpus petitioner to appeal denial of relief); *Smith v. Bennett*, 365 U.S. 708, 708-09 (1961) (holding that filing fee to process state habeas corpus application must be waived for indigent prisoner); *Burns v. Ohio*, 360 U.S. 252, 253, 257-58 (1959) (holding that filing fee for motion for leave to appeal from judgment of intermediate appellate court to state supreme court must be waived when defendant is indigent).

40. 404 U.S. 189 (1971).

41. See *id.* at 196-97.

42. See *id.*

43. *Id.* at 196-97. In *M.L.B.*, Justice Ginsburg stated, "[i]n accord with the substance and sense of our decisions in *Lassiter* and *Santosky*, we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door on equal justice.'" *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 568 (1996) (internal citation omitted). In the same paragraph she noted two exceptions: (1) the basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license, and (2) access to judicial processes in cases criminal or quasi-criminal in nature may not turn on the ability to pay. See *id.* Justice Ginsburg has included parental status termination cases among those that are criminal or quasi-criminal in nature.

However, *M.L.B.* could conceivably be more limited than originally thought. After all, the study used in support of Justice Ginsburg's argument that such an imposition will not be a heavy burden on Mississippi, dealt only with Mississippi's parental rights termination decrees. Now that there is a greater opportunity to appeal these decrees in every state, those states that had greater burdens than Mississippi at the time of this decision may now have to sustain an even greater burden than they had before.

### III. GRIFFIN PRINCIPLE LIMITED TO FUNDAMENTAL RIGHTS IN CIVIL CONTEXTS: *BODDIE* AND ITS PROGENY

In *Boddie v. Connecticut*,<sup>44</sup> appellants, representing a class of welfare recipients, asked a district court to declare a state procedure requiring the payment of process<sup>45</sup> and court fees<sup>46</sup> for commencement of a divorce action unconstitutional as a violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. The practical effect of the Connecticut law was to deny indigents who could not pay these costs access to the courts.<sup>47</sup> The district court held that the fee requirements did not deny appellants a fundamental right, and neither equal protection nor due process was forsaken.<sup>48</sup> On appeal, Justice Harlan, writing for the majority, reversed the district court decision. For Justice Harlan, the issue was clearly one of due process, not equal protection. The existence of a court fee was simply and fundamentally unfair to an indigent seeking a divorce.<sup>49</sup>

The Court found that the right involved was access to the courts for the resolution of conflicts in the marital relationship—marriage consistently being held as an interest of basic importance in our society.<sup>50</sup> Because the state had a monopoly on the dissolution of marriage, private parties were totally dependent on a state's legal system for divorce actions. Thus, due process prohibits a state from denying individuals seeking

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*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), established that if M.L.B.'s defense was sufficiently complex, she would have been designated state-paid counsel. According to Justice Ginsburg, it would be anomalous to hold that M.L.B. could be eligible for state-paid counsel but should be flatly denied a transcript while also holding that one has a right to a transcript when appealing a misdemeanor, although that person may be flatly denied trial counsel regardless of the complexity of the misdemeanor defense. See *M.L.B.*, 117 S. Ct. at 567.

44. 401 U.S. 371 (1971).

45. See CONN. GEN. STAT. ANN. § 52-261 (West 1958).

46. See *id.* § 52-259(c).

47. See Klimpl, *supra* note 37.

48. See *Boddie*, 401 U.S. at 372-74.

49. See *id.* at 381.

50. See *id.* at 376 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). In *Boddie*, Justice Harlan cited these cases for the proposition that marriage has been held to be a fundamental right. See *id.*

judicial resolution of their marriage access to its courts solely because of their inability to pay.<sup>51</sup>

*Boddie* established that where a fundamental interest is involved in a civil proceeding and the state has a monopoly on the means of dissolving that relationship, due process prohibits a state from denying access to its courts by requiring the payment of fees.<sup>52</sup> *Boddie* extended the *Griffin* principle to civil proceedings in which a fundamental liberty interest is at stake.<sup>53</sup>

Later cases, such as *United States v. Kras*<sup>54</sup> and *Ortwein v. Schwab*,<sup>55</sup> show the Court's reluctance to extend the *Griffin* principle to civil cases devoid of a fundamental liberty interest. Thus, cases involving state control or intrusions on family relationships are generally set apart from "the mine run of civil cases."<sup>56</sup>

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51. *See id.* at 375; *see also* *Little v. Streater*, 452 U.S. 1, 13-17 (1981) (holding that a state must pay for blood grouping tests sought by an indigent defendant to enable him to contest a paternity suit).

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

53. In *Boddie*, the fundamental liberty interest was marriage and divorce. *See id.*

54. 409 U.S. 434 (1973). Justice Ginsburg cites *Kras* in *M.L.B.* because the case states the general rule that "a constitutional requirement to waive court fees in civil cases is the exception, . . ." *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 563 (1996). *Kras* concerned fees, totaling \$50, required to secure a discharge in bankruptcy. The Court held that bankruptcy discharge entails no fundamental interest. *See Kras*, 409 U.S. at 445. Such an interest "does not rise to the same constitutional level" as the interest in establishing or dissolving a marriage as in *Boddie*; nor is resort to court the sole path to securing debt forgiveness as marriage termination requires access to the state's courts. *Id.*

55. 410 U.S. 656 (1973) (per curiam). The appellants in *Ortwein* sought court review of agency determinations reducing their welfare benefits. *See id.* at 656. Alleging poverty, they challenged an Oregon statute requiring appellants in civil cases to pay a \$25 fee. *See id.* at 658. The Court followed *Kras* because there was no fundamental interest gained or lost depending on the availability of the relief sought by the complainants. *See id.* at 659. Absent a fundamental interest or classification attracting heightened scrutiny, the applicable equal protection standard is that of rational justification, a requirement satisfied by Oregon's need for revenue to offset the expenses of its court system. *See id.* at 660. In *M.L.B.*, Justice Ginsburg used *Ortwein* and *Kras* to show that the Court did not extend *Griffin* to apply in a broad array of civil cases. *See M.L.B.*, 117 S. Ct. at 563.

56. *M.L.B.*, 117 S. Ct. at 556.

#### IV. PARENTAL RIGHTS ARE LIBERTY INTERESTS: DUE PROCESS ANALYSES OF *LASSITER* AND *SANTOSKY*

Due process evolution in the area of parental rights began in 1972, when the Supreme Court recognized the essential right to conceive and raise one's children.<sup>57</sup> In determining what procedures are required by due process, the Court has considered three factors: (1) the importance of the individual liberty at stake; (2) the extent to which the requested procedure may reduce the possibility of erroneous decision making; and (3) the governmental interest in avoiding the increased administrative and fiscal burdens that result from increased procedural requirements.<sup>58</sup>

In *Lassiter v. Department of Social Services*,<sup>59</sup> the Court addressed the issue of an indigent's right to appointed counsel in a state-initiated proceeding for termination of parental rights. The Court balanced the three due process considerations enunciated in *Mathews v. Eldridge*<sup>60</sup> against a presumption that the right to appointment of counsel is contingent upon imprisonment.<sup>61</sup> Though the Court did not find a per se right to ap-

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57. See *Stanley v. Illinois*, 405 U.S. 645 (1972). "The importance of the parent-child relationship is such that the Court will strictly scrutinize the fairness of procedures used to establish or terminate that relationship." NOWAK & ROTUNDA, *supra* note 30, § 13.8, at 556 (footnote omitted).

58. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* involved a person whose social security disability benefits had been terminated. An action was brought challenging the administrative procedures established by the Secretary of Health, Education and Welfare for assessing whether there exists a continuing disability. The United States Supreme Court held that an evidentiary hearing is not required prior to termination of disability benefits and that the procedures promulgated by the Secretary did comport with due process. See *id.* at 324-25, 349.

The difficulty of predicting how the Supreme Court will employ the *Mathews* balancing test is evident in its rulings in parental rights cases. See NOWAK & ROTUNDA, *supra* note 30, § 13.8, at 556.

59. 452 U.S. 18 (1981).

60. 424 U.S. 319 (1976).

61. See *Lassiter*, 452 U.S. at 18. The Court's method actually involved a two-step process. Initially, the three civil due process considerations—the litigant's interests, the need for procedural safeguards, and the state's interest—were weighed and balanced. See *id.* at 27-30. The result was then balanced against the presumption that imprisonment is required to invoke a right to appointed counsel. See *id.* at 31. The Court concluded that Ms. Lassiter's interests were insufficient to overcome the combined weight of the State's interests and the presumption that imprisonment is a prerequisite to appointment of counsel. See *id.* at 32-33. Because the parent's interests may sometimes outweigh this combination, the decision to appoint counsel was to

pointed counsel in this case, it did find the parent's interest in the accuracy and justice of the decision to be a commanding one.<sup>62</sup> Because the object of such a proceeding is to end the parent's fundamental liberty interest in a relationship with her child, a decision against a parent "works a unique kind of deprivation."<sup>63</sup> Even though the state is not a party to the proceeding, the result is the same because the state is terminating the rights of a parent. The Court recognized that the trial court must decide whether the indigent should receive counsel on a case by case basis, subject to appellate review.<sup>64</sup>

Due process evolution in the area of parental rights culminated in *Santosky v. Kramer*,<sup>65</sup> where the Court held that the due process rights of parents require petitioners to prove the grounds for termination by "clear and convincing evidence."<sup>66</sup> This standard is appropriate when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."<sup>67</sup> The Court went on to apply the *Mathews* balancing test<sup>68</sup> and determined that the use of a preponderance of the evidence standard in such cases is inconsistent with due process.<sup>69</sup> The Court found that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he

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be made on a case-by-case basis. See *id.* at 32; see also Kevin W. Shaughnessy, Note, *Lassiter v. Department of Social Services: A New Interest Balancing Test for Indigent Civil Litigants*, 32 CATH. U. L. REV. 261, 264 & n.20 (1982); see generally Colene Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v. Department of Social Services*, 11 WIS. WOMEN'S L.J. 327 (1996).

62. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 565 (1996) (citing *Lassiter*, 452 U.S. at 27).

63. *Id.* (quoting *Lassiter*, 452 U.S. at 27).

64. See *Lassiter*, 452 U.S. at 31-32.

65. 455 U.S. 745 (1982). In *Santosky*, the parents appealed a judgment of a family court, which found their children to be permanently neglected. See *id.* at 751-52. The Supreme Court held that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence. See *id.* at 769-70. This is because natural parents have a fundamental liberty interest in the care, custody, and management of their child. See *id.* at 753.

66. See *id.* at 767-68. This standard is an intermediate standard of review. See *supra* note 15; see also Gary R. Govert, *Termination of Parental Rights: Putting Love in its Place*, 63 N.C. L. REV. 1177, 1183-89 (1985).

67. *Addington v. Texas*, 441 U.S. 418, 424 (1979).

68. See case and source cited *supra* note 58.

69. See *Santosky*, 455 U.S. at 758.

may be 'condemned to suffer grievous loss.'<sup>70</sup> Thus, since the loss of parental rights to one's child is severe, and that loss is a fundamental liberty interest protected by the Fourteenth Amendment,<sup>71</sup> a heightened "clear and convincing evidence" standard is appropriate.

*Lassiter* and *Santosky*, despite their divided opinions, unanimously held that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."<sup>72</sup> This fundamental liberty interest of a natural parent in a relationship with her child is what was at issue in *M.L.B.*<sup>73</sup>

## V. *M.L.B.*: A CONVERGENCE OF DUE PROCESS AND EQUAL PROTECTION TO AFFORD "EQUAL JUSTICE"

### A. *The Majority Opinion*

M.L.B. and S.L.J. are, respectively, the biological mother and father of two children.<sup>74</sup> After they divorced, the children remained in the father's custody, as agreed to by both parties.<sup>75</sup> S.L.J. remarried and filed suit in a Chancery Court of Mississippi, seeking to terminate the parental rights of M.L.B. and to gain approval for adoption of the children by their stepmother.<sup>76</sup>

After hearing evidence, the Chancellor terminated all the parental rights of M.L.B., approved the adoption, and ordered the adopting parent to be shown as the mother on the children's birth certificates.<sup>77</sup> The Chancery Court cited the governing Mississippi statute<sup>78</sup> and found that there had been

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70. *Id.* at 758 (citing *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (citation omitted)).

71. *See id.* at 753 (citations omitted).

72. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 565 (1996) (Rehnquist, J., dissenting) (quoting *Santosky*, 455 U.S. at 774).

73. *See* discussion *infra* note 107 and accompanying text.

74. *See M.L.B.*, 117 S. Ct. at 559.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See* MISS. CODE ANN. § 93-15-103(3)(e) (1994). This statute sets forth several

a "substantial erosion of the relationship between the natural mother, [M.L.B.], and the minor children, which had been caused at least in part by [M.L.B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children."<sup>79</sup> The Chancellor stated that the natural father and his second wife had met their burden of proof by clear and convincing evidence.<sup>80</sup> However, the Chancellor did not describe the evidence nor reveal precisely why M.L.B.'s parental rights were terminated.<sup>81</sup> M.L.B. filed a timely appeal and paid the \$100 filing fee.<sup>82</sup> The Clerk of the Chancery Court estimated the costs for preparing and transmitting the record to be over \$2,300.<sup>83</sup>

Mississippi granted civil litigants a right to appeal, but conditions that right on prepayment of costs.<sup>84</sup> "Relevant portions of a transcript [had to] be ordered, and its preparation costs advanced by the appellant."<sup>85</sup> M.L.B. was unable to pay these costs, so "she sought leave to appeal in forma pauperis."<sup>86</sup> The Mississippi Supreme Court denied her application relying on its

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grounds for termination of parental rights, including, "when there is [a] substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment." *M.L.B.*, 117 S. Ct. at 559 n.1.

79. *M.L.B.*, 117 S. Ct. at 559 (quoting App. to Pet. for Cert. 9-10).

80. *See id.* at 559-60 (citing App. to Pet. for Cert. 10).

81. *See id.* at 560.

82. *See id.*

83. *See id.*

84. *See id.*; *see also* MISS. CODE ANN. §§ 11-51-3, 11-51-29 (1995 & Cum. Supp. 1997).

85. *M.L.B.*, 117 S. Ct. at 560; *see also* MISS. CODE ANN. § 11-51-29 (1995 & Cum. Supp. 1997); MISS. R. OF APP. P. 10(b)(2).

86. *M.L.B.*, 117 S. Ct. at 560. In forma pauperis "describes [the] permission given to a poor person (i.e. indigent) to proceed without liability for court fees or costs. An indigent will not be deprived of his rights to litigate and appeal; if the court is satisfied as to his indigency, he may proceed without incurring costs or fees of court." BLACK'S LAW DICTIONARY 779 (6th ed. 1990); *see also* FED. R. APP. P. 24; Kenneth R. Levine, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 *FORDHAM L. REV.* 1461, 1462 n.6 (1985); *see generally* Ronald A. Case, Annotation, *Determination of Indigency of Accused Entitling Him To Transcript or Similar Record For Purposes of Appeal*, 66 *A.L.R.* 3d 954 (1976); Romualdo P. Eclavea, Annotation, *What Constitutes "Fees" or "Costs" Within Meaning of Federal Statutory Provision (Under 28 U.S.C.A. § 1915(A) and Similar Predecessor Statutes) Permitting Party to Proceed In Forma Pauperis Without Prepayment of Fees and Costs or Security Therefor*, 20 *A.L.R.* FED. 274 (1974).

precedent that allowed the right to proceed in forma pauperis in civil cases only at the trial level.<sup>87</sup>

Before analyzing M.L.B.'s claim that a state may not condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees, Justice Ginsburg, writing for the majority, said this was an issue of "equal justice."<sup>88</sup> She cited *Griffin* as establishing the "equal justice" principle,<sup>89</sup> supported by both the Due Process Clause and Equal Protection Clause.<sup>90</sup> According to the Court in *Griffin*, states are not required to establish a system for criminal appeals.<sup>91</sup> However, under the "equal justice" principle, once a system is established, the state cannot unreasonably distinguish litigants in a manner that will impede equal access to the courts.<sup>92</sup> She then found the principle to be a "flat prohibition 'against' making access to appellate processes . . . depend upon the [convicted] defendant's ability to pay."<sup>93</sup>

Turning to a civil analysis of due process, Justice Ginsburg recognized a narrow category of cases in which the state must provide access to its judicial processes without regard to a party's ability to pay court fees. Relying on *Boddie*, she explained that because marriage is a fundamental interest and the State has a monopoly on the means for dissolving it, "due process 'prohibit[s] a State from denying, solely because of in-

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87. See *M.L.B.*, 117 S. Ct. at 560 (citing App. to Pet. for Cert. 3). Mississippi, by statute, provides for coverage of transcript fees and other costs for indigents in civil commitment appeals. See MISS. CODE ANN. § 41-21-83 (1993 & Cum. Supp. 1997) ("The record on appeal shall include the transcript of commitment hearing."); *id.* § 41-21-85 (1993) ("All costs of hearing or appeal . . . shall be borne by the [state board of mental health] where the patient is indigent . . .").

88. See *M.L.B.*, 117 S. Ct. at 560.

89. See *supra* text accompanying note 7.

90. See *M.L.B.*, 117 S. Ct. at 561.

91. See *id.* at 560 (citing *Griffin v. Illinois*, 351 U.S. 12, 24 (1956)).

92. See *id.* at 560-61.

93. *Id.* at 561 (citing *Mayer v. Chicago*, 404 U.S. 189, 196-97 (1971)). These justifications demonstrate the seemingly dominant equal protection concerns of the *Griffin* principle. The Court eventually analyzed the fundamental liberty interest of due process, established by *Lassiter* and *Santosky*, under the predominantly equal protection framework of *Griffin* and *Mayer*. See *infra* note 99. The application of the "equal justice" principle began in *Griffin*, a criminal case, and has been subsequently used in both *Lassiter* and *M.L.B.*, civil cases.



ability to pay, access to its courts . . . .<sup>94</sup> Application of the *Griffin* principle then is limited to civil litigation where a fundamental liberty interest like marriage is at stake. Later cases, such as *Kras* and *Schwab*, demonstrate the Court's reluctance to extend the *Griffin* principle to civil cases devoid of such a liberty interest.<sup>95</sup> According to Justice Ginsburg, the Court has consistently set apart cases involving state controls or intrusions on family relationships from the "mine run of civil cases."<sup>96</sup>

Justice Ginsburg cited *Lassiter* and *Santosky* as holding the parent-child relationship to be a commanding, fundamental liberty interest under the Due Process Clause.<sup>97</sup> She went on to explain how due process and equal protection concerns converge to protect indigent litigants with such fundamental interests at stake.<sup>98</sup> The equal protection concern relates to the le-

94. *M.L.B.*, 117 S. Ct. at 562.

95. See cases cited *supra* notes 54-55 and accompanying text. In *Ortwein*, the Court upheld a system imposing \$25 filing fees for appellate review of welfare eligibility determinations. See *Ortwein v. Schwab*, 410 U.S. at 656, 656 (1973) (per curiam). This effectively precluded indigent welfare recipients from receiving judicial review of the termination of this benefit. Due process requires only a fair initial hearing. Because there was no constitutional right to welfare payments, the state could impose such filing fees on all persons. See *id.* at 659-60.

96. *M.L.B.*, 117 S. Ct. at 563-64. The governmental interest asserted in defense of the intrusion shall therefore be "examined closely and contextually." *Id.*

97. See *id.* at 565-66; see also *supra* notes 61 and 65. *Santosky* established a standard of "clear and convincing evidence" for parental right termination proceedings. See *Santosky v. Kramer*, 455 U.S. 745, 767-68 (1982).

98. See *M.L.B.*, 117 S. Ct. at 566; see also *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that a sentencing court could not properly revoke a defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet Georgia's interest in punishment and deterrence); *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that a rule requiring appointment of counsel for indigent state defendants on their first appeal as of right would not be extended to require counsel for discretionary state appeals and for application for review in the Supreme Court, such appointment not being required by due process and equal protection clauses of the Fourteenth Amendment).

Justice Ginsburg relied on *Ross* and *Bearden* in her explanation of how due process and equal protection concerns converge when considering access to judicial processes.

The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs . . . . The due process concern hones in on the essential fairness of the state-ordered proceedings anterior to adverse state action . . . . A "precise rationale" has not been composed, . . . because cases of this order "can-

gitimacy of keeping appellants out of court based solely on their inability to pay.<sup>99</sup> The due process concern relates to the essential fairness of the state-ordered proceedings that follow adverse state action.<sup>100</sup> Because due process does not independently require the state to provide a right to appeal, most decisions rest on an equal protection framework.<sup>101</sup> Thus, "M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the

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not be resolved by resort to easy slogans or pigeon hole analysis . . . ." [Under *Bearden*, the Court] inspects the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other.

*M.L.B.*, 117 S. Ct. at 566 (citation omitted).

99. See *M.L.B.*, 117 S. Ct. at 566. The Court never explicitly asserted that the parent-child relationship, as a fundamental liberty interest, requires heightened scrutiny. However, this could be inferred from the Court's language. The Court stated:

In aligning M.L.B.'s case and *Mayer*—parental status termination decrees and criminal convictions that carry no jail time—for appeal access purposes, we do not question the general rule . . . that fee requirements ordinarily are examined only for rationality . . . . The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement . . . . But our cases solidly establish . . . two exceptions to that general rule . . . . [A]ccess to judicial processes in cases criminal or "quasi criminal in nature," [may not] turn on ability to pay. . . . [W]e place decrees forever terminating parental rights in the category of cases which the State may not "bolt the door to equal justice."

*Id.* at 567-568. (citations omitted) Thus, the Court seems to place decrees terminating parental status into some sort of heightened scrutiny category which is greater than the rationality standard appropriate for the "mine run of cases" under an equal protection analysis. Perhaps the confusion can be explained by the fact that the Court's analysis is not singularly one of equal protection. It also involves a due process analysis. Thus, this category of cases does not fit into the traditional tests of "rational basis" or "strict scrutiny" analysis. It is clear, however, that some form of heightened scrutiny will be applied in these cases.

100. See *id.*

Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: M.L.B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationship.

*Id.* at 564 n.8.

Justice Thomas, in his dissent, argued that M.L.B. was afforded due process when she had her day in the Mississippi Chancery Court. See *id.* at 572 (Thomas, J. dissenting). He then rejected the equal protection analysis as being no longer viable. See *id.* at 572-73.

101. See *id.* at 566; see also *Bearden*, 461 U.S. at 665-66.

Court has long required when a family association so undeniably important is at stake."<sup>102</sup>

*Mayer* established that the *Griffin* principle may be applied to appeals of petty offenses where imprisonment is not threatened.<sup>103</sup> The impact of a conviction, even a misdemeanor conviction, may be of such severity to a litigant that the need for unimpeded access to appellate procedures outweighs a state's fiscal interests.<sup>104</sup> As in *Mayer* M.L.B. faced a severe impact while the state's fiscal interest was minimal.<sup>105</sup> Therefore, the *Griffin* principle should be extended to civil litigation where the stakes involve the loss of a commanding, fundamental liberty interest, despite the civil or criminal nature of the case.<sup>106</sup> Like the unreasonable felony-nonfelony distinctions illustrated in *Mayer* that impeded access to appeals in criminal cases where a sufficiently high liberty interest was at stake, the criminal-civil distinction is also unreasonable when a state proceeding has terminated a fundamental, commanding liberty interest of an indigent.<sup>107</sup> Since parental status termination cases re-

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102. *M.L.B.*, 117 S. Ct. at 564.

103. *See id.* at 566. In his dissenting opinion, Justice Thomas stated that *Mayer* was questionable when it was decided and should be limited to the facts if not overruled. *See id.* at 576 (Thomas, J., dissenting).

104. *See id.* at 566.

105. *See id.* at 567.

106. The Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), held that "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Id.* at 262-63 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). In *Lassiter*, the Court held that an examination of its precedents led to the conclusion that the right to counsel is directly related to the "liberty" interest involved. *See Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 26 (1981). As a result, when a criminal defendant is sentenced to prison, she has an absolute right to counsel. This is not based on a criminal defendant's right to counsel under the Sixth and Fourteenth Amendments, but rather it is based upon those liberty interests protected by due process. As the liberty interest decreases, so does the right to counsel. *See id.* at 26.

107. Justice Ginsburg cited *Lassiter* for the proposition that a parent's desire for and right to the companionship, care, custody, and management of her children should receive deference and protection unless there is some powerful countervailing interest. *See M.L.B.*, 117 S. Ct. at 564. She went on to state that: "[t]he object of the proceeding is 'not simply to infringe upon [the parent's] interest,' . . . 'but to end it;' thus, a decision against 'a parent 'works a unique kind of deprivation.' For that reason, [a] parent's interest in the accuracy and justice of the decision . . . is . . . a commanding one.'" *Id.* at 564-65 (citations omitted).

sult in few appeals in Mississippi, there is not likely to be an undue burden imposed on the state.<sup>108</sup>

Justice Ginsburg then aligned *M.L.B.* with *Mayer* for appeal access purposes. She noted the general rule that fee requirements are examined only for rationality<sup>109</sup> and that exceptions are made in cases criminal or quasi-criminal in nature.<sup>110</sup> In

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108. See *M.L.B.*, 117 S. Ct. at 566-67 (1996) (citing Br. for Pet'r 20, 25) (observing that only sixteen reported appeals in Mississippi from 1980 until 1996 referred to the State's termination statute, and only twelve of those decisions addressed the merits of the grant or denial of parental rights). The stakes for *M.L.B.* were sufficiently high because of the "irretrievably destructive" impact on the family relationship and the considerable risk of error. See *id.* at 567 (citing Br. for Resp't 28). Of the 63,765 civil actions filed in Mississippi Chancery Courts in 1995, 194 involved termination of parental rights. Of those cases decided on appeal in Mississippi in 1995 (including court of appeals and supreme court cases), 492 were first appeals of criminal convictions, sixty-seven involved domestic relations, sixteen involved child custody. See *id.*

If costs blocking access to parental rights termination appeals are removed, however, it would seem that the number of these appeals would increase in Mississippi. Justice Ginsburg attempted to dissuade such a theory based on the fact that misdemeanor appeals in Mississippi remained low even after the *Mayer* decision. See *id.*

Assuming that there are more misdemeanor convictions in Mississippi than there are parental rights termination cases, the limited effect of the *Mayer* decision in Mississippi indicates that *M.L.B.* will result in a proportionately lower strain on Mississippi's judicial resources. For example, 298 first criminal appeals were taken in Mississippi in 1995, seven of which were misdemeanors. See *id.* *Mayer* was decided in 1971, so these cases represent the current effect of the *Mayer* decision in Mississippi. Between 1980 and 1996, there were only sixteen reported appeals referring to the termination statute. See *id.* And, even if 194 cases had been filed with the Chancery Court, this number is still less than the 492 first appeal criminal convictions. Thus, the Court reasoned, the impact of *M.L.B.* would not be as great as the impact of *Mayer*. See *id.*

There are problems with this reasoning. First, the number of misdemeanor appeals in Mississippi before the *Mayer* decision is not known. Thus, one cannot really know the effect of that decision in Mississippi. Also, since Justice Ginsburg did not mention a statute, we must presume that Mississippi was affected by the *Mayer* decision—that is, Mississippi had a statute that blocked appellate access for indigents convicted of misdemeanors. Otherwise, this comparison seems to lack merit. Finally, the reasoning does not mention why the number of appeals would not increase once the barriers blocking access to appeals are removed. While misdemeanors may not be worth the time, effort, and expense (though this is probably not a notable criteria for indigents) that is necessary to appeal a conviction, the severity of a court decree terminating one's parental rights may carry greater weight to a parent. Thus, even if there were only 194 cases involving termination of parental rights at the Chancery Court level, if all of these were decided in favor of termination, and all were appealed, judicial economy would not be served.

109. See *M.L.B.* 117 S. Ct. at 567; see also *United States v. Kras*, 409 U.S. 434 (1973) (clarifying that a constitutional requirement to waive court fees in civil cases is the exception, not the rule).

110. See *M.L.B.*, 117 S. Ct. at 567 (quoting *Mayer v. Chicago*, 404 U.S. 189, 196

such cases, access to judicial processes may not turn on ability to pay because the potential severity of an adverse decision demands equal access to the courts.

Parental status terminations can be as severe as cases criminal or quasi-criminal in nature. In his dissent in *Lassiter*, Justice Blackmun stated:

A termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators.<sup>111</sup>

Thus, a state may not "bolt the door on equal justice"<sup>112</sup> in termination of parental rights cases because the "substance and sense" of the Court's decisions in *Lassiter* and *Santosky* indicate the stakes are sufficiently high for the parent and that these cases should be treated as if they were criminal or quasi-criminal in nature.<sup>113</sup> Presumably, the "substance and sense"

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(1971)).

111. *Lassiter*, 452 U.S. at 39 (Blackmun, J., dissenting) (footnotes omitted).

112. *M.L.B.*, 117 S. Ct. at 568 (citation omitted). *Lassiter* established that if M.L.B.'s defense was sufficiently complex, she would have been designated state-paid counsel. If the Court held that M.L.B. could be eligible for state-paid counsel but should be flatly denied a transcript, it would be anomalous that one has a right to a transcript if appealing a misdemeanor, although that person may be flatly denied trial counsel regardless of the complexity of the misdemeanor defense. *See id.* at 567.

113. Justice Ginsburg summarily dismissed cases relied upon by the respondents because the complainants in those cases sought aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action. *See id.* at 568; *see also* *Lyng v. United Auto Workers*, 485 U.S. 360, 363 n.2, 370-374 (1988) (rejecting an equal protection attack on an amendment to the Food Stamp Act providing that no household could become eligible for benefits while a household member was on strike); *Regan v. Taxation With Representation*, 461 U.S. 540, 543-544, 550-551 (1983) (rejecting a nonprofit organization's claim of free speech and equal protection rights to receive tax deductible contributions to support its lobbying activity); *Harris v. McRae*, 448 U.S. 297, 321-326 (1980) (holding that Medicaid funding need not be provided for women seeking medically necessary abortions). M.L.B.'s complaint, said Justice Ginsburg, was of a different order because she was trying to defend against Mississippi's destruction of her family bonds, and to resist the brand associated with being ruled an unfit

to which Justice Ginsburg referred is the idea that a parent's relationship with her child is a fundamental liberty interest of the parent in the same way that liberty from imprisonment is of fundamental importance to the alleged criminal.<sup>114</sup>

Justice Ginsburg concluded by rationalizing a limited application of this newly expanded "equal justice" principal to civil appeals. She explained that *Lassiter* and *Santosky* have not served as precedent for cases in "other areas" and this indicates that *M.L.B.* will not lead to a broad application of the *Griffin* principle to civil appeals.<sup>115</sup>

### B. Justice Thomas' Dissent

Justice Thomas was not convinced that the newly found constitutional right to free transcripts in civil appeals would be restricted to parental status termination cases.<sup>116</sup> He refuted the logic of converging due process and equal protection to form a right that neither alone supports.<sup>117</sup>

According to Justice Thomas, *M.L.B.* was given a meaningful hearing, with counsel, and was, thus, afforded due process.<sup>118</sup> He discredited the majority's reliance on *Boddie* in support of *M.L.B.*'s due process claim. In *Boddie*, the indigents were denied a fundamental right without a hearing. Thus, they were denied due process.<sup>119</sup> In *M.L.B.*, the mother was afforded pro-

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parent by a court. See *M.L.B.*, 117 S. Ct. at 568. She then said that the idea that a law may be unconstitutional simply because of a disproportionate impact is not how the Court has interpreted *Washington v. Davis*, 426 U.S. 229 (1976), as applied to *M.L.B.* See *M.L.B.*, 117 S. Ct. at 569.

114. See *supra* note 99.

115. See *M.L.B.*, 117 S. Ct. at 570.

116. See *id.* at 570 (Thomas, J., dissenting).

117. See *id.* at 571.

118. See *id.* at 572 ("Due process has never compelled an appeal where, as here, its rigors are satisfied by an adequate hearing.")

119. See *id.* at 572.

cedural protections beyond what is required in parental termination cases.<sup>120</sup> Accordingly, Justice Thomas felt that she was afforded due process.

Justice Thomas also cited *Washington v. Davis*<sup>121</sup> as standing for the proposition that equal protection only protects someone from purposeful discrimination and that disparate impact alone does not mean that the Fourteenth Amendment has been violated.<sup>122</sup> He then distinguished *Williams v. Illinois*<sup>123</sup> from *M.L.B.* According to Justice Thomas, the majority relied on *Williams* to support the idea that a law nondiscriminatory on its face may be grossly discriminatory in its operation because that law applies only to one group and does not reach beyond that class.<sup>124</sup> Justice Thomas proposed that disparate impact alone cannot be sufficient to violate equal protection, even when that impact is against racial minorities or poor people.<sup>125</sup>

Although *M.L.B.* was resisting the state's "devastating adverse action," she, much like a criminal defendant, was not entitled to post-trial process.<sup>126</sup> Her desire to have the state subsidize her privately initiated appeal, a procedure not even required under due process, was without merit according to Justice Thomas.<sup>127</sup> He saw no difference between a facially neutral law that serves in some cases to prevent people from obtaining state employment, a state-funded education, or a state-funded abortion and a facially neutral law that prevents a

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120. *See id.* *M.L.B.* received both notice and a hearing before a neutral, legally trained decision maker. She was represented by counsel, even though *Lassiter* does not require such representation in every case. Her attorney could confront witnesses and evidence against her. Also, the parental unfitness had to be proven by the heightened standard of clear and convincing evidence. *See id.*

121. 426 U.S. 229 (1976). *Davis* involved a verbal skill test administered to prospective government employees. Four times as many black applicants failed the test than did white applicants. *See id.* at 237. However, successful as well as unsuccessful test-takers included members of both races. The Court held that disproportionate impact alone was not enough to prove unconstitutional race discrimination. *See id.* at 248.

122. *See M.L.B.*, 117 S. Ct. at 572 (Thomas, J., dissenting).

123. 399 U.S. 235 (1970).

124. *See M.L.B.*, 117 S. Ct. at 569 (Thomas, J., dissenting).

125. *See id.* at 573-74 (citing *Washington*, 426 U.S. at 248); *see also* Harris v. McRae, 448 U.S. 297, 324 n.6 (1980).

126. *M.L.B.*, 117 S. Ct. at 574 (Thomas, J., dissenting).

127. *See id.*

person from taking an appeal.<sup>128</sup> In both situations, a state may, but is not required to, provide them.<sup>129</sup>

Justice Thomas found the Mississippi law facially neutral because it created no classification.<sup>130</sup> He felt that this case was simply one of disparate impact on indigents and, that alone, was not enough to assert a violation of the Equal Protection Clause. The fundamental right of a parental relationship was too attenuated from the Mississippi law because the fee that M.L.B. was unable to pay did not prevent the exercise of this fundamental right directly.<sup>131</sup> Since there was no violation of the Equal Protection Clause, nor a violation of the Due Process Clause, Justice Thomas felt an amalgamation of the two simply could not support M.L.B.'s claim.

In the second part of his dissent, Justice Thomas said that if the case presented the question the majority construes, he would overrule *Griffin*. According to Justice Thomas, the distinction between civil and criminal cases is grounded in constitutional jurisprudence and should remain intact.<sup>132</sup> Even when dealing with fundamental rights issues in a civil context, the Court has not afforded the same protections to civil litigants as it has to criminal litigants. For example, the Court did not find a per se right to counsel for parental rights termination proceedings.<sup>133</sup> In addition, the standard of proof is "clear and convincing" evidence, a standard lower than the "beyond a reasonable doubt" standard needed to find a criminal guilty.<sup>134</sup>

While *Mayer* provided an avenue to extend *Griffin* to parental rights termination cases, Justice Thomas believed that

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128. *See id.* at 574.

129. *See id.*

130. *See id.* at 575.

131. *See id.* at 574 n.1. Justice Thomas cited *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), where the Court struck down a poll tax that directly restricted the exercise of a right found in that case to be fundamental—the right to vote in state elections. Justice Thomas felt that the fee required by the Mississippi law to appeal the Chancery Court's decision did not affect the fundamental right of parental relationships. Rather, it affected a right to appeal, which has never been found to be fundamental. *See M.L.B.*, 117 S. Ct. at 574 n.1 (Thomas, J., dissenting).

132. *See id.* at 575.

133. *See id.* (citing *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31-32 (1981)).

134. *See id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982)).



*Mayer* was an unjustified extension of *Griffin* and should be limited to its facts, if not overruled.<sup>135</sup> His fear was that, under the majority's rationale, anyone with an interest arguably as important as the interest in *Mayer* could not be denied a transcript in a civil appeal.<sup>136</sup>

## VI. IMPLICATIONS OF *M.L.B.*

There are several possible effects of this decision. First, as Justice Thomas notes, this decision may result in greater demands on states to provide free assistance to would-be appellants in civil cases involving interests that cannot be distinguished from the important interest at issue in *M.L.B.*<sup>137</sup> If an interest that appears to be as fundamental as the interest of a convicted misdemeanant is all that is needed to get a free transcript, several kinds of civil suits could arguably be brought.<sup>138</sup> Justice Thomas enunciated several examples of potential extensions of this principle, such as extending the right to a free transcript: to an indigent seeking to appeal the outcome of a paternity suit;<sup>139</sup> to those who wish to appeal custody determinations;<sup>140</sup> to persons against whom divorce decrees are entered,<sup>141</sup> or in foreclosure actions seeking to oust persons from their homes of many years.<sup>142</sup>

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135. See *id.* at 576; cf. McGoogan, *supra* note 11, at 622 (arguing that *Mayer* indicated a shift in the Court's policy limiting extension of *Griffin*).

136. See *M.L.B.*, 117 S. Ct. at 577 (Thomas, J., dissenting).

137. See *id.* (arguing that the fact that *Lassiter* and *Santosky* have not been used as precedent for other areas of law "gives little comfort").

138. See *id.* at 576.

139. In *Little v. Streater*, 452 U.S. 1 (1981), the Court held that the Due Process Clause requires states to provide a free blood grouping test to an indigent defendant in a paternity action. See *id.* at 17. The Court observed that the issue there was the creation of a parent-child relationship. See *id.* at 13. *Little's* description of the interest at stake in a paternity suit seems to place it on par with the interest in *M.L.B.* Both cases involved the fundamental interest in a parent-child relationship.

140. See, e.g., *Zakrzewski v. Fox*, 87 F.3d 1011, 1013-14 (8th Cir. 1996) (noting that father's "fundamental 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").

141. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court referred to a divorce as the "adjustment of a fundamental human relationship." *Id.* at 382-83.

142. Most of these examples might be as important as the interest in *Mayer*, but it is difficult to say that they are as important as the one in *M.L.B.* The Court has made clear that extension of the *Griffin* principle to civil cases is to be limited to

However, pertinent to the Court's analysis is the presence of a commanding, fundamental liberty interest. While, generally, such interests include freedom of choice in family matters, more is needed to trigger the right to a free transcript. For example, by distinguishing the state's imposition of the legal obligations of a biological relationship between parent and child from the state's termination of a fully existing parent-child relationship, the Court has declined to extend *Santosky* to paternity proceedings.<sup>143</sup> In addition to claiming an intrusion on a commanding, fundamental liberty interest, M.L.B. was resisting the imposition of an official decree extinguishing what no power other than the state could extinguish.<sup>144</sup> As most civil litigation does not involve such a decree, it will be difficult to assert this right in the "mine run of civil cases."<sup>145</sup> Therefore, Justice Ginsburg is probably correct that the "floodgates" of litigation will not be opened by this decision.

Another implication involves the legitimacy of establishing a right by converging the Due Process Clause and Equal Protection Clause when neither alone will support that right. Justice Thomas argued that a right should not be found this way.<sup>146</sup> Instead of explaining why, he discussed how neither afford the right alone—a proposition already acknowledged by the majori-

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parental termination proceedings. See *M.L.B.*, 117 S. Ct. at 569-70. But if the Court used *Mayer* to extend it to those cases, the same extension could occur in these other noted examples. See *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.")

143. See *Rivera v. Minnich*, 483 U.S. 574, 578-579 (citing *Santosky v. Kramer*, 455 U.S. 745, 749-50 (1982)). *Rivera* involved a mother's attempt to seek child support from a putative father who denied paternity. See *id.* at 576. The Court held that due process was satisfied by a preponderance of the evidence standard in paternity suits that differed in significant respects from parental status termination proceedings, which require a clear and convincing evidence standard. See *id.* at 577-82. Most state legislatures applied a "preponderance of the evidence" standard in paternity cases, while thirty-eight jurisdictions, at the time *Santosky* was decided, required a higher standard of proof in proceedings to terminate parental rights. See *id.* at 581.

144. See *M.L.B.*, 117 S. Ct. at 564 n.8 (1996).

145. See *id.* at 569 ("termination decrees wor[k] a unique kind of deprivation" (citation omitted) (alteration original)). It is troubling that the state has no control over effecting the merits of the case, yet is still required to pay costs involved in the proceeding. However, such an argument could be made in any civil proceeding and the Court has clearly held that civil cases involving fundamental liberty interests will not be distinguished from criminal cases. See *id.* at 569-70.

146. See *id.* at 571 (Thomas, J., dissenting).

ty.<sup>147</sup> Justice Harlan, dissenting in *Griffin*, noted this problem.<sup>148</sup> Later, Justice Harlan distinguished between laws directed at indigents and those having an adverse affect on them.<sup>149</sup> In Justice Harlan's view, the "State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford."<sup>150</sup> According to him, the Court should consider whether a state's actions violate fundamental "fairness" by using a procedural due process analysis.<sup>151</sup> "If there is a deprivation of life, liberty or property which is based on disputed facts or issues, then the individual whose interests are affected must be granted a fair procedure before a fair decision-maker."<sup>152</sup> Due process safeguards apply whenever the government seeks to burden an individual in the exercise of fundamental constitutional rights.<sup>153</sup> However, the Court continued to apply a dual analysis, emphasizing each clause at different times.<sup>154</sup>

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147. *See id.* at 566.

148. *See supra* note 33. Justice Harlan warned that if courts began to lift economic burdens imposed by the state on the exercise of privileges, indigents would be able to challenge the payment of tuition at state universities or the cost of transcripts in civil appeals. *See Medine, supra* note 33.

149. *See Douglas v. California*, 372 U.S. 353, 361-62 (1963) (Harlan, J., dissenting).

The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.

*Id.* at 361. As examples of permissible laws, Harlan noted a state's constitutional authority to impose a uniform sales tax or a standard fine for criminal violations. *See id.*; *see also Medine, supra* note 33.

150. *Douglas*, 372 U.S. at 362.

151. *See id.* at 363.

152. NOWAK & ROTUNDA, *supra* note 30, § 13.8, at 553.

153. *See id.*

154. *See, e.g., Ross v. Moffitt*, 417 U.S. 600 (1974); *Douglas*, 372 U.S. at 361 (Harlan, J., dissenting). In *Ross*, the Court refused to extend *Douglas*, displacing any hopes for using the Equal Protection Clause as a basis for expanding the ability of litigants to present their cases without regard to their financial condition. So long as fundamental fairness is not violated, any differences between the rights of indigents and those of the rest of society are not constitutionally suspect. *See Ross*, 417 U.S. at 611-16. When providing assistance to indigents, rights found under the Equal Protection Clause are no broader than those found under due process. As a result, indigent defendants are guaranteed only "adequate," not equal, access to the judicial system. *See Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). Thus, due process has allowed the Supreme Court to expand the right of indigents without

Justification for the convergence can best be understood in the context of parental termination decrees. The fundamental constitutional right to privacy<sup>155</sup> includes freedom of choice in marital and family decisions.<sup>156</sup> Therefore, a state seeking to take a child away from its parents must give the parents a hearing to determine their fitness to retain the child. The fundamental nature of the interest in family autonomy requires the state to prove its allegation of parental unfitness by at least clear and convincing evidence.<sup>157</sup> Due process does not entitle an indigent parent to the services of state-paid counsel in such cases.<sup>158</sup> While there is no right to appeal afforded under due process guarantees, once such procedures are established by the state, the equal protection guarantee insures that access will not be impeded by unreasoned distinctions. *M.L.B.* indicates

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relying on an equal protection basis for doing so. See *Medine*, *supra* note 33, at 302-03.

Note that in *Bearden v. Georgia*, 461 U.S. 660 (1983), Justice O'Connor offered a different rationale for not prohibiting discrimination based upon indigence. See *id.* at 665-72. The question in *Bearden* was the effect of a criminal defendant's failure to pay a fine and make restitution while on probation. See *id.* at 665. According to Justice O'Connor:

A due process approach has the advantage in this context of directly confronting the intertwined question of the role that a defendant's financial background can play in determining an appropriate sentence. When the Court is initially considering what sentence to impose, a defendant's level of financial resources is a point on a spectrum rather than a classification. Since indigence in this context is a relative term rather than a classification, fitting "the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished . . . ." The more appropriate question is whether consideration of a defendant's financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.

*Id.* at 666 n.8 (citation omitted).

Responding to an argument that *Griffin* and *Douglas* were based solely on the Equal Protection Clause, the Court in *Evitts v. Lucey*, 469 U.S. 387 (1985), noted that the Due Process Clause and Equal Protection Clause each trigger a distinct inquiry: "Due Process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal Protection" on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Id.* at 405. The Court concluded that both clauses support the *Griffin* and *Douglas* decisions. See *id.* at 405.

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

156. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

157. See *Santosky v. Kramer*, 455 U.S. 745, 767-68 (1982).

158. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981).

that the Court will continue this analysis if needed to combat what it finds to be unreasoned distinctions between those litigants gaining access to judicial processes and those who are denied such access when a fundamental liberty interest is at stake.<sup>159</sup>

A third implication of this decision involves the criminal-civil distinction. Justice Thomas's chief concern about the *Griffin* line of cases is compelling: "[i]f requiring payment for procedures (e.g., appeals) that are not required is invidious discrimination no matter what sentence results, it is difficult to imagine why it is not invidious discrimination no matter what results and no matter whether the procedures involve a criminal or civil case."<sup>160</sup> However, the criminal-civil distinction may not be that troublesome. Most civil cases are between private parties where there exist other means of resolution, such as settlement. Parental rights termination cases are unique because they generally pit the parent against the state.<sup>161</sup> Thus, it is unlikely that a right to free transcripts for appeals will be readily extended to other civil proceedings.<sup>162</sup>

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159. This "equal justice" principle could also be viewed in terms of natural law or substantive due process. As *Lassiter* established, the parent-child relationship is a fundamental liberty interest. See *Lassiter*, 452 U.S. at 27. Substantive due process provides that there are certain individual liberties that are so intrinsic to our existence that the state cannot interfere with them absent a compelling state interest. In such cases, the Court will substitute its judgment on expediency for that of the legislature because the context is that of a fundamental liberty interest. See *Lochner v. New York*, 198 U.S. 45 (1905). In *Lochner*, the Court refused to give the legislature the ordinary amount of deference regarding the expediency of such laws. Because these "fundamental liberty interests" have no textual support in the Constitution, the Court eventually incorporated most of the Bill of Rights through the Fourteenth Amendment to secure the protection of these interests from state legislation. However, a full discussion of substantive due process or incorporation theory is beyond the scope of this Note.

160. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 576 (1996) (Thomas, J., dissenting).

161. In parental rights termination suits, the state can divest someone of their fundamental liberty interest in a relationship with her child. See *supra* note 106. It is important to note that *M.L.B.* was not purely between two private parties. The state had to declare the parental status of the parties before it could proceed with the adoption process. The children's father wanted his new wife to adopt the children. To adopt the children, *M.L.B.*'s parental rights had to be terminated. Thus, the Mississippi Chancery Court had to first declare that *M.L.B.*'s parental rights had been terminated and then that the children could be adopted by the father's new wife. See *M.L.B.*, 117 S. Ct. at 561.

162. While Justice Thomas includes other examples that may be similar, he assumes that extension of this principle would be wrong. See *M.L.B.*, 117 S. Ct. at 570-

The majority justifies its extension of the *Griffin* principle to parental rights termination cases by stating that the Court has consistently set them apart from other "mine run civil actions," even from other domestic relations matters such as divorce, paternity, and child custody.<sup>163</sup> Nevertheless, when comparing the Court's ruling in *Little v. Streater*<sup>164</sup> to that of *Lassiter*, it is ironic that the Court grants, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity,<sup>165</sup> but then rejects, on due process grounds, an indigent mother's claim for state-paid legal assistance when the state seeks to take her own child away.<sup>166</sup> This indicates a disparity between the requirements of due process in paternity suits and in termination suits.<sup>167</sup>

Pertinent to the *M.L.B.* rationale is Congress' recent passing of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA).<sup>168</sup> This Act reduced Legal Services Corporation's (LSC) funding by thirty percent<sup>169</sup> and imposed new restrictions on how LSC funds may be used.<sup>170</sup> One of these restrictions prohibits use of LSC funding for challenging welfare laws. In effect, this means only LSC clients may not

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71. If the state is acting in a manner that would violate the litigant's rights if the proceeding were labeled "criminal," it seems unfair to say that such wrongs will not be recognized because the proceeding was "civil." See, e.g., *In re Gault*, 387 U.S. 1 (1967) (holding that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed," the juvenile has a right to appointed counsel even though the proceedings may be styled "civil" and not "criminal"); see generally Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997); Flynn, *supra* note 61; Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1991/1992); Govert, *supra* note 66.

163. See *M.L.B.*, 117 S. Ct. at 564-66 n.11.

164. 452 U.S. 1 (1981).

165. See *id.*

166. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981).

167. See *M.L.B.*, 117 S. Ct. at 577 n.3 (Thomas, J., dissenting).

168. Pub. L. No. 104-134, 110 Stat. 1321 (1996).

169. OCRAA reduces LSC funding by \$278 million in fiscal year 1996, a reduction of \$122 million from 1995. See *id.* tit. V; *Constitutional Law—Congress Imposes New Restrictions on Use of Funds By the Legal Services Corporation.—Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, 110 HARV. L. REV. 1346, 1351 (1997).

170. See Pub. L. No. 104-134, 110 Stat. 1321 (1996).

challenge welfare laws. This seems to violate the equal protection guarantees enunciated in *M.L.B.* and has created a legally disadvantaged status for clients who rely on LSC lawyers.<sup>171</sup>

Finally, *M.L.B.* presents some very serious problems with the adversarial system as a means of resolving parental status disputes. In this case, the mother's interests were protected. The Court found that one has a per se right to appeal a parental status termination decree so long as the state has provided an appellate system accessible by some. But how meaningful is this right of access? Conceivably, one could be afforded an appeal, but not have an attorney. *Lassiter* stands for the proposition that the trial court decides on a case by case basis whether an indigent defendant will be appointed an attorney. If the court weighs the interests involved and decides not to appoint an attorney, yet the state has established an appellate system for such cases, the defendant should be granted an appeal following an adverse decision. However, that same defendant could be denied a meaningful opportunity to be heard at the appellate level, if such a hearing is without counsel.<sup>172</sup>

Since parental status termination decrees are the end of the road in custody disputes, they do warrant court proceedings as opposed to mediation or early neutral evaluations. Nevertheless, the justification for the adversarial system lies in the romantic notion of each party being represented by a champion who will actually present the case in the light most favorable to his client. Typically, these "champions" charge fees that are indicative of their effectiveness in court. Thus, the effectiveness of representation seems to correlate directly to the amount of money a litigant has available to spend on a case. The Court has recognized that the Due Process Clause does not require an equalization of economic conditions.<sup>173</sup> Judicial recognition of this proposition merely underscores the fact that the amount of money one has often affects the outcome of his day in court. This idea seems to strain the ultimate objective of providing justice for anyone who enters the courts to resolve disputes.

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171. *See id.* (discussing OCRAA and its implications on *M.L.B.*).

172. *See* *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) ("What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner.'").

173. *See* *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring).

The interests involved in parental termination suits are very serious—even fundamental. Perhaps what is needed is a less costly and less formal process that will allow courts to remove the economic advantages that exist for parents who can afford expensive litigation, while the other party is without such means.

One example of how states could cut costs in these proceedings exists in the formalistic practice of requiring official transcripts from the court reporter. Why should a litigant pay \$2,300 for a transcript when there are so many alternatives that are available for a lot less money? Surely these hearings could have been recorded on tape and typed out for less money (even by M.L.B. herself) and, subsequently, checked by the clerk for accuracy. The need for an official transcript produced by the court reporter seems to have a harmful effect on indigent litigants. In fact, the Court has, in the past, recognized that alternatives may exist to official transcripts.<sup>174</sup> In addition, technological advances may soon allow for word processing equipment to take oral testimony and turn it into a document.

Another puzzling question exists: why does a transcript cost \$2,300 when an attorney appointed by the state usually does not cost half as much?<sup>175</sup> Is this a statement about the expense of transcripts or about the lack of appropriate funding by the state for appointed attorneys? In any case, it seems a bit odd that the transcript would cost so much more than what an attorney would receive for trying the case.

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174. See *Britt v. North Carolina*, 404 U.S. 226, 228-29 (1971).

175. See Dominic Perella, *Court-Appointed Lawyers' Fees Causing Alarm*, RICH. TIMES-DISPATCH, Oct. 10, 1997, at B6. This article cited a nationwide survey of the American Bar Association. According to that study, Virginia provides fees of \$60 an hour for work in the courtroom and \$40 an hour for work outside the courtroom. The fees are capped at \$575 for grave felony charges and \$265 for felonies that carry less than 20 years of prison time. Fees for misdemeanors range from \$100 to \$132. Virginia provides the lowest fees in the country. According to the study, Mississippi set the limit at \$1,000, but the limit can be waived when the court-appointed defenders show that they have worked excessive hours or incurred high expenses. See *id.* It seems that the more sensible approach is taken by seventeen other states, including Pennsylvania, New Jersey and North Carolina, which set no limit. See *id.*



## VII. CONCLUSION

The Court has converged a fundamental right recognized under the Due Process Clause with an equal protection analysis. While past decisions seemed to indicate a shift in the Court's reliance on this dual principle, *M.L.B.* indicates the dual principle will remain intact. Also, the Court has applied the *Griffin* principle of "equal justice" to a civil appellate case. This extension will be limited only to parental rights termination decrees. To extend this principle, a fundamental liberty interest would have to be at stake because the Court focused on the interests involved and not the semantic distinctions between procedures. If a state procedure impedes equal access to its courts when this is the only means to challenge intrusions on a fundamental liberty interest, be it civil or criminal in nature, the Court must cast it down.

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