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# FAIRNESS AS A GENERAL PRINCIPLE OF AMERICAN CONSTITUTIONAL LAW: APPLYING EXTRA-CONSTITUTIONAL PRINCIPLES TO CONSTITUTIONAL CASES IN *HENDRICKS* AND *M.L.B.*\*

Larry Catá Backer†

*We speak the unifying language of fairness in law-making in the late twentieth century. This is the age of due process. The language of fairness provides the unifying glue to our law making.*<sup>1</sup>

It is almost a cliché today that, at its limit, all legal categories explode. It is also a commonplace that legal categories tend to be shoved to their limit over the course of time, unless the categories are redefined or destroyed by the weight of their own expansiveness.<sup>2</sup> These quasi-biological truisms affect not only statutory and common law legal categories, but increasingly, constitutional categories as well. Categories begin as sharply defined and well understood descriptions of sets of objects or conclusions. Over time, these categories are necessarily molded, in accordance with the political and socio-cultural expediency of the moment, to encompass ever more different and greater objects within the originally sharply drawn categories. At some point, every category becomes its own contradiction. The category becomes so amorphous that it can logically contain itself and its opposite. At that point the category becomes useless; it becomes something virtually undefinable in any containable sense. Thus expanded, it is emptied of meaning.<sup>3</sup> At this point, as statute, it is aban-

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\* Based on remarks delivered at the Conference, *Practitioner's Guide to the 1996 Supreme Court Term*, at The University of Tulsa College of Law, October 31, 1997.

† Professor of Law and Co-Director, Comparative and International Law Center, University of Tulsa College of Law. My thanks to Marty Belsky and Melissa Koehn for their comments, and to my research assistants Charles Keckler, Denise Jones, and Michael Romano for superlative work. Lastly, my thanks to Kurston P. McMurray, Telisa Webb Schelin, and John J. Baroni and the staff of the Tulsa Law Journal for always going the extra mile.

1. Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQ. L. REV. (forthcoming 1998).

2. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

3. Ironically, originalism is meant to contain this process by building limits to interpretation. Originalism invites a form of Constitutional hermeneutics very similar to Biblical hermeneutics. As such,

doned—led to that graveyard of historical curiosities in the Official Statutes of most jurisdictions.<sup>4</sup> However, when this process affects constitutional law there is no graveyard to which to lead this now exploded category. Instead, empty, it continues to serve as an expedient; it becomes a code, shorthand for new categories which emerge necessarily from the ruins.

This term the Supreme Court has once again demonstrated the verities of these truisms in two spectacularly if deceptively bathetic cases: *M.L.B. v. S.L.J.*,<sup>5</sup> and *Kansas v. Hendricks*.<sup>6</sup> Both cases deal with the fairness of deprivations. In one case, private individuals sought to use the instrumentalities of the state to deprive a woman of her rights as birth mother. In the other case, an instrumentality of the state sought to deprive a person of his liberty by adjudging him a “sexual predator.”

From out of our tradition of constitutionalism and the Justices’ “sense” of the drift of the document,<sup>7</sup> or from out of the “eternal verities” with which the

originalism does not eliminate the need for interpretation, and perhaps for interpretive leaps, originalism merely focuses and narrows the range within which those interpretive exercises may be conducted. A good example of generally agreed originalism is seventh amendment jurisprudence which requires even the most progressive of us to focus on the world at the time of the creation of the amendment. See, e.g., *Chauffeurs v. Terry*, 494 U.S. 558 (1990); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

4. The codes of most states are littered with such provisions. Consider the blasphemy statutes of Oklahoma, for example. See OKLA. STAT. tit. 21, § 901 (1991) (“Blasphemy consists in wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures or the Christian or any other religion.”).

5. 117 S. Ct. 555 (1996). In *M.L.B.*, a Mississippi Chancery Court handed down a decree terminating the mother’s parental rights to her two children. See *id.* at 559-60. The mother (*M.L.B.*) filed a timely appeal from the termination decree, but Mississippi law required her to make a prepayment for “preparing and transmitting the record.” *Id.* at 560. Unable to meet the required prepayment (approximately \$2,400.00), *M.L.B.* sought leave to appeal *in forma pauperis*. See *id.* The Supreme Court of Mississippi denied her application, holding that no right to proceed *in forma pauperis* exists in civil appeals. See *id.* *M.L.B.* petitioned the United States Supreme Court on the theory that, conditioning an appeal from decrees which terminate parental rights on the parent’s ability to pay record preparation fees was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *id.* Justice Ginsburg authored a five-member majority opinion that agreed with *M.L.B.*

Justice Thomas based his dissent primarily on his concern that the majority’s holding is not limited to the termination of parental rights. Accordingly, he believes it “inevitable” that the majority’s “new-found constitutional right to free transcripts in civil appeals” will lead to massive demands on the states to provide “free assistance . . . to appellants in all manner of civil cases . . .” *Id.* at 570-71 (Thomas, J., dissenting).

6. 117 S. Ct. 2072 (1997). In *Hendricks*, Kansas filed a petition under the Kansas Sexually Violent Predator Act to commit Hendricks, who had a history of sexually molesting children and was scheduled for release from prison shortly after the Act became law. See *id.* at 2076. After a trial, a jury determined Hendricks to be a “sexually violent predator” and the court ordered him to an undetermined period of time in civil confinement, pursuant to the Kansas Act. See *id.* Hendricks appealed on the grounds of “Substantive” Due Process, Double Jeopardy, and *Ex Post Facto*. See *id.* The Kansas Supreme Court invalidated the Act, holding its pre-commitment requisites to be inconsistent with the notion of “substantive” due process, and the state of Kansas petitioned for certiorari. See *id.* The United States Supreme Court granted certiorari and reversed the Kansas Supreme Court. See *id.* at 2086.

Justice Thomas wrote the five justice majority opinion, holding (1) the Act’s pre-commitment conditions satisfy “substantive” due process requirements, and (2) the Act does not violate either the Constitution’s Double Jeopardy clause or its prohibition on *ex post facto* lawmaking. See *id.* at 2086.

Justice Breyer’s dissent, however, contends that the Kansas Act is not merely an attempt to commit Hendricks civilly, but an effort to “inflict further punishment upon him.” *Id.* at 2088. Thus, Justice Breyer concludes, the *Ex Post Facto* clause of the Constitution prohibits the Act’s applicability to Hendricks. See *id.*

7. This notion is nicely encapsulated in the view of those who see the Constitution as a “living” construction. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 236-39 (1962). Though Bickel speaks of applying general principles, the notion is aggres-

document is said to have been infused at the time of its crafting,<sup>8</sup> our Court has been fashioning important general principles of Constitutional law. Among the most important, and least acknowledged, is *the constitutional principle of fairness*.

In the "Process" cases of the last Term we see, reconfirmed, what we had suspected for some time: the categories "due process" and "equal protection" have become meaningless. We have known this for a long time with respect to that illogical, oxymoronic and legally untenable construct "substantive" due process. We now see the Justices of the Supreme Court expose, in a blasé sort of way, the truth that these categories mean nothing. We keep them because we must—they are the words in our Scripture. But we apply them interchangeably as something new; we use their overtones and penumbras to do *equity*. In our constitutional hermeneutics, we have sacrificed the rule making of the law courts for the *auctoritas*<sup>9</sup> of the chancellor—almost a contradiction of terms. The implications of the emerging (if shifting) majority of the Rehnquist Court is now clear: just as the European Court of Justice ("ECJ") revolutionized Constitutionalism in the European Union by the crafting of so-called "general principles of Community law,"<sup>10</sup> our Supreme Court has constructed general principles of Constitutional law.

The difference between the ECJ and the American Supreme Court is subtle but significant: the ECJ has made its crafting of general principles of Community law an explicit part of its jurisprudence; the American Supreme Court continues to hide its similar enterprise behind an increasingly ill-fitting, black-letter constitutional jurisprudence. In the final analysis, however, the courts in both systems are engaged in the same enterprise. Whether the enterprise of constructing extra-constitutional principles is a good thing I leave for another day. The purpose of this piece is not to advocate or support those who decry so-called judicial activism or who disingenuously whine about a "liberal" judiciary "out of control." Liberals and conservatives both necessarily indulge in the practice of applying extra-constitutional, interpretive principles to constitutional cases.

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sive and forward looking, and can, rightly, I think, be recast as a political model of judging. The danger of this notion is in the possibility of losing the singular tie between the applied principle and the primary text.

8. Originalism, like liberal "relativism," is an excellent source of constitutional activism. The object here is "purity" rather than "conformity to modernity," but the result is the same. Both objectives must fit within a social, cultural and technological world different from that which preceded it. On the originalist enterprise, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

9. "It was only thus, by originating and instigating public policy, by being an *auctor publici consilii*, that the Roman politician could attain the highest form of prestige, *auctoritas*." DONALD C. EARL, *THE MORAL AND POLITICAL TRADITION OF ROME* 33 (1967). *Auctoritas* has assumed complex levels of meaning in the West. On the development of the notion of *auctoritas* in the Western legal tradition, see Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 805-09 (authority derived from original text or primary source). "The writings of an auctor contained, or possessed, *auctoritas*, in the abstract sense of the term, with its strong connotations of veracity and sagacity . . . [A]s Aristotle says, an *auctoritas* is a judgment of the wise man in his chosen discipline." ALISTER J. MINNIS, *MEDIEVAL THEORY OF AUTHORITY* 10 (1984).

10. For a succinct explanation of the meaning and place of "general principles" of Community Law in the European Union, see D. LASOK AND J.W. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 179 (5<sup>th</sup> ed. 1991). See discussion, *infra* notes 24-38 and accompanying text.

My only quarrel today is with the American Court's failure to be explicit about what it is doing. I emphasize, however, that the habit of such construction is as deeply embedded in "traditionalist" justices<sup>11</sup> as it is in "progressive" justices.<sup>12</sup>

In *M.L.B.*, the constitutional principle of fairness required the provision of needs-based waivers of record preparation fees in appeals from decisions terminating the parental rights of women. The five member majority of the Court melded overtones from the dicta in a series of due process and equal protection cases to arrive at this result.<sup>13</sup> "A 'precise rationale' has not been composed, . . . because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis . . .'"<sup>14</sup> The constitutional principle of fairness now requires what will amount to a heightened scrutiny of any cases "involving state controls or intrusions on family relations."<sup>15</sup> In the name of the constitutional principle of fairness, the Court would have us borrow from the failed "fairness" notions in sex discrimination pay cases and import a "comparable worth" standard.<sup>16</sup> Comparable worth fairness requires the courts to value civil

11. It was a conservative court, after all, which birthed that constitutional principle we refer to as "substantive" due process. On the birth and "death" of economic substantive due process, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 30-32 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-21 (1980); Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 *MERCER L. REV.* 1049 (1997) (expounding a revolutionist view). For a discussion of modern conservative activism, see Bernard Schwartz, *'Brennan v. Rehnquist' Mirror Images in Constitutional Construction*, 19 *OKLA. CITY U. L. REV.* 213 (1994).

12. See, e.g., David J. Garrow, *What the Warren Court Has Meant To America*, in *THE WARREN COURT: A RETROSPECTIVE* 390 (Bernard Schwartz ed. 1996).

13. The majority consisted of Justices Stevens, O'Connor, Souter and Breyer, in an opinion authored by Justice Ginsburg. Justice Kennedy filed a concurring opinion in which he, without much explanation, substantially expanded the reach of the teachings of *Boddie v. Connecticut*, 401 U.S. 371 (1971).

14. *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996) (quoting *Ross v. Moffitt*, 417 U.S. 600, 608 (1974) and *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)).

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

16. The notion of equal pay for equivalent work has had a spotty history in this country. See, e.g., *American Nurses' Association v. Illinois*, 783 F.2d 716 (7<sup>th</sup> Cir. 1986) (Equal Pay Act not violated by failing to construct wage scales based on notions of comparable worth). On the other hand, notions of comparable worth have become well accepted in the jurisprudence of the European Union. See *TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY*, Mar. 25, 1957, 298 U.N.T.S. [EEC Treaty] art. 119:

The principle of equal pay for men and women outlined in Art. 119 of the Treaty, . . . means for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Council Directive 75/117, art. 119, 1975 O.J. (L 45) 19 (On the Approximation of the Laws of the Member States Relating to the Application of the Principle of Equal Pay for Men and Women). For amendments prior to the ratification of the Treaty on European Union, see *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off., 1987). The full text of the last amendment to the EC Treaty, the *TREATY ON EUROPEAN UNION*, along with the text of the EC Treaty as amended, can be found at 1992 O.J. (C 224) 1, 1 C.M.L.R. 573 (1992).

Justice Ginsburg would have us apply the principle of comparable worth in a context in which it has never been used explicitly. She would have us decide whether the "value" of criminal penalties is comparable to that of parental termination. See, e.g., Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 *COMP. LABOR L. J.* 358 (1995). For a critique of the European approach, see Jill Andrews, *Comment: National and International Sources of Women's Rights to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 *NW. J. INT'L L. & BUS.* 413, 421-426 (1994) (European Union approach fails to provide sufficient equal access to employment opportunities). See discussion, *infra* notes 58-69 and accompanying text.

against criminal proceedings and to create a system of equivalent effects. The consequence, in the context of birth mother parental rights termination proceedings is that the general integrity of trial court determinations are treated as suspect, certainly in contrast to appellate determinations. The cult of the birth mother, an increasingly powerful force since its origins in pre-Renaissance cults of the Virgin Mary,<sup>17</sup> has now received the imprimatur of our College of Pontiffs, the justices who are the guardians of our national constitutional cult.<sup>18</sup>

In *Hendricks*, we see the mirror image of *M.L.B.* Here, the constitutional principle of fairness permitted a state to adjudge a *man* a mentally deviant sexual predator, and on that basis commit him to an indeterminate period of confinement in state facilities. A majority of the Justices would have us blend notions of *substantive* due process, and double jeopardy and *Ex Post Facto* limits to arrive at this result.<sup>19</sup> The constitutional principle of fairness permits what will amount to a heightened scrutiny of any person deemed "dangerously sexually deviant." In the name of the constitutional principle of fairness, the Court would have us define and segregate the dangerously deviant for the purpose of curing them of their deviance. It is fair "to protect the public from harm"<sup>20</sup> as long as we observe the substantive and procedural niceties. "[U]nder the appropriate circumstances and when accompanied by the proper procedures, incapacitation may be a legitimate end of the civil law."<sup>21</sup> Thus, where the Court was willing to indulge the assumption that the state could do

17. On the origins and establishment of the cult of the Virgin Mary, as birth mother of what Christians believe to be the "Incarnation of the Word which God spoke to the world, the Word which was with God, which is the Son and the Logos" (1 John 1:1) See MARINA WARNER, *ALONE OF ALL HER SEX: THE MYTH AND THE CULT OF THE VIRGIN MARY* (1983).

18. In Pagan Rome, the College of Pontiffs was the most important grouping of priests, which included all of the highest officials of the religions with which the state was associated. The pontiffs gave instructions for the proper performance of religious acts, they kept the calendar, and they gave *reponsa* to queries about the religious validity of contemplated actions of the state, through the Senate or the magistrates. See ALAN WATSON, *THE STATE, LAW AND RELIGION* 5-7 (1992). "The pontiffs did not act in the name of a particular deity. Rather, they were public officials charged with the duty of keeping good relations between the gods and the state." *Id.* at 9. In a sense, the modern Catholic Papacy derives some of its institutional identity from the antique Roman institution. More tellingly, perhaps, the functions of the College of Pontiffs is currently served by the Justices of our federal Supreme Court. The analogy becomes apparent when one substitutes the word "Constitution" for the word "religion" in the description which follows:

One final issue should be noted. From at least the second century B.C. the Roman believed their greatness was a reward from the gods for their piety, yet it was well known that religion was manipulated—for instance, for political ends. We need not necessarily see cynicism here. What counted for the maintenance of good relations was the proper performance of the appropriate acts, and the state of mind of the participant was not relevant.

*Id.* at 9-10.

19. As Justice Breyer concedes, in dissent, the basic substantive due process treatment question is whether that Clause requires Kansas to provide treatment that it concedes is potentially available to a person whom it concedes is treatable. The same question is at the heart of my discussion of whether *Hendricks'* confinement violates the Constitution's *Ex Post Facto* Clause. . . . For that reason, I shall not consider the substantive due process treatment question separately, but instead shall simply turn to the *Ex Post Facto* Clause discussion.

Kansas v. *Hendricks*, 117 S. Ct. 2072, 2090 (1997) (Breyer, J., dissenting).

20. *Hendricks*, 117 S. Ct. at 2082. The Kansas statute is one of several which either permit civil confinement of "sexual predators," or require registration of and public access to residence information about such "sexual predators." See, e.g., 42 U.S.C.S. § 14071 (Law. Co-op. Supp. 1997); CAL. PENAL CODE § 290.4 (West Supp. 1997).

21. *Hendricks*, 117 S. Ct. at 2084 (citing *Allen v. Illinois*, 478 U.S. 364, 373 (1986)).

no right by a mother whose child was to be ripped from her bosom, the Court indulges the opposite presumption in *Hendricks*.

I first try to make sense of this emerging extra-constitutional doctrine of fairness, and how it is distinguishable from text-based constitutional doctrine;<sup>22</sup> "the *problematique* is rooted in the interpretative gap which exists between the constitutional provision and conduct . . . ."<sup>23</sup> I then discuss the way the principle of fairness molds the outcomes in the two cases.

## I. FAIRNESS AS A FUNDAMENTAL INTERPRETIVE DOCTRINE

The European Court of Justice ("ECJ") has established the practice of fashioning substantially extra-constitutional principles which it then applies to its interpretation of the "quasi-constitution" of the European Union as "General Principles of Community Law."<sup>24</sup> Lasok and Bridges usefully describe a difference between doctrines and principles. The former encompass general propositions "or guidance relating to a fundamental issue such as eg the nature of Community law . . . ."<sup>25</sup> Principles of law, on the other hand, are rules of conduct "prescribed in the given circumstances and carrying a sanction for non-compliance."<sup>26</sup> General rules or principles work like doctrine "though they can be vindicated like any particular rule, they serve a dual purpose: as pointers to interpretation by the courts and as indication of policy to legislators."<sup>27</sup> As such, "new principles are adopted into the law through judicial decision making."<sup>28</sup>

22. I note here that I am *not* suggesting that the Court's enterprise of discerning and apply general principles of Constitutional law is somehow something like Herbert Weschler's neutral principles. See, Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). However, there may well be a touch of the "structural" Ely in the enterprise, especially in his notion that principles are derivable principally from the basic law which is the subject of the interpretation, but not with the representation-reinforcing notion. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-101 (1980). The Constitution does not necessarily have "holes" nor are judges free to transform inclination into some sort of principle of convenience for purposes of decision. The general principles with which the Court seems to be concerned in the cases I examine appears to be a conservative sort of thing. It is derived from the "essence" of the document, as well as a "sense" of the traditions which underlie it.

23. Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1105 (1986) [hereinafter Weiler, *Eurocracy & Distrust*].

24. The issues of the origin, use and limitations of the concept, "general principles of Community law" remain controversial in Europe. I do not discuss those questions here. For a general discussion of the genesis of principles of Community law, see, for example, LASOK AND BRIDGE, *supra* note 10, at 179-208; NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 115-133 (1996) [hereinafter EMILIOU, *THE PRINCIPLE*]; JOXERRAMON BENGOTXEA *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE* 71-79 (1993) [HEREINAFTER BENGOTXEA, *LEGAL REASONING*]; and Weiler, *Eurocracy and Distrust*, *supra* note 23.

25. LASOK AND BRIDGE, *supra* note 10, at 179.

26. *Id.*

27. *Id.* On the interpretive and extra-constitutional utility of principles in continental (and especially European) law, see J. Iguartua, *Sobre "Principios" y "positivismo Legalista,"* 14 REVISTA VASCA DE LA ADMINISTRACIÓN PÚBLICA (1986). Cf. LON L. FULLER, *THE MORALITY OF LAW* (1969). Emiliou suggests four applications of general principles in constitutional interpretation: (i) a guide to the interpretation of primary law, (ii) a guide to the exercise of power under the primary law, (iii) to provide criteria for determining the legality of acts, and (iv) to fill in gaps in primary or secondary law to prevent injustice. See EMILIOU, *THE PRINCIPLE*, *supra* note 24, at 121.

28. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 236-37 (1978). Taking his cue from

Of course, the primary sources of European law may appear to provide at least some small theoretical opening through which the ECJ can justify the articulation and application of "general principles."<sup>29</sup> The ECJ has used this mechanism to consciously and deliberately articulate and apply a number of general principles of Community law.<sup>30</sup> These general principles include fundamental principles of human rights which have been read into the jurisprudence of the European Union,<sup>31</sup> as well as principles of equality of treatment,<sup>32</sup> and a number of principles derived from continental law.<sup>33</sup>

The two "procedure" cases from out of this last term highlight the way in which our Supreme Court, like the European Court of Justice, has incorporated extra-constitutional doctrines for the purposes of reaching the "right" result

MacCormick, Joxerramon Bengoetxea suggests that general principles, in the form of norms, assume extra-constitutional dimension:

Political or ethical principles sometimes enter into the legal system disguised as supra-systemic principles allegedly referred to or implied by valid norms of the system or by formal interpretive consequences of these. If such principles are incorporated into the legal system, e.g., through court decision, they might be considered as reasons guiding further decisions, for principles are regarded as general norms having an explanatory and justificatory force in relation to particular decisions or to particular rules for decisions.

BENGOETXEA, *LEGAL REASONING*, *supra* note 24, at 75 (citing MACCORMICK, *supra* note 28, at 260).

29. There is only one reference to "general principles" in the primary law. Article 215(2) of the EC Treaty provides for EEC liability in non-contractual matters, "in accordance with the general principles common to the laws of the Member States." EC TREATY art. 215(2). See J. V. LOUIS, *THE COMMUNITY LEGAL ORDER* 68 (1980) (suggesting that this is a specific reference to a term of general applicability). However, the ECJ may have taken inspiration from other sources. See, e.g., LASOK AND BRIDGE, *supra* note 10, at 180 (Art. 173 permits the ECJ to annul an act of the Community which infringes "the Treaty or any rule of law relating to its application.").

30. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, [1970] E.C.R. 1125, [1972] CMLR 255. The ECJ in *Internationale Handelsgesellschaft* rejected the notion that the validity of Community measures could be judged by applying the fundamental or constitutional rules of any of the Member States. Instead, the ECJ suggested that

[A]n examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

*Id.*

31. Case 4/73, *Nold v. Commission*, [1974] E.C.R. 491, 508 (ECJ stated that it could draw on international instruments as sources for general principles of human rights against which Community law could be measured.). See Weiler, *supra* note 23, at 1113-21. Weiler notes that there will be an element of constitutional politics at play in the crafting of this general principle of Community law; the incorporation of fundamental human rights into the Community legal order might be characterized as "an attempt to protect the concept of supremacy which was threatened because of the inadequate protection of fundamental human rights in the original Treaty system." *Id.* at 1119.

32. This principle has been deduced from a small number of provisions in the EC Treaty which prescribe discrimination on the basis of nationality (art. 7), sex (art. 119) and production (art. 40(3)). See EEC TREATY, *supra* note 16. It has been applied to great effect in the area of gender equality. Council Directive 75/117, art. 119, 1975 O.J. (L 45) 19 (the Equal Pay Directive); Council Directive 76/207, 1976 O.J. (L 39) 40 (Equal Treatment Directive). "Perhaps EU law has been as successful as possible in creating equality within a society where men have traditionally dominated the best paying and most rewarding jobs, and have had more status than women. Women within the EU will now strive to challenge their historical role, knowing they have the Equal Pay and Equal Treatment Directives behind them in support of their efforts to obtain more prestigious and better paying jobs." Elena Noel, *Prevention of Gender Discrimination Within the European Union*, 9 N.Y. INT'L. L. REV. 77, 91-92 (1996). See generally, Ruth A. Harvey, *Equal Treatment for Men and Women in the Work Place: The Implementation of the European Community's Equal Treatment Legislation in the Federal Republic of Germany*, 38 AM. J. COMP. L. 31 (1990).

33. These include, among others, the principle of proportionality (akin to our constitutional notion of "least restrictive means"). See, e.g., EMLIOU, *THE PRINCIPLE*, *supra* note 24.

where available "black letter" failed to provide a principled means to this result. In this our Court resembles both the pagan Roman curia,<sup>34</sup> and the modern ECJ.<sup>35</sup> The principle doctrine invoked in these cases is that of "fairness." A subsidiary doctrine is that of "proportionality,"<sup>36</sup> or better put in the language of American jurisprudence—comparable outcomes. Yet unlike the ECJ, American courts have been loath to admit what they do, perhaps for fear of appearing to "legislate."<sup>37</sup> In a sense then, this, like many of the decisions of the Rehnquist Court, is a "Stealth" decision.<sup>38</sup>

In her majority opinion in *M.L.B.*,<sup>39</sup> Justice Ginsburg brilliantly revealed the way the principle of fairness explodes conventional categories as well as the way in which she tended to cover her tracks by clumsily folding the application of that principle within the umbrella of "due process" and "equal protection." Justice Ginsburg starts her journey with *Griffin v. Illinois*.<sup>40</sup> The plurality opinion in *Griffin* is literally inapposite, but provides strategic dicta,<sup>41</sup> which "drew support from the Due Process and Equal Protection Clauses."<sup>42</sup> It is in-

34. See WATSON, *THE STATE*, *supra* note 18, at 85-86.

35. The principle difference, of course, being that the Supreme Court attempts the application of these general principles *sub silentio* and within the context of inapplicable and category bursting constitutional categories. For an interesting comparison of the activism of American and European "federal" courts, see HUALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING* 7 (1986).

36. While similar to the European conception of this general principle of law, in American law the concept is not applied in the same way. The differences between American and continental notions of proportionality is beyond the scope of this paper. For a discussion of proportionality in continental law, see EMILIOU, *THE PRINCIPLE*, *supra* note 24, at 23-114 (proportionality in German and French law).

37. The charge of legislation by judiciary has been effectively used by traditionalists to attempt to dampen the aggressiveness with which the American courts have appeared to be interpreting law in a manner inconsistent with the politics or preferences of the critics. For an effective example of this sort of genre, see Lino A. Graglia, *Judicial Activism: Even on the Right it is Wrong*, 95 PUB. INTEREST 57 (1989); Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385 (1969); BORK, *supra* note 11.

Interestingly enough, and as the decision in *Hendricks* clearly shows, traditionalists as well as others continue to "legislate" aggressively on the court. Professor Schwartz has noted that the recent decisions of the Rehnquist Court have been not only "conservative," "they were also as activist as any decided by the Warren and Burger Courts." Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and a Stealth Court*, 33 TULSA L. J. (forthcoming 1997).

38. Indeed, Professor Schwartz has questioned rhetorically whether "the Court during the 1996 Term [can] be characterized as a "Stealth court" because it drastically changed the law without acknowledging that it had done so." *Id.*

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

40. 351 U.S. 12 (1956) (mandatory record required for criminal appeals must be provided to indigents otherwise unable to pay costs to procure it).

41. Thus, from her reading of selected passages from *Griffin*, Justice Ginsburg begins to draw the definition of what will ultimately be a description of the "constitutional principle of fairness:" (i) "the State may not 'bolt the door to equal justice,'" *M.L.B.*, 117 S. Ct. at 560 (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring)); (ii) "[t]o deny adequate review to the poor . . . means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside," *M.L.B.*, 117 S. Ct. at 561 (quoting *Griffin*, 351 U.S. at 19); (iii) "when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review . . ." *M.L.B.*, 117 S. Ct. at 561 (quoting *Griffin*, 351 U.S. at 23) (Frankfurter, J., concurring)). This dicta, Justice Ginsburg, noted, was somehow consolidated by that statement of the majority in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), that "[t]his 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 courts." *Rinaldi*, 384 U.S. at 310.

42. *M.L.B.*, 117 S. Ct. at 561 (citing *Griffin*, 351 U.S. at 13, 18). Note that "drawing support from" and "based on" may be two entirely different things.

apposite because the case involved a criminal conviction for which incarceration was a possibility. But Justice Ginsburg then noted that the *Griffin* result was extended to criminal cases in which imprisonment was *not* at stake in *Mayer v. Chicago*.<sup>43</sup> Here again, the dicta points to a fleshing out of the constitutional principle of fairness.<sup>44</sup> Again, these notions speak to principles springing from the Equal Protection and Due Process Clauses. However, the majority is forced to concede, the Clauses themselves are of little help. For the Court has also clearly held that trial counsel is only available for felony trials<sup>45</sup> and appeals as of right;<sup>46</sup> but does not extend either to non-felony trials where no term of incarceration is actually imposed,<sup>47</sup> or to discretionary appeals.<sup>48</sup> Thus, for all of the eloquence of the decisions, they seem to confine the black letter of Due Process and/or Equal Protection rights of indigents to criminal defendants.

In civil cases, the accepted parameters of the Due Process Clause provides little additional direct help. *Boddie v. Connecticut*<sup>49</sup> holds that a state may not deny a couple's right to divorce for inability to pay court fees.<sup>50</sup> Yet, in that case all access to the court was denied in a proceeding in which the state held a monopoly on the available remedy: divorce. Still, the case provides more material for the construction of a constitutional principle of fairness—the notion of a necessary solicitude for the private life of citizens.<sup>51</sup> *Lindsey v. Normet*,<sup>52</sup> provides the majority with evidence that the principles underlying *Boddie* are generalizable. More importantly, it appears to move into the realm of the civil law a principle (of Equal Protection in the context of appeals) heretofore confined to the line of criminal cases on which the majority had sought support—“[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.”<sup>53</sup> But, of course, the case is also inapposite for the same reason as *Boddie*; in both cases, the procedural requirements effectively deprived the

43. See *M.L.B.*, 117 S. Ct. at 561 (“We declined to limit *Griffin* to cases in which the defendant faced incarceration.”). *Id.* (citing *Mayer v. Chicago*, 404 U.S. 189, 197 (1971)) (indigent defendant convicted of two nonfelony charges and fined \$250 for each offense; state rule providing free transcripts only in felony appeals overturned).

44. Like more serious criminal offenses, “[p]etty offenses could entail serious collateral consequences . . .” *M.L.B.*, 117 S. Ct. at 561.

45. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

46. *Douglas v. California*, 372 U.S. 353 (1963).

47. *Scott v. Illinois*, 440 U.S. 367 (1979).

48. *Ross v. Moffitt*, 417 U.S. 600 (1974).

49. 401 U.S. 371 (1971).

50. See *id.* at 383.

51. The lesson Justice Ginsburg draws from the case is that

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

*M.L.B.*, 117 S. Ct. at 562 (quoting *Boddie*, 401 U.S. at 374). Further, this lesson, Justice Ginsburg tells us, is confirmed by *Little v. Streater*, 452 U.S. 1 (1981), in which the Court held that the state, in paternity suits, must pay for blood tests necessary to defend against such suits. See *Little*, 452 U.S. at 13-17.

52. 405 U.S. 56 (1972) (striking down Oregon law imposing a double-bond on tenants seeking appeal of adverse eviction decisions).

53. *M.L.B.*, 117 S. Ct. at 561 (quoting *Lindsey*, 405 U.S. at 876).

indigent litigant of *any* hearing with respect to a matter over which the courts held something approaching a monopoly of power to dispense remedies (and in *Lindsey* the deprivation affected indigent and non-indigent alike).<sup>54</sup> Moreover, in following the civil line of Due Process cases, Justice Ginsburg has to confront *Kras*,<sup>55</sup> and *Ortwein*.<sup>56</sup> The majority would distinguish these cases on the basis of on acceptance of the Court's conclusion that in both of those cases, *fundamental interests* were not at stake. And so, at the end of the recitation of the cases we are left with very little in the way of black letter: *Griffin* and its progeny would extend something called either Due Process or Equal Protection (no one is sure which) to the costs of preparing records for criminal appeals, but does not apply in the civil context. *Boddie* and its progeny would appear to extend something called Due Process to fees for accessing courts which hold a monopoly on a necessary determination affecting fundamental interests (paternity or divorce), but is inapplicable to economic and social welfare issues as well as to discretionary appeals (and even the right to counsel is unavailable as of right to indigent defendants in discretionary criminal appeals as well). Yet *M.L.B.* involved an indigent charged record preparation fees for the purpose of asserting a discretionary appeal in a case where fundamental interests were arguably involved. Applying the teaching of Due Process and Equal Protection would appear to lead to the conclusion that, as *unfair* as it might seem to one, the people of Mississippi in their legislature represented, could impose such a burden on *M.L.B.*

What to do? One could extend *Boddie* to cover civil discretionary appeals in cases involving a fundamental interest. That, effectively, is what Justice Kennedy, in concurrence, would have had the court hold practically *sub silentio*. Placing the question squarely within the traditional balancing standards of *Mathews v. Eldridge*,<sup>57</sup> Justice Kennedy succinctly concludes:

I acknowledge the authorities do not hold that an appeal is required, even in a criminal case; but given the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake in this particular proceeding, the State may not erect a bar in the form of transcript and filing costs beyond this petitioner's means.<sup>58</sup>

Had the Court chosen this path, perhaps it would have amounted to an aggressive interpretation of the Due Process Clause. At the very least, it would have amounted to a significant slap at the power of trial courts to fairly dispose of cases "on the average." But for all of that, the case would have remained squarely within the well worn Constitutional interpretive traditions.

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54. Only in this manner can we understand the insistence of a discussion of *Lindsey* when, as Justice Ginsburg admits, "that the classification there at issue disadvantaged nonindigent as well as indigent appellants . . . ; the *Lindsey* decision, therefore, does not guide our inquiry here." *Id.* at 562.

55. *U.S. v. Kras*, 409 U.S. 434 (1973) (no constitutional right to have court fees waived for indigents seeking the protection of the bankruptcy laws).

56. *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam) (\$25 fee for appellate review of administrative determination of welfare benefits does not violate Constitution).

57. 424 U.S. 319 (1976).

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

But Justice Ginsburg, for the majority, attempted something far more aggressive; something extra-constitutional. First, she pulls from *Boddie, Lassiter*,<sup>59</sup> and *Santosky*,<sup>60</sup> the notion that parental termination hearings implicate a fundamental right.<sup>61</sup> Then she uses the dicta in both majority and dissenting opinions of the cases to suggest that determinations which affect fundamental interests should be subject to a sort of heightened scrutiny; an argument which implies that when fundamental interests are at stake courts should be more reluctant to trust the disposition at trial or initial hearing.<sup>62</sup> Next, she elevates the "comparable worth" analysis of *Lassiter*<sup>63</sup> to a now generalizable principle she discerns in *Mayer*.<sup>64</sup> From this, the majority constructs, from out of the overtones and expressions of "right" in the cases she outlined, a conclusion that fairness requires the result she reaches. She notes that *Griffin/Mayer* involve a "convergence" of Due Process and Equal Protection "principles."<sup>65</sup> These converging principles "relate to" and "concern" the *fundamental legitimacy* of governmental distinctions (in this case based on ability to pay) and the *essential fairness* of the governmental scheme. These generalized principles of fundamental legitimacy and essential fairness are not Due Process or Equal Protection, as traditionally conceived; something more fundamental is being invoked in the cases.<sup>66</sup> That fundamental principle undergirded the contextualized decisions in the cases Justice Ginsburg described, and ought to undergird a determination of M.L.B.'s situation as well.

This fundamental schematic stands revealed for all who care to see a prime

59. *Lassiter v. Dept. of Social Servs. of Durham County*, 452 U.S. 18 (1981) (appointed counsel for indigent persons seeking to defend against state termination of parental rights constitutionally required under certain circumstances, though not routinely required). Clearly, *Lassiter* was inapposite. It involved a question of a constitutional requirement for the appointment of counsel, and it concerned the rights of parties in the initial action for parental termination. *M.L.B.* involves the rights of indigents in an appeal from such a determination.

60. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (imposing a "clear and convincing" standard of proof in parental termination proceedings). This case is also strictly inapposite—the issue presented to the Supreme Court did not revolve around the use by Mississippi courts of a standard different from that constitutionally mandated.

61. *M.L.B.*, 117 S. Ct. at 564-565.

62. With respect to *Lassiter*, Justice Ginsburg states that

[t]he object of the [termination] proceeding is "not simply to infringe upon [the parent's] interest," the Court recognized, "but to end it"; thus, a decision against the parent "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27 . . . . For that reason, "[a] parent's interest in the accuracy and justice of the decision . . . is . . . a commanding one." *Ibid.*; see also *id.*, at 39 . . . (Blackmun, J., dissenting) . . . .

*M.L.B.*, 117 S. Ct. at 564-65 (quoting *Lassiter*, 452 U.S. at 27, 39).

63. "Parental termination cases, the *Lassiter* court concluded, are most appropriately ranked with probation revocation hearings: While the Court declined to recognize an automatic right to appointed counsel, it said that an appointment would be due when warranted by the character and difficulty of the case." *M.L.B.*, 117 S. Ct. at 564 (citing *Lassiter*, 452 U.S. at 31-32).

64. "For the purpose at hand, *M.L.B.* asks us to treat her parental termination appeal as we have treated petty offense appeals; she urges us to adhere to the reasoning in *Mayer v. Chicago*, . . . . Guided by *Lassiter* and *Santosky*, and other decisions acknowledging the primacy of the parent-child relationship . . . we agree that the *Mayer* decision points to the disposition proper in this case." *M.L.B.*, 117 S. Ct. at 565-66 (emphasis added).

65. *Id.* at 566 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

66. "A 'precise rationale' has not been composed [*Ross v. Moffit*, supra, at 417 U.S. at 609] because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' [*Bearden*, supra, at 461 U.S. at 666]. *M.L.B.*, 117 S. Ct. at 566.

general principle of constitutional law. It is built on the general guidance provided by a slew of cases, none of which were apposite, all of which implicated the construction and application of a principle of Constitutional construction beyond the categories Due Process and Equal Protection. Technically, Justice Ginsburg builds to a holding based on little more than her willingness to be "[g]uided by this Court's precedent on an indigent's access to judicial processes in criminal and civil cases, and on proceedings to terminate parental status . . . ."<sup>67</sup> Yet she has done substantially more than that. That guidance is the cover under which she applies a principle which does not exist in the black-letter norms of the Constitution, but which "designate those norms of a positive legal order or system that have a fundamental character . . . [and which] refer to the 'logical' consequences of groups of norms of a legal system."<sup>68</sup> Yet Justice Ginsburg shrinks from an acceptance of the ramifications of this effort. "Nevertheless, '[m]ost decisions in this area,' we have recognized, 'res[t] on an equal protection framework,' [Bearden, 461 U.S. at 665], as *M.L.B.*'s plea heavily does, for, as earlier observed, . . . due process does not independently require that the State provide a right to appeal."<sup>69</sup> And so, having effectively summoned and applied a general principle of constitutional law, Justice Ginsburg scurries back from the ramifications of the deed, decreeing that "[w]e place this case within the framework established by our past decisions in the area."<sup>70</sup> Yet saying it does not make it so.

Here we have a large forest of trees highlighted in order to hide the forest. One can only follow the majority's discussion of the cases, criminal and civil, to what would appear to be the inevitable conclusion that none, standing alone, permits the result she reaches. Yet at this very point, the majority stops us long enough to lift us up from among the trees, to show us a forest in which a general principle lives. All of the trees (these cases) are of no help when considered individually. However, taken together, they imply a principle which permits the result she reaches. But this is too much. Such an interpretive enterprise suggests that extra-constitutional principles can shape law. So, having ascended to observe the principle, we descend back among the trees. The majority is reduced to describing her efforts in vaguely applicable "black-letter" constitutional terms. This exercise, as both the concurrence, but especially the dissent are at pains to point out, is unsatisfying at best and illogical at worst.

In a sense, *M.L.B.* presented the Court with a problem similar to that faced by the ECJ in *Algera*<sup>71</sup> in which the ECJ was confronted with a situation

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67. *Id.* at 565.

68. BENGOTXEA, *supra* note 24, at 72 (paraphrasing the categories of the utility of general principles of law described by J. Iguartua, *Sobre "Principios" y "positivismo Legalista,"* 14 REVISTA VASCA DE LA ADMINISTRACIÓN PÚBLICA (1986)).

69. *M.L.B.*, 117 S. Ct. at 565.

70. *Id.*

71. Joined Cases 7/56 & 3-7/56, *Algera v. Common Assembly of the European Coal and Steel Community*, [1957-58] E.C.R. 39 (Community attempt to withdraw applicability of certain civil service type rules to a class of employees declared ineffective on basis of a newly articulated principle of "non-existence" or "legal certainty" or "vested rights" which treats administrative measures as presumptively valid, to be set aside only

deemed "unjust" but one for which no remedy was available under the EC Treaty. In *M.L.B.*, the Court was also confronted with a situation for which neither statute nor Constitution provided a remedy. In the European case, rather than "deny justice [the ECJ thought itself] obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the Member States."<sup>72</sup> In the American case, justice was rendered in a similar way.

Indeed, in both cases, the solution lay in recourse to what in Europe is recognized as a "socially realizable morality."<sup>73</sup> In Europe, this socially realizable morality is woven into established patterns of jurisprudential analysis so as to "function as stabilizers of legal development, appealing to the continuity of existing practice and integrating judicial innovation with recognized legal practice."<sup>74</sup> The recent ECJ case, *P. v. S. & Cornwall County Council*,<sup>75</sup> in which the ECJ extended the European Union's protection against sex discrimination to transsexuals, provides a good example of the practice. The ECJ based its decision not on the particular statute or EC Treaty provision at issue, neither of which resolved the question before it. Instead, the ECJ based its decision on an application of the fundamental general principle of equality which both statute and Treaty "expressed."<sup>76</sup> On that basis, the ECJ read the law broadly to provide sex discrimination protection for transsexuals.<sup>77</sup> In a similar way, the Court in *M.L.B.* found that the general notions of essential fairness find expression in the Due Process and Equal Protection Clauses, and that expression requires a broad based reading of the interpretive cases.

Again, understand that what the American Court does is not *necessarily* bad, or constitutionally impermissible. The imperatives which drove the ECJ to craft "general principles" operate with equal force on the American Court. Both courts are charged with the duty to safeguard the "basic law" of their respective jurisdictions. Both have shown a marked disinclination to "deny justice" where the black-letter law appears silent. However, perhaps because our Court must be sensitive to challenges to its power to "say what the law is,"<sup>78</sup> it must make a greater effort to cloak the jurisprudential basis of its decisions in a language barely suited to the task. Confusion is inevitable. This situation ought to be troubling at best, not because what the Court does is wrong, but because the

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by means of annulments or withdrawal, to the extent such may be permitted under law).

72. *Id.* at 55.

73. CLARENCE MANN, *THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION* 355 (1972).

74. EMILIOU, *THE PRINCIPLE*, *supra* note 24, at 125.

75. Case C-13/94, *P. v. S. & Cornwall County Council*, 2 C.M.L.R. 247 (1996). For a discussion of *Cornwall County Council* in the European law context, see Larry Catá Backer, *Harmonization, Subsidiary and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 *TULSA J. COMP. & INT'L L.* 185, 194 (1997).

76. See *Cornwall County Council*, Case C-13/94, 2 C.M.L.R. 247 (1996).

77. "To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard." *Id.* at ¶ 23.

78. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Court's actions are more hidden than they ought to be.

Of course, given the shadow jurisprudence of the majority opinion in *M.L.B.*, one cannot read the dissent without concluding that Justice Thomas missed the point entirely. Yes, the points made by the dissent are all arguably correct and well taken. In the absence of fairness as a general principle of constitutional law, and in a Court unwilling to extend current black-letter interpretation to cover the situation of *M.L.B.*, the dissent has the better arguments.<sup>79</sup> But, that, of course, is the problem. One *cannot* ignore general interpretive principles and directly meet the real arguments of the majority. This is the tragedy of the dissent. Justice Thomas devotes much ink to arguing that *Griffin* be overruled.<sup>80</sup> Yet he fails to understand the implications of his discussion of the anomalies of Justice Ginsburg's gyrations in the majority opinion. Thus, he suggests that "[t]he *Griffin* line of cases ascribed to—one might say announced—an equalizing notion of the Equal Protection Clause that would, I think, have startled the Fourteenth Amendment's Framers."<sup>81</sup> He wonders why the majority seemingly confuses the fundamental right to maintain the parental relationship, with any so-called fundamental interest in the right to a civil appeal.<sup>82</sup> He seeks to overrule *Griffin*, not merely because it is wrongly decided, in his opinion, but perhaps more importantly, because it permits the inference of extra-constitutional principles. These principles are derived, of course, from an understanding of Constitutional principles, which can then be used to shape (or distort) black-letter Constitutional interpretation.<sup>83</sup>

But what is all this if not discomfort in the face of the use of an extra-constitutional principle which fits badly within the constraints of settled notions of Due Process and Equal Protection? Justice Thomas is right that the majority opinion rests badly within traditional Due Process and Equal Protection discourse. But what he doesn't recognize is that it is really not meant to fall within either. The doctrine underlying the majority opinion is extra-constitutional, derived from the majority's understanding of implicit norms within Equal Protection and Due Process sensibilities in our society today. Justice Thomas is also correct when he asserts that the doctrine announced by the majority will not be confined to the facts of the case:

In brushing aside the distinction between criminal and civil cases—the distinction that has constrained *Griffin* for 40 years—the Court has eliminated the least meaningful limit on the free floating right to appellate assistance. From *Mayer*, an unfortunate outlier in the *Griffin* line, has

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79. *M.L.B.*, 117 S. Ct. at 571-575 (Thomas, J., dissenting).

80. *Id.* at 575-78.

81. *Id.* at 575.

82. *Id.* at 574 & n.1.

83. Consider in this light the implications of Justice Thomas's analysis of the relationship between the decisions in *Mayer*, *Scott*, and *Lassiter*.

The assertion that civil litigants have no right to the free transcripts that all criminal defendants enjoy is difficult to sustain in the face of our holding that some civil litigants are entitled to the assistance of counsel to which some criminal defendants are not. It is at this unsettled (and unsettling) place that the majority lays the foundation of its holding.

*Id.* at 576.

sprung the *M.L.B.* line, and I have no confidence that the majority's assurances that the line starts and ends with this case will hold true.<sup>84</sup>

Yet, Justice Thomas fails to recognize that the reason that *M.L.B.* will not be contained is not because the case is aberrational, but rather because it represents a concrete application of the extra-constitutional principles of fairness (legitimacy and essential fairness). As such, Justice Thomas is right to note (but for the wrong reasons) that under the general principle "announced today, I do not see how a civil litigant could constitutionally be denied a free transcript in any case that involves an interest that is arguably as important as the interest in *Mayer*."<sup>85</sup> I agree.

Ironically, in *Hendricks*, it is Justice Thomas who takes up the banner of decision by application of extra-constitutional principles clothed in the language of black-letter constitutionalism. Justice Thomas continues to apply that hoary old principle of constitutional law, which reads into every rule of process a substantive limitation to the freedom given states in the black letter of the fourteenth amendment to deprive every individual of life, liberty or property after complying with the requisites of due process of law. While we continue to argue about the parameters of that substantive limitation,<sup>86</sup> every Justice writing in *Hendricks* agreed that there are substantive limitations on the power of a state to deprive a person of her liberty; that is, there exist classes of deprivations of liberty with respect to which no amount of procedural due process could permit.<sup>87</sup>

While most commentators have treated the rise and transformation of substantive due process as an aspect of mainstream constitutional interpretation, I maintain that the creation and maintenance of "substantive" limitations on the power of a state to deprive citizens of life, liberty or property is among the oldest of the extra-constitutional general principles of constitutional law. The Fourteenth Amendment provision speaks positively about the power of the state to deprive any person of life, liberty or property, once the requisite minimum formalities have been observed. It might be possible to argue that the provision permits variance in the minimum process necessary, depending on the importance of the deprivation; and we have built a huge jurisprudence on this notion. It requires resort to extra-constitutional principles of limitations of state power to derive from the Due Process Clause a notion that certain classes of depriva-

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84. *Id.* at 577-78.

85. *Id.* at 577.

86. Until the 1930s, the Court applied the principle of substantive limitations of constitutionally sanctioned powers to effect deprivations primarily to curtail severely the economic enactments of the state. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). After the 1930s, the force of substantive limitations on the power of states to effect deprivations shifted, along with some of the Court's Constitutional jurisprudence, to issues of personal autonomy. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For a discussion of the shift in the focus of this most restrictive application of the "substantive" limitation on state power to effect deprivations, see BORK, *supra* note 11, at 36-49, 110-126.

87. All members of the Court continue to stand by the decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992) (civil commitment of mentally ill and dangerous persons does not come within that class of deprivations of liberty that even the fourteenth amendment cannot permit).

tion may never (or hardly ever) be effected by the state irrespective of the amount of procedural due process provided. Not tied strictly to black letter, yet couched in the language of ordinary constitutional construction, the principle has had an interesting and wholly unsatisfactory life. Again, don't misunderstand, the fact that the Court has had to construct a general principle of constitutional law to read a substantive limitation into the procedural due process scheme of the Fourteenth Amendment does not make it wrong. It merely suggests another example of a perhaps necessary subterfuge which riddles American approaches to Constitutional interpretation.<sup>88</sup>

Ironically, Justice Thomas' "substantive" due process/double jeopardy/*Ex Post Facto* constitutionalism in *Hendricks* appears in some respects as no more than an expansive application of that very extra-constitutional fairness principle he so resolutely fails to see or contenance in *M.L.B.* This has nothing to do with the "substantive" due process issues underlying the affirmance by the Court of the power of the state to deprive a person of her liberty through carefully circumscribed civil commitment proceedings. No one on *this* Court questions the notion that the power of states to deprive persons of life, liberty or property without due process of law is not unlimited.

Instead, the fairness principle of constitutional law is most evident in the great disagreement between the majority and the dissent regarding the "punitive" nature of Kansas' Sexually Violent Predator Act. Here categorical constitutional analysis fails us.<sup>89</sup> And rightly so. While the implications of "punitiveness" can effect the implementation of the black-letter of Due Process, and in this case, *Ex Post Facto* and Double Jeopardy protections, "punitiveness" itself is necessarily a creature of something else, something extra-constitutional. Here I mean extra-constitutional in the sense that the Court must search outside the four corners of the Constitution for those norms, those principle, on which such a determination is based. For purposes of that determination in this case, the principles of *essential fairness* and of *legitimacy* of purpose, so plainly revealed in *M.L.B.*, guide the determination.

Determinations of "punitiveness" cannot be contained within traditional doctrinal analysis. Instead, both Justice Thomas's majority opinion and Justice Breyer's dissent struggle to mold the principles they employ within the traditional and limited discourse of Due Process and *Ex Post Facto*/Double Jeopardy.

88. A more detailed discussion of this general principle of constitutional law lies outside the scope of this piece. See, e.g., John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (attempting to "marry" Constitutional text to the doctrine of substantive due process).

89. The "basic substantive due process treatment question" of whether Kansas is required "to provide treatment that it concedes is potentially available to a person whom it concedes is treatable . . . is at the heart of [the] discussion of whether Hendrick's confinement violates the Constitution's *Ex Post Facto* Clause." *Hendricks*, 117 S. Ct. at 2090 (Breyer, J., dissenting).

Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life . . . . The concern . . . is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment after the State makes an improvident pleas bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense.

*Id.* at 2087 (Kennedy, J., concurring).

dy. Justice Thomas would employ the language of statutory construction to pronounce the provision "non-punitive."<sup>90</sup> The statute could neither be retributive,<sup>91</sup> nor could the Act be intended to function as a deterrent.<sup>92</sup> As such, the only aspect of the provision which resembled a "punitive" statute at all was its "result"—affirmative restraint. But that is no problem at all under our law, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."<sup>93</sup>

Why does this work? Why does this seem fairly mundane? After all, when the instrumentalities of the state were deployed against M.L.B., all of the Justices were sensitive to her plight and the fundamental nature of her connection to her child. Should not we be as concerned for the liberty of Mr. Hendricks? But no one is particularly concerned. "A common response to this may be, 'A life term is exactly what the sentence should have been anyway,' or, in the words of a Kansas task force member, 'So be it.'"<sup>94</sup> Mr. Hendricks is a monster—a confirmed "lifetime" child molester.<sup>95</sup> He is dangerous.<sup>96</sup> The availability of treatment, or the lack of it, on the one hand, or the decision to withhold treatment until post sentence confinement is available, on the other hand, makes no difference.

Accepting the Kansas court's apparent determination that treatment is not possible for this category of individuals does not obligate us to adopt its legal conclusions. We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation

90. "Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." *Hendricks*, 117 S. Ct. at 2082.

91. Thus, Justice Thomas could discern no retributive purpose in the legislation; "the fact that the Act may be 'tied to criminal activity' is 'insufficient to render the statut[e] punitive' *United States v. Ursery*, . . . 116 S. Ct. 2135, 2149 . . . (1996)." *Id.* at 2082.

92. "Those persons committed under the Act are, by definition, . . . [unable to] exercis[e] adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement." *Id.* at 2082. For a discussion of the notion of deterrence in the context of "uncontrollable" tendencies to sexual action, see RICHARD POSNER, *SEX AND REASON* 211-213 (1992).

93. *Hendricks*, 117 S. Ct. at 2083 (quoting *U.S. v. Salerno*, 481 U.S. 739, 746 (1987)).

94. *Id.* at 2087 (Kennedy, J., concurring) (quoting Testimony of Jim Blaufuss, App. 503).

95. Justice Thomas brilliantly marshaled the full palette of cultural language with which our society has judged people with the habits of Mr. Hendricks as being beyond disgust. For a discussion of the effectiveness of the language of pedophilia as a means of condemnation, see Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 572-78 (1996).

Thus, Justice Thomas went to some lengths to detail Mr. Hendrick's thirty (30) year personal odyssey of sexually molesting children. This was a man who satisfied his insatiable lust on all children—male or female, it didn't make a difference; it was the youth of the victim which made all the difference in the world. He began by exposing himself to girls in 1955 (indecent exposure), progressing soon thereafter to lewdness with a girl (1957). He turned to boys in 1960 in an "every parent's nightmare" scenario—molesting two young boys while he worked at a carnival (all sorts of cultural stereotypes are present in this description). Thereafter, he molested a 7 year old girl, received treatment and was pronounced "safe to be at large" in 1965; only to perform oral sex on an 8 year old girl and fondle an 11 year old boy soon thereafter. He spent the years 1967 to 72 in prison, when he was paroled, abandoned a treatment program and began abusing his stepson and step daughter, an activity which persisted for 4 years. He was arrested for attempting to take indecent liberties with two 13 year old boys in 1984 and found himself in prison; at that time, he became the first person against whom the Kansas violent sexual predator act was used. See *Hendricks*, 117 S. Ct. at 2079.

96. "Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." *Hendricks*, 117 S. Ct. at 2083.

may be a legitimate end of the civil law. . . . A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. . . . Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a state to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.<sup>97</sup>

Here we see the "comparable worth" approach at the core of any application of principles of *essential fairness*, and so transparently applied in *M.L.B.* In *M.L.B.*, certain criminal proceedings were deemed functionally equivalent to parental termination determinations, and fairness required the same or equivalent result. In *Hendricks*, "untreatable, highly contagious disease" is deemed the functional equivalent of pedophilia. Fairness here requires a no less equivalent result. Combined with the focus on the potential victims of the uncontrollable danger emanating from Mr. Hendricks the monster, the meaning of "punitive" as a matter of constitutional law "naturally" follows. But that meaning does not follow from the application of Constitutional black letter. Instead, Constitutional interpretation is possible only through the application of a principle of "essential fairness" as conceived by the traditionalist majority in *Hendricks*. The black letter is of no help here. The Double Jeopardy Clause cannot be used to prevent the civil commitment.<sup>98</sup> For the same reasons, the *Ex Post Facto* laws do not prevent Mr. Hendrick's loss of liberty; "the Act does not impose punishment; thus its application does not raise *ex post facto* concerns."<sup>99</sup>

Thus, the general principle of fairness comes to play in this case not for Mr. Hendricks, but rather fairness is arrayed *against* the man who is to be confined, and in favor of, well, everyone else in the state. That it is Mr. Hendricks' liberty interest which is at stake, that he will face a potential life sentence for the admitted propensity to commit crimes in the future as yet uncommitted, makes no difference. The general principle of fairness directs our attention to the population which needs protection from the deviant proclivities of this sick man. For the majority, the principle of fairness helps direct our attention to the deprivation interests of the general population, and especially its children. Mr. Hendrick's depravity deprives his interest in liberty of substantial value.<sup>100</sup>

Justice Kennedy concurs. "The point, however, is not how long Hendricks and others like him should serve a criminal sentence. With his criminal record, after all, a life term may well have been the only sentence appropriate to protect

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97. *Id.* at 2084.

98. *See id.* at 2086.

99. *Id.*

100. What has been said of the European Court of Justice applies with the equal force in *Hendricks*: The European Court must be and has been shrewdly sensitive to national reaction to the digestibility of its rulings. If the Court is considering whether to deliver a ruling that it foresees may be rejected at a national level, it must weigh up whether it can justify running the risk of non-compliance and the consequent loss of credibility for itself and, perhaps, for the Community as a whole.

society and vindicate the wrong.”<sup>101</sup> Moreover, “[i]n this case, the mental abnormality—pedophilia—is at least described in the DSM-IV.”<sup>102</sup> In none of this can Justice Kennedy find that the civil commitment, in this case, was “a mechanism for retribution or general deterrence” anathema to the precedents.<sup>103</sup>

However much he agrees with the disposition of the liberty of this monster, he remains generally suspicious of the utility of this tool of civil commitment the Court appears to give the states under the mantle of a dispensation from the limitations of the “substance” of Due Process. He writes only to warn.<sup>104</sup> The warning arises from the fear that the results of this case might be generalizable to people who might be deviants, certainly, and perhaps dangerous, theoretically, but not the sort of monster for which such confinement statutes ought to be limited. Sham or pretextual treatment, or attempts to rectify improvident plea bargains, in the form of civil confinement statutes would shift the balance of fairness to the person who was to be deprived of his liberty. Nor is the state free to indulge in the creation of definitions of “mental abnormality” as a category “too imprecise . . . to offer a solid basis for concluding that civil detention is justified . . . .”<sup>105</sup>

But Justice Kennedy’s concerns are precisely the problem for the dissent. The defendant may be revolting, but by complying with the formalities of traditional Constitutional black-letter jurisprudence, Kansas is attempting to use the permissiveness of “substantive” due process to trump the limitations of the *Ex Post Facto* doctrine. Justice Breyer, in dissent, deliberately conflates notions of substantive due process and the *Ex Post Facto* doctrines to create another iteration of the principle of fairness. He then applies this principle to quibble, not with the understanding of the use of principle of fairness, but rather with its application in this case. We do not like sex predators, but in this case the state is as out of control as it claims Mr. Hendricks has been for most of his life. In such cases, essential fairness requires the state to give way to the interests of the individual. Much of the dissent is taken up by an attempt to show precisely the sham or pretext in the creation of the confinement which Justice Kennedy suggested would trouble him.<sup>106</sup>

Thus the practical experience of other States, as revealed by their statutes, confirms what the Kansas Supreme Court’s finding, the timing of the civil commitment proceeding, and the failure to consider less restrictive alternatives, themselves suggest, namely, that for *Ex Post Facto* Clause purposes,

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101. *Id.* at 2087 (Kennedy, J., concurring).

102. *Id.*

103. *Id.*

104. “My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.” *Id.*

105. *Id.*

106. “[W]hen a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.” *Hendricks*, 117 S. Ct. at 2091-92 (Breyer, J., dissenting).

the purpose of the Kansas Act (as applied to previously convicted offenders) has a punitive, rather than a purely civil, purpose.<sup>107</sup>

But, given the nature and effect of this civil confinement statute, the objections are a quibble. For Justice Breyer, legitimacy and fairness principles are not offended by a determination to use the civil statutes to deprive people adjudged by the state to be "dangerous" and "mentally ill" of their liberty for the purpose of treating them. Moreover, essential fairness to the general population would also prevent the use of "substantive" Due Process, *Ex Post Facto* or Double Jeopardy Clauses to prevent the confinement of "dangerous, mentally ill and untreatable" people, provided the minimum procedural niceties are observed, whether such confinement is imposed prospectively or retroactively.<sup>108</sup> The real problem here is that, under the peculiar circumstances of this case, the state appears to be a bigger monster than Mr. Hendricks. Essential fairness "in these circumstances does not stand as an obstacle to achieving important protections for the public's safety; rather it provides an assurance that, where so significant a restriction of an individual's basic freedoms is at issue, a State cannot cut corners."<sup>109</sup> As such, the State "must hew to the Constitution's liberty-protecting line."<sup>110</sup> That line is neither inherent in the limitations of Due Process, or *Ex Post Facto*, but flows from the interpretive potential of the general principle of essential fairness. This "essential fairness" to Hendricks, to the state of Kansas and its population, empowers the court to read into the black letter of Due Process, substantive limitations which it does not contain, in order to permit confinement to be counted as a civil penalty. Yet, in doing so, Justice Thomas also uses the principle to reserve to the court the power, on the basis of an equivalence analysis, to treat the civil penalty as criminal.

The Courts have insisted on cramming the analysis flowing from the application of general principles of constitutional law into conflated notions of the Due Process and Equal Protection Clauses in *M.L.B.*, and the Due Process and *Ex Post Facto* Clauses in *Hendricks*. This practice has tended to distort Constitutional analysis, making it practically inscrutable from time to time. Indeed, disentangling technical constitutionalism from the principles which the Courts may necessarily have to apply to breathe life into the document may well be a valuable exercise.

107. *Id.* at 2095.

108. *Id.* at 2096.

To find a violation of [the *Ex Post Facto*] Clause here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes. A statute that operates prospectively, for example, does not offend the *Ex Post Facto* Clause . . . . Neither does it offend the *Ex Post Facto* Clause for a State to sentence offenders to the fully authorized sentence, to seek consecutive, rather than concurrent, sentences, or to invoke recidivism statutes to lengthen imprisonment. Moreover, a statute that operates retroactively, like Kansas' statute, nevertheless does not offend the Clause *if the confinement that it imposes is not punishment* . . . .

*Id.* at 2098.

109. *Id.*

110. *Id.* The dissent makes clear that it smelled a rat in the actions of the State, which "decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, [that] refusal to treat while the person is fully incapacitated begins to look punitive." *Id.* at 2096.

## II. PRACTICING FAIRNESS

We now understand how the Court deploys general principles of constitutional law *sub silentio* even as it attempts to use the language of black-letter discourse. The general principle of fairness or "essential fairness" has been deployed this term to reach two seemingly inconsistent conclusions. In *M.L.B.*, the principle was used to overcome the limitations of Due Process and Equal Protection to require that indigent mothers be provided the record needed for a discretionary appeal. In *Hendricks*, the same court used the principle to overcome the limitations of *Ex Post Facto* and Double Jeopardy to confirm a state's power to confine people they deem medically deviant and dangerous.

Yet the results are not inconsistent. Rather, this Term's cases demonstrate that the Court has been able to deploy the general constitutional principle of essential fairness to create its own hierarchy of interests. In paramount position is a mother's interest in her birth children. With respect to that interest essential fairness appears to mandate an extremely high sensitivity to erroneous deprivation. This Term seems to confirm what we have long suspected, a state's interest in the health and safety of its citizens, in general, appears to be accorded a high position. Especially where the state's interest is in the protection of its children, essential fairness appears to permit a high sensitivity to potential deprivations of safety (read as a liberty interest). The interest of people labeled as dangerous social deviants is of relatively small importance. Essential fairness permits, and perhaps requires, a low sensitivity to erroneous deprivations of the liberty of people.

This hierarchy has several ramifications I wish to explore briefly. The first is that enhanced solicitude for the interests of mothers in their birth children (or in their children generally) necessarily appears to result in a substantially lower solicitude for the integrity of lower court decisions. With respect to interests that matter, the Supreme Court now tells us that we should not place substantial trust in lower courts to reach the correct result. The second is that where a state appears to define a condition of deviance as amounting to a mental illness of some sort and can reasonably couple it with dangerousness (i.e., an individual's inability or unwillingness to control her deviance), then that individual's interest in her liberty can be accorded substantially less weight than the interest of society in being free of the dangerous condition. As Justice Kennedy suggests, if unchecked, the possibilities of this notion can be quite breathtaking.

Justice Ginsburg did an exceptional job of suggesting that state lower courts which deal with parental rights termination cases, or at least the lower courts of Mississippi which deal with those issues, are not reliably competent. The Mississippi Chancery Court did not bother to elaborate on its reasons for concluding that the natural father and his new wife had met their heavy burden of proof. "Nothing in the Chancellor's order describes the evidence, however, or otherwise reveals precisely why *M.L.B.* was decreed, forevermore, a stranger

to her children."<sup>111</sup> Justice Ginsburg quotes *M.L.B.*'s brief for statistics on the "efficacy of appellate review in parental status termination cases [to the effect] that of the eight reported appellate challenges to Mississippi trial court termination orders from 1980 through May 1996, three were reversed by the Mississippi Supreme Court for failure to meet the [statutory] standard."<sup>112</sup> For the *M.L.B.* majority, this constitutes an unacceptable risk of error given the importance of *M.L.B.*'s interest in her natural children.<sup>113</sup> When lower courts deal with a "stern judgment" such as this, then "[o]nly a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence . . . ."<sup>114</sup> As against this, the *M.L.B.* majority arrays merely the State's interest in saving a couple of thousand dollars per case in situations where it is unlikely that many cases will require such expenditure.<sup>115</sup> This interest the *M.L.B.* majority dismisses as almost irrelevant. Justice Ginsburg's majority could not be clearer that in matters affecting fundamental rights, lower court determinations are at best contingent, subject to the now almost necessary confirmation by the appellate courts.

But consider the implications of this balancing on the integrity of lower court determinations. The *M.L.B.* majority seems to imply that because the Chancery Court of Mississippi was reversed in some number of its rulings, the rulings reversed were necessarily *wrong*. Worse, they might have been wrong because they were sloppy—heedless of the good manners of providing the necessary fodder for the appellate courts. This is especially disturbing with respect to cases touching on relationships such as that between mother and child. But appellate courts are as fallible as the courts which they reverse.<sup>116</sup> Indeed, it is the height of illogic to insist that the State of Mississippi need not grant appeals from parental termination proceedings, and then argue strongly that the appellate rights of the indigent should be eased in some large part because of the high reversal rate of such determinations in the appellate courts of

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111. *M.L.B.*, 117 S. Ct. at 560. Quoting the language of the statute, the Chancellor determined that there had been a substantial erosion of the relationship between *M.L.B.* and her natural children. As to the cause of this deterioration, the Chancellor quoted, without elaboration, the statutory grounds for parental rights termination under these circumstances. See *id.* at 559.

112. *Id.* at 560 & n.3. Justice Ginsburg also noted, from *M.L.B.*'s brief, that the reversal rate at the appellate level was almost 39%, and the reversal rate at the state supreme court was nearly 37%. *Id.*

113. "And the risk of error, Mississippi's experience shows, is considerable." *Id.* at 566. Worse, the Chancellor fudged, not even bothering to create the sort of record which federal judges are now trained to deliver up to the appellate courts under Federal Rule of Civil Procedure 52. "[T]he Chancellor's termination order in this case simply recites statutory language; it describes no evidence or otherwise details no reasons for [its] finding" that *M.L.B.* was unfit. *Id.*

114. *Id.*

115. "Mississippi's experience with criminal appeals is noteworthy in this regard. In 1995, the Mississippi Court of Appeals disposed of 298 first appeals from criminal convictions, . . . of those appeals, only seven were appeals from misdemeanor convictions, . . . notwithstanding our holding in *Mayer* . . ." *Id.* at 567.

116. Consider Justice Jackson's famous suggestion that "[t]here is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). For a discussion of the way in which our system balances between discouraging and encouraging appeals through the construction of rules of appellate procedure, see, Larry Catá Backer, *Civil Wars: Stays of Execution, Appellate Sanctions and the Nature of Consensus on the Utility of Appellate Review*, 29 *TULSA L. J.* 65, 146-157 (1993).

Mississippi. But Justice Ginsburg might not have meant what she said—indeed in some future case the Court will find that in matters of fundamental rights, appellate review may be constitutionally mandated (perhaps only in those cases where high reversal rates indicate some substantial showing of erroneous deprivation). On the other hand, if she did mean what she said, then the fact of the high reversal rate should have added little to the *constitutional* argument. Ultimately, the only sentiment that emerges loud and clear is that lower court determinations should not be trusted. This may well be a dangerous sentiment indeed. A system in which the Justices of the Supreme Court suggest weakness in the lower courts is one which might well encourage disrespect and disregard for such determinations.<sup>117</sup>

The relationship between the power to define deviance and dangerousness, on the one hand, and, on the other hand, the related power to confine people, under either the criminal or civil law, or both, who meet these definitions, provide another point of interest. We are all well aware of the long saga of the construction of sexual deviances of a number of different stripes as medical and even psychiatric (uncontrollable) illnesses, and the subsequent rehabilitation of a number of those “conditions,” in medicine if not in morals. Masturbation,<sup>118</sup> sodomy,<sup>119</sup> and others have each, in turn, provided grist for the mill of the criminal law, as well as fodder for civil commitment.

We are also well aware of the cynical uses to which other less democratic nations have used psychiatry as a means of controlling dissidence, by defining it (conveniently) as dangerous, anti-social activity. The former Soviet Union provides a singular example of this practice, though we in this country have not historically been immune from the practice.

It is with this in mind that Justice Thomas’ paeon to the State of Kansas and its civil commitment scheme is so striking. Justice Thomas would clearly have us continue to applaud the power of the state to remove dangerous deviants from civil society.<sup>120</sup> That power is based on the principle that the interests of society as a whole exceeds that of an individual in her liberty, where that individual threatens the safety of other members of society. But what standards does the majority offer for the balancing to be effected between the safety of the whole and the deviance of the individual. Justice Thomas, in his rush to ensure that Mr. Hendricks trouble the children of Kansas no more, appears to

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117. Harlan Leigh Dalton has written on the negative consequences of a system which emphasizes the “rectitude” of appeals and which encourages the questioning of decisions of the lower courts. See Harlan Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

118. On Western pseudo-scientific paranoia about masturbation as a socially dangerous activity, see, Lesley A. Hall, *Forbidden by God, Despised by Men: Masturbation, Medical Warnings, Moral Panic and Manhood in Great Britain, 1850-1950*, in FORBIDDEN HISTORY: THE STATE, SOCIETY AND THE REGULATION OF SEXUALITY IN MODERN EUROPE 293 (John C. Fout ed., 1992); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* 677 (1977).

119. On the evolution of American state court attitudes about and rationales for continuing to enforce statutes proscribing sodomy, see, Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993).

120. “It thus, cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.” *Hendricks*, 117 S.Ct. at 2080.

give states a substantial amount of leeway in defining the conditions under which the weighing of interests will tilt heavily against the liberty interest of the individual. Thus, states are not required "to adopt any particular nomenclature in drafting civil commitment statutes,"<sup>121</sup> nor need the state even track accepted medical definitions when attempting a political definition of illness.<sup>122</sup> But Justice Thomas would invite even more expansiveness than that:

We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia . . . as "mental illness[]." . . . These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes.<sup>123</sup>

The dissent, on the other hand, would limit the availability of legislative freedom where professionals disagree.<sup>124</sup> Under either version, when some quantum of some portion of the medical professions defines some condition as abnormal, *and* the condition describes conduct which cannot be controlled, *and* it threatens the safety of the public, *then* the state may confine the individual until "cured." *Hendricks* and the cases cited in that case are relatively easy. But they are easy only because we continue to be revolted, as a society, by adults who would attempt sexual conduct with children. Yet just 40 years ago most of our society exhibited the same sort of revulsion with respect to adults of the same sex who engaged in sexual activity with each other.<sup>125</sup>

Yet the fact that we as a society might be revolted by some action does not necessarily mean that it amounts to a mental disorder. On that theory, every criminal act, every violent anti-social activity punished by the criminal law, could conceivably also describe the symptoms of some mental abnormality equivalent to mental illness of some sort. Moreover, that our society ought to have the power to punish certain conduct (the limits of which I do not discuss here), does not necessarily also mean that the society ought to attempt to treat

121. *Id.* at 2081.

122. *Id.*

123. *Id.* at 2081 n.3. The ECJ has taken a similar approach. *See, e.g.,* Case 174/82, *Criminal Proceedings Against Sandoz BV*, [1983] E.C.R. 2445 (1949 Dutch law prohibiting additions of vitamins to food does not violate EU law). The Court noted:

if[n] so far as there are uncertainties at the present state of scientific research it is for the Member States, in the absence of harmonization, to decide what degree of protection of the health and life of humans they intend to assure, having regard however for the requirements of the free movement of goods within the Community.

*Id. See also*, Case 54/85, *Ministere Public v. Mirepoix*, [1986] E.C.R. 1067 (upholding ban on imported onions with pesticide residue but requiring periodic review of scientific information available).

124. "The Constitution permits a State to follow one reasonable professional view, while rejecting another . . . . The psychiatric debate, therefore, helps to inform the law by setting the bounds of what is reasonable, but it cannot here decide just how States must write their laws within those bounds." *Hendricks*, 117 S. Ct. at 2088 (Breyer, J., dissenting).

125. The sexual psychopath laws of a generation ago, several of which were the object of the cases relied on in *Hendricks*, were far more expansive in their definition of the illnesses for which commitment was warranted than the modern variants. In Nebraska, people posing a danger to society included adults found to have engaged in consensual homosexual activity. *See* Domenico Caporale & Deryl F. Hamann, *Comment: Sexual Psychopathy — A Legal Labyrinth of Medicine, Morals and Mythology*, 36 NEB. L. REV. 320, 325 (1957).

the crime as illness. This we understood fairly long ago:

There is a tendency, noticeably increasing in strength over recent years, to label homosexuality a "disease" or "illness." This may be no more than a particular manifestation of a general tendency discernable in modern society by which, as one leading sociologist puts it, "the concept of illness expands continually at the expense of moral failure."<sup>126</sup>

Perhaps *Hendricks* is evidence that we have no choice in this society. If we eliminate immorality as a basis for criminalization or social control, then an easy and permissible alternative is to convert moral failure into medical deviance. The trick, of course, is to characterize that deviance as "dangerous." Criminal activity, of course, can be evidence of inherent danger, if not directly, then indirectly.<sup>127</sup> Conduct involving minors or the incapacitated also qualify.

But with the expansive power of incapacitation Justice Thomas seems to approve, the state appears to have a tremendous power. It has the power to confine individuals under its criminal and civil laws. Moreover, it has the power to define those actions with respect to which it can then assert the power to commit an individual under the civil law. Deviance and dangerousness sufficient to warrant civil commitment are legal, not necessarily medical terms,<sup>128</sup> especially where at least some arguably qualified group of medical practitioners support the definitions used. Justice Thomas and the *Hendricks* majority, though, would seem to go further: not only does the state have substantial power with respect to those two critical aspects of incapacitation, but having defined deviance and dangerousness in the form of some identifiable condition over which the person has substantially no control, and having labeled that condition dangerous, the state will be entitled to a large degree of deference. This will be especially the case where the conduct subject to incapacitation elicits some substantial revulsion among the general population. In many cases the "result" will appear "right," but the danger of medicalizing social deviance is substantial, and the power given to the state to limit the liberty of those subject to that condition can be great, and, in retrospect, "wrong."<sup>129</sup>

Justice Kennedy may have had the right of it, though he did not grasp its

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126. COMMITTEE ON HOMOSEXUAL OFFENSE AND PROSTITUTION, THE WOLFENDEN REPORT 30 (Authorized Am. ed., Stein & Day 1963) (1957) (quoting in part Barbara Wootton, *Sickness or Sin, in THE TWENTIETH CENTURY* (1956)).

127. This is possible because it might lead to violence in its commission or in the prevention of discovery of the crime.

128. "Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Hendricks*, 117 S. Ct. at 2081.

129. The implications extend well beyond the area of civil commitment. Thus, for example, consider the power of the state to compel poor women to attend school, or live with their parents, on pain of losing their welfare benefits, or custody of their children. See, for example, MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988) (on the repeated efforts to extract penalties from women for socio-cultural deviance). Consider, alternatively, proposals permitting the state to convert certain classes of the poor into permanent "wards" of the state, and subject to their control where the evidence is strong that they are incapable of "controlling" or "changing" their socially and economically "deviant" behavior. See Neil Gilbert, *Welfare Reform: Implications and Alternatives*, 7 HASTINGS WOMEN'S L.J. 323 (1996) (discussion of a form of such a plan). Yet, there is no reason that the ideas expressed in *Hendricks* cannot have application in those situations.

full implications: "We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."<sup>130</sup> Ironically, the criticism so lavishly bestowed by the traditionalist judges on *Roe v. Wade*<sup>131</sup> and its "medically approved" notion of autonomy, comes back to haunt those very judges in this case.<sup>132</sup> It seems to me that Justice Thomas is no less guilty of "medically approved" constitutionalism in *Hendricks*, than Justice Blackmun was in *Roe*.

### III. CONCLUSION

This Term the Court did something more than articulate new directions for Due Process Clause jurisprudence. That something was to articulate, with far greater precision and transparency, an enterprise with which the Supreme Court has been engaged for a time: the determination of Constitutional cases through the application of internally crafted "general principles of Constitutional law." In *M.L.B.* and *Hendricks*, the Court applied the far more realistic yet imprecise extra-constitutional category—*legitimacy or essential fairness*—to overcome the limitations inherent in the black letter of the Due Process, Equal Protection, *Ex Post Facto* and Double Jeopardy Clauses of the federal Constitution. Fairness requires none of these categories. Indeed, as the opinions in the two cases make quite clear, fairness explodes those categories when the Court attempts to cram this general principle of Constitutional law into these black-letter categories. The Court, though, retains the language of these categories to obfuscate both the reality and application of these extra-constitutional principles. Perhaps this is done out of habit; perhaps it is a requisite of the political games by which we play at constitutionalism.<sup>133</sup>

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130. *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring).

131. 410 U.S. 113 (1973).

132. As then Judge Ginsberg tellingly explained in 1984:

Justice O'Connor, ten years after *Roe*, described the trimester approach as "on a collision course with itself." [City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2507 (1983) (O'Connor, J., dissenting)]. Advances in medical technology would continue to move *forward* the point at which regulation could be justified as protective of a woman's health, and move *backward* the point of viability, when the state could proscribe abortions unnecessary to preserve the patient's life or health. The approach, she thought . . . called upon courts to examine legislative judgments . . . as "science review boards." [Id.]

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985).

133. In describing the ways in which the European Court of Justice approached similar interpretive problem, Joseph Weiler suggested that general principles are the necessary response to problems created by the "inevitable gap conditioned *inter alia* by the nature of constitutional language (and of language in general), the passage of time between drafting and interpretation, and, perhaps, even the inherent indeterminant nature of law. It is rendered acute by social, ideological, and economic differentiation of society." Weiler, *supra* note 23, at 1103-04. He further suggests that in societies with greater social and cultural cohesion, this interpretive process will appear less visible. *See id.* at 1104 n.4. Where cultural conflict becomes more important, for instance in late twentieth century America, such processes inevitably become not only more visible, but more contentious. On the way these processes become more visible in culturally contentious societies, see, Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 5-15, 18-30 (contention and interpretation in the law of public benefits).

For a long time, commentators have been content to describe the general principles by other names, such as privacy, "substantive" due process, and others.<sup>134</sup> It is time to see the practice for what it is—the construction of new restraints on the relationship between government and its citizens which are drawn from out of the overtones of our basic law and within the limits of the hugely exploded traditional categories of constitutional interpretation.

The cases decided this term provide a road-map for the construction and use of the emerging principle of fairness. This is not to say that the work of constructing general principles of constitutional law is new. Our Court has been traveling this road for at least a generation. Consider the way in which our Court has fashioned what amounts to the general principle of respect for personal autonomy we commonly call "privacy."<sup>135</sup> Yet this enterprise created a furor among "traditionalists" who saw the enterprise as a naked power play on the part of liberal judges masquerading as legislators—our "constitutional time bomb."<sup>136</sup> What makes this so surprising is that the task of continuing the construction of these principles now appears to be the property of centrists and even the most traditionalist members of the court.

Thus, it is with a great deal of irony that I end with a quote from Robert Bork. He has seen the Supreme Court articulate those guiding principles of general law necessary to breathe life into the Constitution. He views the practice with horror; in light of the experiences of the European Court of Justice as it struggles with its own Constitution, and the two hundred year application of these principles by our Court, I view the practice as *necessary*. What troubles me is the continuing need, perhaps because of the vehemence and political importance of views such as those of Mr. Bork, that such an enterprise has had to be hidden from view.

From era to era, the values the Court writes into the Constitution change. As new values are added, the old ones are dropped. The Court's performance, in terms of favored values, displays no single political trajectory over time. Moreover, the style of the Court's theorizing varies, as does the provision of the Constitution used to provide an appearance that what is being done is related in some legitimate manner to the actual document.<sup>137</sup>

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134. Robert Bork, though inveighing bitterly against the practice of creating and applying general principles of constitutional law and then applying them by means of the obscurantist language of constitutional jurisprudence, nevertheless well describes the long tradition within the Supreme Court of crafting and applying extra-constitutional general principles of law as an aid to the interpretation and understanding of the Constitution. See BORK, *supra* note 11, at 130.

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

136. See BORK, *supra* note 11, at 95-100 (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

137. BORK, *supra* note 11, at 130 (1990). Where Mr. Bork goes wrong, as do many current so-called conservatives, is in the further assertion that this resort to extra-constitutional principles of constitutional law "means that we are increasingly governed not by law or elected representatives, but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own." *Id.* How sad to have so miserable a perception of the people we have appointed to so lofty a function. I prefer to view the enterprise of general principles as the search for what Justice Holmes understood "fundamental principles as they have been understood by the traditions of our people and our law" as the method by which "rational and fair" people can judge the legitimacy, within the parameters of that social compact we call our Constitution, of the

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natural if shifting "outcome[s] of a dominant opinion." *Lochner v. New York*, 198 U.S. 74, 76 (1905) (Holmes, J., dissenting).