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The Constitutional Right to Expert Assistance for Indigents in Civil Cases

by

DAVID MEDINE*

The ability to obtain an expert witness can be a decisive factor in civil litigation. Without the benefit of expert testimony, litigants may be unable to prove all but the most readily observable injuries and cannot make use of any sophisticated techniques for valuing losses. For example, in a suit by a landlord against an indigent tenant, an expert may be required to establish damages in a breach of warranty of habitability counterclaim. The judge may insist on a real estate expert's testimony regarding the market value of the apartment given its poor housing conditions. The thesis of this Article is that the due process clause of the Constitution requires expert assistance for indigent civil litigants in certain appropriate cases.

The cost of expert assistance is one of many financial burdens faced by indigents in civil lawsuits. In general, these burdens may be divided into two categories: access fees and equipage. Access fees are costs im-

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1. "Expert witness," as used in this Article, refers to one who is entitled to testify at trial regarding her opinion when a lay witness' opinion is inadmissible. "Expert assistance" refers to assistance to litigants provided by similarly qualified persons out of court. The Article principally will consider fees experts charge for their time and services, not the statutorily mandated witness fee that must be paid to all witnesses who are subpoenaed to testify at trial.


3. For purposes of this Article, an "indigent" is one who cannot afford to pay even court fees without depriving herself or her family of the day-to-day necessities of life. See Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 DUKE L.J. 1153, 1162 n.36. Significantly, this definition does not require that a person be "wholly destitute" in order to receive special consideration with regard to court fees. See Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339-40 (1948).

4. Michelman, supra note 3, at 1163. See also Jeffreys v. Jeffreys, 58 Misc. 2d 1045,
posed as a legal condition of participation in judicial proceedings. They include the costs of filing a lawsuit, service by a marshall or sheriff, and fees for demand of a jury trial. Failure to pay these fees can result in an indigent's inability to present her case, or in rejection of the case by the court. By contrast, equipage costs are expenses required to make an effective presentation of one's case once filed. Equipage costs can include attorney, laboratory, or expert witness fees. These expenses are owed to third parties who are not a part of the court system. Either civil plaintiffs or defendants may incur equipage expenses in asserting claims or defenses.

Many litigation access barriers for indigents have been lowered. It is logical that courts generally have considered barriers to access before moving on to equipage. There is no need for equipage if an indigent cannot even get into court. By the same token, however, access to the courts for an indigent may not be of practical significance without provision for equipage.

The Article examines strategies courts might employ to provide expert assistance to those unable to afford it. Finding these strategies inadequate, it then explores the feasibility and makes the case for a constitutional right to expert assistance for indigents in civil cases. It concludes that entitlement to expert assistance, grounded in the principles of due process, ensures that litigants are not treated arbitrarily or unfairly due to indigence.

1048, 296 N.Y.S.2d 74, 79 (N.Y. Sup. Ct. 1968) ("expenses payable by litigants to third persons other than public officers commonly labelled 'auxiliary expenses' ").

5. Michelman, supra note 3, at 1163.

6. It is even possible that such fees could be charged to civil defendants as well as plaintiffs. Id. at 1154 n.4-5. But see Griffin v. Illinois, 351 U.S. 12, 17 (1956) ("Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court.").

7. See Campbell v. Chicago & N.W. Ry., 23 Wis. 490, 490-91 (1868) (case dismissed because plaintiff unable to pay security for costs); Maguire, Poverty and Civil Litigation, 36 HARV. L. REV. 361, 362 (1923) (indigent may be "cast out of court"); Note, In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions, 53 FORDHAM L. REV. 1461, 1461 n.3 (1985) (authored by Kenneth R. Levine) ("a pauper may lose his day in court altogether if he cannot afford to meet court costs.").

8. Michelman, supra note 3, at 1163.

9. A series of United States Supreme Court cases have struck down access fees, especially for indigent criminal defendants. See, e.g., Smith v. Bennett, 365 U.S. 708, 713-14 (1961) (state may not require an indigent prisoner to pay filing fee to file habeas corpus action); Burns v. Ohio, 360 U.S. 252, 258 (1959) (indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction).

10. Michelman, supra note 3, at 1165-66 n.42.
EXPERT ASSISTANCE IN CIVIL CASES

Part I of the Article demonstrates the importance of availability of expert witnesses to the indigent civil litigant. While an expert may be useful in many cases, in some situations it is not possible to establish a claim or defense without the benefit of such assistance.

Part II of the Article examines ways that indigent civil litigants under contemporary civil procedure and court rules can obtain experts. If an indigent is able to raise the expert's fee, or if the expert agrees to defer compensation, courts might regard expert witness fees as costs at the conclusion of the litigation. Alternatively, courts often have authority to appoint their own expert witnesses. A judge could appoint an expert for an indigent who could not afford to hire her own. The Article discusses why these approaches are not adequate solutions to facilitating expert assistance for indigent civil litigants.

In light of the inadequacy of current judicial practice, Parts III and IV address whether indigent civil litigants have a constitutional right to the appointment of an expert, or the provision of funds required for the retention of an expert. The equal protection and due process clauses are examined as possible doctrinal sources for such a right. At one point it appeared that the equal protection clause might serve as the basis for such a right. However, commentators have argued that the sixth amendment requires expert witnesses in criminal cases because of: 1) the right to compulsory process of witnesses, Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 MICH. L. REV. 1326, 1337 n.79 (1986) (authored by John M. West) [hereinafter Note, Expert Services] and Note, Criminal Procedure — Defendant's Due Process Right to a Psychiatric Expert — Ake v. Oklahoma, 8 CAMPBELL L. REV. 323, 330 (1986) (authored by William D. Auman) [hereinafter Note, Criminal Procedure] (discussing People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966)); 2) the right to effective assistance of counsel, Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 U. CIN. L. REV. 574, 593-99 (1982); and, 3) the confrontation clause, Note, Expert Services, supra, at 1337 (though not yet relied upon by any cases); Note, The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 CORNELL L. REV. 632, 642-43 (1970) (authored by Craig Bowman) [hereinafter Note, Indigent's Right]. Because sixth amendment rights protect criminal defendants and not civil litigants, these rights are not considered.

It has been suggested that the first amendment provides constitutional support for an indigent's right to expert assistance in criminal cases. Note, A First Amendment Right of Access to the Courts for Indigents, 82 YALE L.J. 1055 (1973) (authored by Coleman H. Casey and Stewart G. Rosenblum). The assumption underlying this argument is that the first amendment right to petition applies not only to elected representatives of the people, but to the judiciary as well. Id. at 1060. In NAACP v. Button, 371 U.S. 415, 429 (1963), the Supreme Court stated that "litigation is not [always] a technique of resolving private differences; it [can be the] means for achieving the lawful objectives of equality of treatment by [the] government. . . . It is thus a form of political expression." The right to petition arises in this context because the judiciary has the power to make the law and to nullify legislative enactments, and is a forum for the expression of dissatisfaction. Note, supra, at 1059-60. Limitations on standing and justiciability, such as article III of the Constitution, are treated as procedural regulations analo-
for a claim that disparate treatment of indigents by the court system is unconstitutional. Part IV examines the development of equal protection
gous to limitations placed on the right of legislative petition, such as on participation in legislative hearings by private citizens. Id. at 1060 n.34.

A right to petition in cases in which expert testimony is required is ineffective for indigents who cannot afford to hire the experts. Nonindigents who can afford experts would have an unfair advantage in petitioning the judiciary for redress. The first amendment rationale for an entitlement to experts, however, does not withstand scrutiny.

Although there are, indeed, Supreme Court decisions that appear to support a first amendment right to petition the judiciary, see for example, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585-86 (1971) (right of union to assist members in filing damage suits); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 5-6 (1964) (right of union to advise members on choice of attorney); NAACP v. Button, 371 U.S. 415, 416-17 (1963) (right of NAACP to refer individuals to an attorney), most cases deal with the right of individuals to associate together for the purpose of pursuing legal claims. In one case, however, the court, in dicta, appeared to recognize a right to petition the judiciary. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The Court in that case stated that "[c]ertainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." Id. at 510. In California Motor Transport, a number of businesses filed an antitrust suit against their competitors arguing that the competitors used administrative and judicial proceedings to interfere with plaintiffs' business activities. Id. at 509. The Court held that federal antitrust laws may overcome the right to petition if the challenged litigation is a "sham" to cover anticompetitive activities. Id. at 516.

Even assuming a first amendment right to petition the judiciary, however, this right would not support the provision of expert witnesses for indigents in civil litigation. The most significant problem is that the first amendment provides only a right to access, not to assistance in taking advantage of that access. By analogy to the right of free speech, one may have the right to publish a book, but no right to government assistance with the printing expenses. Use of expert witnesses cannot be denied but each litigant must bear the expense entailed. Nothing in the first amendment's language, which is prohibitionary, nor its application, suggests that it has a positive as well as a negative effect. There is no limit to the litigation expenses the government would be required to subsidize if the first amendment were found to support a claim for expert assistance.

Another limitation on grounding the right to expert assistance in the right to petition is that the first amendment arguably would advance the rights of plaintiffs—because they are seeking to express themselves through bringing a lawsuit—but not those of defendants. A defendant may file a counterclaim, however, recasting herself into a petitioner entitled to first amendment protection. Of course, it is possible to argue that this right to petition is matched by a similar right to express oneself in response. Legal defense could be cast as a form of expression. This might raise some problems if the defendant's strategy is simply to challenge the plaintiff's ability to satisfy the burden of proof. In those instances, the defendant is forced to look to the due process clause for protection and assistance. Note, supra, at 1068 n.78.

There is some indication that the Supreme Court is unwilling to give the first amendment any significance beyond that given the due process clause in this context. In Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam), the Court stated: "[a]ppellants also claim a violation of their First Amendment right to petition for redress. Our discussion of the Due Process Clause, however, demonstrates that appellants' rights under the First Amendment have been fully satisfied." Id. at 660 n.5. In the context of refusing to strike down a $10 limitation on attorney's fees in certain veterans' claims proceedings, the Supreme Court found that the first amendment had "no independent significance" and that appellees' first amendment claims
law with regard to indigents and its ultimate merger with due process analysis.

Part IV develops an argument that due process of law is violated when an indigent cannot be "heard" effectively without benefit of an expert. The section demonstrates that Supreme Court decisions regarding the rights of indigents support the conclusion that failure to provide indigent civil litigants with expert assistance violates due process. The decision whether to appoint an expert in individual cases or classes of cases should be based on a balancing of the individual and governmental interests involved and the efficacy of the expert's involvement. Part IV also addresses some practical questions regarding implementation of a system for appointing experts for indigent civil litigants.

I. Indigent Civil Litigants' Need for Expert Assistance

[A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him.

— Judge Cardozo

Imagine an indigent couple are living in an urban apartment. They fall behind in rent and their landlord brings an eviction action. They find a legal services lawyer to represent them in landlord-tenant court. The lawyer advises them that, because their apartment is in terrible condition, with paint peeling, inadequate heat in the winter, and leaky faucets, they can counterclaim for breach of the implied warranty of habitability.

They appear in landlord-tenant court and request a jury trial. There is a fee for jury trials but the judge quickly grants their request to proceed in forma pauperis based on a local statute waiving the jury trial fee. At trial, the judge rules that in order to recover damages for breach of warranty of habitability the tenants must present expert testimony as to the market value of their apartment by someone familiar with the local housing market. That figure will be subtracted from their rent in order to determine the amount actually owed the landlord. Unfortunately, the tenants are unable to afford the fees of an expert witness. As a result, the tenants are unable to present their case fully. In fact, the judge grants a

were "inseparable" from their due process claims. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985).

One commentator has argued that there should be a "right of judicial access" woven from strands of doctrine based upon procedural due process, equal protection, and the first amendment rights of speech and petition, supported by the ninth amendment. See L. Tribe, AMERICAN CONSTITUTIONAL LAW, §§ 10-18, at 759 (2d ed. 1988).

directed verdict against them on their counterclaim. The landlord is awarded a judgment for full back rent despite the substandard conditions of the apartment.

* * * * *

Variations on this scenario can occur in a wide variety of cases. Without expert assistance, access to the courts for indigents may indeed be a hollow right. At the extreme, there are instances in which the inability to obtain an expert itself is fatal to the case. Sometimes, an expert witness is critical to rebut the testimony of an adversary’s expert, to assist in preparing cross examination of the adversary’s expert, or to establish the indigent’s claim in the most forceful way.\textsuperscript{14}

Courts have required expert testimony on particular issues in some civil cases. For instance, courts have required expert testimony on the issue of defectiveness in a number of product liability actions.\textsuperscript{15} One court held that “expert testimony is required because of the complex and technical nature of the commodity. The fact of an injury . . . does not establish the presence of a defect.”\textsuperscript{16} Expert testimony thus may be essential to establish an element of the plaintiff’s prima facie case. If expert testimony is required to prove an element of plaintiff’s prima facie case, the failure to produce expert testimony at trial may lead to a directed verdict against the plaintiff.\textsuperscript{17}

Courts have required expert testimony in medical malpractice actions in order for the plaintiff to establish the appropriate standard of care: “Only physicians who practice their profession at a particular place could have any knowledge of the method of treatment customarily used

\textsuperscript{14} Of course, there are also instances in which an expert witness would be of marginal or no benefit.


\textsuperscript{16} Comment, supra note 15, at 211 (quoting Sears, Roebuck & Co. v. Haven Hills Farm, 395 So. 2d 991, 995 (Ala. 1981)).

\textsuperscript{17} Oleksiw v. Weidener, 8 Ohio App. 2d 199, 202, 195 N.E.2d 813, 815 (1964), rev’d on other grounds, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965); Comment, supra note 15, at 211-12.
Expert assistance in civil cases by the other members of the profession practicing there; the subject, therefore, calls for expert opinion only."

Expert testimony also has been required in negligence suits, legal malpractice cases, and professional malpractice cases generally. In some cases, expert testimony also may be required to prove damages.

The requirement of expert testimony is not necessarily imposed by statute or formal court rule. For instance, in the District of Columbia, for a period of time a number of judges required expert testimony in landlord-tenant lawsuits similar to the above fact pattern. Illinois courts also have required expert testimony to establish the fair rental value of an apartment or house given its defective condition.

18. Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 33 Cal. 2d 89, 95, 199 P.2d 302, 307 (1948) (quoting Arais v. Kalensnikoff, 10 Cal. 2d 428, 433, 74 P.2d 1043, 1046 (1937) (emphasis added)). See also Hutchinson v. United States, 838 F.2d 390, 393 (9th Cir. 1988) (expert medical testimony required to defeat motion for summary judgment); Schmidt v. St. Joseph's Hosp., 105 N.M. 681, 684, 736 P.2d 135, 138 (1987) (In a malpractice action, expert testimony is generally required.); Note, Compelling Expert Testimony: A Proposed Statutory Reform, 30 HASTINGS L.J. 209, 216 n.59 (1978) (authored by Richard R. Patch) (expert testimony generally required to support a claim of negligence in malpractice actions). Expert testimony also may be required to establish proximate cause. See Sitts v. United States, 811 F.2d 736, 740 (2d Cir. 1987) (Expert medical testimony is required even in a case tried by the court and when negligence is within the layperson's realm of knowledge. Such testimony may be required to prove that negligence was the proximate cause of the injury.). See also C. KRAMER, MEDICAL MALPRACTICE § 29.01[2] (1988) ("the rule is that expert evidence is ordinarily necessary to support the conclusion of causation").

New York has imposed a requirement that before filing a medical, dental, or podiatric malpractice action, the attorney consult with an expert physician, dentist, or podiatrist, respectively, to determine whether there is a reasonable basis for commencing the suit. N.Y. Civ. PRAC. L. & R. 3012-a(a) (McKinney 1988). The attorney only need make three good faith attempts at such consultation. Id. at 3012-a(a)(3). The statute does not indicate, however, whether an attorney seeking a free consultation on behalf of an indigent litigant is proceeding in good faith.

19. Colmenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1109 (1st Cir. 1986) (to prove negligence was due to operator negligence).


21. Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 911 (7th Cir. 1986) ("Expert testimony is required as a matter of law in most cases of malpractice, i.e., of professional negligence."). See also Blockhead, Inc. v. Plastic Forming Co., 402 F. Supp. 1017, 1027 (D. Conn. 1975) (expert testimony may be required to prove breach of warranty).


24. Id. at 184. See Department of Pub. Works & Bldgs. v. Blackberry Union Cemetery, 32 Ill. App. 3d 62, 65, 335 N.E.2d 577, 580 (1975); Fusco, Collins & Birnbaum, Damages for
Without some form of assistance in these cases, an indigent is unable to assert legitimate claims or defenses solely because of her inability to hire an expert witness. Often an indigent cannot rely on a contingency-fee lawyer to take her case, especially if the representation requires significant expenditures for expert witnesses. There are, of course, less extreme examples of the importance of expert testimony. During a civil trial, there are numerous instances in which such testimony could be critical: accounting in tax cases; analysis of glass, teeth and bite marks, and medical opinions in tort actions; handwriting, typewriter, and ink analysis in contract and will cases; genetic testing for paternity; psychiatric and psychological reports in family disputes; and technology-based evidence such as neutron activation analysis, atomic absorption spectrometry, trace metal detection, and gas chromatography. The list
seems endless.\textsuperscript{32} The absence of such testimony could be dispositive in many cases.\textsuperscript{33}

Even if an indigent does not wish to offer her own expert testimony, the other side may. In order to rebut such testimony effectively, the indigent may be required to have her own expert. With the proper assistance even seemingly neutral results from commercial laboratories offered by an adversary may be subject to challenge. Studies have shown that federal, state, local, and private laboratories can have significant error rates\textsuperscript{34} that are relevant if, for instance, an indigent wants to challenge a dismissal from school or employment after a positive drug or AIDS test.

In a highly specialized area, counsel for an indigent litigant, and more likely a pro se indigent litigant, may have no idea where to look for evidence or how to deal with it when it is found. Expert witnesses can play a critical part in the preparation of a case. They can assist the indigent's counsel in planning the presentation of the case, and in gathering and organizing the available evidence.\textsuperscript{35}

\textsuperscript{32} See, e.g., Cagle v. Cox, 87 F.R.D. 467, 472 (E.D. Va. 1980) (testimony by corrections experts considered indispensable to plaintiffs and extremely helpful to court in evaluating plaintiffs' claims); Wade v. Mississippi Coop. Extension Serv., 64 F.R.D. 102, 105 (N.D. Miss. 1974) (lay testimony can be inappropriate; technical advice would be indispensable to plaintiff challenging installation of a new municipal sewer system); Note, \textit{The Contingent Compensation of Expert Witnesses in Civil Litigation}, 52 IND. L.J. 671, 686-87 (1977) (authored by Reed E. Schaper) ("The use of experts in litigation has become almost a fixture in many areas—antitrust, condemnation, desegregation, malfunction and defects in design in products liability, malpractice in an increasing number of professions, obscenity control, patent and copyright, probate—the list continues.").


\textsuperscript{34} \textbf{SCIENTIFIC AND EXPERT EVIDENCE} 5 (E. Imwinkelried ed. 1981). \textit{See also} Decker, \textit{supra} note 11, at 579 ("the questionable level of competence . . . suggests that a defendant's interest in a second expert opinion is a necessity, not a luxury").

II. Expert Assistance for Indigents Not Based on a Constitutional Right

[Congress has not] extended any roving authority to the Judiciary to allow [expert witness] fees as costs or otherwise whenever the courts might deem them warranted.

— Chief Justice Rehnquist

Before considering any constitutional entitlement that indigent civil litigants may have to expert assistance, it is important to consider whether a constitutional approach is necessary. If expert assistance can be obtained through statute, rule, judicial order, or by other means, it is unnecessary to find constitutional support.

The limited funding of the Legal Services Corporation has meant that many indigent litigants go unrepresented in civil cases. The lucky few who can obtain legal services counsel still face the problem of funding for expert witnesses. While Legal Services Corporation regulations do not prohibit their offices from paying for expert witnesses explicitly, they do require some consideration of the costs of handling certain types of cases. Given existing budget constraints such offices likely will choose to expend funds on attorneys and other staff to provide help to the greatest number of eligible clients.

Given the apparent inability of Legal Services and similar organizations to provide expert assistance, this part of the Article examines the assistance to indigent litigants that can be provided by courts, either by assessing costs at the conclusion of the lawsuit or by appointing an expert as the court's witness. As will appear, neither of these provide effective expert assistance in the wide range of civil cases in which indigent litigants participate.

A. Shifting the Cost of Expert Witnesses to the Losing Party

There are a number of methods by which the court can require the losing party in a civil case to pay an adversary's expert witness fees. For example, the court can tax the prevailing party's expert witness fees as costs at the conclusion of a lawsuit, as other court costs are taxed.


37. See 45 C.F.R. § 1620.2(b)(9) (1988) (factors to consider in establishing office priorities include "[w]ether legal efforts will result in efficient and economic delivery of legal services") (emphasis added); 45 C.F.R. § 1620.3 (1988) (allocation of resources may take into account "the considerably higher costs of providing [certain] services").

38. To tax costs is to assess against the losing party those expenses of the lawsuit that the prevailing party is legally entitled to recover.

1987 decision by the United States Supreme Court, however, will impede, if not eliminate, such cost shifting in the future.

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, the Supreme Court ruled that federal courts are constrained by statute to award only thirty dollars per day in witness fees as costs for each witness, regardless of whether the witness is a lay or expert witness. Two federal statutes and a rule of civil procedure were read together to reach, in the Court's view, the only rational construction of the three. Federal Rule of Civil Procedure 54(d) provides that a court may award costs at the conclusion of a case. The term "costs" in Rule 54(d) is defined in 28 U.S.C. section 1920(3) as including witness expenses. The problem is that 28 U.S.C. section 1821 sets a limit of thirty dollars per day on the rate of compensation for witnesses, an amount not intended to cover the fees of an expert witness. This limit on witness fees was established in response to the concern that losing litigants were being saddled with huge costs. Thus, following *Crawford Fitting*, the full cost of hiring expert witnesses for indigent civil litigants cannot be shifted to the adversary. This re-

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result is consistent with the general "American Rule" that each party bears its own litigation expenses.  

Indigent litigants in state court civil proceedings often do not fare better than they do in federal court. Many states do not allow expert witness fees to be taxed as costs, regardless of whether an indigent is a party. Thus, indigent litigants must look to authority other than court rules if expert witness fees are to be taxed.

Expert witness fees also may be imposed upon an adversary if the federal statute on which the suit is based contains a fee-shifting provision. Many federal statutes provide for such shifting of expert witness fees. For example, expert witness fees may be taxed in Consumer Prod-

expert witness fees as costs in civil suits after Crawford Fitting, even when expert required to establish claim), cert. denied, 108 S. Ct. 1298 (1988).

Justice Blackmun, in a concurring opinion in Crawford Fitting, 482 U.S. at 444, as well as Justice Marshall in dissent, id. at 447 n.1, would have reserved the question of whether expert witness fees in excess of $30 per day could be awarded in civil rights actions pursuant to 42 U.S.C. § 1988. Nothing in the majority's opinion, however, suggests that § 1988 suits should be treated any differently and several courts have taken the position that Crawford Fitting is controlling. See Ecos, Inc. v. Brinegar, 671 F. Supp. 381, 404 n.12 (M.D.N.C. 1987) (Crawford Fitting found persuasive in a § 1988 case); Bee v. Greaves, 669 F. Supp. 372 (D. Utah 1987) (same); see also Harris v. Marsh, 679 F. Supp. 1204, 1370 (E.D.N.C. 1987) (law of the circuit prior to Crawford Fitting).


47. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Chicago College of Osteopathic Medicine v. George A. Fuller Co., 801 F.2d 908, 912 (7th Cir. 1986) (Under the "American Rule," "the winning party must bear the expense of his side of the lawsuit.").

48. See, e.g., James P. Driscoll, Inc. v. Gould, 521 So. 2d 301, 302 (Fla. Dist. Ct. App. 1988) (charges made by expert witnesses for reports submitted to an attorney, for conferences with an attorney, and for waiting at the courthouse to advise the attorney during the course of the trial are not taxable costs); Naiditch v. Shaf Home Builders, Inc., 160 Ill. App. 3d 245, 268, 512 N.E.2d 1027, 1040 (1987) (fees of a structural engineer incurred in trial preparation not recoverable by successful litigants), appeal dismissed, 117 Ill. 2d 545, 517 N.E.2d 1088 (1987); Mist v. Westin Hotels, Inc., 738 P.2d 85, 92-93 (Haw. 1987) (expert witness fees are not taxable as costs, absent a statute specifically allowing such an expense); Nichols v. Bossert, 727 S.W.2d 211, 213-14 (Mo. Ct. App. 1987) (in the absence of a statute or a contractual agreement, a party is not obligated to pay the other party's expert witness fees); Estep v. Miller, 731 S.W.2d 677, 680 (Tex. Ct. App. 1987) (in the absence of statutory authority or exceptional circumstances, experts' fees are not taxable as costs). See Comment, supra note 15, at 224 n.99.

49. See International Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1179 n.7 (5th Cir. 1986) (list of 28 statutes which provide for taxing expert witness fees as costs in civil actions), aff'd sub nom, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987); Note,
uct Safety Act actions for injuries that result from violation of consumer product safety rules50 and under the Equal Access to Justice Act in civil actions, other than tort cases, brought against the United States.51 These fee provisions are designed either to encourage suits that enforce a federal policy, if awarded to plaintiffs, or to discourage frivolous or vexatious litigation, if awarded to defendants.52 Litigants in antitrust and civil rights actions often seek recovery of expert witness fees, despite the fact that the underlying statutes contain no fee-shifting provisions. These requests rarely succeed,53 though they had limited success in antitrust cases prior to Crawford Fitting, because expert testimony was found to be "necessary" in proving damages.54

One significant consequence of financing experts through the taxation of costs is that costs may be taxed against the indigent civil litigant at the conclusion of the case.55 Taxation thus may be a high stakes economic gamble for the indigent litigant. If she prevails, her expert witness costs are paid by her adversary. Yet, if she loses, not only is she responsible for her own expert witness fees, she may be required to pay her adversary's expert witness fees as well. This could act as a strong deterrent to asserting legitimate, although not certain, rights in court.56

Reliance on taxation of expert witness fees also fails to address a practical problem—many indigents cannot afford to pay for expert testimony in advance of trial. The possibility of recovery of such expenses at

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53. Id. at 1219.
56. While in some instances such costs are uncollectible against indigent litigants, it remains possible that indigents who are working will have their already low wages garnished or will receive negative credit reports based upon the unpaid costs.
the conclusion of the case would not overcome the economic hurdle of retaining the expert in the first instance.

For these reasons, it appears that reliance on taxation of costs generally would not serve the interests of indigents.

### B. A Court Can Appoint an Expert as its Own Witness

In most cases advance payment of expert witnesses is necessary. An expert is unlikely to perform work for an indigent client without being assured of payment. Even if the expert were willing to accept a promise of future payment, this effectively would constitute a contingency fee.\(^{57}\)

The indigent would pay the expert only if she prevailed. A contingency fee for an expert raises serious problems due to the interest that the expert would have in her client prevailing.\(^{58}\) Since the expert is paid only if the client is successful, the expert might not testify openly or truthfully if it would harm the client's case. In any event, there would be a public perception of a conflict of interest.\(^{59}\)

One solution for indigent civil litigants is to request court appointment of expert witnesses.\(^{60}\) A federal district court judge has the author-

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57. In theory, the indigent litigant could make an unconditional though practically unenforceable promise to pay the expert witness. In practice, if the expert's fee is a significant amount, it is clear that the only likelihood of payment is upon the contingency that the indigent prevails.

58. Person v. Association of the Bar of New York, 554 F.2d 534, 538-39 (2d Cir. 1977) (state bar rule proscribing payment by attorneys of contingent witness fees is constitutional), cert. denied, 434 U.S. 924 (1977); Note, supra note 32, at 674 (such arrangements heighten the suspicion that complicity exists). But see Tagatz v. Marquette Univ., 861 F.2d 1040, 1042 (7th Cir. 1988) (in dicta: rule prohibiting retaining expert witnesses on contingency fee is one of professional conduct, not admissibility; plaintiff may testify as own expert witness).

59. The Comment to Rule 3.4 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT (1984) states that the "common law rule in most jurisdictions is that it is improper to pay... an expert witness a contingent fee."

60. Another possibility is for the indigent civil litigant to subpoena an expert to testify as any other witness would be subpoenaed. In a 1946 Alabama Supreme Court case, Hartley v. Alabama Nat'l Bank of Montgomery, 247 Ala. 651, 25 So. 2d 680, 681-82 (1946), the court, in dicta, stated that an expert witness could be subpoenaed and, so long as special preparation was not required or agreed upon, the witness was entitled only to a regular witness fee. See also Kaufman v. Edelstein, 539 F.2d 811, 820 (2d Cir. 1976) (there is no constitutional or statutory privilege against the compulsion of expert testimony); Dixon v. People, 168 Ill. 179, 48 N.E. 108, 196-97 (1897) (a physician, subpoenaed as an expert witness, held in contempt for refusing to testify on grounds that he had not been paid special compensation).

Apparently, however, no jurisdiction has been willing to compel an expert to testify when preparation or examination is required in order to form an opinion. See, e.g., Ondis v. Pion, 497 A.2d 13, 18 (R.I. 1985) (court refused to compel physician to give expert testimony after he had been subpoenaed and testified on patient's treatment); Mason v. Robinson, 340 N.W.2d 236, 242-43 (Iowa 1983) (party must demonstrate some compelling necessity for an expert's testimony and expert cannot be required to engage in any out of court inquiry); Note, supra note 18, at 218-19 (proposal for statute that would allow expert testimony to be compelled
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ity to appoint a neutral expert witness based on Rule 706 of the Federal Rules of Evidence as well as the "inherent power" of federal courts to take actions, including the appointment of experts, that are essential to their judicial authority.

In one case the court concluded that:

While § 1915 does not authorize the district court's order [that the government pay witness fees], we conclude upon careful analysis that Federal Rules of Evidence 614(a) and 706(b), read in light of 28 with provision for reasonable compensation). Moreover, language in Fed. R. Evid. 706 and many similar state rules that provide for court appointment of experts forbids the appointment of nonconsensual experts. Federal Rule 706(a) provides that an "expert witness shall not be appointed by the court unless he consents to act."

61. Fed. R. Evid. 706 provides:
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.
(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such times as the court directs, and thereafter charged in like manner as other costs.
(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.
(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

62. T. Willging, COURT-APPOINTED EXPERTS I (Federal Judicial Center 1986). See also United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976) (the "inherent power" to appoint an expert is "clear"), cert. denied, 430 U.S. 910 (1977); Fed. R. Evid. 706 advisory committee's note (the "inherent power" is "virtually unquestioned"). If an expert is needed by an indigent litigant for out-of-court assistance only, it may be necessary to rely on the court's inherent power to appoint an expert because it has been held that Rule 706 does not provide authority for the appointment of experts for purposes other than testifying. See Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (authority to appoint-expert to advise or consult with a special master was based on court's "inherent" power or Fed. R. Civ. P. 53 (appointment of masters)).

63. Fed. R. Evid. 614(a) provides that the court "may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." If the court does call a witness as its own, either lay or expert, no witness fees or travel expenses need be tendered at the time the subpoena is served. Fed. R. Civ. P. 45(c) ("[w]hen the subpoena is issued on behalf of the United States or an office or agency thereof,
U.S.C. §§ 1920 (1988) provides in relevant part that "[a] judge or clerk of any court of the United States may tax as costs the following . . . (3) Fees and disbursements for printing and witnesses; . . . (6) Compensation of court appointed experts . . . ."

65. 28 U.S.C. § 2412 (1988) provides, in relevant part:
   (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States . . . (d)(2) For the purposes of this subsection—(A) "fees and other expenses" includes the reasonable expenses of expert witnesses . . . .

66. FED. R. CIV. P. 54(d) states:
   Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

67. Means, 741 F.2d at 1057 (emphasis added).

68. See FED. R. EVID. 706 advisory committee's note ("[The judge] may require the parties to contribute proportionate shares of the fee in advance. He may think it wise to excise an impeccuous party from paying his proportionate share."); see also Means, 741 F.2d at 1058 ("plain language of Rule 706(b) thus permits a district court to order one party or both to advance fees and expenses for experts that it appoints"). T. Willging, supra note 62, at 15 (court-appointed experts should be paid in advance to avoid the possibility of bias based on the superior ability of one party to pay their fee at the end of the case).


70. Means, 741 F.2d at 1059.

71. 28 U.S.C. § 1915(e) states that the "United States shall not be liable for any of the costs . . . incurred." See also Note, supra note 7, at 1477 ("Section 1915(e) may be interpreted to mean that the court must ultimately tax to the parties any expenses it advances."). Since § 1920(6) covers expenses of court-appointed experts, their fees may still be taxed as costs, as Crawford Fitting applies only to noncourt-appointed experts. Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 442 (1987). Fees for expert witnesses that have been appointed by
costs of any court-appointed witnesses against either or both parties.\textsuperscript{72}
Just as with advanced expert fees, the court may, but is not required, to take into account the fact that one of the parties is indigent in deciding how costs should be taxed.\textsuperscript{73}

Court appointment of experts is not the solution to the inability of indigent civil litigants to afford expert witnesses. First, in addition to testifying in court, experts serve a valuable function in assisting counsel or pro se litigants in case planning and preparation.\textsuperscript{74} The neutrality of court-appointed experts precludes them from providing that service. Second, courts have been extremely reluctant to appoint expert witnesses.\textsuperscript{75} Thus, as a practical matter, indigent civil litigants cannot rely on courts as a source of assistance in obtaining the services of expert witnesses. Third, while judges may take indigence into account in taxing the costs of expert witnesses, they are not required to do so. The potential financial responsibility for expert witness fees, in the event the indigent litigant does not prevail, may deter requests for assistance. Finally, it has been suggested that judicial appointment of expert witnesses for indigents pursuant to Rule 706 may violate the ethical constraint on hir-


\textsuperscript{73}Note, supra note 7, at 1475 & n.68. See United States Marshals Serv. v. Means, 741 F.2d 1053, 1058-59 (8th Cir. 1984) (en banc), cert. denied, 109 S. Ct. 3227 (1989); Maldonado v. Parasole, 66 F.R.D. 388, 390 (E.D.N.Y. 1975). See FED. R. EVID. 706 advisory committee's note ("No doubt in the usual case the judge will provide that the expense of the experts shall be taxed as costs and paid by the loser.").

\textsuperscript{74}See section IV(F)(5), infra, on the value of partisan experts.

ing expert witnesses on a contingency fee. If the indigent prevails, the fees will be taxed against her adversary. If the indigent loses, however, she will not have funds to pay the expert, thus leaving the expert unpaid. This effectively would make payment of the expert contingent on one side prevailing, placing pressure on the expert to testify in a way that is favorable to the indigent litigant.

A number of states have rules of evidence which are similar to Federal Rule of Evidence 706. Those rules are subject to the same deficiencies as the federal rule with regard to providing expert assistance to indigent litigants in civil cases.

As a result, court appointment of expert witnesses does not provide adequate assistance to indigent civil litigants.

III. Wealth Discrimination and Equal Protection

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

— Justice Black

The Supreme Court's treatment of wealth discrimination in the context of access to the courts and equipage has evolved from an equal

78. This assumes that the court has not required advance payment of the expert's fee. Fed R. Evid. 706 gives the judge discretion with regard to the timing of payment to the expert: "[T]he compensation [of the court-appointed expert] shall be paid by the parties in such proportion and at such time as the court directs . . . ." According to the commentary to the Model Code of Evidence Rule 410 (1947), which was the basis of the current Fed. R. Evid. 706, "[n]o doubt in the usual case the judge will provide that the expense of the experts shall be taxed as costs and paid by the loser. He may require the parties to contribute proportionate shares of the fee in advance" (emphasis added). See Means, 741 F.2d at 1058.
79. See, e.g., Ark. R. Evid. 706 (Court may appoint any expert witness of its own selection. Compensation is payable from funds which may be provided by law; otherwise the compensation shall be paid by the parties in such proportion as the court sees fit.); Cal. Evid. Code §§ 730-733 (West Supp. 1988) (The court on its own motion may appoint an expert to investigate and to testify at trial. Compensation for expert testimony in certain criminal, civil and juvenile actions are charged to the county where the action is pending. Otherwise, compensation shall be apportioned between the parties as the court decrees.); Maine R. Evid. 706(a) (The court may appoint expert witnesses. The expert witness shall be informed of his duties by the court and shall advise the parties of his findings and shall be available for cross-examination at trial.).
81. Expenses of litigation are required of both rich and poor. Thus, technically there is no overt discrimination against those who are not wealthy. The concern is with the disproportionate impact of the requirement of payment on the poor.

Disproportionate effect, standing alone, however, has not been enough to trigger heightened equal protection review, even in the context of race. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-66 (1977) (disproportionate impact is not
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proficiency analysis under the Warren Court, to a due process view under the Burger and Rehnquist Courts. Justice Black's statement above, made in the context of holding that a state must provide an indigent criminal defendant with a free trial transcript for use on appeal, demonstrates the Court's initial, expansive view of wealth discrimination. In a plurality opinion written by Justice Black and joined by Chief Justice Warren and Justices Douglas and Clark, grounded in both due process and equal protection, the Court concluded that discrimination based upon poverty is no more permissible than discrimination based on "religion, race, or color." 8

irrelevant, but is not the only test of racial discrimination, and, standing alone, does not qualify the impact for strictest scrutiny.); Washington v. Davis, 426 U.S. 229, 238-48 (1976) (same).

In fact, these cases do not forbid discrimination by the government; they require it by giving preferential treatment to indigents. This is what concerned Justice Harlan. Nonetheless, the shorthand of "wealth discrimination" will be used to describe this disparate impact.

82. *Griffin*, 351 U.S. at 16. Although a transcript was not a prerequisite to perfecting an appeal, the state conceded that in order to receive "adequate appellate review" a transcript was necessary. *Id.* See Long v. District Court, 385 U.S. 192, 194 (1966) (free transcript must be provided for appeal of a civil habeas corpus hearing, even though alternative means is available because a "liberty" interest was involved in post conviction proceedings). But see Britt v. North Carolina, 404 U.S. 226, 230 (1971) (adequate alternative to transcript was available).

83. *Griffin*, 351 U.S. at 17 ("[O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.").

The Supreme Court has often not made it clear whether due process or equal protection analysis should apply in determining the rights of indigent litigants. In the 1974 case of Ross v. Moffitt, 417 U.S. 600, 608-09 (1974), the Court acknowledged that it had never stated explicitly in *Griffin* whether its decision rested on the equal protection clause or the due process clause of the fourteenth amendment. See also G. GUNThER, CONSTITUTIONAL LAW 823-24 (11th ed. 1985) ("The Court repeatedly has divided on the issue of whether procedural due process or equal protection analysis provides the appropriate framework for analysis."); Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. REV. 703, 703 n.3 (1986) (authored by Mark P. Goodman) (due process affords an indigent person the right to select his psychiatrist); *The Supreme Court, 1984 Term — Leading Cases*, 99 HARV. L. REV. 120, 130 n.1 (1985) (cases after *Griffin* have not specified which clause of the fourteenth amendment they are relying on).


The Court's language "verged on categorizing the poor as a suspect class for the purposes of equal protection jurisprudence." Leading Cases, supra note 83, at 138. See infra, note 97 for a discussion of fourteenth amendment classifications.

An alternative to treating wealth as a suspect classification would be to view access to the courts as a fundamental right, thus invoking strict scrutiny in reviewing state-imposed impediments to the right. Comment, Ake v. Oklahoma: A Question of Experts, 12 OKLA. CITY U.L.
The majority gave no indication that it had considered the consequences of striking down wealth discrimination in the context of an indigent's participation in the judicial process. However, in a separate dissent in *Griffin*, Justice Harlan, who recognized where this approach might lead, began a campaign to shift the basis of the analysis from equal protection to solely due process. Harlan warned that if courts began to lift economic burdens imposed by the state on the exercise of privileges, indigents would be able to challenge the payment of tuition at state universities or the cost of transcripts in civil appeals.\(^{85}\) He proposed instead a due process, "fundamental fairness" approach that would permit the Court to strike down unreasonable discrimination without having to abolish all wealth discrimination, as might be required by an equal protection analysis.\(^{86}\)

In a subsequent case, Harlan distinguished between laws directed at indigents and those having an adverse affect on them:

The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.\(^{87}\)

As examples of permissible laws, Harlan noted a state's constitutional authority to impose a uniform sales tax or a standard fine for criminal violations.\(^{88}\) In Harlan's view, the "State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford."\(^{89}\) The proper approach, according to Harlan, is a consideration of whether a state's

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\(^{85}\) *Griffin*, 351 U.S. at 35.

\(^{86}\) See *id.* at 38.


\(^{88}\) *Id.* at 361-62.

\(^{89}\) *Id.* at 362.
actions violate fundamental "fairness" using a procedural due process analysis.90

The Burger Court's decision in Ross v. Moffitt,91 a case concerning indigent criminal defendants' right to counsel on appeal, eradicated any significant promise for using the equal protection clause as a basis for expanding the ability of litigants to present their cases without regard to their financial condition. Justice Rehnquist, in his majority opinion, refused to extend the approach or reasoning of Douglas v. California,92 in which the Warren Court held unconstitutional California's procedure of appointing counsel for indigent criminal appellants only after a determination by the appellate court of the efficacy of the appointment. The Court held that states are not required to provide counsel for indigent criminal defendants petitioning for discretionary state appellate or United States Supreme Court review.93 Rejecting the expansive equal protection analysis of Griffin and Douglas, the Court held that the duty of the state "is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . . but only to assure the indigent defendant an adequate opportunity to present his claims fairly."94 In this fashion, the Court, consistent with Justice Harlan's suggestions in Griffin and Douglas, abandoned its reliance upon equal protection analysis, which allowed almost no wealth discrimination, and embraced the more flexible fundamental fairness test of due process.

In Bearden v. Georgia,95 Justice O'Connor offered a somewhat different rationale for not prohibiting discrimination based upon indigence. The question in Bearden was the effect of a criminal defendant's failure to pay a fine and make restitution while on probation. According to Justice O'Connor:

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

90. Id. at 363.
93. The Supreme Court subsequently has held that if there is no right to counsel for discretionary appeals, a fortiori, there is no right to counsel in postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 556-59 (1987).
94. Ross, 417 U.S at 616.
accomplished[.]" The more appropriate question is whether consideration of a defendant’s financial background in setting or resetting a sentence is so arbitrary or unfair as to be a denial of due process.96

Thus, according to Justice O’Connor’s analysis, an indigent alleging discrimination is not entitled to strict or even heightened scrutiny of the alleged mistreatment by the Court.97

The Supreme Court’s due process analysis has meant that it need not focus on the plight of indigents qua indigents. So long as fundamental fairness is not violated, any discrepancy between the rights of indigents and those of the rest of society are not constitutionally suspect. In the context of providing assistance to indigents, rights found under the equal protection clause are no broader than those found under due pro-

96. *Id.* at 666 n.8 (emphasis added) (footnote omitted). *See also* G. GUNTHER, supra note 83, at 829 n.3. Responding to an argument that *Griffin* and *Douglas* were based solely on the equal protection clause, the Supreme Court in *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (quoting *Ross*, 417 U.S. at 609), noted that the due process and equal protection clause each trigger a distinct inquiry: “ ‘Due Process’ emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. ‘Equal Protection’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.” The Court concluded that both clauses supported the *Griffin* and *Douglas* decisions.

97. The Supreme Court continues to apply varying degrees of scrutiny to state classifications challenged under the equal protection clause. “Strict scrutiny” is reserved for classifications affecting a “fundamental right” or those which discriminate against a “suspect class.” *Kadrmas v. Dickinson Pub. Schools*, 108 S. Ct. 2481 (1988). Other classifications need only be “rationally related to a legitimate governmental purpose” to survive an equal protection attack. *Id.* *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). “Heightened scrutiny,” more demanding than the rational relation test though less demanding than strict scrutiny, has been applied in cases involving discrimination based on gender or illegitimacy, as well as children of illegal aliens. *Plyler v. Doe*, 457 U.S. 202, 217-26 (1982) (barring a compelling governmental interest, it is a denial of equal protection to refuse free public education for children of illegal aliens). *Cf.* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 443-44 (1985) (purportedly applying rational basis test to classification based on mental retardation, but arguably employing a more searching inquiry in addition to the classification).

The Court has consistently held that statutes having a disparate effect on rich and poor do not qualify for strict scrutiny. *See, e.g.*, *Kadrmas*, 108 S. Ct. at 2487 (applicable standard is rational justification); *Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (same); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (same).

In *Kadrmas*, the Rehnquist Court held that a state could charge indigents a fee for transporting their children to public school. The facts of the case, however, made the conclusion easier to reach than it might have been had the parents in the case not employed alternative methods of transportation for their children, in fact, at greater expense than paying the state fee. *Kadrmas*, 108 S. Ct. at 2485 (over $1000 versus $97 for the bus). A more challenging factual setting would have been presented if the children had been unable to attend school due to the fee. That would present a closer analogy to the difficulty faced by indigent litigants in presenting their cases without expert testimony.
cess. As a result, "indigent defendants . . . are guaranteed only 'adequate,' not equal, access to the judicial system." Thus, due process has allowed the Supreme Court to expand the rights of indigents without relying on an equal protection basis for doing so.

IV. Indigents' Due Process Right to Equipage

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

— Justice Marshall

The Supreme Court appears to have stymied development of a right to expert assistance based upon equal protection principles. The Court's refusal to treat wealth as a suspect class or access to the courts as a fundamental right means that a constitutional right to expert assistance can be recognized, if at all, only if it is essential to a "fundamentally fair" litigation process.

This Article argues that in civil cases when expert testimony or consultation is critical to a successful outcome, the fundamental fairness query of due process analysis requires that indigents be given the opportunity to obtain expert assistance. To date, the Supreme Court has not confronted the question of whether in civil litigation between private parties courts must, under certain circumstances, provide expert witness assistance to an indigent party. A number of Supreme Court decisions applying the due process clause to related questions of access and equipage costs for indigents, however, provide some guidance.

Each of the Supreme Court decisions involved a number of variables, such as whether: (1) the case was civil, criminal, or more properly considered "quasi-criminal"; (2) the government was, in fact, or in effect, a party; (3) the request was for access or equipage; and, (4) the expertise requested was for assistance of counsel. When considered in terms of these variables, a due process doctrine emerges that supports the right of indigent civil litigants to expert assistance. The variables most helpful in analyzing the Supreme Court's opinions are the distinction between access and equipage and whether counsel is being sought.


The Supreme Court has been very restrictive in providing indigents access to the courts in civil cases.\(^{101}\) Beginning in the criminal context, however, the Court has found a due process right to equipage under some circumstances. While the few civil or quasi-criminal equipage cases decided by the Court have tended to involve either a fundamental right, or the state as a party, these cases provide an analytical structure for providing equipage to indigents in civil suits between private parties. Finally, the Court has been extremely reluctant to provide counsel to indigents in civil cases. Thus, civil access cases will be considered first, followed by criminal and the civil and quasi-criminal equipage cases. Cases involving requests for counsel, a variation on equipage cases, will be considered separately.

A. Civil Access Cases

In a two-year period, the Supreme Court considered three significant civil cases in which indigent litigants sought to have access fees waived.\(^{102}\) The first case, *Boddie v. Connecticut*,\(^{103}\) was decided on narrow grounds but held out the prospect of wider application.

In *Boddie*, a class of welfare recipients in Connecticut sought to have the requirement of filing and service of process fees in divorce actions held unconstitutional. The Supreme Court struck down the fee requirement on the ground that in order to get a divorce it was necessary to use the courts:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.\(^{104}\)

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101. Of course, barring the theoretical imposition of appearance fees, access is not an issue for criminal defendants.

102. The Supreme Court has been more comfortable applying an equal protection analysis to the question of access in criminal cases. See *Burns v. Ohio*, 360 U.S. 252, 258 (1959) (violation of equal protection to require an indigent to pay a filing fee to file a motion for leave to appeal a criminal conviction). Perhaps because criminal defendants are not charged access fees at the trial level, the Court is not concerned that equal protection will prove to be unduly expansive in the criminal context.


104. *Id.* at 374. At least one state court was willing to extend the *Boddie* rationale to cover payment of the cost of service of a summons by publication in divorce actions. Even though the costs of publication were payable to a third party, not a court office, "[t]he effect of indigency is . . . the same in each case—denial of access to the courts—and, thus, we deem the rationale of *Boddie* controlling." *Deason v. Deason*, 32 N.Y.2d 93, 95, 296 N.E.2d 229, 230, 343 N.Y.S.2d 321, 322 (1973), quoted in *Note, Justice For The Poor? A Look At The Right To Counsel For Indigents In Divorce Litigation*, 22 N.Y.L. SCH. L. REV. 87, 90 (1976) (authored...
Justice Harlan's opinion focused on the state monopoly on granting divorces and the analogous due process right of a civil defendant to be heard, which treat the divorce petitioner and civil defendant, respectively, as involuntary participants in the legal process. He distinguished other types of disputes that are capable of resolution without resort to the courts. Presumably he was referring to private contractual disputes which in theory can be resolved through settlement between the parties or invocation of some other method of dispute resolution.

by Richard B. Cohen). See also Johnson v. Johnson, 329 A.2d 451 (D.C. 1974) (litigants' access to court to obtain a divorce may not, under the due process clause, be barred by financial considerations); King v. King, 21 Ill. App. 3d 1062, 316 N.E.2d 555 (1974) (In accord with Boddie, when an indigent plaintiff seeks a divorce, he is entitled to a waiver of the cost of service by the due process clause of the fourteenth amendment.); Monroe v. Monroe, 33 Ohio Misc. 129, 294 N.E.2d 250 (1972) (following Boddie's interpretation of due process, an indigent is entitled to a waiver or reduction in the cost of service by publication in divorce actions). 105. Boddie, 401 U.S. at 376-77. This opinion gave Justice Harlan, a critic of the Court's prior equal protection analysis, an opportunity to demonstrate how claims by indigents could be resolved under the due process clause without creating principles that would prohibit all wealth discrimination.

106. Id. at 376. Justice Brennan, in a concurring opinion, rejected Harlan's monopolization theory, noting that the state has a monopoly on all judicial dispute resolution. Id. at 387 (Brennan, J., concurring). If disputes cannot be settled between the parties, the court may be the only forum available for a binding resolution. Justice Brennan found no difference between judicial enforcement of rights generally under federal and state law and obtaining a divorce. Id. The judicial monopolization distinction has also received scholarly criticism:

The court, after all, usually has a monopoly on lawful deployment of remedial force . . . . An indigent insolvent person, for example, has alternative avenues to relief from debts only on the assumption that his creditors are not unyielding. But why should they yield, since he is indigent and, by holding out, they cannot get less than they would get out of bankruptcy?

[I]t is apparent that the "monopoly" factor which activates special access rights for divorce suitors refers strictly to the legal possibility, and not the practical likelihood, of extrajudicial relief. [T]here is nothing internally illogical or incoherent in such a notion. Its defect is not that it is unintelligible, but, quite as fatal, that it is unpersuasive—that it lacks any external coherence with the context of common understandings within which it arises. . . . The notion appears to have been conceived by Justice Harlan for a specific argumentative purpose, that of assimilating the predicament of the Boddie petitioners to the plight common to civil defendants—a comparison deemed significant because of an initial assumption that civil defendants generally enjoy constitutional protection against exclusionary court access fees, the very protection that the Boddie reasoning meant to extend to divorce suitors.

Michelman, supra note 3, at 1179-80.

Justice Black, in a dissent, commented that because civil disputes generally do not involve the government as a party and no deprivation of life, liberty, or property as punishment, they are not entitled to the same level of constitutional protection. 401 U.S. at 391 (Black, J., dissenting). Thus, the distinction between civil and criminal lawsuits, according to Justice Black, should lead to the conclusion that divorce actions are not entitled to the same protection as say, a felony prosecution. Id.
Two months after *Boddie* was decided, the Supreme Court avoided the opportunity to elaborate on the significance of that holding by denying certiorari in five cases and vacating and remanding two additional cases that raised issues of an indigent's access to the judicial system.\(^\text{107}\) The cases involved issues such as the right to file bankruptcy without payment of the statutory fee and the right of a mother to have counsel appointed in a child neglect case.\(^\text{108}\)

Any hope that *Boddie* was a portent of future decisions striking down access barriers for indigents in civil cases quickly faded. Instead, the Court chose to view *Boddie*'s emphasis on fundamental interests and on state monopolization of the means for protecting those interests as limiting factors.\(^\text{109}\) The Court simply declined to extend *Boddie* unless these factors were present.

The first case to consider the possibility of extending *Boddie* was *United States v. Kra*,\(^\text{110}\) in which the Supreme Court upheld the Bankruptcy Act's conditioning the right to discharge on payment of a fifty dollar fee, against a constitutional challenge by an indigent who could not afford the filing fee. Distinguishing *Boddie*, the Court held that discharging a debt did not have the constitutional significance of dissolving a marriage, which the Court considered a protected associational activity.\(^\text{111}\)


\(^{108}\) *Id.* at 954-55. Although he had dissented in *Boddie*, Justice Black wanted to review these cases because of his view that if *Boddie* were good law, then it would have to be expanded to all civil cases. *Id.* at 954 n.1 (Black, J., dissenting). Justice Douglas would also have granted review and reversed, on equal protection grounds. *Id.* at 960-61 (Douglas, J., dissenting).

Justice Black's interpretation of *Boddie* was that "no person can be denied access to [state and federal civil] courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney." *Id.* at 955-56. Black rejected the "monopolization" distinction in *Boddie* on the ground that state and federal courts "hold the ultimate power of enforcement in almost every dispute." *Id.* at 956. He also rejected limiting indigents to the right to divorce actions, with the view that "[p]ersons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes," *id.* at 954 n.1, and "the right to seek a divorce is simply not very 'fundamental' in the hierarchy of disputes." *Id.* at 957. The only way to provide "meaningful access" to the courts, according to Black, was to extend the right to counsel to civil cases. *Id.* at 959 (citing Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam)). Justice Black concluded that counsel could still be denied to indigent civil litigants having frivolous claims. *Meltzer*, 402 U.S. at 959.

\(^{109}\) According to one commentator, by limiting the holding to cases involving a basic interest, such as marriage or divorce, Harlan avoided "creating a constitutionally mandated *forma pauperis* for civil litigation." *Note, Indigent's Access to Civil Court*, 4 COLUM. HUM. RTS. L. REV. 267, 295 (1972) (authored by Michael Klimpl).


\(^{111}\) *Id.* at 444-45. The Court also considered whether equal protection would provide
The Court also noted that bankruptcy, unlike divorce, is not the only method of accomplishing an indigent’s goals: “However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors.”

In a per curiam opinion, the Supreme Court in *Ortwein v. Schwab*, 112 confirmed that it was moving in the direction of *Kras* and would not extend *Boddie*. The Court upheld a requirement that indigents pay a twenty-five dollar fee to appeal an adverse decision in a welfare hearing. Finding that the interest in increased welfare payments had no more constitutional significance than the interest in filing for bankruptcy, the Court applied a rational relationship test and, as in *Kras*, concluded that such fees are justified. 114 Since the parties could challenge the agency’s decisions in an administrative hearing, the Court concluded that, unlike the situation in *Boddie*, the judicial system did not provide the exclusive means of relief. 115

any relief. Because the fee requirement pertained to “economics and social welfare,” the lowest form of equal protection scrutiny is invoked—that there be some “rational justification” to support the government’s actions. *Id.* at 446. A rational basis in imposing a fee, namely to make the system self-supporting, was found. *Id.* at 447-48.

*Kras* was distinguished in *In re Sarah Allen Home, Inc.*, 4 Bankr. 724 (Bankr. E.D. Pa. 1980). The court held that indigents had the right to file an adversary bankruptcy proceeding in forma pauperis. The case is analogous to *Boddie* in that, due to the automatic stay, the resolution of the dispute had to occur in bankruptcy court. The case differed from *Kras* in that instead of seeking to discharge debts, the parties were seeking to protect their property. A similar property interest is at the heart of much civil litigation.

112. *Kras*, 409 U.S. at 445. Justice Stewart, joined by Justices Douglas, Brennan, and Marshall dissented on the ground that due process was violated, as in *Boddie*, by denying indigents access to the bankruptcy court. *Id.* at 454. Because debts are only enforceable through the government’s court system, they concluded that only the government can provide relief from those debts. *Id.* at 455. In a separate dissent, Justice Marshall castigated the majority for blithely assuming that the debtor could easily pay the filing fee if given a number of months, ignoring the reality of the financial condition of those living in poverty: “[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” *Id.* at 460.


114. *Id.* at 659-60. It has been suggested in the context of analyzing *Kras*, that the Court has adopted a tautological position, i.e., that the charging of a filing fee is its own justification: the Court’s position is that “charging [a fee is] rational because it is a financing scheme, not because it is a fair one.” L. TRIBE, supra note 12, § 16-51, at 1648-49.

115. *Ortwein*, 410 U.S. at 659-60. In their separate dissents, Justices Douglas and Marshall argue that the litigation in question is the first time the parties will have access to the courts. *Id.* at 662, 665 n.*. Thus, the case is distinguishable from the line of cases holding that, even in criminal cases, states are not required to provide for appeals. See, e.g., Lindsey v. Normet, 405 U.S. 56, 77 (1972) (due process clause does not require a state to provide appellate review; it is within the discretion of the state to allow such review); McKane v. Durston, 153 U.S. 684, 687 (1894) (“appeal from judgment of conviction is not an absolute right”). Justices Stewart and Brennan also dissented, though without much vigor. *Ortwein*, 410 U.S. at
Clearly, the Supreme Court, in the *Kras* and *Ortwein* decisions, has jealously limited access to the courts for indigent civil plaintiffs. Unless there are no alternatives to the judicial relief available, as in *Boddie*, free access will be denied. Under this theory of due process, fundamental fairness is not offended by the prospect of turning an indigent plaintiff away from the court because of her inability to afford the filing fee, if she has another way to resolve her dispute. This is an exceedingly narrow construction of fundamental fairness. The assumption that disputes can be resolved outside the judicial system ignores the fact that indigents often lack the power to bargain effectively with their adversaries. Only free access to the judicial system can provide either the prospect of litigation that will encourage adversaries to bargain seriously, or adequate relief when the bargaining process is unsuccessful.

There is nothing inherent in the concept of fundamental fairness that limits it to fundamental rights. While deprivation of a divorce decree may implicate a fundamental right, deprivation of property may also be “fundamentally” unfair. Without free access to the courts, indigents are denied a forum for a wide range of disputes. Yet, the Supreme Court, perhaps concerned about imposing the cost of litigation by indigents on society in a time of fiscal conservatism, has chosen to construe fundamental fairness narrowly in this context.

Fundamental fairness is not applied to all aspects of legal proceedings, but instead to a court’s role in resolving disputes. *Boddie* addressed a problem that could only be resolved by the courts; *Kras* and *Ortwein* arguably did not. Once an indigent finds herself in court, either involuntarily as a defendant or through a statute or rule which permits in forma pauperis proceedings, the due process calculus shifts.

**B. Criminal Equipage Cases**

Indigent criminal defendants occasionally need expert assistance in the same manner as do indigent civil litigants. The inability to afford an expert witness’ fee may result in a failure to establish a defense to the crime charged or to challenge the prosecution’s case. This problem cannot arise more dramatically than in a death penalty case.

In 1979, Glen Burton Ake was charged with murdering a couple and wounding their two children.\(^\text{116}\) While in jail before arraignment,
and at his arraignment in the district court for Canadian County, Oklahoma, Ake's behavior was so bizarre that the trial judge, sua sponte, ordered a psychiatric examination. The examining psychiatrist diagnosed Ake as probably paranoid schizophrenic and recommended an extended psychiatric examination to determine whether he was competent to stand trial. The trial court ordered such an examination. The next month Ake was committed to a state hospital for examination. The following month, less than six months after the alleged crime, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. Based on the psychiatrist's testimony, Ake was committed to the state mental hospital. Six weeks later, the chief forensic psychiatrist informed the court that if Ake remained on the medication he had been prescribed, he would be competent to stand trial.

At a pretrial conference, Ake's attorney informed the court that he intended to raise the insanity defense. Despite the extensive psychiatric examinations of Ake, none had focused on his state of mind at the time of the alleged crimes. As a result, defense counsel requested that the court arrange for a psychiatrist to perform an examination, or provide funds to hire a psychiatrist, as Ake's indigence precluded him from retaining his own psychiatrist. The trial judge denied the request on the ground that indigent defendants have no constitutional right to receive such assistance from the court. As a result, no expert testimony was presented from either side on Ake's sanity at the time of the offense. The jury, rejecting his insanity defense, convicted Ake of murder and shooting with intent to kill.

At sentencing, the prosecution sought the death penalty. Presenting no new evidence, the prosecutor relied significantly on the psychiatric evidence from the guilt phase that Ake was dangerous to society, in order to establish the likelihood of his future dangerousness. Ake was unable to introduce any expert testimony to rebut the trial evidence. The jury sentenced him to the death on the murder counts and to 500 years' imprisonment on each of the two counts of shooting with intent to kill. His

117. *Id.* at 71-72.
118. *Id.* at 72.
119. *Id.*
120. *Id.* The trial judge based his opinion on United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 568 (1953) (holding that it is not the constitutional duty of the state to appoint a psychiatrist to make a pretrial examination into petitioner's sanity).
121. *Ake,* 470 U.S. at 72.
122. *Id.* at 73.
conviction was affirmed by the Oklahoma Court of Criminal Appeals.\textsuperscript{123} The United States Supreme Court, in \textit{Ake v. Oklahoma},\textsuperscript{124} reversed his conviction on due process grounds.

In developing its due process analysis,\textsuperscript{125} the Supreme Court emphasized the liberty interest involved in a criminal case. The Court looked to the three-part procedural due process test stated in \textit{Mathews v. Eldridge},\textsuperscript{126} a civil case:

The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.\textsuperscript{127}

The private interest in the accuracy of a criminal proceeding involving life or liberty, the first factor in the \textit{Mathews} test, was found, in \textit{Ake}, to be "obvious" and "uniquely compelling."\textsuperscript{128} By contrast, the state's interest in not providing psychiatric assistance to indigent criminal defendants, the second factor, was found to be purely economic and was given little weight.\textsuperscript{129} Also, even more so than in civil proceedings, the state has an interest in fair and accurate criminal proceedings, and unlike a private litigant, it has no legitimate interest in maintaining a strategic advantage over the defendant.\textsuperscript{130}

\textsuperscript{124} 470 U.S. 68 (1985).
\textsuperscript{125} The Court relied solely on the due process clause to conclude that indigent criminal defendants had the right to psychiatric assistance in appropriate cases: "Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context." \textit{Id.} at 87 n.13. By basing its decision on due process rather than equal protection, the \textit{Ake} Court was able to limit the extent of assistance to be provided to indigents. Because the right was not based upon an entitlement to psychiatric assistance on par with nonindigent litigants, the Court avoided having to give indigent defendants a defense psychiatrist of their own choice. \textit{See} Ross v. Moffitt, 417 U.S. 600, 616 (1974) (state is not required to duplicate what could be privately retained); \textit{Note, After Ake: Implementing the Tools of an Adequate Defense}, 7 \textit{PACE L. REV.} 201, 238-39 (1986) (authored by Susan S. Brown). Thus, the case demonstrates that one effect of the move from an equal protection to a due process analysis is that the right established generally is more limited than it might have been under extensions of prior Supreme Court doctrine.
\textsuperscript{126} 424 U.S. 319 (1976). In \textit{Mathews}, the Supreme Court considered what procedures must be followed prior to the termination of claimant's property interest in Social Security disability benefit payments. Prior to \textit{Ake}, the \textit{Mathews} test had been used primarily in administrative law contexts. \textit{Note, Expert Services}, \textit{supra} note 11, at 1332 n.41.
\textsuperscript{127} \textit{Ake}, 470 U.S. at 77 (citing Little v. Streater, 452 U.S. 1, 6 (1981), and \textit{Mathews}, 424 U.S. at 335).
\textsuperscript{128} \textit{Ake}, 470 U.S. at 78.
\textsuperscript{129} \textit{Id.} at 78.
\textsuperscript{130} \textit{Id.} at 87 (Burger, C.J., concurring).
The third Mathews factor requires an evaluation of the value of the psychiatric assistance sought and the risk of error in the proceeding if it is denied. Because Oklahoma law made the defendant's mental condition relevant to criminal culpability, psychiatric testimony was crucial to the presentation of a defense when, as in this case, mental condition was at issue. The Court reached a similar conclusion as to the value of psychiatric testimony at the sentencing phase of the trial. The Court held that where a defendant makes the threshold showing that his sanity is likely to be a "significant factor" in his defense, he is entitled to access to a competent psychiatrist.

Weighing the three factors, the Supreme Court concluded that the trial court erred in not providing Ake with the assistance of a psychiatrist in both the guilt and sentencing phases of the trial.

Significantly, the Court was willing to examine the trial judge's decision based on the facts available at the time the psychiatrist was requested, rather than considering whether the testimony would have been determinative. This differs from the approach taken by the Criminal

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131. Under Oklahoma law, insanity was a complete defense. Ake, 470 U.S. at 73 n.1 (quoting OKLA. STAT. tit. 21, § 152 (1981)).

132. Judge Cardozo has stated that: "[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929), quoted in Ake, 470 U.S. at 82 n.8.

133. In Ake, the Supreme Court distinguished its opinion in Smith v. Baldi, 344 U.S. 561 (1953) and the decision in McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951), upon which the trial court had relied for the proposition that there was no obligation to provide access to a psychiatrist for an indigent defendant. 470 U.S. at 84-85. The Court noted that in Smith neutral psychiatrists had, in fact, examined the defendant and testified at trial as to his sanity. A psychiatrist not bound to the prosecution had examined the defendant in McGarty.

The Court also made it clear that Smith is no longer reliable authority in light of the subsequent expansion of indigent defendant's rights. Id. at 85.

134. Ake, 470 U.S. at 82-83.

135. Id. at 83, 86-87. In the federal system, the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982), provides for "investigative, expert, or other services necessary for an adequate defense." 18 U.S.C. § 3006A(e)(1) (1982). The Act, which preceded Ake, followed the recommendation of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. Note, Expert Services, supra note 11, at 1327. As a result, Ake-type issues will only arise in state courts, and only in those states that do not have similar statutory provisions. See Annotation, Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert, 34 A.L.R.3d 1256, 1270-72 (1970); Note, supra note 125, at 221 ("A larger majority of states provide certain indigent defendants with psychiatric and other expert defense assistance through legislation.").

Justice Act, which requires a showing of substantial prejudice after the trial to reverse a conviction due to the failure to provide expert assistance. An indigent's inability to retain an expert may make it difficult to demonstrate how the presentation of the case was prejudiced by the absence of an expert.

Application of the three-part Mathews test, used in Ake in the context of appointment of a psychiatrist, supports the appointment of other types of experts in addition to psychiatrists. Following Ake, the Eighth Circuit held that the due process rights of a rape defendant were denied by the trial court's refusal to appoint an expert on hypnosis to challenge the testimony of the alleged victim, who had been hypnotized by the police. To date, however, the Supreme Court has not consid-


138. Chief Justice Burger concurred in the result in Ake but, unlike the majority's silence on the issue, would have limited the ruling to capital cases. Ake, 470 U.S. at 87. As a result, there has been some uncertainty as to whether Ake applies to noncapital cases. See Williams v. Newsome, 254 Ga. 714, 715, 334 S.E.2d 171, 172 (1985); Satterwhite v. State, 697 S.W.2d 503, 507 (Tex. Crim. App. 1985). See also Isom v. State, 488 So. 2d 12, 13 (Ala. Crim. App. 1985) ("Ake does not reach noncapital cases"). The distinction between capital and noncapital cases was rejected in Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988):

[W]e [do not] draw a decisive line for due-process purposes between capital and noncapital cases. To be sure, the defendant's interest in staying alive is greater and different in kind from his interest in avoiding a prison term, but the latter interest, in our opinion, still outweighs the state's interest in avoiding the relatively small expenditure that would be required.

Justice Rehnquist, the only dissenter in Ake, recited in detail the facts of the horrible crime to conclude that the defendant had not sufficiently raised the factual issue of his sanity to justify the appointment of a psychiatrist. Ake, 470 U.S. at 90. Even if there had been such a showing, Justice Rehnquist would not have found a due process violation "merely because an indigent lacks sufficient funds to pursue a state-law defense as thoroughly as he would like." Id. at 91. Particular reliance was placed on the fact that the burden of proving insanity was on the defendant in Oklahoma. If the state had assumed the burden of proving sanity, and if it had relied extensively on psychiatric testimony, perhaps, according to Justice Rehnquist, an indigent defendant might have a claim to a court-provided psychiatrist in a capital case. Id.

139. Note, Expert Services, supra note 11, at 1338 ("no reason to believe that the Mathews test would turn out any differently for a pathologist or a handwriting expert"); Note, Criminal Procedure, supra note 11, at 336 ("the ratio decidendi [of Ake] can be legitimately applied to fact situations where other forms of expert assistance are sought"); Leading Cases, supra note 83, at 137 (the reasoning of Ake may also support the use of other kinds of experts).

EXPERT ASSISTANCE IN CIVIL CASES

In *Ake*, the Court shattered the distinction between access and equipage, between removing barriers to litigation and providing positive assistance:

Meaningful access to justice has been the consistent theme of [the cases from *Griffin* to *Little*]. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

The Court made it clear in *Ross* that while this does not mean that a "State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy," it does mean that "fundamental fairness" requires that indigent defendants be provided "an adequate opportunity to present their claims fairly within the adversary system."

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141. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court affirmed a Mississippi Supreme Court affirmation of a death penalty conviction in which a request had been made for a criminal investigator, a fingerprint expert, and ballistics expert. Because there had been no showing at trial of the reasonableness of these requests, the Court chose not to decide "what if any showing would have entitled a defendant to assistance of the type here sought." *Id.* at 323 n.1.

In dissenting from the denial of certiorari in Johnson v. Oklahoma, 108 S. Ct. 35 (1987), Justices Marshall and Brennan argued that the Court should consider and resolve the questions of whether and when expert assistance should be provided. *Id.* at 37. The defendant in *Johnson* had been denied the appointment of an expert chemist to rebut the testimony of a police chemist that the defendant's hair, blood, semen, and clothing were consistent with physical evidence found in the victim's apartment. *Id.* at 36.

142. *Ake*, 470 U.S. at 77. See also Judge Frank's dissent in United States v. Johnson, 238 F.2d 565, 572 (2d Cir. 1956), vacated, 352 U.S. 565 (1957):

The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist. . . . In such circumstances, if the government does not supply the funds, justice is denied the poor — and represents but an upper-bracket privilege.

See also Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 101 (1954) (not democratic justice to allow indigent to be jailed or executed for want of an expert).


144. *Id.* In *Ross*, the Court held that criminal defendants are not entitled to counsel for discretionary appeals. 417 U.S. at 616. The Supreme Court in Bounds v. Smith, 430 U.S. 817 (1977), narrowed the application of the reasoning in *Ross*, holding that prison inmates had the right to access to law libraries or assistance from persons trained in the law. Because an appellate court reviewing a petition for discretionary review is "not primarily concerned with the correctness of the judgment below," but rather only determines whether the case "raises an issue of significant public interest or jurisdictional importance or conflicts with controlling precedents," appointment of counsel is not mandated. *Id.* at 827. Because such appellants already have had the benefit of counsel both at trial and on their initial appeal, they are able to
C. Civil and Quasi-Criminal Equipage Cases

While the Supreme Court took a highly restrictive view of access in Kras and Ortwein,\(^\text{145}\) it has taken a more expansive view regarding the question of equipage in civil and quasi-criminal cases. An example is the Court's decision in Bounds v. Smith,\(^\text{146}\) in which the Court held that prisoners had the right to law libraries or other types of legal assistance in filing both habeas corpus petitions and civil rights complaints.\(^\text{147}\)

The Court in Bounds, reaffirming its per curiam opinion in Younger v. Gilmore,\(^\text{148}\) viewed its holding as an extension of the right of access of indigent prisoners to the courts.\(^\text{149}\) States not only must allow inmates to assert their rights, they must "expend state funds to implement affirmatively the right of access."\(^\text{150}\) It was "indisputable," according to the Court, that states already had the economic obligation of providing indigent inmates with "paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them."\(^\text{151}\) The Court reasoned that affirmative assistance was required because of the need to conduct legal research before filing a complaint, in order to present "meaningful legal papers," or to check and respond to authorities cited by the state.\(^\text{152}\)

The Supreme Court arguably has addressed the issue of equipage in a purely civil case. The prerequisite of posting a civil appeal bond could be characterized as an expense of access to the courts. Since it calls for payment to a third party (surety), it is also equipage. In Lindsey v. present their claims adequately pro se using briefs previously prepared for their case, trial transcripts and appellate court opinions. \textit{Id.} Thus, the question of an indigent's right to assistance at trial is not precluded by Ross.

\(^{145}\) It appeared that the Kras and Ortwein decisions left Boddie as "a single, unprincipled exception to the otherwise blanket current rule that indigents have no constitutional right of access to civil courts." L. Tribe, \textit{supra} note 12, §§16-51, at 1650 (emphasis added).

\(^{146}\) 430 U.S. 817 (1977).

\(^{147}\) \textit{Id.} at 825.


\(^{150}\) Bounds, 430 U.S. at 823. \textit{Contra id.} at 834-35 (Burger, C.J., dissenting) ("[T]he duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights. . . . Prohibiting the State from interfering with federal statutory rights is, however, materially different from requiring it to provide affirmative assistance for their exercise.").

\(^{151}\) \textit{Id.} at 824.

\(^{152}\) \textit{Id.} at 825.
Normet, the Supreme Court struck down Oregon's requirement that in appealing eviction actions tenants post a bond double the rental value of the premises from the time of commencement of the eviction suit to final judgment. The Court recognized that "discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." The Court concluded that the double bond requirement served no legitimate state interests.

Although basing its decision on equal protection grounds, the Court's concern about financial barriers to participation in civil litigation by indigent litigants has due process consequences as well. As distinguished from Boddie, Lindsey involved no significant government involvement beyond providing a forum, and there was no fundamental interest at stake. There also were no criminal aspects to the proceedings, yet the Court granted relief to the indigent litigants. The relief, however, simply eliminated litigation expenses and did not provide any financial assistance.

The Supreme Court, in Little v. Streater, considered equipage in the context of a paternity action. After giving birth to a girl, appellee brought a paternity action with the help of an attorney provided by the state. Appellant, the putative father, through counsel provided by legal aid, moved the trial court to order a blood grouping test on appellee and her child. State law required the movant to pay the cost of such tests. Because appellant was indigent, the tests were never performed. State law also presumed paternity unless the putative father offered evidence beyond his own testimony. As a result, the trial court found that appellant was the child's father.

Departing from the approach in Kras and Ortwein of applying the two factors discussed in Boddie, the United States Supreme Court in Little turned to a civil due process case, Mathews, for a construct to evaluate

154. Id. at 63-64, 79.
155. Id. at 79.
156. In 1988, the Supreme Court, distinguishing Lindsey, upheld a Mississippi statute which imposed a 15% penalty on unsuccessful appellants as not being discriminatory and as more reasonably related to legitimate state objectives than the double bond in Lindsey. Bankers Life & Casualty Co. v. Crenshaw, 108 S. Ct. 1645, 1653-54 (1988).
158. Id. at 3.
159. Id.
160. Id. at 3-4.
161. Id. at 11-12.
the due process claim for equipage. The Court did not repudiate completely the application of the *Boddie* factors of monopolization and fundamental interest, although this discussion was relegated to a footnote.\footnote{162} The Court distinguished *Kras* and *Ortwein* and found *Boddie* analogous "[b]ecause appellant ha[d] no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant."\footnote{163}

A unanimous Court in *Little* found the *Mathews* elements were satisfied. The putative father's financial interest and the creation of a parent-child relationship were considered substantial private interests.\footnote{164} The likelihood that strong self-interest would color the testimony combined with the conclusive exclusionary value of the blood tests of falsely accused putative fathers increased the risk of erroneous results without the blood tests. The state's limited financial interest in not having to pay for the tests,\footnote{165} considering the state's own interest in securing support for the child, and the fact that such expenses could be taxed as costs to the parties,\footnote{166} led to the conclusion that "the State's monetary interest 'is hardly significant enough to overcome private interests as important as those here.'"\footnote{167}

In finding a due process violation,\footnote{168} the Court stressed the level of the state's involvement in paternity proceedings.\footnote{169} As a result, the appellant did not have to assert that the state had a "constitutional obligation to fund blood tests for an indigent's defense in ordinary civil


163. *Little*, 452 U.S. at 16 n.12. Presumably, the only reason appellant had no choice of an alternative forum was that he was put in the role of a defendant.

164. *Id.* at 13.

165. These costs were offset by federal reimbursement of 75% of their cost, pursuant to 42 U.S.C. § 1302 (1982). *Little*, 452 U.S. at 15.

166. *Id.*

167. *Id.* at 16 (quoting *Lassiter v. Department of Social Serv.* 452 U.S. 18, 28 (1981)).

168. *Little*, 452 U.S. at 17. As an indication of how completely the analysis of claims by indigents had shifted from an equal protection to a due process analysis, the Court stated in a footnote that because of the disposition on due process grounds, it "need not consider whether the statute, as applied, also violated the equal protection clause." *Id.* at 17 n.13.

169. *Id.* at 9. The state became a party to the action, had to approve any settlement, referred the case to appellee's attorney and paid his fee as well as all litigation costs, and will be the recipient of the monthly support payments made by appellant. *Id.*
litigation between private parties.”170 The Court also characterized paternity actions as being “quasi-criminal.”171

The Supreme Court's shift from application of the rigid Boddie factors to the use of the more flexible Mathews elements in deciding the right to equipage provides the analytic basis for a right to expert assistance for indigent civil litigants. In most civil cases, it is impossible to satisfy Boddie's strict monopolization and fundamental interest factors. Civil disputes, especially regarding financial matters, could be settled out of court. The Mathews elements, which amount essentially to a balancing test, provide the basis for the provision of expert assistance upon a proper factual and legal showing.172

170. Id. at 9-10. According to a constitutional law treatise:
It seems unlikely that the Court would find that, in a truly private paternity proceeding, in which the state had no involvement, the state would have to provide for the financing of blood tests for indigent male defendants. The opinion noted that the Court was only ruling on the due process claim of a defendant who faces the state as an adversary and that its ruling made it unnecessary to consider the equal protection claim of the putative father in this case.

Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure § 17.8, at 267 n.35 (1986). See also Note, Expert Services, supra note 11, at 1345 n.134 (“The Streeter and Ake decisions could lead to a more general right to expert assistance in certain kinds of civil proceedings, for example civil commitment hearings.”).

Some courts are unwilling to go very far in providing such assistance. In In re Williams, 133 Ill. App. 3d 232, 234, 478 N.E.2d 867, 869 (1985), the court stated, in dicta:
A respondent in a civil contempt proceeding does not have a constitutional right to an independent psychiatric examination at the State's expense. Although the United States Supreme Court has recently recognized such a right in criminal proceedings where a defendant's sanity is at issue (Ake), the right has not been extended to civil cases.

The court proceeded to find statutory authority to provide the requested assistance.

171. Little, 452 U.S. at 10. The unusually difficult standard of proof discussed above was an additional factor. Id. at 10-12.

172. A related issue has arisen as to whether court-imposed witness fees can also be waived. To the extent that this issue involves the payment of funds to third parties to assist indigents in the presentation of their cases, it is analogous to the issue of providing expert witnesses. There is some authority that 28 U.S.C. § 1915 (1982) may provide for prepayment from government funds of fees that must be tendered a witness who is subpoenaed to testify as part of an in forma pauperis proceeding. Morrow v. Igleburger, 584 F.2d 767, 772 n.7 (6th Cir. 1978) (dicta: if witness is necessary for full presentation of indigent's case, the court could order government to pay fees), cert. denied, 439 U.S. 1118 (1979); White v. Sullivan, 368 F. Supp. 292, 293 (S.D. Ala. 1973) (payment of witness fees under § 1915(c)). But see Johnson v. Hubbard, 698 F.2d 286, 290 n.4 (6th Cir.) (treats Morrow footnote as dicta), cert. denied, 464 U.S. 917 (1983). Without such prepayment, an indigent would be able to file suit without having to pay a filing fee, but would be unable to require the attendance of witnesses at trial due to her inability to tender witness fees when the subpoena is served. Fed. R. Civ. P. 45(c) provides in relevant part:
Service. A subpoena may be served by the marshall, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such
D. Equipage as Right to Counsel—The Supreme Court’s Hostility

The application of due process to an indigent civil litigant’s right to appointment of counsel should, in theory, provide support for the appointment or provision of funds for expert witnesses.\(^\text{173}\) Both may be

(person and by tendering to him the fees for one day’s attendance and the mileage allowed by law.

(Emphasis added.) See also 28 U.S.C. § 1821 (1982) (per diem and mileage charges paid to witnesses). This does include additional fees that would be paid an expert to testify. The vast majority of courts, however, have concluded that the term “fees and costs” in § 1915(a) does not even include basic witness fees and expenses. Note, supra note 7, at 1467 n.26. See United States Marshals Serv. v. Means, 741 F.2d 1053, 1056-57 (8th Cir. 1984) (en banc) (no congressional intent to apply § 1915 to witness fees and expenses), cert denied, 109 S. Ct. 3227 (1989); Johnson v. Hubbard, 698 F.2d 286, 290 (6th Cir.), cert. denied, 464 U.S. 917 (1983).

Although the outcomes of the following cases were not favorable to the indigent litigants, they did adopt a due process analysis that would support an indigent’s right to assistance in producing witnesses for trial when the failure to do so would violate “fundamental fairness.” In a civil rights action relating to a convict’s transfer from a state hospital to the corrections department, the plaintiff requested that the court pay the fees and travel expenses of twelve of his apparently nonexpert witnesses, due to his indigence. 698 F.2d at 288. Because, in the court’s view, the plaintiff had “numerous alternative methods to proceed with his case” without the witnesses, his “right of access” to the courts was not denied. Id. at 289. The court distinguished Boddie and Bounds as involving “access to the court” rather than “procedures essential to the trial process.” Id. at 288-89. The court separated assistance that is necessary to presentation of the case from that which is only beneficial. Lacking statutory authority and finding no constitutional violation, the Sixth Circuit affirmed the trial court’s denial of the request, but commented “[i]t is paradoxical to provide an indigent plaintiff with the right to proceed in court, then deny him a meaningful chance to exercise that right by not providing him assistance in paying routine costs in so exercising that right.” Id. at 291. Judge Swygert, in dissent, argued that providing the plaintiff witnesses to prove facts was more important than counsel who would do legal research. Id. at 292.

The Seventh Circuit has held that absent a statutory provision, courts have no inherent authority to waive witness fees. McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987), cert. denied, 108 S. Ct. 1236 (1988). The court in McNeil refused to waive witness fees for an indigent who was alleging the denial of medical care while he was imprisoned. Testimony was sought from witnesses who were called because they had personal knowledge of the facts, not to give exclusively expert testimony. In rejecting the indigent’s claim, the court held that the trial judge had not denied the plaintiff “fundamental fairness in violation of his due process rights under the circumstances of this case,” because: 1) the subject matter of the testimony was available from other sources, such as medical records; 2) plaintiff had the opportunity to elicit the information through cross examination at trial; and, 3) plaintiff attended the deposition of one of the doctors and had the opportunity to question the doctor. Id. at 1373-74. If the testimony had been “necessary” and alternatives were unavailable, the court might have found a due process violation.

The approach of the Johnson and McNeil courts was to consider whether a witness was necessary and how harmful the witness' absence would be to the subpoenaing party. The decisions suggest that if both criteria were met, then due process would require that witness fees be waived for witnesses sought by indigent litigants. This same analysis would support the provision of expert witnesses as a matter of due process when those same criteria were met.

173. The idea of appointing counsel to assist indigents in civil cases is not novel. In the late thirteenth and early fourteenth centuries in England, litigants who informed the court that they could not afford lawyers were assigned counsel. Note, The Right to Counsel in Civil
EXPERT ASSISTANCE IN CIVIL CASES

categorized as equipage as they are costs paid to a third party to provide a litigation service that the indigent cannot afford. Both, in appropriate cases, can help the litigant in a variety of ways, such as case investigation, preparation, settlement discussions, and trial, if necessary. Both provide the type of service that a wealthier litigant often decides are worth the expense. There will, of course, be cases in which one form of assistance is more helpful than the other or where both are needed.

Yet, the Supreme Court has demonstrated hostility to the appointment of counsel for indigent civil litigants. It has denied indigent lit-

Litigation, 66 COLUM. L. REV. 1322, 1326 (1966) [hereinafter Note, Right to Counsel]. Many other countries have adopted this idea: “Most civil law countries have long recognized Legal Aid as a public function to be regulated by law. Statutory schemes . . . make sure that in civil as well as criminal litigation an indigent party will be represented by competent counsel.” R. SCHLESINGER, COMPARATIVE LAW 276 (3d ed. 1970), quoted in Note, supra note 104, at 99. See O'Brien, Why Not Appointed Counsel in Civil Cases? The Swiss Approach, 28 OHIO ST. L.J. 1, 1 (1967) (the Swiss Constitution guarantees the right to counsel in civil cases); Note, The Indigent's Right to Counsel in Civil Cases, 76 YALE L.J. 545, 551 (1967) (free legal counsel for the poor is provided by most industrial nations) [hereinafter Note, Indigent's Right to Counsel].

174. Indigents need not rely exclusively on a constitutional right to appointment of counsel in federal civil cases because a federal statute gives federal courts authority to “request” that a private attorney represent indigent litigants:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor . . .

(d) The Court may request an attorney to represent any such person unable to employ counsel . . .


Some courts have taken the position that “request” means that they cannot generally compel counsel to accept representation. See United States v. 30.64 Acres of Land, 795 F.2d 796, 798-801 (9th Cir. 1986); Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978). Other courts have interpreted it to mean that they can “appoint” counsel to serve without compensation. See Mallard v. United States District Court, 109 S. Ct. 1814 (1989) (unwilling attorney appointed to represent indigent civil litigant); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971).

In addition, Title VII provides that complainants in employment discrimination actions may request appointment of counsel. See Poindexter v. F.B.I., 737 F.2d 1173, 1179 (D.C. Cir. 1984).

Many courts considering the appointment of counsel under 28 U.S.C. § 1915(d), however, especially in civil rights cases, have held that counsel should be appointed only in “exceptional circumstances.” Annotation, Appointment of Counsel, in Civil Rights Action, Under Forma Pauperis Provisions, 69 A.L.R. FED. 666, 671 (1984) [hereinafter Annotation, Appointment of Counsel]. One reason is that many requests for counsel arise in state prisoner actions under 42 U.S.C. § 1983. McKeever v. Israel, 689 F.2d 1315, 1323 (7th Cir. 1982) (Posner, J., dissenting) (almost 16,000 § 1983 suits by state prisoners in fiscal year 1981). Thousands of such cases are filed each year and, in the opinion of some judges, most are lacking in merit. See, e.g., Merritt v. Faulkner, 823 F.2d 1150, 1157 (7th Cir. 1987) (Posner, J., dissenting) (“frivolous cases are the norm in prisoner civil rights litigation”). Not wishing to further encourage
gants who have been convicted of state crimes the right to counsel in several civil contexts, including collateral attacks on convictions and post-conviction relief.\textsuperscript{175} In a case decided on the same day as \textit{Little v. Streater},\textsuperscript{176} \textit{Lassiter v. Department of Social Services},\textsuperscript{177} the Supreme Court exhibited its hostility to the appointment of counsel for indigent civil litigants.

In \textit{Lassiter}, the state sought to terminate the parental rights of Ms. Lassiter due to her failure to visit her son who had been placed in foster care.\textsuperscript{178} During this period, Ms. Lassiter was tried, convicted, and sentenced for second-degree murder.\textsuperscript{179} She had begun to serve a sentence of twenty to forty years of imprisonment.\textsuperscript{180} Ms. Lassiter's request for appointed counsel at the termination proceedings was denied.\textsuperscript{181}

The Supreme Court began its analysis by noting that due process is a flexible, sliding scale concept that only can be defined in the context of time, place, and circumstance. Rather than being capable of precise definition:

the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise that must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.\textsuperscript{182}

such actions and tax the limited resources of the local bars around the country, courts have been reluctant to appoint counsel in those cases. Annotation, \textit{Appointment of Counsel, supra}, at 670. \textit{See also} \textit{McKeever}, 689 F.2d at 1325 (Posner, J., dissenting) ("There are not enough lawyers in America to satisfy prisoners' demands for free legal counsel; those demands are insatiable.").


\textsuperscript{176} 452 U.S. 1 (1981). \textit{See section IV(C), supra.}

\textsuperscript{177} 452 U.S. 18 (1981).

\textsuperscript{178} \textit{Id.} at 20-21.

\textsuperscript{179} \textit{Id.} at 20, n.1.

\textsuperscript{180} \textit{Id.}

\textsuperscript{181} \textit{Id.} at 22. Interestingly, at the hearing Lassiter did not allege that she was indigent. \textit{Id.} Yet, on appeal she argued that "because she was indigent" certain of her rights had been violated. \textit{Id.} at 24. No mention is made of this disparity either by the United States Supreme Court or the Court of Appeals of North Carolina. \textit{See In Re Lassiter}, 43 N.C. App. 525, 259 S.E.2d 336 (1979), \textit{aff'd}, 452 U.S. 18 (1981).

\textsuperscript{182} \textit{Lassiter}, 452 U.S. at 24-25. This flexible, open-ended approach was criticized by Justice Douglas in his concurrence in \textit{Boddie v. Connecticut}, 401 U.S. 371, 384 (1971). Preferring an equal protection analysis that provides clearer guidelines, Justice Douglas found the
Before applying its due process analysis, the Court created a rebuttable “presumption against the right to appointed counsel” in civil cases in which no loss of liberty would result. An examination by the Court of its precedents led to the conclusion that the right to counsel is directly related to the “liberty” interest involved. As a result, when a criminal defendant is to be sentenced to prison, there is an absolute right to counsel. This is not based on a criminal defendant’s right to counsel under the sixth and fourteenth amendments but rather to a due process liberty interest. As the liberty interest decreases, so does the right to counsel.

Although precedent regarding protection of liberty interests was clear, the Court did not explain why a due process right to counsel should exist only when deprivation of a liberty, as opposed to a property, interest is involved. Deprivation of an indigent’s property rights, for instance the right to remain in an apartment or maintain possession of essential household belongings, may be more significant than a minor intrusion on an indigent’s liberty interest. Ironically, the Lassiter Court employed the Mathews factors that arose in a case involving protection of a social security recipient’s property rights. There is no apparent reason why procedural protections are not required when property or liberty are at stake, but in the Court’s view counsel is required only when liberty is at stake.

The rebuttable presumption against appointment of counsel in Lassiter was weighed against the three-part Mathews factors. Despite a conclusion that the parent’s interests in the termination proceeding are great, the state’s financial interests weak, and the value of counsel often significant, the Court declined to adopt a per se rule finding the rebuttable presumption against appointment of counsel overcome in such cases. Instead, the Court chose to adopt a case-by-case balancing ap-

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183. Lassiter, 452 U.S. at 31 (emphasis added).
185. Lassiter, 452 U.S. at 25. See In Re Gault, 387 U.S. 1 (1967) (notification of right to be represented by counsel and appointment of counsel if unable to afford one required in juvenile commitment proceedings even though styled a “civil” proceeding).
188. The Lassiter opinion did not mention Boddie, and the Little opinion did so only in a cursory fashion, suggesting the preeminence of the Mathews factors.
189. Lassiter, 452 U.S. at 31. It has been suggested that the reason for the outcome in
proach by trial courts, subject to appellate review. In *Lassiter*, the Court held, because the trial had not been particularly complex, and because Ms. Lassiter had not demonstrated a strong interest in the proceedings, the trial court’s decision not to appoint counsel should be affirmed.

*Lassiter* was the “singularly unsympathetic facts of the case.” L. Tribe, supra note 12, § 16-51, at 1652. Lassiter’s failure to appear at the 1975 custody hearing, lack of contact with her son, and murder conviction, demonstrating her lack of fitness as a mother, seemed to weigh heavily on the justices’ minds. *Id.*

190. Despite the Court’s preference for a case-by-case approach, at least one trial court has concluded in a habeas corpus proceeding, after considering the *Mathews* factors, that there is a right to counsel in all state civil contempt hearings to show cause why one who has been convicted and failed to pay a fine should not be committed. Colson v. Joyce, 646 F. Supp. 102, 108 (D. Me. 1986), aff’d, 816 F.2d 29 (1st Cir. 1987). But see Davis v. Page, 714 F.2d 512, 518 (5th Cir. 1983) (“Our function is not to question the wisdom of the *Lassiter* opinion, but rather to apply it straightforwardly.”), cert. denied, 464 U.S. 1052 (1984).

191. *Lassiter*, 452 U.S. at 31-32. Justice Blackmun, joined by Justices Brennan and Marshall, dissented, criticizing the majority for adopting in the civil context the same case-by-case approach that had been employed in the criminal context in *Betts* v. Brady, 316 U.S. 455 (1942), only to be later rejected in *Gideon* v. Wainwright, 372 U.S. 335, 345 (1963), with the conclusion that a fair criminal trial required counsel. 452 U.S. at 36. The dissenters would apply the *Mathews* test to a class of cases, such as termination of parental rights proceedings, to determine whether there was a right to counsel in all such cases. *Lassiter*, 452 U.S. at 59 (Stevens, J., dissenting). Justice Blackmun’s view was that the Court’s approach would result in an increased number of appeals resulting in increased federal interference in state proceedings. *Id.* at 51.

In 1966, one commentator predicted that the Court would adopt a *Betts* special circumstances approach in the civil context to the right to counsel and eventually move toward a “*Gideon*” absolute approach. Note, Right to Counsel supra note 173, at 1339.

The dissent acknowledged that in a termination of parental rights proceeding brought by a private party rather than the state that “application of the three [Mathews v.] *Eldridge* factors might yield a different result with respect to the right to counsel.” *Lassiter*, 452 U.S. at 42 n.9. Significantly, the right to counsel in such private civil litigation was not ruled out.

192. No expert testimony had been offered and no troublesome points of law were raised. The Court did concede that an attorney could have improved the defense and objected to the admission of certain evidence against Lassiter. *Id.* at 32-33.

193. She had declined to appear at a 1975 child custody hearing. *Id.* at 33.

194. Lower court decisions often begin: “Of course, there is no constitutional right to appointed counsel in civil cases.” Tripati v. Polland, 610 F. Supp. 1047, 1049 (E.D. Wis. 1985). See also Nicholson v. Rushen, 767 F.2d 1426, 1427 (9th Cir. 1985) (per curiam) (court denied plaintiff’s claim of ineffective assistance of counsel when although counsel was court-appointed, counsel was not constitutionally required in plaintiff’s case). This, however, is the starting point, not the conclusion of the analysis of the right to counsel. The decisions continue to state that the denial of a request for counsel will be overturned on appeal if it would “result in fundamental unfairness impinging on due process.” *Tripati*, 610 F. Supp. at 1949. See also Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978) (Although appointment of counsel was not required, the court stated that “it is extremely helpful to the court to have the plaintiff represented by counsel . . .”); LaClair v. United States, 374 F.2d 486, 489 (7th Cir. 1967) (habeas corpus and § 2255 proceedings). Implicitly, in some circumstances, there is a constitutional right to the appointment of counsel in civil cases. In *Jeffries* v. *Reed*, 631 F. Supp. 1212, 1217 (E.D. Wash. 1986), the court held that a prisoner had no constitutional right
Since *Lassiter*, many courts have had an opportunity to consider whether there is a constitutional right to appointment of counsel in civil cases. When a fundamental deprivation of liberty is threatened in civil proceedings, such as civil contempt and commitment proceedings, courts have held that there is a right to counsel.195 Similar categories include paternity proceedings,196 and termination of parental rights cases.197 The reasoning in these cases is similar to that employed in paternity cases,198 namely that it is unfair to unleash the state's resources as an adversary against an indigent without counsel.199 The same reasoning could be extended to other similar types of proceedings, such as child abuse and adoption.200 The Court has taken a more restrictive view of a right to counsel when only property interests are involved.

While not employing a rebuttable presumption, the Supreme Court in *Walters v. National Association of Radiation Survivors*201 nonetheless refused to strike down the ten dollar limitation on fees that could be paid an attorney representing a veteran seeking Veteran's Administration benefits in certain types of cases. The district court, after applying the *Mathews* factors, had concluded that the fee limitation was unconstitutional.202 In itself applying the *Mathews* factors, the Supreme Court to appointed counsel to challenge prison conditions, but "lack of access to such legal assistance could state a constitutional violation if it resulted in denial of access to the courts."


198. See discussion supra notes 157-62 and accompanying text.


200. *Id.* at 1155-63.


Court took the opportunity to devalue the role of lawyers in concluding that their absence would not significantly affect the outcome of these cases. Despite some evidence that claimants with lawyers had higher success rates than those with veteran's organizations representatives or no representative at all, the Court found that lawyers made the proceedings more adversarial, complex, administratively costly, time consuming, and confusing. This view led to the inevitable conclusion that the fee limitation did not violate due process.

Considering Ake, Lassiter, Little, and Walters together, it appears that in cases in which claims are made for equipage based on due process the Supreme Court has applied the Mathews factors, with a rebuttable presumption against or hostility toward providing assistance only in those cases in which the appointment of counsel is sought. A more even-handed application of the Mathews factors is made to noncounsel equipage claims.

E. Indigents’ Due Process Right to Expert Assistance

The applicability of due process to indigent civil litigants’ request for expert assistance is subject to at least two modes of analysis. The first is that by virtue of being a litigant in federal or state court, due process provides protection and the Mathews factors determine the amount of protection to be provided. A second view is that participation in the litigation process is not enough state involvement to invoke constitutional protection. Under this view, only when the state’s degree of involvement and responsibility is sufficient do the Mathews factors attach. Only when the state involvement test is satisfied do the Mathews factors determine to what extent indigent litigants are entitled to equipage. Both views are considered in this section.

(1) Access Versus Equipage

When divided according to access versus equipage claims, an ironic pattern emerges from the Supreme Court’s decisions addressing indigents’ due process right to participate in the judicial process. The Court is far more willing to provide equipage than access. After the expansive language in Boddie regarding justice and the disparity in litigants’ ability

203. Id. at 331.
204. Id. at 325-26.
205. Id. at 334.
206. See Note, Lassiter v. Department of Social Services: What It Means for the Indigent Divorce Litigant, 43 OHIO ST. L.J. 969, 974 n.47 (1982) (authored by Peter E. Van Runkle) (“Little indicates that the Lassiter presumption is inapplicable to cases in which the right to counsel is not at issue.”).
to obtain it based on their wealth, it would seem a natural extension to conclude that indigents in civil cases have a broad right of access to the courts. Instead, the Court in *Kras* and *Ortwein*, implied that indigents have no general right to have access barriers removed. The Court's view is that inability to pay access fees can result in indigents' inability to litigate civil claims without violating the Constitution.

From a policy perspective, it might be argued that it makes no sense to deprive low income people facing economic difficulties the ability to get a fresh financial start because they cannot afford the bankruptcy filing fee. But from the perspective of constitutional jurisprudence, a complete right of access for indigent civil litigants would come dangerously close to a "regression" to an equal protection approach in the context of wealth discrimination. Justice Harlan's concerns have led to a narrow application of due process in this context. *Boddie's* dual requirements of monopolization and fundamental interest screen out all but the most egregious access cases.

In the equipage context the Supreme Court clearly has demonstrated hostility to requests for appointment of counsel, even to the extent, in civil cases, of creating a presumption against it. In a sense, a de facto presumption against counsel exists in the criminal context as well, overcome only in cases in which liberty is actually, not theoretically, threatened. According to the Supreme Court, in criminal cases "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." The sixth and fourteenth amendments, as interpreted by the Court, only require counsel where an indigent criminal defendant is sentenced to jail. Counsel is not even required when the potential of imprisonment was present but not ultimately imposed.

The decisions give no clear reasons for this hostility. One possibility is a concern similar to the equal protection concerns expressed above. Since counsel is arguably helpful in virtually every case, this view of due process could mean that indigent civil litigants would have the right to counsel in virtually every case. The sixth amendment mandates this in certain criminal cases. In the absence of a similar mandate in the civil context, the Court is unwilling to impose such a costly requirement. Given the reluctance to provide legal services and the cutbacks in fund-

207. In fact, federal and state legislatures have enacted provisions that allow indigents to proceed in forma pauperis in many civil proceedings. See, e.g., 28 U.S.C. § 1915 (1982); ILL. ANN. STAT. 110, 5-105 (Smith-Hurd 1983).
210. *Id.* at 373.
ing for the Legal Services Corporation, a requirement of counsel would cut against current political sentiment. The perception that such a right would benefit prisoners who file, in the view of some judges, a huge number of civil rights suits, many of which lack merit, may also be a factor.

The right to equipage assistance in civil and criminal cases not involving appointment of counsel appears to be expanding. In the criminal context, when the indigent criminal defendant has no choice about participation in the proceeding, the right to equipage, in the form of expert assistance is clearer. The Supreme Court started with a capital case, Ake, in establishing a due process right to equipage assistance upon a proper showing, but its reasoning is not limited by the type of case. In the civil arena, both Bounds and Little provide a positive framework for evaluating equipage claims.

The prospects for equipage claims in the future are encouraging. First, by definition, the claimant already has made it into court. The concerns about the consequences of widespread access are no longer present. Equipage claims are limited more easily than requests for counsel. Counsel may be helpful in every case, but a psychiatrist or housing expert is not. Their need is more fact and law specific. Trial courts can be delegated discretion to balance the Mathews factors present in each case.

In addition, provision of experts is consistent with due process doctrine on the treatment of litigants. There may be no due process right to participate in certain procedures, such as appeals, but once the state creates the procedure, it must accord due process to those who are able to participate in it. Likewise, there may be no right of access to the civil courts, but, once the indigent litigant finds herself in court, she is entitled to "fundamental fairness." The Court, while quite willing to deny claims

211. It has been suggested that the right to expert assistance should exist in all cases in which there is a right to counsel. Note, Expert Services, supra note 11, at 1342-45. Conceding that there may be instances in which expert assistance is more important than counsel, it is hard to argue that "the right to expert assistance is more fundamental that the right to counsel" and as a result the reach of Ake should be so limited. Id. at 1345 n.133.

212. See, e.g., Evitts v. Lucey, 469 U.S. 387, 393 (1985) (no constitutional right to a criminal appeal, but once appellate system is established must accord procedural due process); Lindsey v. Normet, 405 U.S. 56, 77 (1972) (no right to appeal; but if granted subject to constitutional limitations); Comment, Procedural Due Process Rights of Pro Se Civil Litigants, 55 U. CHI. L. REV. 659, 677 (1988) (authored by Julie M. Bradlaw) ("government may not be required to give litigants access to court, [but] once it does grant access, the procedures used must comport with due process"); see also Brown v. Dodd, 484 U.S. 874, 876-77 (1987) (Marshall, J., dissenting) (due process requires that an expert witness appointed to an indigent criminal defendant be competent).
to access, has yet to deny an equipage claim not dealing with appointment of counsel.

The *Mathews* test, employed in the later due process cases, provides an ideal way to segregate only the most needy cases for due process relief, while at the same time providing assistance in more cases than under the *Boddie* monopolization and fundamental interest standard. The fact that the Supreme Court has shifted from a *Boddie* to a *Mathews* approach indicates that it views equipage claims more expansively than access requests. The cost-benefit approach in the *Mathews* test is questionable in an inquiry to determine fundamental fairness and has been criticized; however, it is particularly appropriate to the determination of when expenditures for expert assistance for indigents are required. A litigant's decision whether to employ an expert in a civil case is an economic one. Integrating economic factors into the due process calculus in this context is sensible. Fundamental fairness in the context of property rights can appropriately take into account economic factors.

There are few reported decisions that have considered whether an indigent civil litigant has a due process right to expert assistance. In *Cagle v. Cox*, inmates alleged that the conditions under which they were being confined violated the constitution. They requested authorization to retain several experts on prisons at a cost not to exceed 7,000 dollars, or in the alternative that such expenses be taxable as costs at the conclusion of their case. The district court denied the requested authorization, despite the acknowledgment that the "expert testimony will be indispensable to the plaintiff's counsel in presenting this case," on the ground that it lacked authority "to commit federal funds to underwrite the necessary expenses of an indigent civil litigant's action." The

213. See Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1136-44 (1984); Note, Lassiter v. Department of Social Services: *Due Process Takes an Ad Hoc Turn—What's a Parent To Do?*, 59 DEN. L.J. 591, 604 (1982) (authored by Rayma Skeen) ("creates the seductive illusion that the analysis is objective"). In fact, the economic balancing in *Mathews* probably is more appropriate to the determination of when the expense of experts should be assumed by the court than what procedural protections should be afforded in administrative proceedings, the application in the *Mathews* case. There are considerable noneconomic values to providing procedural rights. See Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976).


215. Id. at 472.

216. Id. at 468.

217. Id. at 472 (emphasis added).

218. Id. at 469 (emphasis added). See also Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987) (no statutory authority to pay for expert witness for indigents), cert. denied, 108 S. Ct. 1298 (1988). The court in *Cagle* went on to approve taxing expenses of the experts as costs
court did not engage in a due process analysis though it did acknowledge that “indigents should have meaningful access to the courts.”219 The case suggests that the court was frustrated by its inability to provide essential assistance to indigent civil litigants. The Supreme Court could provide an interpretation of due process that would allow courts to grant such assistance.

Setting aside the Supreme Court’s hostility to the right to counsel for indigents in civil cases, the arguments supporting appointment of counsel for indigent civil litigants also support appointment of expert witnesses. In Merritt v. Faulkner,220 the Seventh Circuit considered the denial of a request for counsel in a suit for violation of an indigent prisoner’s eighth amendment rights, due to poor medical care in prison. Specifically, the prisoner suffered problems with his eye that he attributed to lack of treatment and mistreatment. The case was reversed, based on the factors noted above, including consideration of the merits of the claim, inability of the indigent to investigate, the potential benefit of counsel, the difficulty with which the indigent might present her own case, and complexity of the issues.221 The court concluded that in some civil cases, “meaningful access requires representation by a lawyer.”222 The same could be said about the availability of expert witnesses.223

in the event plaintiffs prevailed, finding the $7,000 to be “reasonable.” Cagle, 87 F.R.D. at 472. This probably would be an incorrect ruling after the Supreme Court’s decision in Crawford Fitting prohibiting the taxing of expert witness fees. See section II(A) supra.

If the court had been unable to tax these costs, its ruling on authorization to retain experts might have been different. The court stated that “[w]ithout the authority to tax expert witness fees as costs, the Court could not assure indigent plaintiffs the same access to the court and appropriate remedies available to plaintiffs who can afford to retain necessary expert witnesses.” Cagle, 87 F.R.D. at 471. It is not clear whether the court felt that “access” had to be provided by some means. With the removal of the statutory option to tax expert witness fees, it is imperative that the constitutional due process right to such assistance be addressed.

221. Id. at 764.
222. Id. at 763.
223. A debate has been developing over whether counsel should be appointed in cases in which monetary damages are being sought. The argument, as set forth by Judge Posner and others, is that the marketplace will provide contingency fee attorneys in meritorious cases, thus obviating the need to appoint counsel:

Where damages are sought, the prisoner should have no difficulty finding a lawyer willing to take his case on a contingency-fee basis, provided the case has some merit. Even if only injunctive relief is sought, he should be able to retain counsel to assist him with a claim having substantial merit, because 42 U.S.C. § 1988 allows the court to award the winning party in a civil rights case a reasonable attorney’s fee. . . . Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner’s claim. If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer.
In *Merritt*, where medical issues were central, access to an ophthalmologist might have been more critical to prevailing than obtaining legal assistance. See also *Darden v. Illinois Bell Tel. Co.*, 797 F.2d 497, 505 (7th Cir. 1986) (Easterbrook, J., concurring) (marketplace should govern); *Merritt*, 697 F.2d at 769 (Posner, J., dissenting) (fears that court's approach will lead to appointment in civil cases as a rule). After a remand in *Merritt*, the plaintiff entered into a settlement, with the assistance of appointed counsel, that provided for no financial recovery. Plaintiff then unsuccessfully attempted to challenge the settlement. On appeal of that challenge, the settlement was upheld and Judge Posner noted that the case had offered proof of his market theory. *Merritt v. Faulkner*, 823 F.2d 1150 (7th Cir. 1987). In Posner's view, plaintiff's inability to obtain counsel had been for good reason, the lack of merit in his claim. *Id.* at 1155-58.

Posner bolsters his argument above by claiming that the marketplace will also screen out frivolous cases with the added benefit of reducing the federal caseload and preserving judicial resources for cases with merit. *Id.* at 1158. One way courts have made use of market theory is to interpret the "unable to employ" counsel requisite in § 1915(d) as imposing a requirement on the indigent civil litigant of attempting to obtain counsel on her own before requesting assistance from the court. See *Bunton v. Englemyre*, 557 F. Supp. 1, 5 (E.D. Tenn. 1981). This preserves the limited resource of local attorneys for appointment to the cases when the market will not provide counsel.


The decisionmaking process of the private bar, however, does not always indicate whether a case is meritorious. There may be a variety of reasons even meritorious cases are declined by attorneys, including:

—the difficulty of proof. *Poindexter v. FBI*, 737 F.2d 1173, 1181 (D.C. Cir. 1984); *Petete v. Consolidated Freightways*, 313 F. Supp. 1271, 1272 (N.D. Tex. 1970) ("Further complicating plaintiff's problem has been the reluctance of the attorneys she has approached to undertake the specific and complex challenges of a Title VII lawsuit which are not common to more frequently litigated areas of the law.");

—unpopularity of the client. *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1309 (5th Cir. 1977);

—unfamiliarity with the legal issues. *Id.*; or,


Judge Cudahy, who sits with Judge Posner on the Seventh Circuit, has challenged Judge Posner's law and economics approach to obtaining counsel for prisoners, arguing that Posner's approach only works for large dollar amount claims. *Merritt*, 697 F.2d at 768-69 (Cudahy, J., concurring). Indigent prisoners may not be able to attract contingency-fee lawyers with smaller claims for damages, he argues. *Id.* Another disincentive for a lawyer to accept a case
advice. Given the importance of pretrial discovery and case investigation, access to expert witnesses at an early stage can be more helpful than legal advice. One commentator has noted that "the services of an accountant may be of far greater value to one accused of tax fraud than those of his attorney."224

In fact, the Merritt court considered a request for payment for a medical examination of the prisoner, that presented the issue raised here of a right, possibly constitutionally based, to expert assistance. Finding the claim to be "novel," the court concluded it was "unwise" to decide the issue prior to the new trial it had ordered.225

under § 1915 is the question of whether the lawyer's expenses are reimbursed. In Moss v. ITT Continental Baking Co., 83 F.R.D. 624, 626-28 (E.D. Va. 1979), the court held there was no authority under § 1915 to reimburse expenses. The court rejected the argument that this would discourage lawyers from accepting cases with the response that it was a lawyer's duty to accept such cases that provided the lawyer with valuable experience.

The difficulty of obtaining private counsel is not limited to prisoners. Employment discrimination plaintiffs have had problems finding lawyers to represent them, even with the prospects of attorney's fees in Title VII actions. See Poindecker, 737 F.2d at 1181. As one commentator notes:

The legal requirements of the poor center in a few areas: domestic relations, housing, welfare, mental illness, civil rights, credit and collection, employer-employee and consumer matters.... Most of these matters do not generally involve money judgments of considerable amounts. Consequently, in most proceedings the contingent fee is ineffective in securing representation for persons desirous of instituting suit. Moreover, in those instances where counsel can in fact be retained on a contingent fee basis, extensive problems remain in providing investigation, expert witnesses, and appeals.

Note, Right to Counsel, supra note 173, at 1324-25.

Posner's theoretical view of the marketplace breaks down in practice. Even if Posner were correct, the problem of expert witnesses will not be solved by the reliance on contingency-fee lawyers. A contingency-fee attorney must assume responsibility for an expert's fees in advance, because it is unethical to retain an expert on a contingency-fee basis. Comment, supra note 15, at 224; Comment, Contingency Fees for Witnesses, 8 J. LEGAL PROF. 237, 238 (1983) [hereinafter Comment, Contingency Fees]; Note, Contingent Fees for Expert Witness in Civil Litigation, 86 YALE L.J. 680, 1685-88 (1977) (authored by Michael D. Lowe) [hereinafter Note, Contingent Fees]; Note, The Contingent Compensation of Expert Witnesses in Civil Litigation, 52 IND. L.J. 671, 674 (1977) (authored by Reed E. Schaper) [hereinafter Note, Contingent Compensation]. As a result, even though a contingency-fee lawyer may be willing to accept an indigent's case, she may be unwilling to expend the large sums of money on the case, in the form of expert witness fees that are required. Comment, supra note 15, at 224. Once again, either Posner's marketplace breaks down completely or the dollar value of the claim must be extremely large in order to attract a contingency-fee lawyer.


225. The court stated that plaintiff was concerned with:

the district court's refusal to order a medical examination by an independent physician, pursuant to Fed. R. Civ. P. 35(a). The primary thrust of the claim appears to concern the payment of the medical experts' fees. [Plaintiff] recognizes that the
(2) **State Responsibility**

There is an alternative rationale for providing expert assistance to indigent civil litigants even if the distinction between access and equipage is not viewed as critical. It is to focus on the degree of state responsibility for the due process deprivation. In this regard, the *Boddie* opinion can be viewed as requiring a showing that the state is particularly responsible for the harm to the litigant before assistance is provided. Thus, the fact that the litigants in *Kras* and *Ortwein* theoretically had alternative means of resolving their disputes meant that their lack of access to the courts was not a due process violation. In those cases, the alternative remedies relieved the state of direct responsibility.

The degree of state responsibility required to invoke due process protection has not been established. Once the state is found to have the requisite responsibility, the *Mathews* factors would determine how much process was due when the state deprives life, liberty, or property.\[^{226}\]

Assuming state responsibility is a key determinant, the range of state responsibility in cases involving indigent litigants is examined. In such cases, the state may act as one or more of the following: (1) an adversary; (2) the source of the objectionable law; (3) an enforcement mechanism; (4) the provider of a possibly exclusive forum. Each of these is considered separately.\[^{227}\]

Cases in which the state is the adversary seem to present the strongest case for finding state responsibility. Criminal cases, such as *Ake*, present the clearest analog. Also, when the state is suing to deprive an indigent litigant of life, liberty, or property, responsibility is clear. For instance, in the paternity action in *Little*, the state, inter alia, was a party. The Court applied the *Mathews* factors and held that equipage in the claim is novel. It is unwise to reach this issue now. At his new trial, [plaintiff] will be represented by counsel who has a variety of options unavailable to [plaintiff], including depositions and contingency fee or pro bono services by physicians. Only when these more traditional avenues have been pursued would it become necessary to consider under what circumstances a court can or should appoint a medical expert for an indigent litigant. *Merritt*, 697 F.2d at 767-68 (footnote omitted). The court's suggestion of a contingency fee for expert witnesses raises ethical questions. *See section II(B) supra.*

\[^{226}\] The application of the *Mathews* factors is considered in section IV(F) *infra.*

\[^{227}\] Some of the cases in which equipage has been granted, such as *Bounds* and *Cagle*, have involved constitutional claims. Although this aspect of the cases was not explicitly stated as a ground for relief, it is consistent with the fundamental interest factors in *Boddie*. It is the independent constitutional violation of taking property arguably without due process, that is the basis for an equipage claim, and not the underlying cause of action, whether of constitutional, statutory, or common law nature.
form of blood tests was required. This analysis also supports a claim for equipage in suits by indigents against the state claiming a prior deprivation. Claims of this type might include an improper termination of welfare benefits by state or federal authorities.

It may be appropriate to treat the court as the state in assessing responsibility, at least under some circumstances. The strongest case is one in which the court, in a civil context, compels a loss of property or liberty. This is because: "whenever the government enforces private claims to property of one person against another, it has acted to deprive someone of his property." Thus, judicial action and state action may

228. It was a state law which required the blood tests. The state was also financing the litigation. Little v. Streater, 452 U.S. 1, 9-10, 12 (1981).


Many civil suits, such as contract and tort cases, concern only monetary damages. Property cases may involve only the ownership of property. In such cases, the protected interest is often “property” as opposed to “life” and “liberty.” The claim may be a speculative, unliquidated one for money damages. According to the Supreme Court in Fuentes v. Shevin, 407 U.S. 67, 86 (1972), “[t]he Fourteenth Amendment’s protection of ‘property’ . . . has never been interpreted to safeguard only the rights of undisputed ownership.” See Comment, The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein, 8 HARV. C.R.-C.L. L. REV. 571, 588 (1973) (authored by Phillip L. Spector). Of course, some civil proceedings, such as eviction suits, involve more than a financial dispute. They arguably implicate liberty interests as well. Scherer, Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings, 23 HARV. C.R.-C.L. L. REV. 557, 566-69 (1988).

Criminal cases, such as Ake, which involve both life and liberty interests, cannot be distinguished from civil cases, even those implicating only property interests, in terms of the need of indigent parties for expert assistance. As a practical matter, the factual and legal issues in civil cases are often more complex than in criminal cases. See Merritt, 697 F.2d at 764. Civil cases raising constitutional questions are especially complex. Id.

From a policy perspective, there is no reason to distinguish between providing assistance in civil as opposed to criminal cases:

[T]he citizen who permanently loses his home, a government job, a required license, or unemployment benefits may, in many circumstances, receive a more crippling blow than the criminal who serves a jail sentence. If vindication is prevented by financial inability to secure counsel, and counsel is not provided, the resulting harm is indistinguishable from that suffered by the criminal defendant.

Note, Right to Counsel, supra note 173, at 1333.

It does not follow, as suggested by the Supreme Court’s decisions, that the state always presents the most formidable adversary due to its great resources. Often state attorneys are overworked and, due to low salaries, not always the best lawyers. Private counsel at larger law firms may, in fact, have more talent and resources available to oppose the indigent. It makes more sense instead to focus on the plight of the indigent rather than who is opposing her.
be indistinguishable.\textsuperscript{230}

One author, favoring the right to counsel for indigents in civil cases, argues that due process is implicated in purely private, civil cases:

Someone may retort that it is not the state but another private person or merely unfortunate personal circumstances that might inflict the damage. But the government cannot easily wash its hands. . . . Doesn't the state . . . violate [the equal protection] clause and the due process clause as well when a court rules against a poor person without counsel who couldn't properly present his own case?\textsuperscript{231}

One step removed from direct state involvement is the case in which state law imposes the requirement of expert testimony in order to prevail on a claim or defense.\textsuperscript{232} It is unfair for the state to impose this burden on indigent litigants without assuming some responsibility for bearing the cost.

A series of recent cases involving private litigants has taken the notion of state responsibility in purely private litigation a step further. In these cases, white litigants have sought to exercise their peremptory challenges in civil jury trials to exclude black jurors, presumably because the adversary is black and the jurors are expected to be sympathetic. The Supreme Court, in \textit{Batson v. Kentucky},\textsuperscript{233} found this practice impermissible when employed by prosecutors in criminal cases, where state responsibility is clear. The Court has never ruled on a comparable claim in a civil case. A number of district and appeals court decisions, however, have concluded that requisite state involvement is present in such instances.

In \textit{Edmonson v. Leesville Concrete Co.}\textsuperscript{234} a black construction worker in a federal enclave was injured and brought a personal injury suit against a concrete company. The company challenged peremptorily two black jurors, leaving a jury of eleven whites and one black. The district court denied plaintiff's \textit{Batson} based request to require the defendant to articulate a nondiscriminatory explanation for the exercise of the challenges. The court of appeals, however, remanded the case for consideration of that request.\textsuperscript{235}

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\textsuperscript{230} \textit{See Botein, Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without A Judicial Remedy?, 36 Brooklyn L. Rev. 368, 373 (1970) ("Judicial action is state action, and thus a judgment which deprives a person of a constitutional right is itself unconstitutional.").}
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\textsuperscript{231} O'Brien, \textit{supra} note 173, at 10.
\textsuperscript{232} \textit{See} section I \textit{supra}.
\textsuperscript{233} 476 U.S. 79 (1986).
\textsuperscript{234} 860 F.2d 1308 (5th Cir. 1988), \textit{rehearing en banc granted}, 860 F.2d 1308 (5th Cir. 1989).
\textsuperscript{235} \textit{Id.} at 1315.
\end{flushright}
While the plaintiff’s claim in *Edmonson* was based on equal protection, the court of appeals noted that because the fourteenth amendment only applies to the states, the claims, if upheld, must be based on the due process clause of the fifth amendment, which contains an implicit guarantee against denial of equal protection. The threshold question the court had to consider was whether the private exercise of peremptory challenges constituted governmental action to which the fifth amendment applied.

The two-part test for state action applied was derived from the Supreme Court’s opinion in *Lugar v. Edmondson Oil Co.* The claimed deprivation had to have “resulted from the exercise of a right or privilege having its source in state authority” and the private persons may be appropriately characterized as “state actors.” In this regard, the Court cited *Shelley v. Kraemer* with approval: “[d]espite the fact that a restrictive covenant is a contractual arrangement between private parties, the Supreme Court held that enforcement of such private agreements by ‘judicial officers in their official capacities is to be regarded as actions of the State.’” In finding state action, the court noted the intimate involvement of the government in the litigation process, from ordering the venire to appear, to excusing prospective jurors after a peremptory challenge is exercised.

While the state has direct responsibility to provide and compensate jurors, it also has assumed responsibility to provide a judicial system. While admittedly pushing the limits of state responsibility, it could be argued that a court’s denial of an indigent’s request for expert assistance is sufficient to invoke a due process analysis. The government provides the statutory authority for the case to be heard in court, the courtroom facility itself, and a judge to administer the case and order appropriate relief at its conclusion. Unlike the judge’s role in implementing a discriminatory peremptory challenge, which is arguably “ministerial”
and not as a decisionmaker, in denying a claim by an indigent for expert assistance, the judge is the critical actor.

It ultimately is left to the Supreme Court to determine at what point state responsibility for a private litigant ceases. Kras, Ortwein, and Kadmos do not suggest that an expansive view will be taken.

In addition it can also be argued that a litigant has a protected interest in a meaningful opportunity to be heard, independent of the nature of the cause of action, that is entitled to due process protection. The courts cannot wash their hands when an indigent has no meaningful opportunity to be heard without assistance by an expert witness.

F. Application of the Right

Even if indigent civil litigants have some right to expert assistance, it still must be determined under what circumstances due process requires that an expert be appointed. In light of experience with the appointment of counsel cases, it is certain that indigents will not be given carte

243. Id. at 1312.
244. Despite the lack of judgment exercised, the Eleventh Circuit, in Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), cert. denied sub. nom., Tiller v. Fludd, 110 S. Ct. 201 (1989), viewed the trial judge's ruling on a challenge to the exercise of a discriminatory peremptory challenge as the critical act:

The trial judge's decision—to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race—is the one that harms the objecting party. In overruling the objection . . . the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes.

Id. at 828.
245. The Court may well take into account the presence of an arguably fundamental right in Boddie and the fact that the litigants in Bounds were being held as prisoners by the state in evaluating the degree of state responsibility required to trigger due process.
247. One obvious threshold requirement is that the civil litigant requesting assistance be indigent. To date, legislatures and courts have not generally imposed a definition of indigence in determining the qualification for proceeding in forma pauperis. The Legal Services Corporation has adopted an approach to this determination. 45 C.F.R. § 1600.1 - 1611.9 (1989). In court, the conclusion of indigence is generally left to the trial judge. See, e.g., Cross v. General Motors Corp., 721 F.2d 1133, 1154 (2d Cir. 1986) (“decision whether to grant or deny in forma pauperis status is within the sound discretion of the trial court”). The many possible variables, such as family income, family size, overall debt, employment status and prospects, receipt of public benefits, total assets, anticipated future debts, and income, tend to require a highly individualized assessment.
248. In the future, courts may come to take the position that indigents have the right to expert assistance on demand in civil cases, much as criminal defendants have the right to counsel after Gideon. See Merritt v. Faulkner, 697 F.2d 761, 764 (7th Cir. 1983) (logic that
blanche in the choice and use of experts. Based on the Supreme Court's most recent decisions, it appears likely that the Mathews factors will be applied to evaluate claims for denial of due process in the judicial process, including claims for expert assistance. Thus, each of the Mathews factors is considered in light of a claim by an indigent civil litigant for expert assistance.

(1) *The Private Interest at Stake*

In the Supreme Court's decisions applying the Mathews factors, the private interest at stake has unquestionably been great. In *Ake*, the defendant's life was at stake; in *Lassiter*, the loss of parental rights. As a result, great weight was given to this factor. A right to expert assistance in the wide range of civil cases with differing private interests will lead courts to consider closely whether such a significant interest is at stake.

Where nonmonetary relief is sought, such as an injunction to cease a nuisance or deceptive trade practice, assessment of the interest at stake becomes difficult. Since litigants often feel strongly about their interests, an objective test is called for: how would the interest be valued by a reasonable person under the circumstances? The significance of the interest will weigh heavily in determining whether relief should be granted.

In cases when monetary relief is sought, there might be a tendency simply to balance the amount at stake with the cost of the expert, the primary component of the government's interest. Thus, if the amount at stake is comparable to the cost of the expert, then no assistance would be provided.

This conclusion fails to take into account the motivation for providing assistance to indigents: the fundamental unfairness in administering a system in which indigents cannot participate effectively due to their financial status. The Mathews factors also militate against this result. They are value laden and do not suggest a strict cost-benefit analysis. As has been noted about the application of Mathews: "[E]ven in its most empirical moments, the Supreme Court's theory of interpretation does not adopt an efficiency standard. The Court may talk about 'costs' and 'benefits' to give the impression that some agreed upon common scale is being used for weighing values, but the Court's analysis is decidedly non-

moved the United States Supreme Court from *Powell* to *Gideon* to *Argersinger* was "no less compelling" in the civil context of the instant case), cert. denied, 464 U.S. 986 (1983). As with *Betts* in the criminal context and now *Lassiter* in the civil context, if that is to happen it will occur over a long period of time. Of course, since counsel would be helpful in almost every case, whereas experts are only useful in particular cases, it is likely that courts will retain control over the appointment of experts.
economic.”

The primary economic consideration in the Mathews factors is the focus on the state's interest. One aspect of the state's interest is the state's ability to assume the economic burden in light of the utility of the benefits. The cases suggest, however, this consideration is to be given relatively little weight. Courts consistently have concluded that state's can well afford to provide counsel, psychiatrists, blood tests, and so on. Since expert witnesses clearly will not be needed in all cases, the economic burden on the state should not be unreasonable.

That is not to say that relative cost is irrelevant. At the extreme, in a case in which the cost of an expert significantly exceeds the amount at stake, a court could conclude that it was not fundamentally unfair to require the indigent to proceed unassisted. This determination could be affected by the importance of the recovery or defense to that particular indigent litigant.

For example, in a suit by an indigent against a health insurance company for denial of some minor claims and cancellation of the insurance policy for filing too many nonmeritorious claims, the risk to the indigent of future liability for uncovered hospital bills may be great, even though the dispute over the denied claims may involve a relatively small amount. The risk in that case may justify an expenditure, in excess of the amount in dispute, for expert witness fees to obtain a medical opinion. Especially when the medical opinion would help establish the validity of the denied claims in order to support an argument that the policy should remain in effect. Similarly, in a typical contractual dispute over monetary damages, such as an alleged breach of a home improvement contract, the cost of the construction expert, when not offset by other factors, must be weighed against the likely recovery. Under those circumstances, an expert charging more than the anticipated recovery cannot be justified.

(2) The Affected Governmental Interest

The governmental interest in cases in which an indigent requests appointment of expert assistance is multifaceted. On one hand, the

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250. There may be instances, such as in Little, in which the state is also a party to the civil action. In those instances, the state's interests will be more complex and perhaps conflicting. The state may seek to avoid liability but, at the same time, want to ensure that its citizens have been treated fairly.

government has an interest in just adjudication of its citizens' claims. This interest supports expenditures for experts when necessary to a proper resolution of the case. On the other hand, to the extent the state is required to pay expert witness fees, it has a strong economic interest. In cases in which the other Mathews factors are strong, the court has concluded that the state's economic interests do not carry much weight.251

It is difficult to estimate the cost of providing expert services to indigent civil litigants. The total expense, however, is not likely to be overwhelming for states and the federal government. Since the number of civil cases filed nationally approximately equals the number of criminal filings,252 the Supreme Court's analysis of financial considerations in Ake should provide some guidance. In Ake, the Court considered evidence of the costs incurred by the federal government and a number of states in providing expert services in criminal cases253 and concluded that the financial burden was not too great.254 No effort was made to estimate the cost of an expert witness for any individual case. Instead, the cumulative cost of providing assistance was considered and found acceptable.

While the number of civil filings nationally may appear large, several factors will reduce the number of cases in which expert assistance is sought. First, requests will only be made in cases in which one or both parties are indigent. Second, as with any other group of cases, many are likely to be settled or not pursued after filing. Third, expert testimony will not be helpful or relevant in many cases and in other cases the indigent litigant may be able to obtain expert assistance without cost, or to have the costs financed by a contingency-fee attorney. These factors should limit significantly the number of cases in which the court will be called upon to provide expert assistance.

Schwab, 410 U.S. 656 (1973). One response is that the fairness of the judicial process is a significant interest as well.


254. Ake, 470 U.S. at 78-79. Comparable figures are unavailable for expenditures for experts in civil cases because they are not currently provided at government expense.
One way to mitigate the overall expense to the state of paying for expert assistance is to require that indigent litigants make some effort to obtain assistance, either pro bono or at reduced fees, without court intervention.255 Because most expert witnesses do not belong to professional societies that encourage pro bono service, it can be extremely difficult to find volunteer experts.256 Because experts cannot be paid on a contingency fee,257 the market theory does not operate if the indigent seeks only an expert and not a lawyer. If a contingency fee lawyer is found, the lawyer might be willing to advance the costs of expert assistance. If the indigent is ultimately responsible for these expenses in the event she does not prevail, however, this is not an adequate solution. Thus, in many, if not most cases, indigents must turn to the courts for assistance if they are to obtain expert assistance.

Another way to mitigate expenses and ensure that funds are available for other indigent litigants is to require that the indigent reimburse the state: a) out of the proceeds, if any, of the lawsuit; or, (b) if the indigent’s financial position changes and she is able to afford reimbursement.

It is argued that providing indigent civil litigants free expert assistance would give them an unfair advantage over nonindigent litigants who cannot afford to hire an expert.258 If there were no requirement that expert witness fees be repaid, indigents’ net recovery in lawsuits would

255. See also McAninch, A Constitutional Right to Counsel for Divorce Litigants, 14 J. Fam. L. 509, 510 (1975) (“A court then might respond to a post-Boddie request for procedural assistance with a requirement that the requested service, be it counsel, subpoena power or stenographer’s services, be not only important in a procedural due process sense, but such that there be no possible alternative means of securing relief.”).

In applying 18 U.S.C. § 3006A, the indigent’s efforts to obtain the needed assistance through means other than court appointment or payment has been taken into account: “elements to consider include the likelihood that defense is warranted and sufficiency of psychiatric assistance received from other sources.” Note, An Indigent’s Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma, 39 Sw. L.J. 957, 965 n.73 (1985) (authored by Helen Hubbard) (citing United States v. Chavis, 476 F.2d 1137, 1143 (D.C. Cir. 1973)).

256. An employee of the Florida Clearing House for Justice noted:

The problem of indigents is magnified by the difficulty of obtaining expert services on a pro bono basis. According to the director of a Florida volunteer defender organization: “Competent lawyers often volunteer their help, but psychiatrists rarely do. Over the years, I have found hundreds of attorneys who have been willing to volunteer millions of dollars of their time to these defendants. I have found only three free shinks . . . .”

Note, Expert Services, supra note 11, at 1327 n.12 (quoting Sherrill, In Florida, Insanity is No Defense, 239 NATION 537, 555 (1984) (quoting Scharlette Holdman, of the Florida Clearing House for Justice)).

257. See section II(B) infra.

exceed that of nonindigents who had to pay for experts out of pocket. One district court has proposed that expert witness fees be taxed as costs.\textsuperscript{259} The drawback of this approach is that concern about liability for expert witness fees may deter indigents from bringing meritorious suits, and may result in a crushing financial burden at the conclusion of an unsuccessful suit.

The Supreme Court, in \textit{Fuller v. Oregon},\textsuperscript{260} considered the constitutionality of an analogous recoupment scheme under which a state required an indigent defendant to repay the costs of her criminal defense if she was convicted and subsequently acquired the financial means to bear those costs.\textsuperscript{261} The costs included not only counsel fees but other expenses incurred by counsel, and paid by the state, including fees for an investigator.\textsuperscript{262}

In upholding the scheme, the Court rejected a number of constitutional arguments, including the familiar argument, advanced by Justice Marshall in dissent, that the scheme constituted wealth discrimination in violation of the equal protection clause.\textsuperscript{263} Because repayment was part of the plan designed to provide indigents with counsel, the Court reasoned, it followed that only indigents would be affected by it. Therefore, there was no invidious discrimination against the poor as a group.\textsuperscript{264} The Court failed to consider to what extent it was appropriate to burden the provision of equipage to which the recipient is entitled. Nonetheless, if a repayment scheme has been upheld in the criminal context, a fortiori it can be applied in the civil context as well.\textsuperscript{265}

(3) \textit{The Value of Expert Testimony and the Risk of Erroneous Outcome Without It}

A determination of the value of expert testimony and the risk of an erroneous outcome without it, the third \textit{Mathews} factor, necessarily re-

\begin{itemize}
\item \textsuperscript{260} 417 U.S. 40 (1974).
\item \textsuperscript{261} \textit{Id.} at 43. Under Oregon law, repayment may be made a condition of probation.
\item \textsuperscript{262} \textit{Id.} at 41.
\item \textsuperscript{263} \textit{Id.} at 48 n.9. The majority, however, took the position that because Justice Marshall’s argument did not appear in petitioner’s brief or oral argument, and was not raised in the state courts, it was not properly before the court. \textit{Id.} Nonetheless, the Court chose to respond to it.
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} \textit{See} Walker v. McLain, 768 F.2d 1181, 1184 (10th Cir. 1985) (permissible to recoup attorney’s fees for counsel appointed to an indigent in a civil contempt proceeding), \textit{cert. denied}, 474 U.S. 1061 (1986); Smith v. Lees, 431 F. Supp. 923, 927 n.3 (E.D. Pa. 1977) (indigent only liable for transcript if successful on appeal); Carter v. Telectron, Inc., 452 F. Supp. 939, 942-44 (S.D. Tex. 1976) (court may require plaintiff, whose economic status has changed and is no longer indigent, to repay costs of multiple suits or face dismissal of those cases).
\end{itemize}
EXPERT ASSISTANCE IN CIVIL CASES

quires an analysis of the litigant's claims (their legal and factual basis) in light of the added value of an expert in establishing the claim. In some instances, as noted in section I, above, there are claims which cannot legally be established in the absence of expert testimony. In other cases, expert testimony practically may be necessary to satisfy the burden of proof (or prevent the adversary from doing so), but is not a strict legal requirement. Down the scale is expert testimony that is only marginally beneficial, even unnecessary.\(^{266}\)

Inherent in balancing the Mathews factors is the notion that expert assistance should be provided only when necessary.\(^{267}\) The Supreme Court, in Ake, suggested a standard for satisfying the third prong of the Mathews test, namely that the issue on which expert testimony is sought be a "significant factor" in the case:

A defendant's mental condition is not necessarily at issue in every criminal prosecution, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. . . . When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.\(^{268}\)

In a subsequent case, Caldwell v. Mississippi,\(^{269}\) the Court elaborated that the same showing of the reasonableness of the request for expert assistance would be required: "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial,\(^{270}\) we find no deprivation of due process in the trial court's decision [to refuse appointment of an investigator and fingerprint and ballistics

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\(^{266}\) There are, of course, many cases in which only lay testimony is necessary or even relevant. For instance, a suit by a business against an indigent consumer for nonpayment of a debt will usually not call for expert testimony.

\(^{267}\) The showing of necessity will go not only toward the need for expert testimony but the question of how much is needed as well.

\(^{268}\) Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985). A related consideration is how important to the case is the issue on which expert assistance is sought:

Some courts and commentators have suggested that an expert should be supplied only when the issue is "pivotal," i.e., when it, alone, is dispositive of guilt. See, e.g., State v. Green, 55 N.J. 13, 18, 258 A.2d 889, 891 (1969). . . . While it is true that such a distinction may affect the "third prong" of the Mathews balancing test . . . it should not do so decisively. If a given question is indeed at issue in the trial, the "third prong" interest in accurate determination should still carry sufficient "weight," together with the individual defendant's interest, to outweigh the government's minimal fiscal interest.

Note, Expert Services, supra note 11, at 1357 n.193.

\(^{269}\) 472 U.S. 320 (1985).

\(^{270}\) The petitioner's motion to the trial court only justified his request for expert assistance with the statement that the expert "'would be of great necessary witness'." Caldwell v. State, 443 So. 2d 806, 812 (Miss. 1983), rev'd in part on other grounds, 472 U.S. 320 (1985).
The Eighth Circuit has concluded that considering *Ake* and *Caldwell* together: "a defendant must show more than a mere possibility of assistance from an expert. Rather, the defendant must show a *reasonable probability* that an expert would aid in his defense, and that denial of expert assistance would *result in an unfair trial*."273

Thus, a successful request for expert assistance will require an analysis of the issues likely to be raised and how expert testimony would contribute toward development of those issues. The court then should determine how helpful the expert would be and how harmful it would be to the indigent litigant's case to forego expert assistance.

There are a number of alternative methods for determining when experts should be appointed. One is whether a similarly situated private litigant would have chosen to use expert testimony under the circumstances.274 This is reminiscent of Justice Black's statement in *Griffin* that


272. It is not clear what type of showing this entails. According to one commentator: The *Ake* formulation could be described as a "presumed need" standard, that is, one where the defendant's need for the expert is presumed once it is established that a certain issue will be a "significant factor" at trial. Once the defendant has shown that the relevant issue exists, no further particularized showing is necessary. Note, *Expert Services*, supra note 11, at 1357-58. Courts, however, have taken a more stringent approach in applying *Ake* and have required a showing of a "substantial basis" for the defense raised. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1985) (en banc), cert. denied, 481 U.S. 1054 (1987).

273. Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988) (emphasis added). *See also Moore*, 809 F.2d at 712 n.8 (providing expert witnesses absent a substantial showing of need would place an "onerous burden on the administration of criminal justice"); Vassar v. Solem, 763 F.2d 975, 977 (8th Cir. 1985) (appointment should be made "when the facts reasonably suggest that use of an expert would be beneficial to the accused in preparing his case").

The Fourth Circuit, in a decision well before *Ake*, employed a similar approach with the dual requirements that the expert be necessary and that other available methods of proof of the relevant question be inadequate:

In *Jacobs v. United States* [350 F.2d 571 (4th Cir. 1965)] the court created a two-tier test by which to determine whether court-appointed expert assistance is constitutionally compelled. The first tier examines whether a substantial question exists concerning an issue requiring expert testimony for its resolution. The second tier considers whether the defendant's position could be fully developed without expert assistance. If both questions are answered affirmatively, the constitution mandates that the trial court grant the defendant's request for free expert counsel.


274. The Criminal Justice Act, 18 U.S.C. § 3006A(e)(1) (1982), provides that indigent criminal defendants are entitled to the assistance of experts "necessary for adequate defense." Courts, in applying this provision, have adopted a reasonableness standard to the requirement of necessity. *See, e.g.*, United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976) ("necessary to an adequate defense" includes expert defense witness); United States v. Shultz, 431 F.2d 907, 911 (8th Cir. 1970) (A trial court should authorize expenditures for an expert witness when "underlying facts reasonably suggest that further exploration may prove beneficial to the ac-
"[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."\textsuperscript{275} The Supreme Court’s use of due process rather than equal protection analysis in this context suggests that this broad approach is not likely to be employed.

There will be many cases in which it becomes clear, either through discovery or pretrial conferences, that an indigent’s adversary plans to use expert testimony. Even if a private party opponent’s decision to retain an expert is not used as a surrogate for the judge’s determination of need, because it would be reminiscent of an equal protection approach, it may be that the indigent litigant would, as a result, require an expert to adequately rebut or challenge the opponent’s expert.\textsuperscript{276}

Yet another approach is suggested in \textit{Lindsey v. State},\textsuperscript{277} an insanity defense case decided by the Supreme Court of Georgia after \textit{Ake}. The court suggested a two-step process in which a court-appointed expert determines whether a private expert should be appointed. First, a court-appointed expert examines the defendant to determine whether “sanity is likely to be a significant factor in this defense.”\textsuperscript{278} If the examination is positive, the court must then provide a psychiatrist. While this might be effective in the limited context of insanity defense cases, it is unduly burdensome and costly to require a court to employ its own expert only to determine whether the indigent civil litigant should be provided with funds to employ her own expert. The better approach, in light of the Supreme Court’s continued adherence to a due process analysis, is to place the burden on the indigent litigant to demonstrate the benefit of an expert in the particular case and the harm that would result if none were provided.

There might be a concern that judicial time and resources will be wasted by indigents pursuing baseless claims with court-appointed expert
witnesses. It would be appropriate for courts to consider the merits of asserted claims in determining the necessity for expert assistance. In the context of considering a right to counsel in civil cases, one commentator has suggested that such a right should not include the right to assert frivolous claims through a publicly furnished attorney. The commentator suggests that some screening mechanism be established consisting of either a bar committee, a panel of judges, or some combination of the two, to determine whether the asserted claim or defense is frivolous. It would be most efficient to leave this decision to the discretion of the trial judge.

There is also the question at what stage in the proceedings the expert should be appointed. A case can be made for expert assistance in drafting the complaint. Early appointment of experts might lead to fewer complaints being filed, if the expert can inform the indigent litigant that the factual arguments or conclusions in the contemplated case lack merit. An indigent litigant may need at least some expert assistance in making the case to the court that expert assistance is needed. It might be useful to provide some amount of expert assistance to indigents automatically, as is done under the Criminal Justice Act. This initial expense could be a cost-effective means of preserving judicial resources by eliminating or refining claims at an early stage. The value of an expert goes beyond testifying at trial. As most civil cases are resolved prior to trial, an expert witness can provide invaluable assistance to an indigent in evaluating her claim and assessing settlement offers. Experts, even if they do not ultimately testify, can help in trial preparation. In applying the test of need for an expert, it is important to keep these other uses in mind.

(4) How Is the Expert to be Chosen?

After it has been decided that an indigent is entitled to expert assistance, the practical question arises of how to choose the expert. The Supreme Court’s opinion in Ake made it clear that indigents do not have the right to an expert of their own choosing. This is not to say that

279. Note, Right to Counsel, supra note 173, at 1337.
280. Id. at 1337 n.94.
281. Clearly assistance by appointed counsel, if available, would be invaluable at this stage.
283. See Pieras, Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method, 35 Cath. U.L. Rev. 943, 943 (1986) (author’s experience as a federal judge consistent with statistic that only six percent of the civil cases filed in federal court are tried).
courts could not allow indigents to select their own experts, at least subject to the approval of the court.\textsuperscript{285}

An alternative would be for the court to develop a list of acceptable experts and have the indigent propose one or more names for the court's approval or reserve the right at least once to reject the court's choice.\textsuperscript{286} Although this is feasible in standard criminal cases, it might be a problem in civil cases because the types of expert witnesses used in civil cases are so varied that it would be difficult for the court to maintain such a current list.\textsuperscript{287}

A third approach would be the creation of panels to choose experts. This has been proposed in the context of appointing psychiatrists for defendants in criminal cases:

Under a panel-type approach, the prosecution and the defense would each appoint a psychiatrist to serve on a panel. The two appointed psychiatrists would then in turn agree on a third psychiatrist to assist the defense. If the two members of the panel cannot reach an agreement, then each member must submit a name to the court. The court will then act as a tie-breaker and choose one of the two submitted names.\textsuperscript{288}

It is worth examining, in this regard, the application of 28 U.S.C. section 1915, the federal statute which gives judges authority to "request" that private attorneys represent indigent litigants. The standards that have developed for applying section 1915(d) can provide some guidance in determining when and how to appoint expert witnesses in civil cases. Many of the same problems and concerns are likely to arise.

\textsuperscript{285} The American Bar Association's Criminal Justice Mental Health Standard § 7-3.3(a) (1984) calls for the provision of a mental health expert "selected by the defendant." See Note, Expert Services, supra note 11, at 1357 n.189 ("simplest solution would be to permit the defendant to choose his expert, subject only to court control of the expert's qualifications and her fee").

\textsuperscript{286} Note, Expert Services, supra note 11, at 1357 n.189.

\textsuperscript{287} Indigent civil litigants might need plumbing experts in home improvement cases, psychiatric experts in child abuse cases, or automotive mechanic expertise in a case against an automobile repair shop.

\textsuperscript{288} Comment, supra note 278, at 412. Consistent with this approach:

Ohio and Arizona, for example, have statutory provisions which allow the court to appoint a panel of experts to examine the defendant. [ARIZ. REV. STAT. ANN. § 13-4013 (1978); OHIO REV. CODE ANN. § 2945.39 (Page 1982).] Both states permit the state and the defendant to name their respective choices to the panel.

Note, Criminal Procedure, supra note 11, at 337-38.
While there is no right to automatic appointment of counsel under this provision, appellate courts have held that it is error for the trial court not to consider explicitly a number of relevant factors, which include: 1) the type and complexity of the case; 2) the ability of the litigant to present the case; 3) the ability of the litigant to investigate the case adequately; and, 4) whether the evidence would consist in large part of conflicting testimony that would require skill in presentation and extensive cross-examination. The merits of the claim also are considered an important factor.

(5) Are Indigents Entitled to a Partisan Expert?

The Supreme Court's decision in Ake has raised the issue of whether defendants have the right to a partisan or simply to a neutral psychiatrist. The role of the psychiatric expert is that of "help[ing to] determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." This role implies an expert who is partisan. Justice Rehnquist, in his dissent in Ake, took the position that because a psychiatrist's

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289. Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982).
290. See Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985) (remand for more specific findings). But see Howland v. Kilquist, 833 F.2d 639, 646 (7th Cir. 1987) (review of record demonstrates failure to state reasons was harmless error). See also McKeever v. Israel, 689 F.2d 1315, 1320 (7th Cir. 1982) (abuse of discretion to fail to exercise discretion to appoint or not to appoint counsel); Ray v. Robinson, 640 F.2d 474, 478 (3d Cir. 1981) (same).
291. Ulmer, 691 F.2d at 213 (5th Cir. 1982). See also Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981) (courts must consider merits even when not frivolous); Annotation, Appointment of Counsel, supra note 174, at 671 (same).
293. See Maclin v. Freake, 650 F.2d 885, 889 (7th Cir. 1981) (prisoner's handling of the case demonstrated lack of working knowledge of the legal process).
294. See id. (confinement to wheelchair and constant pain prevented prisoner from investigating his case).
296. See Childs v. Duckworth, 705 F.2d 915, 922 (7th Cir. 1983) (threshold question should be merit of case); McKeever v. Israel, 689 F.2d 1315, 1320 (7th Cir. 1982); Tripati v. Poland, 610 F. Supp. 1047, 1049 (E.D. Wis. 1985).
299. See Note, supra note 274, at 963 (psychiatric experts can do far more for the defense than testify in court).
role is not one of an advocate, the defense is entitled only to a competent opinion from a psychiatrist independent of the prosecutor's office.300

The importance of a partisan expert in a civil proceeding may be as great as in the criminal context.301 In both instances the expert can be invaluable not only in testifying,302 but also in assisting counsel or the pro se indigent in preparation of the case,303 assembling, creating, and interpreting information,304 and cross-examination of the opponent's witnesses, especially experts.305 A neutral expert would not serve those functions.306

Furthermore, under the Federal Rules of Evidence, a neutral expert would be required to report her results to both parties.307 This would place a tremendous burden on an indigent litigant's decision to use an

300. Ake, 470 U.S. at 92.
301. But see C. McCORMICK, MCCORMICK ON EVIDENCE § 17 (3d ed. 1984) (endorsement of use of neutral experts to reduce partisanship in selection of experts and presentation of their results).
302. [W]hile probative and rigorous cross-examination of an opposing psychiatrist may partially fulfill [the role [of the defense attorney of adducing probative evidence in support of her client's claims and in challenging the State's evidence], "calling to the stand a psychiatrist . . . is an even better way of forcing judges and juries to use their common sense."

304. See Note, supra note 274, at 963 (can assist counsel in preparing and designing defendant's case).
306. See United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985) (indigent defendant entitled to appointment of psychiatric expert even though psychiatrist had been appointed to examine defendant at the request of the government).

A contrary view is that so long as the litigant has access to a competent expert who will conduct the appropriate examinations, assist in evaluation, preparation, and presentation of the case, there is no further right to have that expert be to the litigant's personal liking. See Martin v. Wainwright, 770 F.2d 918, 935 (11th Cir. 1985) (no entitlement to favorable expert), modified on other grounds, 781 F.2d 185 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986). The appointed expert in a criminal case may even be one employed by the state. See Roach v. Martin, 757 F.2d 1463, 1471-72 (4th Cir.), cert. denied, 474 U.S. 865 (1985).
expert. If the expert's analysis turned out to be unfavorable, the other side would be given evidence they might not otherwise have developed.

Ultimately, reliance on neutral experts places indigents at a disadvantage in the adversarial system because they do not have the "resources to participate independently in [the] 'battle of the experts.'" To some extent, use of a neutral expert shifts the ultimate decision in the case away from the trier of fact to the expert because the opinions of a neutral court-appointed expert, who appear to have judicial sanction may be given more credence.

Conclusion

Without the right to expert assistance, indigent civil litigants can be put in a legal "Catch 22," legally required to produce expert testimony, yet unable to afford it. Based on a series of Supreme Court decisions applying the due process clause in the context of indigents' claims for access and equipage, it appears that a right to expert assistance for indigent civil litigants exists in appropriate cases. No longer should indigents be placed at a disadvantage in those cases solely due to an inability to afford experts to support or defend their position.

Returning to the indigent couple described in section I, facing an eviction suit and unable to retain an expert on the local housing market: consider how a request for expert assistance would be handled by the trial judge. In determining whether an expert should be appointed, the judge would apply the three Mathews factors. The first, the private interest at stake, would be great. Not only is the couple pursuing a financial claim for back rent, they face eviction if unsuccessful. These are serious property and liberty interests.

By contrast, the governmental interest

308. Note, Expert Services, supra note 11, at 1349; Note, Criminal Procedure, supra note 11, at 337 n.121 (“'battle of the experts' refers to the tendency in insanity cases for the testimony of opposing psychiatrists to conflict”) (citing McGarty v. O'Brien, 188 F.2d 151, 155-57 (1st Cir.), cert. denied, 341 U.S. 928 (1951)).

309. Note, Expert Services, supra note 11, at 1350 (“judge or jury ... almost invariably accepts the expert's opinion”). This danger that the jury may abdicate its decisionmaking responsibility in favor of the expert may be somewhat diminished by Fed. R. Evid. 706(c) which gives the court discretion whether to "authorize disclosure to the jury of the fact that the court appointed the expert witness."


311. It has been argued that liberty interests are implicated by the eviction process. Due to the unavailability of affordable housing, eviction of low-income people could well result in their becoming homeless: "Because the threat of eviction poses the threat of homelessness and its devastating consequences, the liberty interest at stake is one which falls within the rubric enunciated by the [Supreme] Court in Lassiter." Scherer, supra note 229, at 564-69.
is mixed. Counterbalancing the costs of providing expert assistance are the numerous expenses the state incurs in caring for the homeless.\textsuperscript{312} Finally, expert assistance in this context is invaluable. Without it, the couple will lose their case, regardless of the merits. Clearly, under these circumstances, the court should grant their request.

The constitutional right to expert assistance is really a subset of the broader due process right to equipage. This right includes, for example, claims by indigent civil litigants for laboratory tests, such as the blood tests used in paternity proceedings,\textsuperscript{313} investigators or computer analyses. Each such request should be tested under the \textit{Mathews} factors. Denial of claims for these types of assistance violates the fundamental fairness required by due process.

\footnotesize{312. Id. at 576-79.}

\footnotesize{313. \textit{Cf.} Little v. Streater, 452 U.S. 1, 16 (1981) (court granted defendant tests).}