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CRIMINAL LAW

THE CONSTITUTION AND TRUTH SEEKING: A NEW THEORY ON EXPERT SERVICES FOR INDIGENT DEFENDANTS

DAVID A. HARRIS*

I. INTRODUCTION

In 1902, Clarence Darrow addressed the inmates of the Cook County Jail in Chicago, Illinois.¹ In his speech, he did not talk of rehabilitation or of incapacitation, of morality or of blameworthiness for crimes. Instead, he talked of money. “[I]t will make little difference if you are guilty or innocent,” he told the inmates. “First and last, it’s a question of money.”² Only those with money could hire the lawyers, investigators and experts necessary to present a defense.³ For those without money, the criminal justice system did little but pronounce guilt.⁴ Put simply, money—or lack of it—affected the outcome of criminal trials.⁵

Almost a century since Darrow spoke, money continues to influ-

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¹ ARTHUR WEINBERG, *ATTORNEY FOR THE DAMNED* 3 (1957).

² *Id.* at 11.

³ *Id.* at 12.

⁴ *Id.*

⁵ Concern with the effect of wealth and poverty on the courts is not new. In Griffin v. Illinois, 351 U.S. 12 (1956), one of the central cases discussed here, the Court cites *Leviticus* 19:15 (“Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbor.”) and the Magna Carta (“To no one will we sell, to no one will we refuse, or delay, right or justice.”). *Id.* at 16 and n.10. See also John MacArthur Maquire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 362 (1923) (A poor person “may

ence the outcome of criminal cases. Despite the constitutional requirement that the state supply indigent defendants with counsel,⁶ other resources critical to a defense⁷—the services of investigators,

lose his day in court" because he has no money to pay "costs, fees, expense of legal services, and sundry miscellaneous expenses incident to litigation.").

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendants charged with felonies entitled to counsel), addressed perhaps the most glaring inequality in the criminal justice system—those with money could afford counsel; the poor could not. *Gideon* and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (defendants charged with misdemeanors who are incarcerated entitled to counsel), were based on the Sixth Amendment's right to counsel, which exists independent of any issues of equality. Thus, these cases, while important, are not within the scope of the problem I address here—insufficient access to services other than counsel necessary to mount a defense.

Note, however, that many question the efficacy of the service provided by some public defenders and appointed counsel because of lack of resources and heavy caseloads. See, e.g., Marcia Coyle, *Indigent Defense System KO'd*, NAT'L L.J., Feb. 24, 1992, at 3; Mark Hansen, *Criminal Crash Course*, 78 A.B.A. J. 14 (Apr. 1992) (all lawyers, practicing and non-practicing, in Knox County, Tenn., forced to take cases of indigent criminal defendants free because of lack of resources, regardless of lawyers' experience with criminal defense); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 ("[A]lmost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds."); Report, *System for Providing Lawyers to Indigent Federal Defendants Needs Change, Critics Say*, 51 CRIM. L. REP. 1263 (June 17, 1992); Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991); Peter Applebome, *Indigent Defendants, Overworked Lawyers*, N.Y. TIMES, May 17, 1992, § 4, at 18; Tom Watson, *No Dollars for the Defense*, LEGAL TIMES, June 8, 1992, at 1.

⁷ E.g., *Reilly v. Barry*, 166 N.E. 165, 167 (N.Y. 1929) (Cardozo, C.J.) (experts are such a necessity in trials on issues like insanity or forgery that a "defendant may be at an unfair advantage if he is unable because of his poverty to parry by his own witnesses the thrusts of those against him."); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 5-1.4 (3d ed. 1990) (plans for providing defense services "should provide for investigatory, expert and other services necessary to quality legal representation."); EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 203, at 609 (3d ed. 1984) ("[S]kills in building cases with admissible scientific evidence and demolishing these same structures are becoming increasingly valuable as the forensic applications of science are becoming more commonplace."); THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 265 (2d ed. 1988) ("Your own experts are usually essential in preparing the cross examination of your opponent's experts."); ANDRE MOENSSSENS ET AL., SCIENTIFIC EVIDENCE IN CRIMINAL CASES iii (3d ed. 1986) (scientific evidence and expert testimony increasingly vital in criminal investigation trials); YOUNG LAWYERS SECTION, BAR ASS'N OF D.C., AND PUB. DEFENDER SERV. OF D.C., 1 CRIMINAL PRACTICE INSTITUTE TRIAL MANUAL 2.1 (1987) (thorough investigation is key element of defense and "legal, ethical, and moral obligation" of defense counsel) [hereinafter *Criminal Practice Institute*]; Edward N. Bliss, *Defense Detective*, 47 J. CRIM. L. & CRIMINOLOGY AND POLICE SCI. 264 (1956) (necessity of defense investigator); Louis Genevie, *The Key to the Desired Verdict*, NAT'L L.J., June 8, 1992, at 15 (importance of jury selection expert to winning verdicts in Rodney King case); David A. Harris, *It Can Take a Pile of Cash to Fight in Criminal Court*, NAT'L L.J., Feb. 24, 1992, at 17-18 (emphasizing importance of investigators and experts in criminal litigation and the fact that indigent defendants seldom have access to these resources); Jim Kitchens, *Be Your Own Sherlock Holmes*, TRIAL, Apr. 1992, at 34 (cautioning attorneys who investigate their own cases that "ethical or tactical considerations will sometimes preclude trial lawyers from personally investigating certain aspects of their cases, lest they make them-

scientists and other experts—remain luxuries for indigent defendants.

In *Griffin v. Illinois*,⁸ the Supreme Court first addressed an indigent defendant's request for services other than counsel. Griffin, an indigent defendant convicted of armed robbery, asked the state to supply him with a free trial transcript necessary for his appeal.⁹ The Court found the state's refusal to supply the transcript violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.¹⁰ Both of these constitutional provisions, the Court said, "emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"¹¹ This idea became known as the equality principle.¹²

As appealing as the equality principle seemed on the surface, it engendered criticism. The equality principle, Justice Harlan argued in dissent,¹³ was without any logical limit. It committed the state not only to avoiding the creation of inequality, but to remedying inequalities not of its own making. Further, the principle implied a kind of economic leveling thought to be inconsistent with prevailing American political and economic philosophy. The only reasonable governing principle, Harlan said, was due process.¹⁴

Almost thirty years after *Griffin*, the Supreme Court resolved this debate. In *Ake v. Oklahoma*,¹⁵ the Court held that the Due Process Clause alone determined what services, other than counsel, the state must supply to indigent defendants.¹⁶ Due process entitled the indigent defendant not to equality, but to the basic tools of an

selves witnesses and thus become disqualified from participating in the trial as lawyers"); see also *infra* notes 234-88 and accompanying text.

⁸ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁹ *Id.* at 13.

¹⁰ *Id.* at 18.

¹¹ *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

¹² The core concept in *Griffin* is still known as the equality principle. *E.g.*, RONALD J. ALLEN & RICHARD B. KUHN, *CONSTITUTIONAL CRIMINAL PROCEDURE* 151 (1985); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 73 (7th ed. 1989).

¹³ Justice Harlan's dissents in both *Griffin*, 351 U.S. 12, 29-39 (1956), and *Douglas v. California*, 372 U.S. 353, 360-67 (1963), set out the criticisms summarized here. See *infra* notes 51-59 and accompanying text.

¹⁴ *Griffin*, 351 U.S. at 37. For a thorough treatment of these criticisms, see *infra* notes 51-59 and accompanying text.

¹⁵ 470 U.S. 68 (1985). To be sure, there were intermediate steps in *Britt v. North Carolina*, 404 U.S. 226 (1971), and *Ross v. Moffitt*, 417 U.S. 600 (1974). See *infra* notes 65-87 and accompanying text.

¹⁶ *Ake*, 470 U.S. at 76-77.

adequate defense.¹⁷ The question was no longer what the indigent defendant would receive as a matter of equal justice, but what a basic, minimal standard of justice required.¹⁸

Ake's "basic tools" doctrine may have avoided the pitfalls of the equality principle, but as the scholarship that followed *Ake*¹⁹ showed, *Ake* raised problems of its own. *Ake* institutionalized a double standard of justice: one for those who could pay, and another—the "basic tools" variety—for those who could not.²⁰ *Ake* simply failed to come to grips with the problem the Court attempted to address in *Griffin*—the effect of disparities in wealth on the outcomes of criminal cases. If *Griffin* was too ambitious, surely *Ake* failed to do enough. Moreover, as the services of experts, especially forensic scientists, grow in importance,²¹ so too do the implications of unequal access to these services. If indigent defendants cannot persuade courts to grant requests for expert services, the outcomes

¹⁷ *Id.* at 77.

¹⁸ *Id.*

¹⁹ The scholarship that followed *Ake* discusses many of these problems. E.g., David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763 (1990); *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 120, 131-41 (1985) [hereinafter *The Supreme Court*]; Susan S. Brown, Note, *After Ake: Implementing the Tools of an Adequate Defense*, 7 PACE L. REV. 201 (1986); Blake Champlin, Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 TULSA L.J. 121 (1985); Karen Frances Clark, Case Comment, *Criminal Procedure—Narrowing the Rights of Future Indigent Criminal Defendants in the Name of Due Process*, 16 MEM. ST. U. L. REV. 417 (1986); Mark P. Goodman, Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. REV. 703 (1986); Brita Haugland, Note, *Criminal Procedure: The Constitutional Extent of the Adequate Tools of a Defense*, 39 OKLA. L. REV. 273 (1986); Helen Hubbard, Note, *An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma*, 39 SW. L.J. 957 (1985); Marion Ty Rutter, Note, *Ake v. Oklahoma: A Question of Experts*, XII OKLA. CITY U. L. REV. 385 (1987); Michael James Todd, Case Note, *Criminal Procedure—Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L.J. 610 (1986); John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326 (1986); A. Michelle Willis, Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995 (1988). Scholarship prior to 1985 shows that interest in the subject of resources other than counsel for indigent defendants preceded *Ake*. E.g., Craig Bowman, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970); John E. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574 (1982); Ephraim Margolin & Allen Wagner, *The Indigent Criminal Defendant and Defense Services: A Search For Constitutional Standards*, 24 HASTINGS L.J. 647 (1973); Dennis W. Alexander, Comment, *Assistance in Addition to Counsel for Indigent Defendants: The Need For; The Lack Of; The Right To*, 16 VILL. L. REV. 323 (1970); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963).

²⁰ See *infra* notes 131-32.

²¹ See *supra* note 7. I will use the term "expert services" to denote the services of experts of all kinds, including investigators. I have borrowed the term from West, *supra* note 19, at 1327 n.11.

of criminal cases will continue to be affected, just as Darrow thought.

I propose a new approach. Rather than using either the Equal Protection or Due Process Clauses, courts should look to the Confrontation²² and Compulsory Process²³ Clauses of the Sixth Amendment and to the constitutional right to present a defense.²⁴ These three constitutional guarantees have a shared purpose—to help factfinders decide whether the accused is guilty of the crime charged. All three are critical to the proper functioning of an adversary system of justice,²⁵ the context within which our courts operate. Instead of asking what resources would insure the defendant's equality (as the equality principle would have us do), or asking whether a particular service is so basic a tool that the state must pay for it (as *Ake* says we should do), my theory suggests that we turn our attention to the central issue in any criminal case: Would the expert service the defendant wants enhance the jury's ability to find the facts? After all, the search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.

Under my theory, which I will refer to as the truth seeking theory, access to expert services would depend upon the answers to two questions that are both simpler and easier to answer than those suggested by the equality principle or *Ake*'s basic tools approach. First, is the issue to which the resource pertains contested? Second, if the issue were resolved in favor of the defendant, could it be the basis for a finding of reasonable doubt? In other words, would the resource help the factfinder come to a better, more thoroughly informed (even if not always different) decision? The resolution of defense requests for expert services would rest closer to the purpose of the trial—deciding whether or not the accused is guilty—than to some undefined idea of equality or “basicness.” In contrast to both the equality principle and the basic tools approach, my theory addresses the problem of wealth-based inequality in the criminal justice system without employing a standard that sweeps either too broadly or too narrowly.

With these goals in mind, in Section II of this article, I will discuss the origins of the equality principle, the Supreme Court's tran-

²² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

²³ *Id.* (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).

²⁴ See *infra* notes 219-30 and accompanying text.

²⁵ See *infra* notes 160-78 and accompanying text.

sition from the equality principle to the basic tools approach, and the problems arising from each. In Section III, I will fully describe the truth seeking theory and discuss policy reasons for the theory's adoption, the theory's place in the adversary system, and its constitutional underpinnings. In Section IV, I will show that the truth seeking theory responds differently to requests for expert services than the equality principle or the basic tools approach. I will conclude in Section V by discussing several practical considerations involved in implementing the theory.

II. FROM *GRIFFIN* TO *AKE*: FROM THE EQUALITY PRINCIPLE TO BASIC TOOLS

A. THE EVOLUTION OF EQUAL PROTECTION AND DUE PROCESS ANALYSIS

The Supreme Court considered state provision of services other than counsel for the first time in *Griffin v. Illinois*.²⁶ After conviction, the defendants²⁷ in *Griffin* asked the state to provide them with a free transcript since they were indigent.²⁸ Without the transcript, they could not provide the appellate court with the required bill of exceptions or report of proceedings at trial,²⁹ regardless of the merits of their claim; in contrast, any defendant with money to buy a transcript would not face this obstacle.³⁰ Illinois refused to provide the transcripts, and the state's courts upheld this refusal.³¹

Justice Black's opinion found that the denial of the transcript violated both the Equal Protection and Due Process Clauses.³² Both of these constitutional provisions, Justice Black said, highlighted the central tenet of the American judicial system: equal justice before the law for everyone, rich or poor.³³ Black invoked the language of discrimination to describe the situation: A state that provided for appellate review could not "do so in a way that discriminates against some convicted defendants on account of their poverty."³⁴ Poverty-based discrimination in criminal trials, Black said, is just as odious as

²⁶ 351 U.S. 12 (1956).

²⁷ *Griffin* and co-defendant Crenshaw were tried together. *Id.* at 13.

²⁸ *Id.* The full request was for a certified record of the trial, which would include a transcript.

²⁹ *Id.* at 13-14.

³⁰ *Id.* at 16.

³¹ *Id.* at 15.

³² *Id.* at 19. Chief Justice Warren and Justices Douglas and Clark joined Justice Black's opinion. Justice Frankfurter concurred in the judgment and wrote a separate opinion.

³³ *Id.* at 17.

³⁴ *Id.* at 18.

discrimination based on race, religion or color.³⁵ Put simply, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”³⁶

Black’s analysis in *Griffin* lacked precision. For instance, he hardly seemed to distinguish between the equal protection and due process justifications for the Court’s holding. Yet, *Griffin* clearly held the state responsible for remedying an inequality not of its own making. This obligation went a step beyond simply prohibiting the state from creating illegitimate discrimination through its own actions.

With intermediate steps in 1959³⁷ and 1961,³⁸ Justice Black’s position reached maturity in *Douglas v. California*.³⁹ After conviction, the indigent defendants in *Douglas* sought appointment of counsel to assist in presentation of appeals of right.⁴⁰ In accordance with a state rule of criminal procedure, the District Court of Appeal reviewed the record and concluded that appointment of counsel would do “no good whatever.”⁴¹ Thus, while a person with money could present an appeal of right, complete with briefs and oral argument by counsel regardless of the merits, an indigent appellant’s case was prejudged.⁴² The Supreme Court found that this practice violated both the Equal Protection and Due Process Clauses, calling it “‘a discrimination at least as invidious as that condemned in *Griffin*’”⁴³ In each case, “the evil is the same: discrimination against the indigent.”⁴⁴ The Court did not require absolute equality,⁴⁵ but it would not countenance the line the California statute had drawn between the cases of the rich, who could require the court to listen to argument of counsel before deciding, and those of

³⁵ *Id.* at 17.

³⁶ *Id.* at 19.

³⁷ *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (refusal to allow indigent defendant to proceed without paying costs violates Equal Protection and Due Process Clauses).

³⁸ *Smith v. Bennett*, 365 U.S. 708, 710-14 (1961) (refusal to docket habeas corpus petition because of failure by indigent prisoner to pay filing fee violates Equal Protection Clause).

³⁹ 372 U.S. 353 (1963).

⁴⁰ *Id.* at 354.

⁴¹ *Id.* at 355.

⁴² *Id.* at 356.

⁴³ *Id.* at 355 (quoting *People v. Brown*, 357 P.2d 1072, 1076 (Cal. 1960) (Traynor, J., concurring)).

⁴⁴ *Id.* The Supreme Court reserved the question of the effect of such a statute in discretionary appeals or on appeals that are at a stage “at which the claims have once been presented by a lawyer and passed upon by an appellate court.” See *infra* notes 57-66 and accompanying text.

⁴⁵ *Douglas v. California*, 372 U.S. 353, 357 (1963).

the poor, who got no real hearing.⁴⁶ This amounted to both a denial of due process and an invidious discrimination.⁴⁷ Thus, the equality principle was fully formed: One could not be treated differently in the criminal justice system simply because of poverty. While the boundaries of this rule were indistinct, it implied not only that the state must not create discrimination, but also that the state was responsible for remedying the effects of existing discrimination not of its own making.

The equality principle generated substantial support by courts and commentators. Drawing on the broad implications of *Griffin* and *Douglas*, many observers believed that if the Equal Protection and Due Process Clauses prohibited economic discrimination within the criminal justice system,⁴⁸ perhaps these constitutional provisions

⁴⁶ *Id.*

⁴⁷ *Id.* at 355-56.

⁴⁸ The equality principle of *Griffin* and *Douglas* was applied and discussed in other cases and in numerous articles. *E.g.*, *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (statute allowing enlargement of maximum imprisonment if defendant is unable to pay fine violates Equal Protection Clause; Court reaffirms *Griffin*'s "allegiance to the basic command that justice be equally applied to all persons"); *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967) ("[D]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution" and violate Equal Protection Clause); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (abolishing poll tax, declaring that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored"); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708, 710-14 (1961) (refusal to docket habeas corpus petition because of failure by indigent to pay filing fee held violative of Equal Protection Clause); *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (refusal to allow *in forma pauperis* petition to proceed before Ohio Supreme Court violates Equal Protection and Due Process Clauses); *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting) (*Griffin* doctrine "represents an important step forward in the direction of democratic justice"); Francis Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 157 (1957) (discussing whether *Griffin* requires providing indigent defendants with expert witnesses and investigators); Philip Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 409-15 (1964) (arguing that *Griffin* requires rethinking of traditional practices regarding bail, alternative sentencing and aid for investigators and expert witnesses); Frederick G. Hamley, *The Impact of Griffin v. Illinois on State Court-Federal Court Relationships*, 24 F.R.D. 75, 78 (1960) (discussing impact of *Griffin* on practice of using monetary bail, requirements of filing fees and appellate bonds, and state appointment of counsel); J. Harvie Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947 (1975) (Warren Court's "most significant imprint" may lie in the expansion of the Equal Protection Clause to protect, *inter alia*, indigent criminal suspects, citing both *Griffin* and *Douglas*); Bertram F. Willcox & Edward J. Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957) ("[T]he *Griffin* decision brings new vigor to our democracy. It promises to stand . . . as a milestone in the treatment of the poor and and friendless by the courts of our land."); *see also* *Tate v. Short*, 401 U.S. 395, 398-99 (1971) (system in which punishment by fines results in imprisonment only for indigent persons due to their inability to pay violates Equal Protection Clause); *Mayer v. Chicago*, 404

might also require the state to alleviate economic inequalities in areas such as housing, subsistence and education.⁴⁹ Indeed, *Griffin* and *Douglas* seemed to open up new vistas to equal protection analysis.⁵⁰

Notwithstanding their rhetorical appeal, Justice Black's opinions in *Griffin* and *Douglas* provoked criticism from Justice Harlan, whose dissents questioned the very premises of the equality principle. Harlan's objections revolved around two related ideas. First, Harlan objected to the imposition of "an affirmative duty to lift the handicaps flowing from . . . economic circumstances" based on the Equal Protection Clause.⁵¹ Harlan found the situations of the defendants in *Griffin* and *Douglas* to be no different than other cases in which the "economic burden attendant upon the exercise of a privilege bears equally upon all"; yet, in these other cases, the Court did not consider the resulting classification invidious.⁵² What was at work, Harlan said, was not the typical equal protection analysis of classification schemes, but rather the Court's "unarticulated conclusion" that the procedure violated "fundamental fairness."⁵³ Cases such as *Griffin* and *Douglas* were therefore more appropriately analyzed under the Due Process Clause.⁵⁴

Second, Harlan questioned the potentially broad implications

U.S. 189, 195-96 (1971) (unconstitutional to supply free transcripts to appellants in felony, but not misdemeanor, cases punishable only by fines).

⁴⁹ E.g., Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 223 (1970) ("Encouraged by the progressive line of equal protection decisions beginning in the criminal law area [citing *Griffin* and *Douglas*] and reaching into state welfare policies, commentators and attorneys for the poor began to apply the new equal protection to the legal analysis of other problems, particularly to inequality in education and the unequal provision of state and municipal services."); Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9, 11 n.12 (1969) (suggesting cases such as *Griffin* and *Douglas* imply an equal protection-based "duty to protect against certain hazards which are endemic in an unequal society," even though the society on the whole "continues to be individualistic, competitive and market-oriented . . .").

⁵⁰ E.g., Note, *Discriminations Against The Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 446 (1967) ("The principles developed in *Griffin*, *Douglas* and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) have implications far beyond their narrow fact situations. The most obvious applications are within the criminal law area, but the principles might also be extended to civil litigation, education, medical care, or any area in which there is important state involvement.").

⁵¹ *Griffin v. Illinois*, 351 U.S. 12, 34 (1956).

⁵² *Id.* at 35.

⁵³ *Id.* at 35-36.

⁵⁴ *Id.* at 36; *Douglas v. California*, 372 U.S. 353, 363 (1963). Addressing the issue of fundamental fairness, Harlan found no violation of due process in either case. Neither the Illinois nor California systems at issue in *Griffin* and *Douglas* were a denial of fundamental fairness that shocked the conscience. 351 U.S. at 38; 372 U.S. at 363-67.

of the equal protection reasoning used in *Griffin* and *Douglas*. According to Harlan, the implications of the equality principle⁵⁵ simply did not comport with our Constitution or system of government:⁵⁶

[T]he Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. 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.⁵⁷

Harlan found the logic of *Griffin* and *Douglas* too broad even if confined to the criminal justice system. If the deprivation of transcripts or counsel for appeal violated the Equal Protection Clause, what were the limits of this reasoning? Did the equality principle require that indigent defendants be given access to the same resources that the wealthiest defendant had? Conversely, would the equality principle prevent wealthy defendants from spending more money on their defenses than the amount provided by the state to indigent defendants? Did the principle dictate that the resources available to both rich and poor defendants must be brought to some undefined middle level? While the Court held that the Constitution did not require absolute equality of access to defense services,⁵⁸ it supplied no principle by which to distinguish the practices that violated the Constitution from those that did not.⁵⁹

⁵⁵ See *supra* note 49.

⁵⁶ In fact, several commentators disagree with Harlan's contention that application of the equality principle *within* the narrow context of criminal justice exceeded constitutional and economic norms. See, e.g., Willcox & Bloustein, *supra* note 48, at 15-16 (*Griffin* majority's goal of equal access to justice is essential to guarantee democratic government); Fahringer, *supra* note 48, at 415 (contrary to Harlan's view, "the equal protection clause does offer a rational standard for reaching results that does comport with our ideals.").

More recently, commentators have argued that equal protection standards should inform analysis of the quality of counsel which the state must provide to indigent criminal defendants. See Gary S. Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 65 (1986) (equal protection principles dictate that similarly situated defendants should not receive unequal treatment, either because of unequally skilled attorneys or because they do not have equivalent resources to devote to the case; the latter can make competent lawyers "functionally incompetent because they lack the time and resources necessary to do competent work.").

⁵⁷ *Douglas*, 372 U.S. at 362 (citation omitted).

⁵⁸ *Id.* at 357.

⁵⁹ Even supporters of the majority opinion concede this point to Harlan. E.g., Willcox & Bloustein, *supra* note 48, at 13 (key to *Griffin* is not logical reasoning; rather, it is a

There is much force in Harlan's criticisms. While the equality principle surely represents an earnest and well-intentioned effort to deal with the effect of poverty on criminal defendants, it is, if nothing else, simply too open-ended. Nevertheless, from 1956 to 1971, the Supreme Court extended the *Griffin* majority's logic to new contexts, both civil and criminal.⁶⁰ In *Mayer v. City of Chicago*,⁶¹ the Court extended *Griffin* to mandate the provision of trial transcripts to cases in which the defendant could only be punished by a fine.⁶² The majority in *Mayer* held that the equality principle should not attempt to strike a balance between the interest of the state and the defendant.⁶³ "[The] principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. . . . The State's fiscal interest is, therefore, irrelevant."⁶⁴ Perhaps in reaction to this far-reaching statement, the Court began to move away from the equality principle and toward due process analysis in *Britt v. North Carolina*⁶⁵ and *Ross v. Moffitt*.⁶⁶

In *Britt*, an indigent defendant's first trial ended in a mistrial because of a deadlocked jury.⁶⁷ In preparation for the second trial, the defendant moved unsuccessfully for a free transcript of the first

feeling "that it was an indecency, in a nation of free people, to bar a poverty stricken man from a chance to show that his government had convicted the innocent.")

In the 1980s, the struggle over the meaning of equality took on new vibrancy. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40, 543-50 (1982), in which Professor Westen makes an argument similar in some ways to Justice Harlan's: To say two people are equal and must therefore be treated equally is to substitute hidden value judgments for analysis. See PETER WESTEN, *SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF 'EQUALITY' IN MORAL AND LEGAL DISCOURSE* (1990). For a reply to Professor Westen, see, e.g., Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1136-41, 1144-47 (1982) (decrying Westen's preference for rules over the idea of equality as conceptual tool).

⁶⁰ E.g., *Harper v. Bd. of Elections*, 383 U.S. 663 (1966) (Equal Protection Clause violated by required payment of fee or tax to vote); *Williams v. Illinois*, 399 U.S. 235 (1970) (Equal Protection Clause mandates uniform limits on imprisonment, regardless of indigent convict's inability to pay court-imposed fines); *Tate v. Short*, 401 U.S. 395 (1971) (Equal Protection Clause prohibits incarceration of indigent defendants convicted of offenses punishable only by fines).

⁶¹ 404 U.S. 189 (1971).

⁶² *Id.* at 196-98.

⁶³ *Id.* at 196.

⁶⁴ *Id.* at 196-97. This language seems especially strong in light of what follows in *Britt* and *Ross*, see *infra* notes 67-87 and accompanying text, and the clear command of *Ake* that courts should engage in a due process balancing that includes the state's interest in its fisc, see *infra* note 92. See KAMISAR ET AL., *supra* note 12, at 75 ("[Mayer] carried the *Griffin* principle further than it ever has the *Gideon* principle . . .").

⁶⁵ 404 U.S. 226 (1971).

⁶⁶ 417 U.S. 600 (1974).

⁶⁷ *Britt*, 404 U.S. at 226.

trial.⁶⁸ The Supreme Court refused to hold that the state must provide a free transcript in such a case.⁶⁹

More importantly, however, *Britt* foreshadows the end of the equality principle, even while seeming to reaffirm it. While asserting that the Equal Protection Clause still governed the treatment of indigent defendants,⁷⁰ the Court conceded one of the main arguments against the equality principle: it seemed to have no clear "outer limits."⁷¹ The Court then took a clear (if somewhat tentative) step away from equal protection and toward due process. *Griffin* and the equality principle did not mandate equality of resources treatment; rather, they guaranteed "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."⁷²

The evolution toward due process continued in *Ross v. Moffitt*,⁷³ in which the Court expressly limited the equality principle.⁷⁴ The issue in *Ross* was whether the Constitution required appointment of counsel for discretionary appellate review.⁷⁵ The Supreme Court began by acknowledging the analytical and doctrinal confusion apparent in *Griffin* and *Douglas*. Neither due process nor equal protection provided a fully satisfactory or coherent basis for cases decided under the equality principle.⁷⁶ Due process emphasized fairness between the individual and the state; equal protection focused on dis-

⁶⁸ *Id.* at 226-27. Note that *Britt* is the first of the cases discussed here in which the assistance sought by the indigent defendant is to be used for trial, instead of appeal. Yet the equality principle was, from the beginning, considered a way to assist the indigent defendant at trial. See, e.g., *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). Since that assumption has now carried through to *Ake*, I make it here as well.

⁶⁹ *Britt*, 404 U.S. at 229. Justice Marshall's opinion for the Court said that, given the small-town setting of the case, the court reporter could have shared his trial notes with counsel to help prepare for the second trial. *Britt* thus seems confined to a setting largely irrelevant to urban court systems. Further, I wonder about the efficacy of this arrangement if the necessity arose for impeachment of a witness during the second trial. At the very least, it would make impeachment significantly more cumbersome; instead of reading from a printed page, there would have to be constant references to, and reading from, stenographic notes intelligible only to the court reporter. This would likely take at least some of the force out of what can be a powerfully dramatic tool. See, e.g., MAUET, *supra* note 7, at 234, 242-53.

⁷⁰ *Britt*, 404 U.S. at 227.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 417 U.S. 600 (1974).

⁷⁴ *Id.* at 610.

⁷⁵ Specifically, the indigent defendant in *Ross* moved for appointment of counsel to assist in obtaining discretionary review by the North Carolina Supreme Court and to assist in the preparation of a petition for certiorari in the United States Supreme Court. *Ross v. Moffitt*, 417 U.S. 600, 603-05 (1974).

⁷⁶ *Id.* at 608-09.

parity in treatment by a state between arguably similar individuals.⁷⁷

As for due process, the Court found *Ross* easily distinguishable from cases in which a resource is necessary for trial.⁷⁸ In a trial, the accused is presumed innocent and seeks to use the Due Process Clause and other constitutional provisions as a shield for protection from the government.⁷⁹ In an appeal, by contrast, the defendant seeks to overturn an existing finding of guilt.⁸⁰ Given these "significant differences between the trial and appellate stages of a criminal proceeding,"⁸¹ denying indigent defendants appointed counsel for discretionary appeals did not offend the Due Process Clause.

As for equal protection, the Court de-emphasized equality and the effect of poverty on criminal trials.⁸² According to the Court, there were limits beyond which equal protection analysis could not go without distorting recognized principles.⁸³ The Fourteenth Amendment "'does not require absolute equality or precisely equal advantages,' nor does it require the State to 'equalize economic conditions.'"⁸⁴ These words resemble Justice Harlan's criticism of the equality principle;⁸⁵ they reflect a conception of equal protection in the criminal justice system, clothed in the language of equality but actually rooted in due process. Under the Equal Protection Clause, the Court said, the state's duty is not to duplicate for the poor the legal arsenal of the rich, but simply to assure that "indigents have an adequate opportunity to present their claims fairly within the adversary system."⁸⁶ Thus, after *Ross*, the equality principle becomes nothing more than a thinly disguised form of due process analysis.⁸⁷ *Ross* thus set the stage for the full ascendancy of the Harlan position that came eleven years later in *Ake v. Oklahoma*.⁸⁸

⁷⁷ *Id.* at 609.

⁷⁸ *Id.* at 610-11.

⁷⁹ *Id.*

⁸⁰ *Id.* at 610.

⁸¹ *Id.*

⁸² *Id.* at 611-12.

⁸³ *Id.*

⁸⁴ *Id.* at 612 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (Equal Protection Clause does not require states to fund all public school districts equally), and *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)).

⁸⁵ See *supra* notes 51-59 and accompanying text.

⁸⁶ *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

⁸⁷ Yale Kamisar, *Poverty, Equality, and Criminal Procedure*, in CONSTITUTIONAL LAW DESKBOOK 1-101 (National College of District Attorneys, ed., 3d ed. 1978). Indeed, after *Ross* it is not even clear that the equality principle "add[s] anything to what the indigent defendant already has in his arsenal" by virtue of the Due Process Clause. KAMISAR ET AL., *supra* note 12, at 83.

⁸⁸ 470 U.S. 68 (1985).

Ake represents the final and complete collapse of the equality principle into due process analysis. In *Ake*, the indigent accused's only defense to homicide and other charges was insanity.⁸⁹ The trial judge denied the defendant's motion for appointment of a psychiatrist to assist with the insanity defense.⁹⁰ The jury found *Ake* guilty, and he received two death sentences.⁹¹ The Supreme Court reversed, finding that the trial court should have supplied the defendant with a psychiatrist at state expense.⁹²

The Court began by recognizing the importance of defense experts in the criminal justice system. Experts, like psychiatrists, can play critical roles in the defense of criminal cases.⁹³ For example, a psychiatrist would not only examine the defendant to ascertain his sanity at the time of the offense; the psychiatrist would also assist the defense by evaluating the strength of the insanity defense, presenting the defense to the jury,⁹⁴ and by helping to evaluate and cross-examine government experts.⁹⁵

Perhaps more importantly, in *Ake* the equality principle dissolves into due process. The Court characterized *Griffin, Douglas* and other cases based on the equality principle as built around the theme of "[m]eaningful access to justice."⁹⁶ A state, the Court held, "must take steps to assure that the defendant has a fair opportunity to present his defense,"⁹⁷ because "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."⁹⁸ The Court described the concerns raised by poverty in the criminal justice system as questions of fundamental fairness,⁹⁹ the traditional language of due process.

As for the effect of poverty on criminal trials, *Ake* implied that, beyond setting a constitutional minimum, there was no satisfactory approach but to allow free market economics to dictate the distribu-

⁸⁹ *Id.* at 72.

⁹⁰ *Id.*

⁹¹ *Id.* at 73. The jury also sentenced *Ake* to 500 years of imprisonment on two counts of shooting with intent to kill. *Id.*

⁹² *Id.* at 74.

⁹³ *Id.* at 81.

⁹⁴ *Id.* at 81-83.

⁹⁵ *Id.*; see also MAUET, *supra* note 7, at 265 (emphasizing importance of using expert to understand and confront opponent's experts); MARILYN J. BERGER ET AL., TRIAL ADVOCACY, PLANNING, ANALYSIS AND STRATEGY 405 (1989).

⁹⁶ *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985).

⁹⁷ *Id.* at 76.

⁹⁸ *Id.*

⁹⁹ *Id.* at 77.

tion of legal services.¹⁰⁰ All due process required was that indigent defendants get “‘an adequate opportunity to present their claims fairly within the adversary system.’”¹⁰¹ Implementing this principle meant identifying the “‘basic tools of an adequate defense or appeal’”¹⁰²

To determine whether something is a “basic tool,” the Court resorted to the familiar three-factor due process balancing test of *Mathews v. Eldridge*.¹⁰³ Under the *Mathews* test, a court balances three factors:

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 addition or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.¹⁰⁴

Applying the *Mathews* test, the Court said the risk of an erroneous deprivation of liberty was so high without a psychiatrist to assist with an insanity defense,¹⁰⁵ and the state’s fiscal interest was so low,¹⁰⁶ that the trial court should have granted the motion. Therefore, the Court held that when a defendant shows that sanity will be a “significant factor” at trial, “the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”¹⁰⁷ The Court left the terms “significant factor” and “basic tool” for lower courts to define.¹⁰⁸ In a case such as *Ake*—in which sanity was the only issue¹⁰⁹—the Court held that a psychiatrist was a basic tool of an adequate defense.

B. DEFICIENCIES OF THE *AKE* STANDARD

Even if *Ake* does address the doctrinal problems raised by the equality principle, the case raises problems of its own. These

¹⁰⁰ *Id.*; see also *The Supreme Court*, *supra* note 19, at 139-40 (*Ake* exemplifies the Supreme Court’s submergence of wealth-oriented equal protection analysis into due process doctrine, avoiding the wealth question).

¹⁰¹ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (citation omitted).

¹⁰² *Id.* (citation omitted).

¹⁰³ *Id.* at 77 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 79-82.

¹⁰⁶ *Id.* at 78. The state’s interest in preserving its treasury was small. The state had no interest in any strategic advantage that the lack of a psychiatrist for the defense would give it, since the state’s interest in criminal trials is not just to win but to obtain an accurate verdict.

¹⁰⁷ *Id.* at 83.

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* note 89 and accompanying text.

problems stem from ambiguities in the opinion, misinterpretation of *Ake* by lower courts, and disregard of the implications of economic disparity in criminal justice.

1. *The Meaning of "Basic Tools"*

To say that the state must supply the indigent defendant with the basic tools of an adequate defense only begins the inquiry.¹¹⁰ How basic does a tool have to be before the Due Process Clause obligates the state to supply it to indigent defendants?

The *Mathews* due process approach, which the Court used in *Ake* to determine what a basic tool is, offers no answers. The *Mathews* balancing test is inherently ambiguous; this makes it highly manipulable.¹¹¹ Since *Mathews* fails to articulate its underlying values and assumptions,¹¹² the test becomes whatever a court wants it to be in any particular case.¹¹³

Many lower court interpretations of *Ake* attempt to limit its reach by looking at its facts narrowly. For example, *Ake* dealt with only one type of expert—a psychiatrist. Nothing in the opinion, however, limited its reasoning to psychiatrists. Presumably, any type of expert who meets the *Mathews v. Eldridge* balancing test should fall within *Ake*'s ambit. Some courts, however, have interpreted the Supreme Court's failure to move explicitly beyond psychiatry¹¹⁴ as an invitation to declare that *Ake* does not cover other types of experts.¹¹⁵ Other courts disagree.¹¹⁶

¹¹⁰ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

¹¹¹ West, *supra* note 19, at 1335-36 (1986). For these and other reasons, Justice Stevens has argued that the *Mathews* balancing test is appropriate only for property interests, not for liberty interests. See *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting). *But cf.* *Schall v. Martin*, 467 U.S. 253, 275-81 (1984) (pretrial detention for juveniles approved; procedural safeguards adequate under *Mathews*).

¹¹² See, e.g., *Champlin, supra*, note 19, at 127 n.47 (values and assumptions underlying due process balancing test left unarticulated).

¹¹³ Others argue that the *Mathews* approach is desirable precisely because of its flexibility. See Goodman, *supra* note 19, at 729 n.177.

¹¹⁴ *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985) (refusal to provide several experts, including one on ballistics, upheld because requests were merely "undeveloped assertions"; question of entitlement to nonpsychiatric experts expressly reserved).

¹¹⁵ E.g., *Harris v. Vasquez, second amended opinion*, 943 F.2d 930, 949-50 (9th Cir. 1990); *Jackson v. Ylst*, 921 F.2d 882, 885-87 (9th Cir. 1990) (appointment of expert on eyewitness identification would require an extension of *Ake*); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1119 (6th Cir. 1990) (Kennedy, J., dissenting) (*Ake* limited to psychiatrist, which is provided only "after defendant shows his sanity will be a significant factor"); *Harris v. Vasquez*, 913 F.2d 606, 619 (9th Cir. 1990); *Cartwright v. Maynard*, 802 F.2d 1203, 1210-11 (10th Cir. 1986); *Volson v. Blackburn*, 794 F.2d 173, 176 (5th Cir. 1986); *Bowden v. Kemp*, 767 F.2d 761, 763 (11th Cir. 1985); *Kansas v. Call*, 760 F. Supp. 190, 192 (D. Kan. 1991) (*Ake* does not apply to expert DEA agents who could

Courts construing *Ake* have also focused on the extent to which denial of the defendant's request for expert service determined the outcome of his case. For example, in *Ake*, insanity was the only issue; proof of insanity is heavily dependent on expert testimony. The Court in *Ake* recognized that when a state makes the defendant's mental condition relevant to culpability and punishment, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."¹¹⁷ Add to this the fact that psychiatry is not an exact science,¹¹⁸ and it quickly becomes apparent that

testify about marijuana supplies); *Siebert v. State*, 562 So. 2d 586, 590 (Ala. Crim. App. 1989) (quoting *Ex Parte Grayson*, 479 So. 2d 76, 82 (Ala. 1985), *cert. denied*, 474 U.S. 865 (1985) (*Ake* does not extend beyond psychiatrists)); *Ex Parte Grayson*, 479 So. 2d 76 (Ala. 1985), *cert. denied*, 474 U.S. 865 (*Ake* limited to psychiatrists and the insanity defense); *Ex Parte Grayson*, 479 So. 2d 76, 82 (Ala. 1985) (On Application for Reh'g) (*Ake* limited to psychiatrists and issue of insanity only); *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990) (*Ake* does not extend to social psychologist who would assist in jury selection or psychologist who would help present non-sanity defense); *State v. Zuniga*, 357 S.E.2d 898, 908 (N.C. 1987) (investigators do not fall under *Ake* because, *inter alia*, counsel should interview witnesses); *State v. Massey*, 342 S.E.2d 811, 816 (N.C. 1986) (defendant not entitled to expert on competency to waive *Miranda* rights); *Williamson v. State*, 812 P.2d 384, 395 (Okla. Crim. App. 1991) (*Ake* does not extend beyond psychiatrists); *Shelton v. State*, 793 P.2d 866, 873-74 (Okla. Crim. App. 1990) (defendant not entitled to investigator); *Munson v. State*, 758 P.2d 324, 330 (Okla. Crim. App. 1988) (*Ake* does not extend beyond psychiatrists); *Vowell v. State*, 728 P.2d 854 (Okla. Crim. App. 1986) (same); *Stafford v. Love*, 726 P.2d 894, 896 (Okla. 1986) (*Ake* limited to psychiatric experts); *Moore v. State*, 802 S.W.2d 367, 371-72 (Texas Ct. App. 1990) (*Ake* does not extend to expert on victim's injuries, since it is limited to psychiatrists in insanity cases); *see also West, supra* note 19, at 1341-42 & n.111 (requests for non-psychiatric experts rejected on basis of insufficient showing of need).

¹¹⁶ *E.g., Kordenbrock*, 919 F.2d at 1103-05 (Merritt, J., dissenting) (*Ake* not limited to insanity cases; also applies in cases in which defendant's "mental capacity" is at issue); *Little v. Armontrout*, 835 F.2d 1240, 1243, (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988) (rule of *Ake* applies to requests for experts other than psychiatrists; question isn't expert's field but importance of issue to which expert would speak); *Moore v. Kemp*, 809 F.2d 702, 711-12 (11th Cir. 1987) (en banc), *cert. denied*, 481 U.S. 1054 (1987) (court "assume[d], for sake of argument that the due process clause could require the government, both state and federal, to provide non-psychiatric expert assistance to an indigent defendant . . ."); *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987) (defendant entitled to expert on intoxication defense); *In re Allen R.*, 506 A.2d 329, 331 (N.H. 1986) (*Ake* entitles defendant to mental health expert on issue of defendant's competency to waive *Miranda* rights); *Washington v. State*, 800 P.2d 252, 253 (Okla. Crim. App. 1990) (Supreme Court did not preclude extending principles of *Ake* to experts other than psychiatrists such as forensic odontologists); *but see Stanridge v. State*, 701 P.2d 761 (Okla. Crim. App. 1985) (question of whether *Ake* extends to other experts left open). States have been required to pay for important scientific tests in noncriminal cases as well. *See, e.g., Little v. Streater*, 452 U.S. 1 (1981) (requiring state to pay for blood grouping tests requested by indigent putative father in paternity case).

¹¹⁷ *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). *But cf. Kordenbrock*, 919 F.2d at 1119 (Kennedy, J., dissenting) (*Ake* does not entitle defendant to psychiatric assistance on issue of diminished capacity through drug use, notwithstanding that testimony would bear directly on issue of specific intent necessary to convict).

¹¹⁸ *Ake*, 470 U.S. at 81.

having a psychiatrist was " 'a virtual necessity if [Ake's] insanity plea [was] to have any chance of success.' " ¹¹⁹ In other words, the presence of a psychiatrist in *Ake* was an all-or-nothing proposition: With a psychiatrist, the defense could present an insanity defense to the jury; without a psychiatrist, no jury would sustain an insanity defense.

As lower courts have struggled to define "basic tools," they have asked whether the particular resource requested by an indigent defendant is a " 'virtual necessity' " ¹²⁰ for the defense. Is the resource so important that the defense simply cannot do without it? Thus, "basic tool" has come to mean not just something fundamental to a defendant's legal arsenal, but a resource without which the defense fails. ¹²¹ Under this interpretation, most expert services re-

¹¹⁹ *Id.* (footnote omitted).

¹²⁰ *Id.*

¹²¹ Many cases limit expert services to such "virtual necessity" situations. *E.g.*, *United States v. Austin*, 933 F.2d 833, 841 (10th Cir. 1991) (with psychiatric aid, either insanity or absence of criminal intent may have been available as defenses); *Jackson v. Ylst*, 921 F.2d 882, 885-87 (9th Cir. 1990) (*Ake* does not extend to appointment of expert on eyewitness identification, where that issue is only one of several issues in contention); *Kansas v. Call*, 760 F. Supp. 190, 192 (D. Kan. 1991) (*Ake* does not extend to DEA agents who could have offered testimony concerning marijuana supplies); *Clark v. State*, 562 N.E.2d 11, 14-15 (Ind. 1990) (funds to hire expert witnesses on arson and medical issues, including inconsistency of defendant's injuries with prosecution's case, properly denied); *Hough v. State*, 560 N.E.2d 511, 515-17 (Ind. 1990) (requests for psychologists and ballistics expert denied as not mandated by *Ake* and because defendant offered no evidence to think such experts would differ with state experts); *State v. Zuniga*, 357 S.E. 2d 898, 908 (N.C. 1987) (unless defendant shows reasonable likelihood of fundamentally unfair trial, request for investigator properly denied); *State v. Massey*, 342 S.E.2d 811, 816 (N.C. 1986) (*Ake* requires hiring a state-funded psychiatrist only when sanity is a significant factor in the case; it does not require hiring psychiatrist to assist in determining whether defendant's mental capacity was such that he could have voluntarily and intelligently waived *Miranda* rights); *Tibbs v. State*, 819 P.2d 1372, 1376-77 (Okla. Crim. App. 1991) (requests for medical doctor, fingerprint expert and criminal investigator denied in case where defense was that another person committed the crime because, *inter alia*, defendant failed to demonstrate "specific need" under *Ake*); *Williamson v. State*, 812 P.2d 384, 395-96 (Okla. Crim. App. 1991) (refusal to grant motion for state-funded hair and serology expert did not violate due process, because, *inter alia*, evidence in scientific subjects can be addressed through cross-examination); *Banks v. State*, 810 P.2d 1286, 1293 (Okla. Crim. App. 1991) (cross-examination of state's expert adequately substitutes for defense expert who could have discredited "extremely damaging fingerprint evidence"); *Shelton v. State*, 793 P.2d 866, 873-74 (Okla. Crim. App. 1990) (appointment of investigator refused, because defendant did not demonstrate that "he was denied access to evidence which is material to either guilt or punishment . . . [and] substantial prejudice"); *Munson v. State*, 758 P.2d 324, 330 (Okla. Crim. App. 1988) (denial of funds for serologist, hair analyst, chemist and investigator reversed only if defendant shows substantial prejudice from clear and convincing evidence); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 651 (4th ed. 1992) (courts do not appoint experts for defense unless absolutely essential) (citing *Harris*, *supra* note 19); *but see* *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (*Ake* covers experts on mental condition as well as sanity); *State v. Poulson*, 726 P.2d 1036,

main luxuries for indigent defendants because the tasks experts perform and the issues with which they deal are not usually outcome determinative by themselves.¹²² Rather, the service any one expert or investigator provides is typically germane only to one or a few elements of the crime.¹²³ If any one of the links in the evidentiary chain weakens, an acquittal may result, but this usually does not depend on the testimony of a single expert, such as the psychiatrist in *Ake*. Since lower courts have interpreted *Ake* to mean that the defense receives assistance only when the accused's case will fail without it, the basic tools standard does very little for most indigent defendants.

2. Unreasonably High Standards

Lower courts must give meaning to the ambiguous terms in *Ake*—"basic tools" and "significant factor." In particular, interpreting courts must decide what amount and type of evidence indigent defendants must advance to prove they deserve expert services. In decisions on this issue, many courts have denied the accused expert or investigative assistance, not because the service sought is not important enough, but because the quantum of proof required by the court is too great or the defendant cannot present the evidence as early in the litigation as the court wants it.¹²⁴ For example, under

1038 (Wash. Ct. App. 1986) (*Ake* speaks in terms of sanity but does not preclude the applicability of its rationale to the broader scope of a defendant's mental condition, so *Ake* also covers experts on diminished capacity); Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988), *rev'd on other grounds*, 918 F.2d 888 (11th Cir. 1990) (systematic denial of, *inter alia*, investigative and expert resources to indigent defendants states cognizable federal claim); Other courts agree on limiting provision of expert services to situations where the presence is outcome determinative, yet still misapply the standard. *Cf.* Moore v. State, 802 S.W.2d 367, 371-72 (Tex. Ct. App. 1990) (request for expert on victim's injuries denied, even though extent of injuries critical to judgment on guilt for aggravated robbery).

¹²² See *infra* notes 232-79 and accompanying text.

¹²³ *Id.*

¹²⁴ *E.g.*, Guinan v. Armontrout, 909 F.2d 1224, 1227-28 (8th Cir. 1990) (history of violent crime, brutality of current crime and counsel's belief that defendant is mentally ill do not rise to level of "significant factor" in accused's defense); Stewart v. State, 562 So. 2d 1365, 1368-69 (Ala. Crim. App. 1989) (to obtain psychiatrist under *Ake*, defendant must make preliminary showing "that his sanity at the time of the offense is questionable. . . . A defendant bears the burden of persuading the court that a doubt exists as to his or her competency"); Hopkins v. State, 582 N.E.2d 345, 353 (Ind. 1991) (denial of requests for expert assistance reversed only if "so prejudicial as to amount to an abuse of discretion"); State v. Dunn, 758 P.2d 718 (Kan. 1988) (defendant must show mental capacity is a significant issue *before Mathews* balancing is attempted); State v. Broom, 533 N.E.2d 682, 691 (Ohio 1988) ("defendant must show a reasonable probability that expert would aid his defense, and that denial of expert's assistance would result in unfair trial.") (quoting Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987)); Banks v. State, 810 P.2d 1286, 1293 (Okla. Crim. App. 1991) (defendant denied expert must

Moore v. Kemp,¹²⁵ the defendant must “demonstrate a substantial basis” for any affirmative defense, and explain to the court both the state and defense cases and how the requested expert would fit into both.¹²⁶ Moreover, the accused must do this at the earliest stages of the case, perhaps before discovery and other fact gathering has taken place,¹²⁷ effectively eliminating the chance for the defense to explore tenable issues.

3. *Failure to Recognize the Implications of Economic Inequality*

Notwithstanding its equal protection rhetoric, *Ake* represents the full ascendancy of Justice Harlan’s position in *Griffin* and *Douglas*. *Ake* eliminates all of the questions about equality and wealth that Harlan found vexing and perhaps unanswerable.¹²⁸ *Ake* avoids the pitfalls of the equality principle by turning exclusively to an orthodox application of due process analysis. By doing so, *Ake* eliminates the problem of the equality principle’s lack of any logical limita-

show “that with any of these requested experts, he was denied access to evidence which is material to either guilt or punishment, and . . . tangible prejudice” from the denial of the expert help); *Shelton v. State*, 793 P.2d 866, 873-74 (Okla. Crim. App. 1990) (defendant must show that denial of motion precludes “access to evidence which is material to either guilt or punishment” and “substantial prejudice”); *Munson v. State*, 758 P.2d 324, 330 (Okla. Crim. App. 1988) (defendant denied expert assistance must show “prejudice by clear and convincing evidence”).

A number of other courts have made more moderate demands on defendants making requests for expert or investigative resources. *E.g.*, *Cowley v. Stricklin*, 929 F.2d 640, 643-45 (11th Cir. 1991) (with some evidence of both sanity and insanity, court should appoint an expert to assist defense, not neutral expert); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1103-05 (6th Cir. 1990) (en banc)(state must provide psychiatric assistance on mental capacity where defendant shows that the expert is “necessary to aid in a proper defense,” and that “without the expert the result of the trial would be unfair.”); *United States v. St. John*, 851 F.2d 1096, 1098 (8th Cir. 1988) (“[A] defendant must show a reasonable probability that an expert would have aided in her defense, and that the denial of an expert witness resulted in an unfair trial. . . .”); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (“clear showing to trial judge that his mental condition will be a significant factor at trial.”); *State v. Gambrell*, 347 S.E.2d 390, 394 (N.C. 1986) (defendant need only show that his sanity will likely be a significant factor at trial, not a prima facie showing of insanity). There is little in the way of a discernible pattern. One cannot tell why one court seems to want to throw up substantial roadblocks to the defense and another does not.

¹²⁵ 809 F.2d 702 (11th Cir. 1987)(en banc), cert. denied, 481 U.S. 1054 (1987).

¹²⁶ *Id.* at 712.

¹²⁷ *Id.* (information necessary to prove entitlement to expert services must come at pretrial motion stage of case); see also Harris, *supra* note 19, at 771 (*Moore* requires proving prima facie case of insanity before trial, without expert help necessary to show insanity).

¹²⁸ *Douglas v. California*, 372 U.S. 353, 362 (1963). Perhaps these questions are unanswerable only if we refuse to question the basic assumptions of our political and economic system.

tion¹²⁹ and the enormous and far-flung implications of the principle.¹³⁰

What is striking, however, is that *Ake's* due process/basic tools solution fails to come to grips with the effect of the poverty on the outcomes of trials. Instead of asking how defendants' poverty influences justice and what might be done about this, *Ake* asks that we balance the interests of the individual against the interests of the state to determine whether a resource requested by a defendant is worthwhile. The importance of the resource in enabling the factfinder to arrive at a just determination of guilt beyond a reasonable doubt constitutes only one subsidiary part of the calculus. At best, *Ake* offers only a partial solution to problems presented by the equality principle; it relegates the questions the equality principle tried to address to the realm of the unsolvable.

In the final analysis, *Ake* succeeds only in two limited ways. It addresses some of the stronger criticisms of the equality principle—its open-endedness, its failure to tell us how equal is equal and the like. It also provides expert help to a small class of indigent defendants—those whose cases turn on one issue, which issue turns on the assistance of an expert. Indeed, “succeed” may be too strong a word. After all, to focus on the excesses of the equality principle does not solve the basic problem; to address the wealth question only in the context of all-or-nothing cases falls far short of what is needed.

The net effect of the abandonment of the search for an effective constitutional method to address the problem is the institutionalization of a two-tiered system of criminal justice. One type of justice exists for those who can afford not only attorneys but the necessary experts and investigators. Those who are indigent receive a wholly different type of justice. As Professor Kamisar has put it, “[s]o long as the indigent defendant's ‘brand of justice’ satisfies certain minimal standards—passes government inspection, one might say—it need not be the same brand of justice or the same ‘choice’ or ‘prime’ grade of justice as a wealthy man's.”¹³¹ When this lack of funding

¹²⁹ See *supra* notes 55-59 and accompanying text.

¹³⁰ *Id.*

¹³¹ KAMISAR ET AL., *supra* note 12, at 84 (quoting Kamisar, *supra* note 87, at 1-101 to 1-108).

Having surveyed the weaknesses of the basic tools theory, it might be argued that what is needed is not a new theory but a reinterpretation or tightening up of the basic tools theory. That is not correct. Under due process analysis, anything tightened can be loosened again; recall my comments *supra* about the malleability of due process. A court will always come back to the same question: What process is due? As with questions of equality, there will be no guiding principle to help answer the question. Under my

for resources other than counsel is combined with the current financial strangulation of systems for providing the indigent with counsel,¹³² the differences between the types of justice the rich and poor receive become stark.

Ake leaves us, then, where we started. The equality principle, though possessed of a noble aim, sweeps too broadly. *Ake*, by contrast, accomplishes too little. Some states have attempted statutory remedies, but the assistance they provide is usually limited.¹³³

theory, there is a goal, a guiding principle for courts to keep in mind: helping the factfinder ascertain the truth. That is the source of its superiority to the other two theories.

¹³² *E.g.*, *supra* note 6; Michael deCourcy Hinds, *Circumstances In Philadelphia Consign Killers*, N.Y. TIMES, June 8, 1992, at A7 (Philadelphia courts hand out second-highest number of death sentences of any U.S. city, due to "prosecutors zealously seeking the death penalty, judges refusing to pay for expert witnesses and a small group of overworked and generally overwhelmed defense lawyers"; as a result, some defense attorneys have filed a federal civil rights suit); Claudia MacLachlan, *Defense Dollars Screech to Halt*, NAT'L L.J., June 8, 1992, at 3 (with federal funding for paying private lawyers about to run out, lawyers may wait until October 1992 to be paid, creating concomitant "'significant problems for the panel attorneys and their experts and their interpreters'").

¹³³ The leading statute is the federal Criminal Justice Act, 18 U.S.C. §§ 3006A(e)(1),(3) (1988). The statute requires federal courts to grant requests by the defendant for government-funded "investigative, expert, or other services" when the services are "necessary for adequate representation" and the defendant cannot afford them. While undoubtedly helpful, the federal statute and the state laws modeled on it have significant shortcomings.

First, these statutes limit the amount of money available, often to small amounts. *E.g.*, ALA. CODE § 15-12-21(d) (Supp. 1991) (maximum \$500); KY. REV. STAT. ANN. § 31.070 (Michie/Bobbs-Merrill 1992) (maximum \$1000); S.C. CODE ANN. § 17-3-80 (Law. Co-op. Supp. 1991); TEX. CRIM. PROC. CODE ANN. art. 26.05 § 1(d) (Vernon 1989 & Supp. 1992) (maximum \$500). Some states allow defendants to exceed statutory limits, but only with the explicit permission of the court, *e.g.*, MINN. STAT. § 611.21 (Supp. 1992) (maximum of \$1000 may be exceeded if court finds this necessary to provide for services of unusual character and duration); NEV. REV. STAT. § 552.030 (1987) (maximum of \$300 may only be exceeded if need to do so is certified by trial judge and presiding judge of district); N.H. REV. STAT. ANN. § 604-A:6 (Supp. 1991) (maximum of \$300 may be exceeded if court finds nature and quantity of services reasonably merits exception); W. VA. CODE § 29-21-14(e)(3) (1986) (maximum of \$500 may be exceeded only with prior court approval). At least two states commit the determination of the amount available for expert services to the trial court's discretion. *E.g.*, IOWA CODE ANN. § 813.2, r. 19.4 (West 1983) (court determines reasonable compensation); ALM MASS. R. CRIM. P. 41 (1979) (amount limited to what court deems reasonable), *but see* 30 Mass. Prac. Series (Smith) § 492 (1970, Supp. 1978) (most judges put ceiling on amount); TENN. CODE ANN. § 40-14-207 (1990) (reasonable amount, as determined by court).

Second, many of these statutes apply only to murder or capital murder cases. *E.g.*, ARIZ. REV. STAT. ANN. § 13-4013(B) (1989) (funds available in capital murder cases only; availability of experts in other cases solely a matter of court's discretion); CAL. PENAL CODE § 987.9 (West Supp. 1992) (limited to capital murder cases or cases in which defendant has prior murder conviction); OHIO REV. CODE ANN. § 2929.024 (Baldwin 1987) (limited to aggravated murder cases), or make expert services available only on the issue of insanity, FLA. STAT. ANN. R. CRIM. PROC. 3.216 (West Supp. 1991) (limited to insanity defense); MICH. COMP. LAWS ANN. § 768.20a(3) (West Supp. 1992) (lim-

While *Ake* has inspired a great deal of scholarship,¹³⁴ most of it does not strike off in any new direction that promises to address the real problem.¹³⁵

III. A NEW APPROACH: THE TRUTH SEEKING THEORY

Instead of trying to make indigent defendants equal (under the equality principle) or giving them basic tools (under *Ake*), I suggest that courts use a theory geared to address directly the disparities of wealth in the criminal justice system. This theory targets the implications of economic disparity in criminal justice by focusing on whether the defendant's poverty could prevent the jury from hearing all of the relevant evidence on contested issues. Based on the Sixth Amendment, this theory would have judges ask two questions in deciding whether to grant a request for expert services. First, is the issue to which the requested resource pertains in dispute? Second, is the information that could be brought to trial as a result of

ited to insanity defense); OKLA. STAT. ANN. tit. 22 § 1176 (West Supp. 1992) (limited to cases in which sanity will be a significant factor).

Third, many of these statutes, including those already cited from Alabama, Arizona, Texas, California, Tennessee, Massachusetts and West Virginia, make receiving *any* expert services *at all*—not just the *amount* of funds received—a matter solely within the discretion of the court.

Other issues that these statutes fail to address include whether the defendant gets to choose who the expert will be, and whether counsel must pay for expert services first, in the hope that the court will, in its discretion, pay for the services. Perhaps worst of all, some states cast the burden of paying for expert services on their already underfunded public defenders by forcing them to divert the money from other needs in their budgets. *E.g.*, N.J. STAT. ANN. § 2A:158A-5 (West Supp. 1991) ("All necessary services and facilities of representation (including investigation and other preparation) shall be provided in every case. The factors of need and real value to a defense may be weighed against the financial constraints of the Public Defender's office in determining what are the necessary services and facilities of representation."); *Gorman v. State*, 507 A.2d 1160, 1164-65 (Md. 1985) (public defender receives budget from state and has obligation to fund expert services out of it, rather than seeking funding from court). All of this tells us that while a statutory approach *could* help, existing statutes do not address the full scope of the problem. Of course, most of the states not named here have not even *tried* a statutory solution. *See generally* Mary F. Moriarty, *Liberty, Justice . . . and Experts for All*, 6 LAW & INEQ. J. 247, 251-58 (1988).

¹³⁴ *See supra* note 19.

¹³⁵ *E.g.*, Harris, *supra* note 19, at 780-82 (arguing that courts should interpret *Ake*'s significant factor test in terms of reasonableness, rather than proposing a new standard altogether); Willis, *supra* note 19, at 1029-31 (proposing a clarifying gloss on *Ake* that requires balancing materiality against cost, but remaining within the context of due process); West, *supra* note 19, at 1358-61 (proposing an equal protection test or partial version of the *Mathews* balancing test as an alternative to *Ake*). While some earlier scholarship explored the possibility of using either the Confrontation or Compulsory Process Clauses, no commentator has gone beyond a basic level of analysis. Further, no one has combined the two clauses with the right to present a defense, as I do here. *See infra* notes 179-80.

granting the defendant's request for expert services helpful to the factfinder's decision? In other words, could this information, either by itself or in combination with other information, be the basis for a finding of reasonable doubt?

I will begin this section by examining these two questions in greater depth. I will then explain the relationship of the truth seeking theory to the purposes and context of the criminal justice system, and demonstrate how the two questions will enable factfinders to make determinations of guilt relatively unaffected by the defendant's poverty. I will conclude the section by discussing the theory's constitutional underpinnings.

A. THE TWO QUESTIONS

The two questions posed above form the heart of the truth seeking theory. Instead of asking questions that are either unanswerable¹³⁶ or that fail to address the fundamental problem,¹³⁷ these questions force us to focus on the central objective¹³⁸ of the criminal trial: ascertaining whether the state's allegations against the accused are true beyond a reasonable doubt.

1. *Is the Issue in Dispute?*

The first question—Is the issue for which expert assistance is requested in dispute?—screens out requests for experts or investigators on issues that the defendant will not actively contest.

Most criminal cases differ from *Ake* in an important respect: They contain more than one issue. For example, a typical drug possession case may include such issues as the legality of a search or seizure, the defendant's dominion and control over the substance, and the identity of the seized substance itself. Even in such a simple case, however, the defendant may not contest all of these issues. For example, the defendant may not contest that the substance seized is illegal; rather, the dispute may center on one or both of the other two issues. Without the first question, which screens out uncontested issues, defendants would have little to lose by always requesting expert assistance on every issue.¹³⁹ If the defense plans to

¹³⁶ Under the equality principle, we must ask, "How equal is equal?", a question with no obvious or logical answer. See *supra* notes 51-59 and accompanying text.

¹³⁷ *Ake's* basic tools approach may address the problems of the equality principle, but fails to present an alternative that successfully deals with the consequences of inequality in criminal justice. See *supra* notes 128-32 and accompanying text.

¹³⁸ See *infra* notes 141-45.

¹³⁹ In order for the procedure I have outlined to make sense, the defense must have some idea of what the issues in the trial will be. The timing of the request for expert

dispute the issue, the court proceeds to the next question.

2. *Would the Expert Service Bring Helpful Information to the Factfinder?*

Alternatively, as phrased in the introduction to this section, could the expert bring the factfinder information on the issue(s) in dispute that, standing alone or in combination with other information, could form the basis for a reasonable doubt?

This question, like the first, springs from the fact that most cases are multi-faceted; the prosecution usually must prove a whole chain of facts. The breaking or omission of any of the links in this chain may result in an acquittal. If the expert could supply the factfinder with information that could fatally weaken the chain of evidence, then the request for the expert should be granted. Unlike the cases based on *Ake* that impose very high barriers to defendants seeking expert services, the truth seeking theory would not require that the accused make out a full affirmative defense in order for the court to grant a motion for expert services. Rather, the theory asks only whether the expert could provide the court with helpful, relevant information.¹⁴⁰

Note the differences between the truth seeking theory, on the one hand, and the equality principle and the basic tools theory on the other. The equality principle supplies no guiding principle with

services therefore becomes important. See *infra* notes 285-88. Note also that given the procedural changes I describe *infra* at notes 282-84, 288 and accompanying text, the mere possibility of unearthing helpful information will not be enough to support a request for expert services under the truth seeking theory. Further, the possibility of expert testimony that would be merely cumulative will also not be enough to support a request. See *infra* note 213 and accompanying text.

¹⁴⁰ Students of the Federal Rules of Evidence will note the similarity between the standard proposed here and Federal Rule of Evidence 702, which governs the admissibility of testimony by experts. Under Rule 702, expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue"; the second of my two questions also centers on helpfulness to the jury. There is, however, a key difference. Rule 702 governs the admissibility of expert testimony. As such, it concerns only the testimonial role of experts. My theory is broader. It recognizes that experts assist in other important ways: evaluating the prosecution and defense cases, assisting in cross-examination of the prosecution's experts and the like. See, e.g., *supra* notes 93-95 and accompanying text.

Were critics to say that what I have done is to restore the equality principle through the back door of Rule 702, I would disagree. The problem with the equality principle is that it does not—and perhaps cannot—tell us what equal is in any given situation. See *supra* notes 55-59 and accompanying text. The objective of my theory is to tell us how to answer requests for resources from indigent defendants based on what we are actually trying to accomplish—finding the truth of the state's allegations against the accused. It is no surprise that this will in many cases result in indigent defendants being able to use experts in the same way that defendants with money do. This is not, however, because we care about them being, in some way, equal, but because of the interest the theory promotes—an enhanced ability to find truth.

which to select between worthy and unworthy requests for expert services. While the principle acknowledges that inequality of resources affects the criminal justice system, it does not help us understand what to do about it, except to make things "more equal." The basic tools approach does no better; it entitles defendants to due process, but offers only a case-by-case formulation that erects prohibitive barriers to expert services in all but the most extreme cases. By contrast, the truth seeking theory offers criteria that are unambiguous. An issue either is or is not contested; if contested, expert services either can or cannot produce helpful, probative evidence. This obviates the need for answering how equal is equal enough under the equality principle, or for divining when an expert service is significant or basic enough to be required by the infinitely malleable *Mathews* due process formulation.

B. PURPOSE AND CONTEXT: ENHANCING THE ABILITY OF THE FACTFINDER TO FIND THE TRUTH WITHIN THE ADVERSARY SYSTEM

To understand the truth seeking theory, we must first examine the way the criminal justice system works—its goals and the context within which it operates. With this information in mind, we can see the superiority of the truth seeking theory to either the equality principle or the basic tools test.

1. *The Primary Goal: Finding the Truth*

The criminal justice system, like most institutions, has many objectives.¹⁴¹ Nevertheless, one goal emerges as preeminent: finding the truth.¹⁴² Indeed, unless finding the truth is a primary goal, the criminal law cannot serve as a legitimate regulator of conduct or moral guide.¹⁴³ As Professor LaFave says, "[t]he discovery of the

¹⁴¹ See *infra* notes 146-60 and accompanying text.

¹⁴² On the place of truth in the criminal justice system, see Albert Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67 (1982); William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279; Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Monroe Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975); Edwin Meese, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271 (1987); Charles Pulaski, Jr., *Criminal Trials: A 'Search for Truth' or Something Else?*, 16 CRIM. L. BULL. 41 (1980); A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921.

¹⁴³ See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 20 (1991) ("Many participants in the criminal justice system believe that subordination of the truth to any other value is indefensible. They believe that separating the innocent from the guilty is not a casual concern of the criminal justice system, but its utmost goal."), citing Meese, *supra* note 142, at 271.

truth is an essential goal of any criminal justice process that is to serve the ends of the substantive criminal law through effective enforcement of that law."¹⁴⁴ Without this goal, the criminal law would be cast adrift, the mere tool of power, authority or politics. Even in a criminal justice system which acknowledges other goals, as ours does, truth finding remains paramount. In fact, during the 1970s and 1980s, the Supreme Court made truth finding the explicit goal of criminal adjudication.¹⁴⁵

2. Other Goals

Any fair comment on the criminal justice system recognizes that truth finding, although predominant, is only one of a number of goals the system strives to attain.¹⁴⁶ Among these other goals of the

¹⁴⁴ WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 33 (2d ed. 1982); see also Joseph Grano, *Response*, XIV N.Y.U. REV. L. & SOC. CHANGE 97, 98 (1986) ("There is a societal interest in having the truth determined in a criminal trial."); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 471 (1985) (single criterion against which Court evaluates provisions of Bill of Rights is "how much impact does the right in question have on guilt determination at trial?").

¹⁴⁵ *E.g.*, *Rose v. Clark*, 478 U.S. 570, 577 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . .") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)); *Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (suppression of unwarned, voluntary disclosure of guilt would block factfinder's search for truth without justification); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (criminal trial is essentially a search for truth within the context of constitutional safeguards); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (exclusion of unwarned, voluntary statement would deprive factfinder of available, relevant and trustworthy evidence, contrary to "strong interest under any system of justice" in truth finding); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (defendant's right to testify is subject to obligation to testify truthfully and may be tested by "the traditional truth-testing devices of the adversary process."); Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 590 (1977) ("The Burger Court's decisions reflect the view that the primary value deserving recognition in the criminal process is accuracy."); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1007 (1989) (recognizing Court's emphasis on "the central importance of accurate determination of the question of factual guilt"); Office of Legal Policy, U.S. Dep't of Justice, *Truth in Criminal Justice Series* (1986), reprinted in 22 U. MICH. J.L. REF. 437, 439 (1990) (advocating abolition of many aspects of established rights that impair the search for truth); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 18 (1988) (Burger Court decisions "talked first and foremost about the truthfinding function of the criminal trial. The major goal of criminal procedure was no longer to remedy the disadvantages of the poor or to control abuses of official power but to accurately separate the guilty from the innocent."); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 436-37 (1980) (the view that finding the truth is the central mission of the criminal justice system "is amply supported by the Court's own rhetoric.").

¹⁴⁶ The goals used here come from LAFAVE & ISRAEL, *supra* note 144, at 33-43. The treatment of the basic policy goals of the criminal justice system in this book is as thoughtful as any other, and more comprehensive than most.

criminal justice system,¹⁴⁷ the following are arguably the most important: protecting the innocent, respecting individual dignity, equal justice and maintenance of an accusatorial system. All are well-served by the truth seeking theory.

a. Protecting the Innocent

The criminal justice system must not only reliably convict those who perpetrate crimes; it must also reliably exonerate those erroneously accused.¹⁴⁸ To this end, numerous safeguards protect the innocent. To do so, however, requires reaching beyond finding the truth. We therefore seek to minimize the chances of the erroneous conviction of an innocent person, even at the price of a greater chance that a jury may acquit a guilty person.¹⁴⁹

Viewing the system as a whole, this makes some sense. The criminal justice system relies on the judgment of people, and people make mistakes. In recognition of this fact, we attempt to err on the side of being as sure as human beings can be that the innocent are not convicted. Conviction of the innocent with any frequency would undermine the very legitimacy of our criminal law; quite simply, it would be morally reprehensible for the law to cause the innocent to suffer. This is the source of our "fundamental value determination"¹⁵⁰ that "it is far worse to convict an innocent man than to let a guilty man go free."¹⁵¹ A number of rules of constitutional dimen-

¹⁴⁷ Among the goals of the system not discussed here are minimizing the burdens of accusation and litigation, providing lay participation and maintaining the appearance of fairness. *Id.* Additionally, LaFave views the adversary system as a goal (he says that a goal of the criminal justice system is "[e]stablishing an [a]dversary [s]ystem of [a]djudication"). By contrast, I view the adversary system as the context within which the actors in the system work. I am not alone. *E.g.*, Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975) (adversary system is only a means to attain the end of achieving "just determination of disputes," not an end in itself).

¹⁴⁸ LAFAVE & ISRAEL, *supra* note 144, at 34.

¹⁴⁹ *Id.* at 39.

¹⁵⁰ *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

¹⁵¹ *Id.* Professor Tom Stacy perceptively observes that opinions of the Supreme Court seem to contain two different views of the importance of accuracy in criminal adjudication: A traditional view, in which the system is adjusted to make every effort to acquit the innocent even if this means that some guilty persons go free, a view Stacy calls "innocence weighted"; and an emerging view in which the overall number of accurate verdicts, innocent or guilty, is paramount. Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991). In the latter view, changes in the system that actually increase the number of innocent persons convicted would be acceptable, as long as the *total* number of inaccurate verdicts—guilty and not guilty—goes down. *Id.* at 1372. Stacy argues that this new view "effects a fundamental and dramatic shift in the law"; indeed, it is at war with our traditional views of the reasonable doubt standard and the importance of protecting the innocent. *Id.* at 1371-72. Those subscribing to this new conception of accuracy might view the theory described here with

sion protect the innocent, most notably the requirement that the prosecution bear the burden of proving guilt, and that it carry this burden beyond a reasonable doubt.¹⁵²

Note that the goal of protecting the innocent may exist in tension with the goal of truth finding. Indeed, the very idea that we should take enormous care that the innocent not be punished, even if this means that some guilty persons go free, explicitly acknowledges that not all of the factually guilty will be punished. As with other goals of the criminal justice system, protecting the innocent may sometimes deflect the truth.¹⁵³

The truth seeking theory promotes the protection of the innocent by explicitly striving for more accurate and balanced presentation of facts to the judge or jury. Instead of wealth and poverty determining what the factfinder considers, the need for information that only an expert can provide will be the deciding factor.

b. Respecting Individual Dignity

The criminal justice system also promotes respect for the dignity of individual human beings. For purposes of this discussion, dignity means the conditions necessary to maintain the adult personality, such as the freedom to think and feel privately, without interference from the state.¹⁵⁴ We strive for this goal in a number of ways, such as through the constitutional prohibitions against compelled self-incrimination and unreasonable searches and seizures.

Like protecting the innocent, this goal may exist in tension with the truth seeking function. For example, the prohibition against compelled self-incrimination may lead to the exclusion of relevant and highly probative evidence of guilt. This may result in some guilty persons going free, but “the process accepts that sacrifice in efficiency as a cost of preserving respect for human dignity” because “preservation of social order and domestic tranquility require not only freedom from crime, but also freedom from an overreaching

skepticism, since there is no way to gauge its effect on the overall number of accurate verdicts. The truth seeking theory will serve the pursuit of both accuracy in verdicts and protection of the innocent by making more information available to the factfinder than just what the defendant can afford. Accuracy would be less of a slave to money. Further, at least while the “innocence weighted” view of criminal procedure remains the dominant approach, we must use a theory for expert services that errs on the side of ferreting out reasonable doubt.

¹⁵² *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Winship*, 397 U.S. at 361; Stacy, *supra* note 151, at 1371-72 and n.8.

¹⁵³ LAFAVE & ISRAEL, *supra* note 144, at 34; Stacy, *supra* note 151, at 1370.

¹⁵⁴ LAFAVE & ISRAEL, *supra* note 144, at 41.

government.”¹⁵⁵

The truth seeking theory promotes individual dignity in the same manner as the criminal justice system. Under the theory, access to expert services to explore important issues does not depend on wealth. Rather, defendants may have expert services based on the configuration of their cases and the role an expert might play in them.

c. Equal Justice

Professor LaFave calls this goal achieving equality in the application of the process.¹⁵⁶ The idea is that like defendants must be treated alike, and that distinctions may be drawn between them only “on grounds that are properly related to the functions of the process.”¹⁵⁷ This goal was, of course, at the heart of the equality principle. The poverty of the defendant bears no proper relationship to any function of the process.

The truth seeking theory promotes equal justice by assuring that the defendant’s poverty does not govern what information ultimately makes its way to the factfinder. The theory seeks to keep criminal justice focused on what the jury needs to know, rather than on what evidence the defendant can afford to present.

d. Maintenance of an Accusatorial System

American courts operate under an accusatorial system. The government has the responsibilities of coming forward with the accusation(s) against the defendant and proving them beyond a reasonable doubt. If the government does not offer sufficient proof, the factfinder must acquit.¹⁵⁸ The defendant is presumed innocent¹⁵⁹ and may not be compelled to assist the government in proving the accusations against him.¹⁶⁰ While this may frustrate truth seeking by making it more difficult to convict the guilty, maintaining an accusatorial system assumes that the government exercises its immense power to prosecute under scrutiny. Put another way, the process of prosecution should be difficult precisely because it can be misused, to the great harm of the accused.

¹⁵⁵ *Id.* at 42; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson, J., dissenting) (“Due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders that leave lasting stains on a system of justice.”); Dressler, *supra* note 143, at 21.

¹⁵⁶ LAFAVE & ISRAEL, *supra* note 144, at 42.

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* note 152.

¹⁵⁹ *In re Winship*, 397 U.S. 358, 363 (1970).

¹⁶⁰ U.S. CONST. amend. V.

The truth seeking theory advances the maintenance of an accusatorial system by making the accused fully able to put the state to its proof, regardless of economic circumstances. The theory enables the accused to help check the government's power to convict, regardless of poverty.

With all of these goals in mind—finding the truth, along with the other four goals discussed—the strength of the truth seeking theory becomes clear. It serves the primary goal of the criminal justice process by focusing on truth seeking. It supplies the factfinder with all the relevant evidence; none will be withheld because of the defendant's poverty, and thus our confidence in the reliability of the criminal trial as a way to ascertain the truth increases. At the same time, it also promotes the other goals listed here. It protects the innocent by assuring that all evidence that shows innocence comes to light, rather than remaining hidden due to the defendant's poverty. Respect for individual dignity and the mechanics of accusatorial justice are maintained by allowing the defendant to mount a defense relatively unencumbered by economic circumstances. Additionally, even though it does not depend upon the Equal Protection Clause, the theory brings the defendant into a position like that of a person with resources, so that his poverty does not virtually insure *unequal* justice before the law.

C. THE CONTEXT: THE ADVERSARY SYSTEM

To understand the truth seeking theory, we must understand the context within which it would operate. The criminal justice system attempts to ascertain the truth within the context of an adversary system. By the term adversary system, I mean a system of adjudication in which neutral¹⁶¹ judges and/or juries decide the issues. In contrast to so-called inquisitorial systems,¹⁶² the prosecution and the defense—not the factfinder—develop and present the evidence. Each of the parties attempts to persuade the factfinder of the correctness of its contentions¹⁶³ within a "highly structured forensic procedure. . . ."¹⁶⁴ Professors LaFave and Israel put it well:

The adversary model gives to the parties the responsibility of investigating the facts, interviewing possible witnesses, consulting possible

¹⁶¹ LAFAVE & ISRAEL, *supra* note 144 at 35-36 & n.5.

¹⁶² *Id.*; KAMISAR ET AL., *supra* note 12, at 1359.

¹⁶³ For other descriptions of the adversary system, see, e.g., KAMISAR ET AL., *supra* note 12, at 1359-64; STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2 (1984); Gary S. Goodpaster, *On the Theory of the American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987).

¹⁶⁴ LANDSMAN, *supra* note 163, at 2.

experts, and determining what will or will not be told. Each party is expected to present the facts and interpret the law in the light most favorable to its side, and through a searching counter-argument and cross-examination, to challenge the soundness of the presentations made by the other side. The judge and jury are then to adjudicate impartially the issues posed by the conflicting presentations of the parties.¹⁶⁵

Some find the adversary system the best possible process for producing accurate verdicts.¹⁶⁶ This assertion rests on two assumptions. First, keeping factfinders uninvolved in the process of gathering or presenting evidence prevents them from forming biases and jumping to conclusions before complete development of the evidence.¹⁶⁷ Second, putting the parties in charge of gathering and presenting the evidence will guarantee the best possible development of the factual record. Since the parties' self-interest dictates that they will ferret out as much evidence favorable to them as possible, and since there are two parties with opposing self-interests, the adversary system assures that the factfinder will see all relevant evidence and its strengths and weaknesses.¹⁶⁸

Many commentators disagree strongly with these two assumptions, especially the second.¹⁶⁹ They argue that an adversary system provides absolutely no assurance that all relevant evidence will be found and presented to the tribunal. On the contrary, the self-interest of one or even both parties may keep evidence of unquestioned relevancy hidden.¹⁷⁰ The adversaries may turn the trial into a tournament of tactics and obfuscation in which they distort or fail to present probative facts,¹⁷¹ sometimes even by agreement between themselves.¹⁷² This "battle of wits and guile, designed to mislead the decisionmaker rather than to lead him to the truth" may further distort the evidence because the adversary system "rests on the un-

¹⁶⁵ LAFAVE & ISRAEL, *supra* note 144, at 35.

¹⁶⁶ *Id.* at 34-35; KAMISAR ET AL., *supra* note 12, at 1359.

¹⁶⁷ Kamisar, *supra* note 87, at 1359; LAFAVE & ISRAEL, *supra* note 144, at 36.

¹⁶⁸ *See, e.g.*, LAFAVE & ISRAEL, *supra* note 144, at 36; *Herring v. New York*, 422 U.S. 853, 862 (1975) ("[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); *see also United States v. Cronin*, 466 U.S. 648, 656-57 (1984) (if the criminal justice system "loses its character as a confrontation between adversaries, the constitutional guarantee [of effective assistance of counsel] is violated.");

¹⁶⁹ *See, e.g.*, KAMISAR ET AL., *supra* note 12, at 1360 & n.a, and materials cited therein; DRESSLER, *supra* note 143, at 20; *see also supra* note 127; Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 596-97 (1985).

¹⁷⁰ *Id.*; Damaska, *supra* note 169, at 1093.

¹⁷¹ *See, e.g.*, LAFAVE & ISRAEL, *supra* note 144, at 36.

¹⁷² Damaska, *supra* note 169, at 1093 n.22.

realistic proposition that the advocates will be roughly equal" in ability and supporting resources.¹⁷³ Further, while defense counsel has a duty to the accused client—basically, a duty to do whatever can be done within the limits of the system to win—there is no corresponding duty to advance the truth.¹⁷⁴ At bottom, these critics contend that the adversary system does not necessarily advance the search for truth; in fact, it guarantees that the search will be more difficult than it might be under another method of adjudication.

I do not wish to revisit these debates in any greater detail than I have just done. Neither, however, do I wish to avoid their implications. The fact is that we determine guilt and innocence through the adversary system. In order to reckon successfully with poverty's influence on the criminal justice system, any theory must take into account the way that the adversary process itself affects the accuracy of factfinding. Regardless of whether presenting two opposing sides is the best way to get to the truth, it is clear that the adversary system cannot hope to ascertain the truth if only one side is equipped to do battle. Without the contrasting proofs of the opposing sides, the factfinder is left to assume that uncontested facts are true. In fact, this may not be the case at all; the defense may fail to present opposing evidence simply because the defendant's poverty does not allow for the investigation, preparation and presentation of the evidence. The truth seeking theory seeks to promote truth finding (as well as the other goals of the criminal justice system) by equipping the indigent defendant with the resources necessary to present the same evidence that any other defendant would.

Any other approach threatens to turn the trial and its goal of finding the truth into a sham. Imagine the beginning of any criminal jury trial. We present the jury with the traditional partisan advocates for defense and prosecution. The judge explains to the jury that they are to hear evidence from both sides and decide the case based on the evidence both sides present.¹⁷⁵ The jury understands

¹⁷³ LAFAYE & ISRAEL, *supra* note 144, at 36.

¹⁷⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (imposing a duty of loyalty to the client), and Rule 1-6(a) (qualified duty to retain client confidences, even where this may distort the presentation of the facts); compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) (prosecutor's duty includes not only securing convictions but promotion of justice); DRESSLER, *supra* note 143, at 21 ("[S]ome abridgement of the truth currently is accepted in the adversary system of justice.").

¹⁷⁵ See FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 1, 3-4 (1987) (introducing advocates as partisans and explaining that jury decides guilt beyond reasonable doubt based only on evidence and judge's instructions); PATTERN CRIMINAL JURY INSTRUCTIONS, SIXTH CIRCUIT DISTRICT JUDGES ASSOCIATION 1.02, 1.03, 1.04 (1991) (same); EDWARD J. DEVITT & CHARLES B. BLACKMAR, 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 11.03, 11.11 (1977) (same).

and assumes that both sides will present their strongest evidence in the best possible light.¹⁷⁶ When evidence is *not* presented by the defense, especially when that evidence is scientific or expert-based, the jury will assume that the defense does not care to contest the part of the state's case to which the evidence would have been relevant. Worse still, the jury may assume that the defense *did* have its own evidence on the issue but declined to present it because it supported the state, not the defendant. What may in fact be happening is that the evidence was not presented by the defense simply because the defense could not afford to present it. The jury, however, will never know this.

I do not wish to be understood as advocating a sporting chance¹⁷⁷ for the defendant to win. The important issue is not whether the defendant has the same chance to win as the state. Rather, we must focus on the task of the factfinder. How can we rely on the jury's ability to find the facts when it may be doing so without all of the evidence? Granted, the self-interest of the parties may keep some of the evidence from reaching the factfinder. Given the premises of the adversary system, however, self-interest is at least an arguably acceptable criterion for advancing, or not advancing, evidence. The poverty of the defendant, however, is not. If poverty governs what evidence is heard in criminal courts, our whole system suffers the consequences of the defendant's inability to dispute the state's case.

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depend upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. . . . Persons suffering [from poverty] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. . . . [T]he conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and . . . the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests

176 "[T]he jury understands that advocates present a biased set of facts and arguments concerning a dispute in an effort to present the most favorable picture of their position. As a consequence of this principle of 'best case,' the jury assumes that each side's evidence is no better than, and probably not as good as, the advocate presents it to be." Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L.J. 1177, 1178 (1992) (reviewing ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY: EVIDENTIARY TACTICS FOR WINNING JURY TRIALS (1990)).

177 See, e.g., Pye, *supra* note 142, at 926; Joseph Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessional Law*, 84 MICH. L. REV. 662, 677 (1986).

of a free community.¹⁷⁸

D. CONSTITUTIONAL UNDERPINNINGS

The truth seeking theory rests on three constitutional legs. The first two come directly from the Sixth Amendment—the Confrontation Clause¹⁷⁹ and the Compulsory Process Clause.¹⁸⁰ The third, the constitutional right to present a defense,¹⁸¹ springs from the Confrontation and Compulsory Process Clauses and the Due Process Clause. Together, these three constitutional precepts assure the adversary system's integrity. The truth seeking theory strives for the same goal by making these mechanisms—the accused person's rights to confront adverse witnesses and compel witnesses to appear, and the right to present a defense—fully available to indigent defendants.¹⁸² The following discussion will explore the relationship of the Confrontation and Compulsory Process Clauses and the right to present a defense to the adversary system, and it will illustrate how the truth seeking theory will strengthen the process of factfinding at trial.

1. *The Confrontation Clause*

The Confrontation Clause is critical to assuring that the jury has sufficient information to make a reliable decision. Without confrontation, the adversary process breaks down, and the truth finding process suffers.

The right of criminal defendants to confront adverse witnesses has ancient origins.¹⁸³ Colonial Americans found it so well estab-

¹⁷⁸ Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 10-11 (1963).

¹⁷⁹ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."). See *infra* notes 183-201 and accompanying text.

¹⁸⁰ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"). See *infra* notes 202-18 and accompanying text.

¹⁸¹ See *infra* notes 219-30 and accompanying text.

¹⁸² Other commentators have suggested the Confrontation Clause as the basis for the provision of expert services. *E.g.*, Bowman, *supra* note 19, at 642-43 (recognizing necessity of expert and investigative services for meaningful confrontation); West, *supra* note 19, at 1336-37, n. 80-81 & 1359-60 (Confrontation Clause as possible basis for expert assistance). Commentators, and at least one court, have also suggested (again, without much analysis) that the Compulsory Process Clause requires the provision of expert services. *E.g.*, Bowman, *supra* note 19, at 641-42; *People v. Watson*, 221 N.E.2d 645 (Ill. 1966). The Illinois court's reasoning has not been followed. The theory I propose is the first to draw support from both the Confrontation and Compulsory Process Clauses and the right to present a defense.

¹⁸³ Anne Rowley, *The Sixth Amendment Right of Defendants to Confront Adverse Witnesses*, 26

lished in English common law that they included it in many of their declarations and constitutions.¹⁸⁴ While the initial function of confrontation was to combat the use of affidavits in the place of the testimony of live witnesses to prosecute criminal cases,¹⁸⁵ its purposes broadened long ago.¹⁸⁶ The Supreme Court incorporated the right to confrontation into the Fourteenth Amendment, applying it to the states in 1965.¹⁸⁷

The Supreme Court's Confrontation Clause jurisprudence now covers three related areas. The first area is literal, physical confrontation—that is, the right of the defendant to an actual face-to-face encounter in court with those testifying against him.¹⁸⁸ The second area is the intersection of the right to confrontation and the use of hearsay evidence.¹⁸⁹ The third area—and the one on which I will focus this discussion—is the right to cross-examine adverse witnesses. The truth seeking theory promotes effective confrontation by enabling indigent defendants to cross-examine adverse witnesses with necessary expert services.

The core goal of the Confrontation Clause is the search for truth.¹⁹⁰ Cross-examination, implicit in confrontation, is a central

AM. CRIM. L. REV. 1547, 1547-54 (1989) (tracing the history of the clause back as far as 1552). Rowley's note is an excellent overview of the history and current jurisprudence of the right of confrontation.

¹⁸⁴ *Id.* at 1551-52; *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988) (right of confrontation recognized even before right to jury trial).

¹⁸⁵ Rowley, *supra* note 183, at 1547, 1550-51; *but see White v. Illinois*, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."); *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment.").

¹⁸⁶ Rowley, *supra* note 183, at 1550-56. The Supreme Court has made clear, as recently as 1992, that the Confrontation Clause covers much more than prosecution by affidavit. *White*, 112 S. Ct. at 740-41 (explicitly rejecting view of concurring opinion and U.S. Government as *amicus curiae* that limited purpose of Confrontation Clause was to prevent the practice of prosecuting a defendant through affidavits without presenting witnesses in person).

¹⁸⁷ *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

¹⁸⁸ The Supreme Court has explored this area in recent cases in which states have allowed children to testify in sexual abuse cases without having to face the accused. *Maryland v. Craig*, 497 U.S. 836 (1990) (Confrontation Clause did not absolutely prohibit victim of child sexual abuse from testifying outside of defendant's presence on closed circuit television); *Coy*, 487 U.S. 1012 (allowing child victims of sexual assault to testify against defendant behind opaque screen violated defendant's right of confrontation).

¹⁸⁹ The Court has explored the issues arising in this area and their many permutations in a number of cases. *E.g.*, *White*, 112 S. Ct. at 743; *United States v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Green*, 399 U.S. 149; *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965).

¹⁹⁰ *Coy*, 487 U.S. at 1019-20; *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *see also Green*, 399 U.S. at 158 (identifying core values and goals of confrontation similarly); *see*

part of what makes the adversary system work. If the adversary system is designed to ferret out the truth by presenting to the factfinder the strongest evidence both sides can find, cross-examination supplies the critical alternative view of each side's evidence.¹⁹¹ For this reason, Dean Wigmore called cross-examination the "greatest legal engine ever invented for the discovery of truth."¹⁹² It is easy to see why. When cross-examined, the witness testifies under oath, "impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty of perjury."¹⁹³ If the witness intends to lie, he must lie in public under hostile probing. The cross-examiner will, of course, make every effort to expose not only deliberate deceit but biases and difficulties of memory and perception.¹⁹⁴ The jury will observe all this and the witness's demeanor while testifying, and use it to evaluate credibility.¹⁹⁵

Of course, cross-examination is not unlimited, either as to its method or its extent.¹⁹⁶ Nevertheless, the Court has construed the right to cross-examine broadly precisely because of its strong connection to the ability of the factfinder to ascertain the truth.¹⁹⁷ This

also Note, An Argument for Confrontation Under the Federal Sentencing Guidelines, 105 HARV. L. REV. 1880, 1887 (1992) ("[C]onfrontation grants a defendant the right to challenge the prosecution's evidence before the finder of fact.").

¹⁹¹ See, e.g., *United States v. Wade*, 388 U.S. 218, 223-24, 227 (1967) (post-indictment line-up without presence of counsel violated Sixth Amendment right to counsel, because, *inter alia*, counsel would not be able to meaningfully cross-examine state's witnesses about line up; counsel's presence at line up "operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (in cross-examination, "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

¹⁹² JOHN WIGMORE, 5 EVIDENCE § 1367 (3d ed. 1940), *quoted with approval* in *California v. Green*, 399 U.S. 149, 158 (1970).

¹⁹³ *Green*, 399 U.S. at 158.

¹⁹⁴ E.g., MAUET, *supra* note 7, at 226-30, 236-38.

¹⁹⁵ *Green*, 399 U.S. at 158; see also Rowley, *supra* note 183, at 1551 n.27 (summarizing five reasons supporting the confrontation right explained by Sir Matthew Hale in his HISTORY OF THE COMMON LAW (including desirability of public testimony, jury's ability to evaluate witness and witness's demeanor, and superiority of live testimony to limited and carefully presented written answers)).

¹⁹⁶ *Delaware v. Fensterer*, 474 U.S. 15, 20 (1986) (per curiam). For example, in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Supreme Court affirmed a lower court's refusal to allow a defendant in a child abuse case access to confidential information, even though the defendant made a plausible argument that the information could have made a difference in the outcome of his trial. *Id.* at 51-54.

¹⁹⁷ *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (error not to allow cross-examination of prosecution witness about dismissal of pending charge because the jury might have found that the dismissal "furnished the witness with a motive for favoring the prosecution."); *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (error to prohibit cross-examina-

highlights the intimate relationship that exists between the Confrontation Clause and cross-examination on the one hand, and the strength of the adversary process on the other. Cross-examination is "critical for ensuring the integrity of the factfinding process";¹⁹⁸ it is "the principal means by which the believability of a witness and the truth of his testimony are tested."¹⁹⁹ By exposing bias, demeanor, perceptual and memory difficulties—in short, by showing the factfinder an interpretation of the facts different from those the witness testifies to on direct examination—cross-examination helps sift the true from the false.

Even *Ake* recognizes this. The importance of the psychiatrist in *Ake* lies not only in the ability to present an insanity defense; the psychiatrist also helps the defendant to cross-examine the state's expert(s).²⁰⁰ Thus the role of the expert includes not only digging out facts and interpreting them, but helping to test the state's evidence. Without expert services, "the greatest legal engine ever invented for the discovery of truth"²⁰¹ may not start. Indigent defendants will again be left to fend for themselves, and the accuracy and integrity of the truth finding process in their cases may well suffer. By giving these defendants greater access to expert services, the truth seeking theory makes cross-examination an effective tool for everyone.

2. *The Compulsory Process Clause*

The Compulsory Process Clause gives the defendant the same power to obtain witnesses that the state has. The clause makes the state's machinery for insuring the attendance of witnesses at trial—subpoenae, backed by the court's power to hold those disobeying its orders in contempt—available to all.²⁰² The truth seeking theory promotes accuracy in verdicts by making the right to compel witnesses to appear worth something in cases in which expert services are needed; if, practically speaking, experts are unavailable to indigent defendants, the right to compulsory process has no value.

tion about juvenile's otherwise confidential juvenile criminal record); see *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to cross-examine not absolute, but its denial calls into question the "integrity of the fact finding process" and requires close examination of competing interests); *Brookhart v. Janis*, 384 U.S. 1, 3 (1966) (cross-examination found so essential that denial of defendant's right to cross-examine is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.").

¹⁹⁸ *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

¹⁹⁹ *Davis*, 415 U.S. at 316.

²⁰⁰ *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 80-82 (1985).

²⁰¹ See *supra* note 192.

²⁰² STEPHEN A. SALZBURG, *AMERICAN CRIMINAL PROCEDURE* 1017 (3d ed. 1988).

The history of the Compulsory Process Clause is sparse.²⁰³ By the end of the eighteenth century, the idea of compulsory process was well-rooted enough that the inclusion of the clause in the Bill of Rights stirred little debate.²⁰⁴ With only one notable exception,²⁰⁵ the Supreme Court said nothing about the clause until *Washington v. Texas*²⁰⁶ in 1967. In that case,²⁰⁷ the Court found the exclusion of the accomplice's testimony violated the Compulsory Process Clause.²⁰⁸ The Texas law in question "denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense,"²⁰⁹ the Court said. "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."²¹⁰

The Supreme Court reiterated the importance of the Compulsory Process Clause just five years later in *Webb v. Texas*.²¹¹ As the defendant's only witness prepared to testify, the trial judge gratuitously admonished the witness on the dangers of perjury to such an extent that the witness refused to testify.²¹²

²⁰³ See Kevin C. Boyle & Daniel A. Cunningham, *The Compulsory Process Clause*, 26 AM. CRIM. L. REV. 1575, 1575-78 (1989); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 90-108 (1973) [hereinafter *Compulsory Process I*].

²⁰⁴ Boyle & Cunningham, *supra* note 203, at 1578; *Compulsory Process I, supra* note 203, at 90-91.

²⁰⁵ The exception was the trial of Aaron Burr. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807)(No. 14,692d). Chief Justice John Marshall, presiding at trial as a circuit judge, read the Compulsory Process Clause expansively. In ruling on Burr's motion for pretrial production of critical letters so that he might prepare his defense, Marshall stated that "since the compulsory process clause was designed to enable a defendant to present a defense, the defendant must be allowed time prior to trial to prepare that defense." Boyle & Cunningham, *supra* note 203, at 1578-80 (quotation and footnote omitted); *Compulsory Process I, supra* note 203, at 101-08.

²⁰⁶ 388 U.S. 14 (1967).

²⁰⁷ In *Washington*, the defendant wished to call an accomplice as a witness. The accomplice had already been convicted of the crime. *Id.* at 16. The accomplice would have testified that the defendant "pulled at him and tried to persuade him to leave and that [the defendant] ran before [the accomplice] fired the fatal shot." *Id.* The trial court refused to allow the accomplice to testify based on Texas statutes that barred any co-participants in the same crime from testifying as witnesses for each other. *Id.* at 17-18.

²⁰⁸ *Id.* at 22-23.

²⁰⁹ *Id.* at 23.

²¹⁰ *Id.* The Court also found that the right to compulsory process applied to the states through the Fourteenth Amendment's guarantee of due process of law. *Id.* at 17-18.

²¹¹ 409 U.S. 95 (1972) (per curiam).

²¹² Upon defense counsel's objection to the unusual admonition by the court, the court said, "Counsel, you can state the facts, nobody is going to dispute it. *Let him decline to testify.*" *Id.* at 96 (emphasis supplied).

The Supreme Court said that the actions of the judge in *Webb* had the same effect that the Texas statutes had in *Washington*—both kept the defendant from presenting relevant and material evidence, the production of which the defendant had a constitutional right to compel. It would make no sense for the Constitution to guarantee this right if a temperamental or biased judge could nullify it at will.²¹³

Viewed through these cases, it is hard to see how the Compulsory Process Clause could not be part of the fabric of fundamental fairness. The primary goal of the criminal justice system is to determine the truth of the government's allegations. The Confrontation Clause facilitates the search for the truth by requiring that the state put on most of its evidence through live witnesses who can be cross-examined. By itself, however, the Confrontation Clause would not always be sufficient; it requires the Compulsory Process Clause as its complement. If the Confrontation Clause and the right to cross-examination that it protects allows the defense to challenge the state's evidence, the Compulsory Process Clause gives the defense a critical tool it needs to put on its own evidence. In other words, both confrontation and compulsory process are necessary to mount a defense; neither would be sufficient by itself.²¹⁴

Yet we can also see that without necessary expert services, the right to compulsory process becomes hollow. Clearly, the right to compulsory process is aimed at allowing the defense to present its own witnesses to the jury.²¹⁵ The purpose of this right leads us directly back to our discussion of the adversary system: The prose-

²¹³ See also, e.g., *Rock v. Arkansas*, 483 U.S. 44 (1987) (state rule prohibiting use of all hypnotically refreshed testimony violates, *inter alia*, the Compulsory Process Clause). Like the right to confrontation, the right to compulsory process is not absolute. For example, in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the defendant claimed that the illegal aliens the government charged him with transporting would have testified on his behalf except for the fact that the government deported them before the trial. *Id.* at 861. The Supreme Court said that this did not violate the Compulsory Process Clause absent "some plausible showing of how [the] testimony would have been both material and favorable to [the] defense" and not merely cumulative. *Id.* at 867. In other words, the right to compulsory process does not necessarily extend to all witnesses who could be available at trial absent direct government interference. *Id.* See also *United States v. Nobles*, 422 U.S. 225, 241 (1975) (right to compulsory process does not protect defense from use of exclusion of witness as sanction; the clause and the Sixth Amendment "[do] not confer the right to present testimony free from the legitimate demands of the adversarial system . . ."); but see *Ronson v. Commissioner of Correction*, 463 F. Supp. 97 (S.D.N.Y. 1978) (discussing limits on the extent to which non-compliance with procedural rules can result in the loss of a defense). Nevertheless, the right to compulsory process remains a part of the guarantee of fundamental fairness that underlies all criminal trials.

²¹⁴ See *infra* notes 219-20 and accompanying text.

²¹⁵ *Washington v. Texas*, 388 U.S. 14, 22 (1967).

cution and defense present the factfinder with opposing views of the facts. Experts, however, do not simply wait to be called as witnesses with information in hand. Rather, the defense must retain and compensate them based on the work and time involved.²¹⁶ It is only then that experts *become* witnesses. In other words, it is not only compulsion that makes the difference; expert witnesses will appear only if paid. Therefore, the right to compel the appearance of the expert means nothing without the economic wherewithall to pay for the expert's services. The truth seeking theory thus puts real force behind the promise of the Compulsory Process Clause.

Some typical fact witnesses may present similar difficulties. The problem is not that fact witnesses necessarily expect to be paid; rather, fact witnesses sometimes cannot be compelled to appear until they are *found*. Even if counsel alone could manage to have process served on a witness (a dubious assumption, given current caseloads for defenders of indigent clients²¹⁷), determining *whether* the defense *should* compel the witness to testify requires at least a preliminary interview that an investigator should conduct or observe.²¹⁸ Thus, without the resources to pay experts and investigative personnel to find and interview fact witnesses, the right to compulsory process becomes exactly what the Supreme Court feared in *Washington v. Texas*—an empty right. By contrast, the truth seeking theory protects the right to compulsory process by enabling indigent defendants to retain experts and to find and interview fact witnesses. It puts real force behind the right.

3. *The Right to Present a Defense*

The rights to confrontation and compulsory process combine to form the constitutional right to present a defense. This right, which also finds support in the Due Process Clause, guarantees the defendant the right to present evidence to the factfinder, whether through confrontation or the presentation of defense witnesses, in order that the process of finding the truth go forward with all rele-

²¹⁶ See Grano, *supra* note 144, at 98 (equality not possible in a system in which people may pay for services of attorneys).

²¹⁷ See *supra* note 6.

²¹⁸ See *supra* note 139; AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE 4-4.3(d) (1990) (lawyer should not interview witness alone; interview should be conducted by, or in presence of, third person, such as investigator, because of danger of impeachment requiring lawyer to serve as witness and therefore to withdraw from case); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B), DR 5-102(A) (1981); *United States v. Vereen*, 429 F.2d 713 (D.C. Cir. 1970); *United States v. Porter*, 429 F.2d 203 (D.C. Cir. 1970); see also *infra* notes 300-02 and accompanying text, which describes a mechanism for a preliminary interview or investigation.

vant evidence. Just as it promotes the purposes of the confrontation and compulsory process clauses, the truth finding theory supports the right to present a defense by assuring that the facts of the case, not poverty, determine whether the jury hears a defense.

Professor Peter Westen, an astute examiner of the Confrontation and Compulsory Process Clauses,²¹⁹ finds these two clauses to be opposite sides of the same coin, separate but complementary. "After all, the confrontation clause and the compulsory process clause have a common purpose: Both are designed to secure the attendance of witnesses in order to enhance the ability of a defendant to elicit and present testimony in his defense."²²⁰ The Supreme Court explained this intertwining of confrontation, compulsory process and the right to present a defense in *Washington v. Texas*.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.²²¹

The Supreme Court brought the Confrontation, Compulsory Process and Due Process Clauses together in *Chambers v. Missis-*

²¹⁹ Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978) [hereinafter *Confrontation and Compulsory Process*]; Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975); *Compulsory Process I*, *supra* note 203.

²²⁰ *Confrontation and Compulsory Process*, *supra* note 219, at 588-89; see also *Faretta v. California*, 422 U.S. 806, 818 (1975) ("The Sixth Amendment includes a compact statement of the rights necessary to a full defense. . . . [T]hese rights are basic to our adversary system of criminal justice."); *Williams v. Florida*, 399 U.S. 78, 112 (1970) (Black, J., concurring in part and dissenting in part) ("All of these [Sixth Amendment] rights are designed to shield the defendant against state power."); *Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 581-86 (1988).

²²¹ *Washington v. Texas*, 388 U.S. 14, 19 (1967). When the Court spoke in *Webb*, five years later, it repeated these words with approval. *Webb v. Texas*, 409 U.S. 95, 98 (1972).

Washington was not the first time the Supreme Court discussed this issue. The Court foreshadowed the right to present a defense in *In re Oliver*, 333 U.S. 257 (1948). In that case, a person appeared before a "one man grand jury" (a single trial judge) which—in a single secret proceeding—found him uncooperative and evasive, convicted him of contempt and sentenced him to jail. *Id.* at 259. The Supreme Court found this proceeding reminiscent of the Star Chamber and the Spanish Inquisition and violative of due process. *Id.* at 268-69. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence: and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony and to be represented by counsel." *Id.* at 273.

Mississippi.²²² Chambers was arrested for murder.²²³ Another person, McDonald, made but later repudiated a sworn, written confession.²²⁴ McDonald also confessed orally to three other persons.²²⁵ When the state did not call McDonald as a witness at trial, the defense was forced to do so, but was unable to cross-examine McDonald under Mississippi's "voucher" rule.²²⁶ Chambers was also prohibited from calling as witnesses the three persons to whom McDonald confessed.²²⁷

The Supreme Court found that these actions violated the Constitution. Tying the Confrontation and Compulsory Process Clauses to the defendant's right to receive a fair trial under the Due Process Clause, the Court enunciated a constitutional right to present a defense.

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process Both of these [are] elements of a fair trial²²⁸

The right to present a defense furthers the search for truth.²²⁹

²²² 410 U.S. 284 (1973).

²²³ *Id.* at 287.

²²⁴ *Id.* at 287-88.

²²⁵ *Id.* at 289.

²²⁶ *Id.* at 291-92. The "voucher" rule required that to cross-examine a witness it had called, a party must show that a witness was "adverse" in the sense that the witness "point[ed] the finger" at the party calling the witness. *Id.*

²²⁷ The trial court ruled the testimony of these witnesses was inadmissible as hearsay. *Id.* at 292-93.

²²⁸ *Id.* at 294-95. This right to present a defense has been affirmed by the Supreme Court in many other cases. See, e.g., *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (right to confrontation is "designed to promote reliability in the truth finding functions of a criminal trial."); *Rock v. Arkansas*, 483 U.S. 44, 51-53 n.10 (1987) (right to present one's own testimony is, *inter alia*, an essential part of due process of law in an adversary system, and is implicit in the Compulsory Process Clause); *United States v. Wade*, 388 U.S. 218, 226-27 (1967) ("The security of [the right to a fair trial] is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witness in his favor.").

²²⁹ See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) (calling right to present defense by compelling witnesses to attend trial "an essential attribute of the adversary system itself"); *Rock*, 483 U.S. at 63 (Rehnquist, C.J., dissenting) (calling right to testify on one's own behalf truth furthering); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (right to present a defense constitutionally essential for a fair trial); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (characterizing need to develop and present facts in adversary proceeding as fundamental to integrity of, and public confidence in, the criminal justice system); *Chambers v. Mississippi*, 410 U.S. 284, 295, 302 (1973) (confrontation and compulsory process are both basic components of right to defense and essential to truth finding).

Without the right to present a defense, there is no guarantee that the accused can put evidence before the factfinder, and confidence in the truth seeking mission of the adversary system sinks. Therefore, we cannot feel satisfied with the current system, in which the rights to confrontation, to compulsory process and to present a defense apply only to those with the money to pay for the expert services necessary to make these rights worth something.²³⁰ The truth seeking theory gives content to these constitutional provisions by supplying the resources necessary for their exercise when doing so would help attain the system's primary goal—finding the facts. The theory supports the constitutional rights designed to make real the assumptions of the adversary system—that the prosecution and defense present the strongest, relevant available evidence to the factfinder, which can then arrive at the most accurate decision possible. By gearing the provision of expert services to the ability of the factfinder to determine facts, the truth seeking theory points the criminal justice system in the right direction.

IV. HOW WELL DOES THE TRUTH SEEKING THEORY WORK?

Any proponent of a new theory must answer a basic question: Does the new theory represent an improvement over the current way of doing things? We cannot tell with mathematical certainty whether the truth seeking theory would supply us with more reliable verdicts. We can, however, make more than an educated guess. By applying the truth seeking theory to a number of common types of cases, I will demonstrate in the next section of the discussion that the theory works better than the basic tools approach.

For a certain small set of cases, the basic tools theory will work well, in that it will bring the jury all the relevant information. These are cases in which one issue determines the outcome, like *Ake* itself.²³¹ Yet many cases do not fit the one-issue mold. The typical criminal case depends not on one fact, but on a chain of interdependent facts, all of which the state must prove. Consequently, most indigent defendants usually will not receive expert services under the basic tools theory because their cases do not present the court

²³⁰ This problem seems especially serious given the high percentage of cases in the system for which these kinds of funds are not available. Doubts about our ability to find the truth thus occur in a large number of cases. See ROGER A. HANSON ET AL., *INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL* 100 (1992) (disparity in available resources between prosecution and indigent defense attorneys is greatest in area of experts and investigators).

²³¹ See *supra* notes 117-23 and accompanying text.

with all-or-nothing situations.²³² This results in juries not having all the relevant evidence needed to reach an accurate verdict.

By contrast, given the two questions the court would ask under the truth seeking theory,²³³ indigent defendants would receive expert services whenever it might make a difference to the outcome of the case. Unlike the basic tools approach, the theory I propose will build confidence that juries base verdicts on all the relevant evidence, and that no evidence is withheld simply because of the defendant's poverty. Since the presentation of the strongest available evidence from both the prosecution and the defense remains a linchpin of our truth finding process, the truth seeking theory will bolster our ability to get at the truth.

To demonstrate this, I will begin by discussing the use of scientific evidence in multi-issue cases in general. I will then use several common types of cases to show that the truth seeking theory would help important and relevant information reach the factfinder that otherwise could remain hidden under the basic tools theory.

A. SCIENTIFIC EVIDENCE IN GENERAL

While important in modern criminal litigation,²³⁴ scientific evidence does not always determine the outcome of cases in which it appears. Rather, scientific testing more often provides some, but not all, of the evidence necessary to convict.²³⁵ Moreover, factfinders should view scientific evidence with skepticism. While crime laboratories may carry the government's imprimatur, they can and do produce flawed results. One study of 240 forensic laboratories found that, at best, only twenty percent of the laboratories produced completely accurate results in simple tests on drugs, firearms, blood, glass and the like.²³⁶ Similarly, the National Academy of Sci-

²³² See *supra* notes 117-21 and accompanying text. Even if *Ake* were not read this narrowly, it would still present problems. See *supra* note 131.

²³³ See *supra* notes 136-40 and accompanying text.

²³⁴ See *supra* note 7. In fact, some have argued that scientific or other expert evidence has become so important that it can usurp the factfinder's function. See, e.g., CLEARY, *supra* note 7, at § 202. (probative value of scientific evidence to be weighed "against the dangers of misleading the jury who may attach exaggerated significance to the tests.").

²³⁵ For example, scientific testing can tell us whether a seized substance is, in fact, an illegal drug, or whether a particular gun fired a recovered bullet; it cannot, however, tell us whether the defendant possessed the drug or fired the bullet.

²³⁶ Decker, *supra* note 19, at 577-79 (1982), discussing JOSEPH L. PETERSON ET AL., LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, July 1978); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 795-97 (1991) (noting reliability problems in the use of scientific evidence).

ences has recently cautioned against the unquestioning use of DNA "fingerprinting,"²³⁷ a technology seen by some as infallible.²³⁸

The point is not that we either should or could rely less on scientific evidence. To do so would be neither desirable nor possible; forensic science has become an invaluable tool in the arsenal of modern law enforcement.²³⁹ Rather, these studies show us the importance of assessing the evidence presented by experts as carefully as possible.²⁴⁰ And, as *Ake* recognized,²⁴¹ there is often no better way (and sometimes no *other* way) to expose the flaws in forensic evidence than with the help of an expert in the same field.²⁴²

The possibility of inaccuracy in forensic science magnifies the difficulties inherent in *Ake's* basic tools approach. The *Ake* standard provides the indigent defendant with expert services only when the issue to which the services are germane is outcome-determinative. Since many cases do not fit this pattern, most indigent defendants will not get expert services. This will occur despite the fact that the scientific evidence should and could be challenged due, if nothing else, to its strong potential for inaccuracy. Thus under the basic tools approach, some verdicts will depend on scientific evidence that is both unchallenged and inaccurate. By contrast, the truth seeking theory will allow indigent defendants to test the prosecution's scientific evidence through the use of their own experts.

With these general comments about scientific evidence in mind, I will now discuss common types of cases and defenses in which expert services can play critical roles.

²³⁷ NAT'L ACADEMY OF SCIENCES, *DNA TECHNOLOGY IN FORENSIC SCIENCE* (1992); Don J. DeBenedictis, *DNA Report Raises Concerns*, 78 A.B.A. J. 20 (July 1992).

²³⁸ *E.g.*, DeBenedictis, *supra* note 237, at 20 (quoting National Academy of Sciences report committee member Judge Jack B. Weinstein, U.S. District Court, Eastern District of New York: "DNA has been 'touted as a new form of sure-fire evidence,' Weinstein said. 'It's not. It is a very powerful tool, but it has to be used carefully.'"); Giannelli, *supra* note 236, at 796 (noting numerous references to DNA evidence as, *e.g.*, "'foolproof.'").

²³⁹ PAUL C. GIANNELLI & EDWARD IMWINKELRIED, *SCIENTIFIC EVIDENCE* xxi-xxiii (1986); Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671 (use of scientific evidence has "increased significantly"); Joseph L. Peterson et al., *The Uses and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. FORENSIC SCI. 1730, 1748 (1987) (one-quarter of surveyed jurors would have changed votes from guilty to not guilty in the absence of scientific evidence).

²⁴⁰ *See also* Giannelli, *supra* note 239, at 688-92 (demonstrating significant risk of error in forensic testing); Giannelli, *supra* note 236, at 795-97 (same).

²⁴¹ *Ake v. Oklahoma*, 470 U.S. 68, 79-82 (1985).

²⁴² *See, e.g.*, Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1116 (1991) ("Whole categories of cases are dominated by issues that can only be resolved with expert knowledge.").

B. SELF-DEFENSE

Self-defense claims often arise in homicide and assault cases.²⁴³ A person who reasonably believes that he is in imminent danger of bodily harm may use a reasonable amount of force against another when necessary to protect himself.²⁴⁴ Generally speaking, the central criteria in self-defense cases are the reasonableness of the defender's belief in danger and the reasonableness of the defender's response.²⁴⁵ Self-defense thus presents a host of issues, none of which may be totally dispositive, but all of which may affect the verdict. All fairly cry out for investigative and expert services. I will divide these issues into two broad groups.

1. *Victim as Aggressor*

To measure the reasonableness of a defendant's belief in danger and the reasonableness of his response, the jury may consider whether the victim was, in fact, the aggressor. The law allows a defendant in an assault or homicide case to introduce evidence of the reputation of the victim for aggressive or violent behavior.²⁴⁶ This may take the form of testimony about the victim's reputation or a witness's opinion of the victim,²⁴⁷ or evidence of specific instances of conduct.²⁴⁸ Courts admit reputation and opinion evidence to show that the victim was the aggressor, and reputation, opinion and prior acts evidence to prove the reasonableness of the defendant's fear of immediate harm at the hands of the victim.²⁴⁹

Given the almost outsized importance of this type of evidence in a self-defense case, presenting it to the jury becomes critical. Obtaining this evidence requires thorough and time-consuming investigation. While this investigation begins with defense counsel's first interview with the defendant,²⁵⁰ it requires much more. An investigator²⁵¹ must locate and interview persons who have known the vic-

²⁴³ CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.29.

²⁴⁴ *E.g.*, United States v. Peterson, 483 F.2d 1222, 1229-30 (1973), *cert. denied*, 414 U.S. 1007 (1973); CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.29; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 191 (1987); MODEL PENAL CODE § 3.04(1) (1985); WAYNE R. LAFAVE, MODERN CRIMINAL LAW 462-84 (2d ed. 1988).

²⁴⁵ *E.g.*, CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.29.

²⁴⁶ *E.g.*, FED. R. EVID. 404(a)(2); CLEARY, *supra* note 7, at § 193; CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.35; EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 120-23 (2d ed. 1989); MAUET, *supra* note 7, at 143.

²⁴⁷ FED. R. EVID. 405(a); IMWINKELRIED, *supra* note 246, at 123.

²⁴⁸ FED. R. EVID. 405(b); CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.45; IMWINKELRIED, *supra* note 246, at 123.

²⁴⁹ CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.44-45.

²⁵⁰ *Id.* at 32.31.

²⁵¹ The word choice here is deliberate. While attorneys may be present for witness

tim; these witnesses can provide valuable insight into the reputation of the victim for violence or evidence of prior violent acts.²⁵² The defendant can suggest or locate persons who may have this information only when the defendant knows the victim, which will not always be the case. Even when the defendant knows the victim, however, the defendant may be of little help. He may not realize that a potential self-defense argument exists and unknowingly withhold critical information,²⁵³ or he may be incarcerated and unable to help find witnesses.²⁵⁴ Without the help of an investigator, the defendant will find himself unable to take advantage of important and well-accepted avenues of defense, and therefore incapable of presenting the full picture to the factfinder. The factfinder will then base its conclusions on incomplete evidence.

Certainly, courts applying *Ake's* basic tools standard would rarely grant requests for investigators to locate witnesses because single issues or witnesses in self-defense cases are seldom dispositive alone. Rather, the factfinder would assess the credibility of the witness(es), and consider it together with supporting and contrary evidence. By contrast, a court applying the truth seeking theory would grant requests for investigators in most self-defense cases. First, the issues—reasonableness of defendant's belief in the necessity of the use of force and the reasonableness of the amount of force used—will often be contested. Second, an investigator could produce information highly relevant to the factfinder's decision.

2. *Scientific Evidence in Self-Defense Cases*

The circumstances of any violent crime can raise a number of self-defense issues that can be resolved only through the use of scientific evidence. For example, victims of violent assaults may be intoxicated by drugs or alcohol, either or both of which may affect

interviews, having the interview conducted by a trained investigator (or at least having an investigator present) allows for impeachment at trial, if necessary, without the danger of the removal of defense counsel to become a witness. Lest it seem that this is a mistake or danger faced only by the incompetent or underfunded defense attorney, see David Johnston, *Weinberger Pleads Not Guilty in Iran-Contra Case*, N.Y. TIMES, June 20, 1992, at 10 (defense counsel moves to disqualify the lead federal prosecutor because the prosecutor is cited in the indictment as a witness to defendant's allegedly false assertion).

²⁵² CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.43. This evidence may also come from the defendant, but would be subject to the most basic kind of attacks for bias. See MAUET, *supra* note 7, at 303 (prosecutor should tell jury that defendant cannot be believed because defendant obviously has most to lose and therefore greatest motivation to lie).

²⁵³ CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 32.30.

²⁵⁴ *Id.* at 1.1 (whether defendant is detained or released pending trial has a large impact upon many subsequent aspects of the case, including investigation).

behavior and cause aggressiveness. A toxicologist could perform tests that would tell the factfinder about the presence and amount of drugs or alcohol in a decedent's body at the time of death.²⁵⁵ Evidence of intoxication of the victim may therefore be important; however, depending on the prosecution's theory of the victim's conduct, intoxication may not be dispositive by itself because it rarely shapes human behavior alone. At best, intoxication may corroborate behaviors consistent with it, such as aggression.²⁵⁶ Therefore, a court acting under the basic tools theory would not fund expert services necessary to produce evidence of the amount of a drug or alcohol in a victim's body, while courts acting under the truth seeking theory would.

Similarly, forensic pathologists can supply valuable information concerning causes and time of death, weapons used to inflict particular wounds and other circumstances of the victim's death.²⁵⁷ Pathologists, who are experts in the investigation of gunshot wounds,²⁵⁸ are able to draw inferences from the examination of the entry, course and exit of bullets that penetrate the human body.²⁵⁹ These types of evidence could support a self-defense theory by indicating whether the decedent was, for example, leaning forward in an attacking posture.²⁶⁰ Like the expert services already discussed, however, pathologists will not always produce dispositive evidence; rather, they will often produce evidence that will support or contradict a self-defense theory in relevant ways. Under the basic tools theory, requests for the help of pathologists in self-defense cases may be denied, since this type of expert testimony will rarely decide a case alone. Under the truth seeking theory, courts would be likely to grant such requests because they involve disputed factual issues on which expert pathologists could shed light.

C. "SYNDROME" EVIDENCE

Courts have begun to admit evidence that the defendant is or has been subject to a special set of pressures and injuries that may explain that person's actions. These pressures and injuries and the actions of the defendant that result have been grouped under the

²⁵⁵ See GIANNELLI & IMWINKELRIED, *supra* note 239, at 757-88.

²⁵⁶ In addition to the effect intoxication can have in a self-defense case, intoxication can serve as a complete defense to certain crimes. LAFAVE, *supra* note 244, at 439-54; DRESSLER, *supra* note 244, at 275-88.

²⁵⁷ GIANNELLI & IMWINKELRIED, *supra* note 239, at 731-47.

²⁵⁸ *Id.* at 719.

²⁵⁹ *Id.* at 719-25.

²⁶⁰ *Id.* at 724.

term "syndrome."²⁶¹ For example, a woman who endures continuous cycles of physical, emotional or sexual abuse at the hands of a spouse or partner over a long period of time is said to experience battered woman's syndrome.²⁶² In a typical case, the woman kills her abuser while he is not actively engaged in abuse; as a result, the immediate threat to the defendant required by the law of self defense²⁶³ cannot be proven under traditional conceptions of the term.²⁶⁴ Defense counsel, assisted by an expert, could offer evidence of battered woman's syndrome to show that the threat was indeed immediate, given the context of fear and abuse within which the battered woman lives. In sum, "syndrome" evidence²⁶⁵ can demonstrate that circumstances beyond the pale of everyday experiences justify excusing the conduct of a defendant when traditional jurisprudence or notions about the world would hold otherwise.

Persuasive evidence of behavioral syndromes requires the help of an expert. The expert, usually a psychiatrist or psychologist, explains the syndrome, helping the jury to understand the complex of behaviors and symptoms and the reasons battered women do not behave as others might expect (e.g., "Why didn't she just leave?").²⁶⁶ Since it is possible to make a traditional (even if likely

²⁶¹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS app. C, at 405 (3d ed. rev. 1987) ("A group of symptoms that occur together, and that constitute a recognizable condition. 'Syndrome' is less specific than 'disorder' or 'disease.'"); see also J. E. SCHMIDT, M.D., 3 ATTORNEYS' DICTIONARY OF MEDICINE S-309 (1991) (defines "syndrome" as "[a] number of symptoms and signs which occur together as a group and usually indicate a particular disease or diseased condition.").

²⁶² DRESSLER, *supra* note 244, at 203-04 & n.8; MARTIN BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 7.4(K) (Supp. 1989).

²⁶³ E.g., *State v. Hodges*, 716 P.2d 563, 567, 569-70 (Kan. 1986); MODEL PENAL CODE § 3.04(1) (1985).

²⁶⁴ E.g., Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 436-37 (1987) ("In particular, the current formulation of the imminence requirement will, in many situations, impede the success of self-defense claims asserted by women who have killed their batterers."); see also *State v. Kelly*, 478 A.2d 364, 377-78 (N.J. 1984); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 13 (1986) (cases in which defendants have been victims of battered woman's syndrome are difficult because "they do not fit neatly" into criminal law's categories); Walter W. Steele & Christine W. Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169 (1991).

²⁶⁵ Another example of a behavioral syndrome used in court is battered child syndrome. *Jahnke v. State*, 682 P.2d 991, 997 (Wyo. 1984) (defendant accused of killing father after years of abuse, also affecting mother and sister, properly prevented from introducing expert psychiatric evidence of "battered child syndrome"; to allow justification of homicide on such "subjective" evidence "would amount to a leap into the abyss of anarchy"); Mark Hansen, *Battered Child's Defense*, 78 A.B.A. J. 28 (May 1992) (surveying recent cases of children tried for killing abusive parents).

²⁶⁶ See LENORE E. WALKER, *THE BATTERED WOMAN* 19-31 (1979). Nevertheless, many

unsuccessful) self-defense argument without an expert, however, a court using the basic tools theory would be unlikely to grant a request for expert services. After all, such a court would reason, the defendant need not have an expert to make a case; she can attempt to explain her actions through her own testimony or the testimony of other fact witnesses. By contrast, a court applying the truth seeking theory would grant a request for such an expert. The issue is clearly in dispute, and the expert can produce helpful evidence that the factfinder should consider.

D. SEX OFFENSES

The trial of sex offenses often requires the use of scientific evidence, some of it highly specialized. Most sex offense cases center around consent, fabrication or the identity of the assailant. Whichever of these issues predominates in any particular case, medical and scientific evidence may support or undermine the prosecution's allegations in important ways.²⁶⁷

When a victim reports a sexual assault, written reports are usually made by both the police and by medical personnel. The medical report will contain information about the victim's subjective symptoms, behavior, observable trauma and conclusions about the likely cause(s) of the situation.²⁶⁸ Such evidence might generate questions about both consent²⁶⁹ and fabrication that only a forensic expert can properly answer.²⁷⁰

On the issue of the identity of the assailant, scientific evidence becomes critical. DNA testing has quickly become the method of

courts have resisted efforts to introduce expert testimony on these subjects, leaving defendants in these cases to make their self-defense arguments against the backdrop of traditional self-defense doctrine, which ill fits the facts in their cases. Courts give two broad reasons for excluding expert testimony on battered woman's syndrome. First, the testimony of an expert must be helpful to the jury in understanding a subject beyond the ken of most lay people. Second, largely because the concept itself is relatively new, courts sometimes say that battered woman's syndrome does not represent a generally accepted theory in a recognized and reliable field of science. DRESSLER, *supra* note 244, at 204.

²⁶⁷ CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 33.1, 33.9.

²⁶⁸ *Id.* at 33.10.

²⁶⁹ Some states still require resistance from the victim to show lack of consent. This position is the minority rule, and well it should be. Resistance can be dangerous; resistance increases both the frequency of victim injury and its seriousness. BATELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 1-14 (1978). As others have persuasively argued, a woman should not have to put herself at physical risk to avoid nonconsensual sex. See SUSAN ESTRICH, REAL RAPE 22 (1986).

²⁷⁰ For example, given the victim's story, the lack of medical evidence an observer would expect to see might undermine the story's credibility.

choice for identifying attackers in sexual assaults.²⁷¹ Even so, identification through DNA testing deserves careful scrutiny.²⁷² When the state does not use DNA testing to establish identity, it often uses identification by blood typing.²⁷³ By testing a suspect's own body fluids, police are able to tell whether a sample taken from the victim or crime scene is consistent with the fluids of the suspect.²⁷⁴ Thus, a person can be ruled out of, or ruled into, the potential pool of suspects.

The types of evidence discussed here do not exhaust the potential categories of scientific evidence in sexual assault cases.²⁷⁵ They do, however, illustrate the fact that scientific and medical evidence plays an important role in sexual assault cases, without being outcome-determinative. Blood typing, for example, is an almost prototypical type of highly relevant but nondeterminative evidence. It cannot make or break the case by itself, but it can provide a powerful link in the chain of evidence in a typical case. Similarly, evidence of injuries and trauma may support or conflict with the facts the victim relates. All of this evidence shares one characteristic: It proves difficult and sometimes impossible to mount arguments and defenses on these points without expert services on which to rely for the "evaluation, preparation, and presentation"²⁷⁶ of evidence. Despite the significance of scientific evidence in such cases, the basic tools approach would be unlikely to fund expert services for the exploration of these issues, because they will not usually be dispositive. The truth seeking theory, on the other hand, would provide expert services in these cases because the expert's testimony would enhance the factfinder's understanding of the evidence relevant to disputed issues.

²⁷¹ See *supra* notes 236-38 and accompanying text. See also *Commonwealth v. Brison*, 52 Crim. L. Rep. 1273 (BNA) (Jan. 6, 1993) (in sexual assault case centering on identification, prosecution must perform and pay for DNA testing for indigent defendant).

²⁷² *Id.*; Giannelli, *supra* note 236, at 796-97 & n.34 (detailing erroneous DNA testing results).

²⁷³ In the most simplistic terms, it is first determined if the persons involved are secretors. Secretors are persons whose bodily fluids—saliva or semen, for example—carry "markers" that identify their blood types. If forensic personnel find body fluids on the victim, her clothing or surroundings, they can be examined for "markers" of blood type.

²⁷⁴ I have paraphrased this succinct description of identification by blood typing from CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 33.11. For a more thorough explanation, see GIANNELLI & IMWINKELRIED, *supra* note 239, at 565-632; JON ZONDERMAN, BEYOND THE CRIME LAB—THE NEW SCIENCE OF INVESTIGATION 91-93 (1990).

²⁷⁵ See, e.g., CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 33.12-14 (issues regarding sperm, semen, hair and fibers); GIANNELLI & IMWINKELRIED, *supra* note 239, at 304-08; RICHARD SAFERSTEIN, CRIMINALISTICS 337 (4th ed. 1990).

²⁷⁶ *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

E. POLICE "EXPERTS"

Increasingly, the prosecution makes use of police officers as expert witnesses on criminal activities.²⁷⁷ For example, in drug cases, the prosecution typically proffers police officers as experts in methods of drug use, packaging and sales.²⁷⁸

Police testimony can have a great impact on a jury's conclusions. The police are the only ones who can give regular citizens insight into the world of crime. Their testimony becomes all the more weighty when the court and the prosecution label it expert opinion.²⁷⁹ The defense must proffer its own expert testimony in order to be able to challenge the prosecution's interpretation of the defendant's conduct.²⁸⁰ Since such testimony by itself would not be outcome-determinative, however, a court operating under the basic tools standard would not fund it. Under the truth seeking theory, however, a court would provide funding for expert services when the defendant contests a relevant and important issue testified about by police experts.

V. IMPLEMENTATION CONCERNS

The truth seeking theory represents an improvement over the basic tools approach because it provides indigent defendants with funding for expert services on the basis of the utility of the service to

²⁷⁷ I do not mean officers (or even civilians who work for law enforcement agencies) who are employed and trained specifically to do scientific testing, such as police lab toxicologists or field evidence technicians. Rather, I have in mind an officer involved in law enforcement activity on the street, offered by the prosecution as an expert in an aspect of some criminal activity. See, e.g., *People v. Clay*, 38 Cal. Rptr. 431 (1964) (officer offered as an expert on "till tapping"); CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 33.25; Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231 (1992) (prosecutors increasingly use law enforcement officers as experts, especially in narcotics cases).

²⁷⁸ For instance, in a case in which the defendant is arrested with money but without any drugs in his possession, a drug expert may testify that the area is "a high drug trafficking area" and that drug dealers hide their products in "stashers." The prosecution would urge the jury to draw the inference from this testimony that the defendant was, in fact, selling drugs, despite the fact that there may be other explanations for the conduct of the defendant consistent with innocence. CRIMINAL PRACTICE INSTITUTE, *supra* note 7, at 33.25-26.

²⁷⁹ See, e.g., James R. Acker & Hans Toch, *Battered Women, Straw Men, and Expert Testimony*, 21 CRIM. L. BULL. 125, 146 n.53 (1985) (use of expert imbues testimony "with the 'aura of infallibility.'").

²⁸⁰ A problem suggests itself: Given the well-known "code of silence" among police officers, what police officer would serve as a defense expert? Former officers are one solution. Retired police officers sometimes serve as investigators for public defense agencies. See, e.g., Bliss, *supra* note 7, at 264 (experienced police investigator explains his role as one of the first investigators in any public defender's office).

the factfinding process.²⁸¹ The greater access to expert services provided by the truth seeking theory does, however, raise questions concerning implementation. For example, what prevents defense counsel from requesting expert services to explore every conceivable issue in a case? Further, what would implementing the theory cost? I will begin to address these questions by discussing the basis upon which a defendant could make a request for expert services. I will then focus on the mechanics of making the request. Finally, I will consider the cost to society resulting from implementation of the truth seeking theory.

A. BASIS FOR THE REQUEST

Not every case will supply defense counsel with the information necessary to make a request for expert services simply on the basis of the charging papers and information received through discovery. In many cases, it may be necessary to consult *preliminarily* with an expert or investigator just to see whether an issue worth pursuing exists before asking the court for full expert funding.

The federal Criminal Justice Act²⁸² supplies funding for just such a procedure. The Act provides for a small amount of “seed money” that can be obtained without a request to the court for the purpose of investigating whether the preliminarily available facts present an issue worth investigating.²⁸³ The availability of these funds would serve as an initial screening device; if a preliminary inquiry turned up nothing, counsel would be less likely to make a request for expert services, and less able to support such a request if

²⁸¹ There are some types of experts for whom the truth seeking theory would not provide funding. For example, requests for jury selection experts—who assist trial attorneys by constructing profiles of ideal jurors—should not receive funding under the truth seeking theory. The assistance they provide would have no relevance to any issue of fact. Similarly, statisticians who assist attorneys in challenging the composition of the pool of available jurors would not be funded. While quite important—in fact, required—to mount challenges, based on jury composition, these experts would provide no evidence directly relevant to the facts of the case. The point I wish to make is that while the truth seeking theory will undoubtedly provide funds for many more experts than the basic tools approach does, it is not an ever-expanding invitation to expend resources. Rather, it is a reasonably narrow approach focused on the heart of a complex problem—the effect of poverty on factual determinations in criminal trials.

²⁸² See *supra* note 133.

²⁸³ 18 U.S.C. § 3006A(e)(2) (1988) allows appointed defense counsel to obtain “investigative, expert, and other services without prior authorization if necessary for adequate representation.” Counsel’s actions are “subject to later review” by the court; total cost may not exceed three hundred dollars and “expenses reasonably incurred.” *Id.* The court may approve additional expenditures without prior requests “in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization.” *Id.*

made.²⁸⁴

B. THRESHOLD APPLICABILITY: THE MECHANICS OF THE REQUEST

At what point in the proceedings and under what circumstances should the defense request expert services? The answer involves timing and discovery procedure.

Under the truth seeking theory, defense counsel should make requests for expert services after the filing of initial charging papers, any formal indictment, the completion of the state's discovery obligations (including the constitutionally required disclosure of exculpatory evidence), and the state's answers to any bills of particulars. Armed with this information, defense counsel would be in a position to understand the basic thrust of the state's case, to identify disputed issues, and to determine which expert services would produce evidence relevant to the factfinder's decision. This procedure would prevent interpretations of the truth seeking theory that would impose unreasonably burdensome duties of factual production on the defense, as has happened under the basic tools theory.²⁸⁵ Rather than proving a prima facie case before an expert can evaluate and develop the evidence, as *Ake* requires, a defendant under the truth seeking theory need only make a showing *based on the evidence available* that the services of an expert could contribute to the factfinder's resolution of a disputed issue of fact.

As *Ake* suggests,²⁸⁶ motions for expert services should be made *ex parte*.²⁸⁷ Requests for expert services could reveal the theory the defense plans to use at trial, and perhaps even information gathered through client confidences. Exercise of the right to expert services should not require the defense to disclose theory, work product or confidences to the prosecution. Since the request for expert services will follow prosecution disclosure of information to the defense, usually through discovery, rules of procedure should require that discovery come early in the process,²⁸⁸ or simply allow requests for

²⁸⁴ I am not the first to recommend the use of a procedure akin to the Act's seed money provisions. See West, *supra* note 19, at 1361 & n.217.

²⁸⁵ See *supra* notes 124-27 and accompanying text.

²⁸⁶ *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985).

²⁸⁷ West, *supra* note 19, at 1361-62.

²⁸⁸ Some discovery rules do require disclosure early in the process. *E.g.*, MD. R. PROC. 4-263(e) (mandatory disclosure to be made "within 25 days after the earlier of the appearance of counsel or the first appearance of the defendant."); defense request for disclosure of other information "shall be made within 15 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court."); OHIO CRIM. R. 16(F) ("A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at

expert services to follow completion of discovery. When granting a request for expert services would entail some delay in the proceedings, judges should be willing to favorably entertain motions for continuances and bail reductions.

C. THE COST OF IMPLEMENTING THE TRUTH SEEKING THEORY

One criticism of the theory proposed here is that it will cost more than the basic tools approach. This is almost certainly correct, since courts using the theory will grant many requests for expert services currently denied. Supporters of the basic tools approach value the fact that it takes cost into account;²⁸⁹ it balances the potential benefits of the expert service against the damage to the public fisc that granting the request would do.

The simplest response to this argument is that the truth seeking theory will not result in uncontrolled costs. First, the screening function that the theory's two basic questions will perform,²⁹⁰ the procedural recommendations outlined above²⁹¹ and counsel's obligation to make only those arguments for which there is a good faith or reasonable basis²⁹² will limit the number of requests. Second, some jurisdictions are supplying some expert services already;²⁹³ it is only additional expenditures over and above the amount currently spent that represent an increase. Perhaps most important, a purely economic approach disregards the social costs of using *Ake's* basic tools approach. The government's interest in criminal adjudication is not simply to convict the accused. Rather, it is to convict the accused only if it is possible to do so while doing justice.²⁹⁴ Viewing the criminal justice system from this perspective, balancing the need for the resources necessary to give the factfinder all the evidence necessary to decide the case against the expense of doing so seems inappropriate. After all, it is the state that has initiated the prosecution in an effort to convict the defendant, to mark him permanently as a transgressor, and perhaps to take away his freedom. It is incumbent on the state to do this in a way that allows for a fair deci-

such reasonable time later as the court may permit."'). Other rules do not prescribe the time for discovery. *E.g.*, FED. R. CRIM. P. 16.

²⁸⁹ *See, e.g.*, Willis, *supra* note 19, at 1029-31 (cost of expert services for indigent defendants must be considered and might outweigh benefits).

²⁹⁰ *See supra* notes 139-46 and accompanying text.

²⁹¹ *See supra* notes 285-88 and accompanying text.

²⁹² MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4, DR 7-102(A)(2) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

²⁹³ *See supra* note 133 and accompanying text.

²⁹⁴ *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981); DRESSLER, *supra* note 143, at 21.

sion based on all the available evidence—not just the evidence that an impoverished defendant can afford.

VI. CONCLUSION

Since 1956, the Supreme Court has tried, with uneven results, to deal with the problem of the impact of wealth on the criminal justice system. Surely, Justice Black's sentiment—that the quality of justice should not depend on the defendant's wealth or poverty²⁹⁵—is among the most noble to appear in the opinion of any court. Yet its transformation into doctrine proved troublesome; the equality principle seemed to promise almost a reinvention of our society. The eventual replacement of the equality principle by the basic tools approach seemed less problematic from the point of view of doctrine, but it did not do enough to address the problem that took the Supreme Court down this path in the first place—the effect poverty has on the outcomes of criminal cases and on justice as a whole. Indeed, reviewing *Ake* and the cases that have followed it brings Clarence Darrow's words back to mind. Is justice still, first and last—indeed, will it always be—a question of money?

The truth seeking theory addresses this problem not by seeking to make defendants more equal in some undefined (and perhaps undefinable) way, or by asking what tools are so basic that justice absolutely requires them. Instead, the theory gives content to the constitutional guarantees designed to support the search for the truth. By improving the ability of the factfinder to accurately determine the truth, the truth seeking theory helps ensure that indigent defendants have a trial unaffected by poverty.

²⁹⁵ See *supra* notes 33-36 and accompanying text.