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NOTE

THE CURRENT VALUE OF COMPULSORY PROCESS: CAN A DEFENDANT COMPEL THE ADMISSION OF FAVORABLE SCIENTIFIC TESTIMONY?

INTRODUCTION

The law is replete with vague standards of liability and ambiguous definitions of proprietary right and individual rights. Although uniform principles may emerge from the resolution of a particular dispute or prosecution of a specific crime, the true value of law is its ability to adapt to varying contexts and incorporate change as justice demands. Science, however, seeks universal truths that are applicable in all contexts and uniformly descriptive of observed phenomena. Oftentimes, the true value of scientific research is that it raises as many questions as it answers. While the quest for scientific knowledge may take years or even decades, the search for legal truth, particularly in a criminal trial, must proceed at an accelerated pace.¹

Despite these differences, legal doctrine increasingly relies on scientific knowledge to give meaning to vague standards or to evaluate the physical evidence of a crime. As society relies on technological advances to ease the burdens of everyday life, it is neither surprising nor necessarily detrimental for methods of proof to incorporate scientific wisdom. The danger inherent in a marriage of science and law, however, is that this relationship may be forged upon theories and techniques that are not yet proven reli-

¹ The Sixth Amendment provides that the "accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI.

able, or that are reliable for a limited purpose. Both the common law of evidence and codified evidentiary rules, such as the Federal Rules of Evidence, recognize that the reliability of scientific evidence should be a central criterion of admissibility and not merely a factor affecting its weight or credibility.

Certainly in federal jurisdictions, and in states that have adopted the Federal Rules of Evidence, the trial judge functions as a "gatekeeper" to filter out unreliable scientific evidence, whether offered by the defense or the prosecution. In the context of a criminal trial, however, the defendant is granted the right to present favorable, relevant, and reliable evidence in his/her defense under the Sixth Amendment's Compulsory Process Clause.² Thus, a defendant might successfully challenge the exclusion of evidence that is relevant and material to his/her defense as a violation of the Sixth Amendment right to present evidence at trial.

The Supreme Court sustained such a challenge on three notable occasions. In *Washington v. Texas*,³ the Court invalidated a state evidentiary rule that prohibited the defendant, but not the prosecution, from introducing the testimony of an accomplice.⁴ It held that the wholesale exclusion of defense evidence based on general presumptions regarding unreliability violated the defendant's right to compulsory process.⁵ It expressly denounced, however, the use of compulsory process to invalidate testimonial privileges or state rules disqualifying witnesses that are mentally incompetent to testify.⁶ In *Chambers v. Mississippi*,⁷ the Court extended the reasoning of *Washington* to find a state rule that excepted hearsay statements made against pecuniary interests, but not penal interests, a violation of due process.⁸ The Court specifically noted the "persuasive assurances of trustworthiness"⁹ that surrounded an out-of-court confession. If believed by the jury, they could have exoner-

² The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

³ 388 U.S. 14 (1967).

⁴ See *id.* at 22.

⁵ See *id.*

⁶ See *id.* at 23 n.21.

⁷ 410 U.S. 284 (1973).

⁸ See *id.* at 302.

⁹ *Id.*

ated the defendant.¹⁰ Finally, in *Rock v. Arkansas*,¹¹ the Court held that the exclusion of a defendant's hypnotically refreshed testimony, under a state rule barring the admission of all hypnotically refreshed testimony, violated both due process and compulsory process.¹²

This Note attempts to demonstrate that the traditional authority and discretion of the trial judge to exclude potentially unreliable scientific evidence is not greatly impacted by the cumulative effect of these three opinions. Section I discusses the development of the Compulsory Process Clause and the Supreme Court's corresponding construction of the right to present evidence at trial. Section II delineates the scope of compulsory process and proposes that *Washington* and its progeny embody a rational basis test for evaluating a defendant's right to present evidence. This test is applied in Section III in the context of rules governing the admissibility of expert testimony, such as Federal Rule of Evidence 702,¹³ and rules excluding evidence under the legal relevance doctrine, such as Federal Rule of Evidence 403.¹⁴ The discussion demonstrates that the relatively weak constitutional standard will rarely supersede either the interests in preserving the truth-seeking function of a criminal trial, or the integrity of the adversary system that the evidentiary rules excluding unreliable scientific evidence serve. Finally, Section IV uses two types of controversial scientific evidence—polygraph and psychiatric evidence—to dispel the theory that the Sixth Amendment serves as a prophylactic for the exclusion of potentially unreliable scientific evidence.

This Note concludes that the primary purpose of compulsory process, equalizing the position of the defense and the prosecution at trial,¹⁵ is served by prohibiting arbitrary exclusions of evidence critical to the defense. Such a prohibition recognizes that the value of compulsory process is to secure for the defendant merely the opportunity to have the admissibility of his/her evidence assessed.

¹⁰ See *id.* at 297.

¹¹ 483 U.S. 44 (1987).

¹² See *id.* at 51-53, 62.

¹³ FED. R. EVID. 702.

¹⁴ FED. R. EVID. 403.

¹⁵ See Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 78 (1974) (noting that by 1791, compulsory process "represented the culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on a par with that of the prosecution, to present a case in his favor through witnesses").

I. ORIGINS OF THE RIGHT TO PRESENT WITNESSES FAVORABLE TO THE DEFENSE

The Sixth Amendment largely reflects a collection of procedural rights afforded a criminal defendant at trial.¹⁶ The Compulsory Process Clause of the Sixth Amendment can be interpreted narrowly to guarantee the defendant only the use of the court sanctioned subpoena process to compel the physical presence of witnesses at trial.¹⁷ A broad characterization that implicates a right to both obtain and present witnesses at trial has also been attributed to the clause.¹⁸ Before examining the source and scope of a defendant's right to present evidence, it will prove instructive to briefly survey the history of the Compulsory Process Clause and the Supreme Court's early decisions on the right to present witnesses at trial.

James Madison's draft of the Sixth Amendment was adopted without much debate or controversy, since most of its guarantees were already accepted at common law.¹⁹ The Virginia Declaration

¹⁶ The Sixth Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI; see also JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 430-31, 437-38, 442 n.162, 449, 455 (1971) (detailing the various rights afforded defendants at trial).

¹⁷ See *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974) (holding that the defendant's compulsory process rights would have been exhausted by the witness' physical availability at court); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 796-97 (1976) (arguing that the Due Process Clause of the Fourteenth Amendment is the appropriate source of the right to produce evidence at trial and that the Compulsory Process Clause merely grants a defendant access to the court's subpoena power).

¹⁸ See *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the compulsory process guarantee of the Sixth Amendment is incorporated into the Fourteenth Amendment Due Process Clause and that the "right to present . . . witnesses to establish a defense . . . is a fundamental element of due process of law"); Westen, *supra* note 15, at 74 (arguing that "compulsory process constitutionalizes the *entire* presentation of the defendant's case" (emphasis added)).

¹⁹ See EDMUND RANDOLPH, ESSAY ON THE REVOLUTIONARY HISTORY OF VIRGINIA, reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 246, 248 (1971). The amendment's only real point of debate centered around the right to a jury drawn from the place where the crime was committed. See Westen, *supra* note 15, at 77 n.12. This right was "designed by framers mindful of recent abuses by which de-

of Rights, which served as a model for the Sixth Amendment, "reenact[ed] in substance, modes for defence, for accused persons, similar to those under the English law."²⁰

After independence, nine States provided the defendant the right to produce witnesses and three states, including Virginia, provided the defendant "the right to 'call for evidence in his favour.'"²¹ In formulating the Compulsory Process Clause, Madison replaced this terminology with the "right . . . to have compulsory process for obtaining witnesses in his favor."²² Although there may be some ambivalence over the importance of the discrepancy in language, the only mention of the Clause in the congressional record focused on the subpoena power.²³ This supports, perhaps, a narrower scope to the Clause and indicates congressional intent to limit its reach. Consider the response to an amendment suggestion which would have provided for the continuance of trial if subpoenas of material witnesses were not served: "[I]n securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court."²⁴

It is the scope of the court's discretion which determines the threshold at which a defendant's right to present evidence in his favor is triggered. The early decisions of the Supreme Court not only presented the potential origins of such a right, but emerged from the "most outrageous violations of this guarantee."²⁵ Despite the limits their factual contexts may pose to an extension of the principles they announce, the analytic framework adopted displays a cautious recognition of a right to present evidence which may prove inimical to the broad interpretation suggested in later decisions.

*United States v. Reid*²⁶ was the first case the Supreme Court

defendants were transported at great inconvenience back to England to be tried by juries that knew nothing of the circumstances of the crime." *Id.* at 78 n.12; see also FRANCIS HOWARD HELLER, SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 92-101 (1951) (discussing the origins of the Sixth Amendment procedural guarantees).

²⁰ RANDOLPH, *supra* note 19, at 248.

²¹ Westen, *supra* note 15, at 94-95 (quoting PA. DECLARATION OF RTS. art IX (1776); VT. DECLARATION OF RTS. art. X (1777); VA. DECLARATION OF RTS. art. 8 (1776)).

²² U.S. CONST. amend. VI.

²³ See 1 ANNALS OF CONG. 685-792 (Joseph Gales ed., 1789), reprinted in 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1107-14 (1971).

²⁴ *Id.* at 1114.

²⁵ Clinton, *supra* note 17, at 796.

²⁶ 53 U.S. (12 How.) 361 (1851), overruled in part by *Rosen v. United States*, 245

considered regarding the excludability of a defense witness's testimony. In affirming the exclusion of an accomplice's testimony, the Court held that "rules of evidence in criminal cases, are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed."²⁷ Since no right to call an accomplice to testify was available in the state courts in 1789, and no specific guarantee in the Bill of Rights provided for it, the defendant could not introduce such testimony in a federal criminal trial.²⁸

Reid was later overruled by *Rosen v. United States*,²⁹ which held the testimony of an accomplice appearing for the prosecution admissible.³⁰ The Court noted that:

[T]ruth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent.³¹

Neither *Rosen* nor *Reid*, however, were premised on constitutional principles; they relied on statutory construction of evidentiary rules and Supreme Court authority to "supervise the mode of trial in the inferior federal courts."³²

Although presented with opportunities to apply the Due Process Clause to criminal cases originating in state courts prior to the 1960's, the Court mainly relegated such analysis to civil cases. Here it recognized as fundamental the "right to be heard" in one's defense.³³ When confronted with a challenge to a state criminal

U.S. 467 (1918).

²⁷ *Id.* at 366.

²⁸ *See id.*

²⁹ 245 U.S. 467 (1918).

³⁰ *See id.* at 471-72.

³¹ *Id.* at 471.

³² Clinton, *supra* note 17, at 744; *see also* Donnelly v. United States, 228 U.S. 243 (1913) (finding declarations against penal interests to be outside any traditional hearsay rule exception, regardless of independent indicia of reliability and the centrality of the evidence to the defense). *But see id.* at 278 (Holmes, J., dissenting) ("I think we ought to give [the defendant] the benefit of a fact that, if proved, *commonly* would have such weight [as a dying declaration].") (emphasis added).

³³ *See* Hovey v. Elliott, 167 U.S. 409, 417 (1897) ("[D]ue process of law signifies a right to be heard in one's defence. . . ."); Windsor v. McVeigh, 93 U.S. 274, 277 (1876) ("Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations."); Clinton, *supra* note 17,

conviction on the grounds of an erroneous exclusion of defense evidence, the Court relied on the "guarantees enumerated in the fifth and sixth Amendments . . . rather than on the impairment of the defendant's ability to defend himself."³⁴ Although the analytic trend has not followed a linear course, the wholesale and to some extent partial exclusion of defense evidence triggered constitutional protection in some contemporary cases in "what might loosely be called the area of constitutionally guaranteed access to evidence."³⁵

In *Washington v. Texas*,³⁶ the Court construed the Compulsory Process Clause as guaranteeing a criminal defendant the right to present "testimony [that] would have been relevant and material, and . . . vital to the defense."³⁷ In holding a state rule that prohibited the defendant but not the prosecution from introducing the testimony of an accomplice, the Court noted that "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief" is as violative of the Constitution as was the common law tradition of barring all testimony for the defense.³⁸ It further found that the rule could not be "defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury."³⁹

In a concurring opinion, Justice Harlan disagreed with the reliance on compulsory process, arguing that due process is not "reducible to 'a series of isolated points,' but is rather 'a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints.'"⁴⁰ He distinguished

at 748-49 (discussing cases which have held that the right to present a defense is a fundamental constitutional right).

³⁴ Clinton, *supra* note 17, at 756. *But see In re Oliver*, 333 U.S. 257, 274-76 (1948) (reversing a summary criminal contempt charge and concluding that a *reasonable* opportunity to defend was a central element of due process of law).

³⁵ United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). This case is discussed further *infra*, at notes 138-41 and accompanying text.

³⁶ 388 U.S. 14 (1967).

³⁷ *Id.* at 16.

³⁸ *Id.* at 22. The Court, in a footnote, also stated that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination. . . . Nor do we deal with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them." *Id.* at 23 n.21.

³⁹ *Id.* at 22.

⁴⁰ *Id.* at 24 (Harlan, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

this case from one where the defendant challenges a *valid* state evidentiary law that is predicated upon "general experience with a particular class of persons" and reflective of a judgment as to how the "pursuit of truth is best served."⁴¹

The Supreme Court faced a similar challenge to the exclusion of defense evidence in *Chambers v. Mississippi*,⁴² and extended the reasoning of *Washington* to find a due process violation.⁴³ To prohibit the defendant from cross-examining a witness he had called to testify, the Mississippi trial court relied on a common law rule that a party may not impeach its own witness.⁴⁴ The trial court also excluded the testimony of three witnesses that claimed a third party confessed to the crime shortly after it was committed.⁴⁵ Based on the collective impact of the exclusions, the Supreme Court found that the defendant was denied a fair trial.⁴⁶ The Court noted, however, that its judgment established "no new principles of constitutional law" and was limited to the "facts and circumstances" of the case.⁴⁷ Specifically, the Court noted that the lack of "conventional indicia of reliability" surrounding out of court statements gave rise to the hearsay rule, but exceptions evolved when statements were made under "circumstances that tend to assure reliability."⁴⁸ Since the state recognized an exception for statements made against pecuniary interests, the Court extended the exception to reach statements made against the penal interest of the declarant when those statements were shrouded with "persuasive assurances of trustworthiness."⁴⁹ Although the Court found fundamental the right of an accused to present witnesses in his defense, the "accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."⁵⁰

⁴¹ *Id.* at 24-25.

⁴² 410 U.S. 284 (1973).

⁴³ *See id.* at 302.

⁴⁴ *See id.* at 295.

⁴⁵ *See id.* at 298.

⁴⁶ *See id.* at 302-03.

⁴⁷ *Id.*

⁴⁸ *Id.* at 298-99.

⁴⁹ *Id.* at 302. *But see id.* at 308 (Rehnquist, J., dissenting) ("Were I to reach the merits in this case, I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law of evidence.").

⁵⁰ *Id.* at 302.

Compulsory process once again factored into the analysis when the Court considered a challenge to a state evidentiary rule that rendered hypnotically refreshed testimony *per se* inadmissible. In *Rock v. Arkansas*,⁵¹ the trial court excluded portions of the defendant's own testimony that were the product of hypnotically refreshed memory.⁵² The court reasoned that such testimony is presumptively unreliable.⁵³ The Supreme Court held that the "wholesale" exclusion of the defendant's testimony violated her fundamental right to testify on her own behalf, grounding the right in the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and as a corollary to the Fifth Amendment's guarantee against self-incrimination.⁵⁴

The Court interpreted the guarantees of the Compulsory Process Clause to encompass the right to present witness testimony that is "material and favorable to his defense,"⁵⁵ which necessarily included the "right to testify himself, should he decide it is in his favor to do so."⁵⁶ The Sixth Amendment's implied right of self-representation, and the defendant's right to "present his own version of events in his own words"⁵⁷ may be restricted by a state evidentiary rule, however, if the state can justify the legitimacy of the countervailing interests served by the rule.⁵⁸ In this regard the Court found that:

Arkansas . . . has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. . . . The State . . . may be able to show that testimony in a particular case is so unreliable that exclusion is justified.⁵⁹

The Court further noted that the inaccuracies that hypnotically refreshed testimony may introduce could partially be controlled by

⁵¹. 483 U.S. 44 (1987).

⁵². *See id.* at 56.

⁵³. *See id.* at 58.

⁵⁴. *See id.* at 51-53 & n.10.

⁵⁵. *Id.* at 52 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)).

⁵⁶. *Id.*

⁵⁷. *Id.*

⁵⁸. *See id.* at 55-56.

⁵⁹. *Id.* at 61.

adopting procedural safeguards in the administration of hypnosis and through the "more traditional means" of testing accuracy, such as cross-examination.⁶⁰

II. RECONCILING THE SOURCE AND SCOPE OF A DEFENDANT'S RIGHT TO PRESENT WITNESSES AT TRIAL

The source and scope of a defendant's right to present witnesses in his/her favor remains ambiguous,⁶¹ especially in the context of state evidentiary rules that exclude witness testimony based on its potential unreliability. While some courts interpreted *Washington v. Texas*⁶² to extend compulsory process to *all* relevant evidence the defense proffered,⁶³ most accept the limitations inherent in such a right.⁶⁴ The trend in the case law seems to favor a balancing of competing interests,⁶⁵ particularly when partial exclusions of defense evidence are at issue. Although *Washington* expressly incorporated the Sixth Amendment's Compulsory Process guarantee into the Fourteenth Amendment's Due Process Clause,⁶⁶ it did not clearly define which aspects of the right are deemed fundamental

^{60.} See *id.* at 60-61.

^{61.} See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (declining to "decide . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment"). It should be noted at the outset that the following discussion is premised upon the assumption that the Compulsory Process Clause is the precise source of a defendant's right to present evidence. To the extent that *Chambers v. Mississippi*, 410 U.S. 284 (1973), and a handful of lower court cases deviated from strict adherence to the Compulsory Process Clause as the source of the right, and based their analyses on the Due Process Clause, this may be attributed to "faulty advocacy," *Westen*, *supra* note 15, at 150, or a reluctance to "incorporat[e] the specifics of the Bill of Rights into the due process clause of the fourteenth amendment." *Id.* at 151 n.384. *But see* *Clinton*, *supra* note 17, at 795 (proposing that a fundamental fairness standard, grounded in the Due Process Clause, should govern the analysis of a defendant's right to present a defense).

^{62.} 388 U.S. 14 (1967).

^{63.} See, e.g., *State v. Lowther*, 740 P.2d 1017, 1021 (Haw. Ct. App. 1987) (stating that the accused has a constitutional right to present all relevant evidence in his defense, although not citing directly to *Washington*).

^{64.} See, e.g., *Rock*, 483 U.S. at 55 ("Of course, the right to present relevant testimony is not without limitation."); *Chambers*, 410 U.S. at 302 (noting that the accused must "comply with established rules of procedure and evidence").

^{65.} See *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (noting that the Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interest of fairness and reliability—even if the defendant would prefer to see that evidence admitted").

^{66.} See *Washington*, 388 U.S. at 19.

and subject to strict judicial review.⁶⁷ This Section attempts to rectify this ambiguity, and examines whether the test or standard applied in the *Washington* line of cases comports with the principle of heightened scrutiny of state rules or actions which infringe upon a fundamental right. This Section proposes that a reduced level of scrutiny should be invoked when reviewing exclusions of scientific evidence offered by the defense.

The Bill of Rights has served as a guide in establishing the content of the Due Process Clause of the Fourteenth Amendment.⁶⁸ Many of the guarantees of the first eight Amendments, and all but one of the criminal procedural rights, have been "selectively incorporated" into the Fourteenth Amendment.⁶⁹ A specific provision was originally made applicable to the states if it embodied "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty."⁷⁰ The Court refined this standard to reflect the specific characteristics comprising state criminal processes, and focused the analysis on "whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty."⁷¹

^{67.} See *id.*

^{68.} See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772 (2d ed. 1988).

^{69.} See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

^{70.} *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

^{71.} *Duncan*, 391 U.S. at 149 n.14. Although *Duncan* involved a procedural due process claim, its doctrinal basis was extended to substantive due process analysis in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 n.12 (1977). The doctrine surrounding the Due Process Clause spawned two interconnected lines of analysis. One form, characterized as procedural due process, "delineates the constitutional limits on judicial, executive, and administrative enforcement of legislative or other governmental dictates." TRIBE, *supra* note 68, at 664. The other form, termed substantive due process, analyzes the constitutional limits on the content of legislative action. See *id.* at 664 n.4. Although these labels help to organize a large body of constitutional precedent, they do little to assist the analysis in a particular case. In deciding what process is due, the distinction between procedural and substantive choices quickly erodes. See *id.* at 712. For example, a statutory rule banning the use of polygraph evidence restricts not only the procedural form of a defendant's case, but reflects a legislative judgment as to the degree of reliability evidence must have in order for a jury to make an informed and rational decision. In terms of the Compulsory Process Clause, there may also be both procedural and substantive elements—the right to the subpoena process and the substantive right to participate at trial through the presentation of favorable witnesses. See generally *id.* at 713-14 (discussing the self-realization aspects of the right to be heard in one's defense). Defining what process is due under the Compulsory Process Clause, however, does not relegate the analysis to the nomenclature of due process adjudication, for we must necessarily deviate from the literal command of the language—*compulsory* process—to determine its scope and levels of protection. A majority of the Court has never held, for example, that speech may not be limited in par-

The fact of incorporation, however, does little to define the contours of the specific guarantees absorbed by the Fourteenth Amendment, or to define which aspects apply with equal force to the state governments.⁷² The decision in *Washington* highlights both aspects of this problem, since the federal criminal cases it relied upon were decided on nonconstitutional grounds and provided no guidance as to the scope of the Sixth Amendment's Compulsory Process Clause.⁷³ Despite the Court's earlier assertion that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution,"⁷⁴ it appeared willing to consider a "rational" purpose for the state evidentiary rule a sufficient justification.⁷⁵ The focus of its finding centered around the

ticular circumstances, notwithstanding the explicit command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I; see, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("It is a fundamental principle . . . that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish."). Similarly, the task under the Compulsory Process Clause is to define the permissible limits on a defendant's right to present evidence and delineate the level of deference that is likely to be accorded a legislative or judicial restriction on such a right.

⁷² See *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (stating that the specific provisions of the Constitution are no more precise than due process); cf. *Johnson v. Louisiana*, 406 U.S. 356, 369-71 (1972) (Powell, J., concurring) (noting that although nonunanimous juries may constitutionally return criminal convictions in state trials, only a unanimous jury may constitutionally return a criminal conviction in a federal trial (The congruence the *Johnson* Court mandated, despite internal contradiction, is likely to be resolved by abandoning strict symmetry in application of the jury trial right. See *TRIBE*, *supra* note 68, at 773 n.25)).

⁷³ See *Washington v. Texas*, 388 U.S. 14, 21-22 (1967) (citing *United States v. Reid*, 53 U.S. (12 How.) 361 (1851), *overruled in part* by *Rosen v. United States*, 245 U.S. 467 (1918); *Rosen v. United States*, 245 U.S. 467 (1918)); see also *supra* notes 26-32 and accompanying text.

⁷⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁷⁵ See *Washington*, 388 U.S. at 22 (stating that the "rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it *rationaly* sets apart a group of persons who are particularly likely to commit perjury" (emphasis added)). Before continuing, it would be prudent to explain the origin of some doctrinal labels that will appear throughout this discussion. The terms "rational basis" and "heightened scrutiny" are lifted from methods of constitutional interpretation employed in the areas of substantive due process and equal protection. See generally *supra* note 71 (discussing the concept of substantive due process); *infra* note 85 (discussing equal protection). They are terms of art associated with a form of constitutional analysis that requires the decision maker to identify and weigh both the individual interests protected by constitutional command and the countervailing interests of government or society in general. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945-46 (1987). This theoretical approach to constitutional interpretation is termed "balancing." See *id.* (defining the characteristics of a "balancing

state rule's arbitrariness and "absurdity," especially since an accomplice was permitted to testify for the defense once acquitted at his/her own trial, and the prosecution was always permitted to admit the accomplice's testimony against the defendant.⁷⁶ Presumably, the state's interest in preventing perjured testimony from reaching the jury was not rationally furthered by an a priori ban on a whole category of evidence, particularly when the incentive to fabricate may be even greater once the accomplice has been cleared of all charges and cannot be retried for the same offense.⁷⁷

One commentator suggested that the primary lesson of *Washington* is that "the defendant's right to present exculpatory evidence outweighs the court's interest in preventing perjured or otherwise potentially unreliable testimony."⁷⁸ Nowhere in the opinion, however, was the legitimacy of the state's interest questioned; rather, it was the unreasonable *means* utilized that proved violative of the Compulsory Process Clause.⁷⁹ Furthermore, the narrow holding of

opinion"). Although some critics of this approach attack the legitimacy of entrusting the judiciary with placing values not clearly derivable from the Constitution on competing interests, and functioning as pseudolegislatures, *see id.* at 984-86, the implicit role of the judge as "balancer" is subsumed in the Compulsory Process Clause and the interests involved are clear. *See* TRIBE, *supra* note 68, at 711. Most challenges based on the defendant's right to present evidence stem from a trial court's exclusion of exculpatory evidence under a general evidence rule, like Federal Rule of Evidence 702. *See* FED. R. EVID. 702 (governing the admissibility of expert testimony); *see also infra* notes 138-41 and accompanying text (discussing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). A review of a compulsory process claim requires review of *judicial* action. No one would question the discretionary role of the judge to control the form and structure of a trial, even though this supervisory power exerts some restrictions on the content of the trial. *See* TRIBE, *supra* note 68, at 711 ("Values of accuracy, participation and predictability are matters that judges are continually required to consider and balance."). And considering a compulsory process claim in the context from which it arose—a trial—seems to lend credence to the ability of a reviewing court to appreciate and assign value to the interests at stake when implementing evidentiary controls. It is beyond the scope of this Note, however, to debate the use of balancing to interpret constitutional mandate; however, if the Court is in fact engaged in balancing when interpreting the Compulsory and Due Process Clauses, as seems apparent from the language and tone of *Washington*, *Chambers*, and *Rock*, then it is important to recognize that "under a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit." *See* Aleinikoff, *supra*, at 992.

⁷⁶ *See Washington*, 388 U.S. at 22-23.

⁷⁷ *See id.* at 23.

⁷⁸ ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 131 (1992).

⁷⁹ *See Washington*, 388 U.S. at 23 (finding that the state's arbitrary rule preventing a category of defense witnesses from testifying was unconstitutional); *see also Montana v. Egelhoff*, 116 S. Ct. 2013, 2017 n.1 (1996) ("So long as the category of excluded evi-

Washington confirms that the defendant's right is not triggered until the proffered testimony is proven both "relevant and material to the defense."⁸⁰ Thus, the state's interest in preventing jurors from drawing erroneous inferences based on irrelevant evidence, which includes evidence deemed unreliable, was not only upheld by the Court, but operated as a precondition to the existence of the defendant's right.⁸¹

Similar concerns for, and deference to the state's interest in the reliability of evidence permeated *Chambers v. Mississippi*.⁸² Specifically, the Court stated that "we need not decide in this case whether, under other circumstances, [the rule excluding only hearsay against pecuniary interest] might serve *some* valid state purpose by excluding untrustworthy testimony."⁸³ Again, the Court appeared willing to accept that "some" state justification for an evidentiary rule may sufficiently outweigh the defendant's exercise of his/her right to present witnesses at trial under certain circumstances. The "mechanistic" application of the hearsay rule proved fatal to the State, but the Court expressly left it free to reasonably apply and enforce its evidentiary rules.⁸⁴

The evolving rationality standard was not without "bite,"⁸⁵

dence is selected on a basis that has good and traditional policy support, it ought to be valid.").

^{80.} See *Washington*, 388 U.S. at 23. The Court noted further that "[i]t is undisputed that [the accomplice's] testimony would have been relevant and material, and that it was vital to the defense." *Id.* at 16; see *Valenzuela-Bernal*, 458 U.S. at 867 (holding that the defendant must show that witness testimony was both "material and favorable to his defense" to establish a violation of the right to compulsory process).

^{81.} See Edward J. Imwinkelried & Robert G. Scofield, *The Recognition of an Accused's Constitutional Right to Introduce Expert Testimony, Attacking the Weight of Prosecution Science Evidence: The Antidote for the Supreme Court's Mistaken Assumption in California v. Trombetta*, 33 ARIZ. L. REV. 59, 76 (1991) (noting that the Sixth Amendment right to present defense evidence is only invocable when the defendant establishes that the evidence is "highly material" and reliable).

^{82.} 410 U.S. 284 (1973).

^{83.} *Id.* at 300 (emphasis added) (noting also the "considerable assurance of . . . reliability" surrounding the hearsay declarant's confession).

^{84.} See *id.* at 302-03.

^{85.} Gerald Gunther characterized the development of analogous "rationality" standards in the Court's interpretation of the Fourteenth Amendment's Equal Protection Clause as better accommodated by a "means-focused" review of a broad range of social and economic regulations. See Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-22 (1972). This elevated rationality review would require the Court to "assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture." GERALD GUNTHER, *CONSTITUTIONAL LAW* 620 (12th ed. 1991) [hereinafter *CONSTITUTIONAL LAW*]. As was the case in both *Chambers* and *Washington*, the Court overturned evidentiary

however, as was evident in *Crane v. Kentucky*.⁸⁶ The *Crane* analysis began with the declaration that “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”⁸⁷ From this multitude of Constitutional support, the Court held that the exclusion of testimony concerning the circumstances of the defendant’s confession deprived him of a fair opportunity to present a defense.⁸⁸ The Court did not fail to acknowledge, however, the state’s power to apply exclusionary rules that themselves serve the “interests of fairness and reliability.”⁸⁹ More importantly, the Court seized upon the state’s failure to provide “any *rational* justification for the wholesale exclusion of this body of potentially exculpatory evidence.”⁹⁰ Perhaps the key to this decision rested on the inequity that resulted from permitting the prosecution to introduce the defendant’s confession at trial, and preventing the jury from considering evidence that directly tested the credibility of that confession. To the extent that the exclusion of this evidence did not further the state’s interest in ensuring reliability, and was contrary to basic notions of fairness, the state’s power to apply its evidentiary rules could be curtailed.⁹¹

The only apparent divergence from the rationality review and respect accorded the states in enforcing their evidentiary rules emerged in *Rock v. Arkansas*.⁹² The heightened scrutiny that the Court appeared to engage in is evidenced by its focus on “procedural safeguards” as alternative means of protecting the integrity of the fact finding process.⁹³ The “least restrictive means” analysis

rules that had no rational basis in fact.

^{86.} 476 U.S. 683 (1986).

^{87.} *Id.* at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

^{88.} *See id.* at 687.

^{89.} *Id.* at 690. “We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts.” *Id.* at 689.

^{90.} *Id.* at 691 (emphasis added).

^{91.} *See Montana v. Egelhoff*, 116 S. Ct. 2013, 2022 (1996) (“*Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a ‘valid’ reason. . . .”).

^{92.} 483 U.S. 44 (1986).

^{93.} *See id.* at 61. Although the Court suggested several safeguards, it left it to the states to establish “guidelines to aid . . . in the evaluation of posthypnosis testimony.” *See id.* It also noted that cross-examination remained a viable means of testing the accuracy of testimony. *See id.*

the Court engaged in usually signals strict scrutiny of both the means and the ends of a particular state rule or regulation, and is reserved for rights deemed "fundamental."⁹⁴ Although the Court did not hold that the state's interest in ensuring the reliability of proffered evidence was insufficient, it did require a narrower means of effectuating that purpose.⁹⁵

The decision prompted one commentator to suggest that the defendant could surmount a common law or statutory exclusion of any exculpatory scientific evidence through an extension of the constitutional principles announced, notwithstanding the potential unreliability of the evidence.⁹⁶ Assuming that the right to present evidence can be triggered by a proffer of "shaky" scientific evidence,⁹⁷ the heightened standard of review applied in *Rock* is not automatically applicable. The Court's decision was expressly limited to the admissibility of the defendant's *own* hypnotically refreshed testimony, despite the unreliability of the underlying technique.⁹⁸ The Court recognized that Arkansas' *per se* rule excluding all posthypnosis testimony did not advance the truth-seeking function of a criminal trial since it provided the Court no opportunity to examine the reliability of testimony in a particular case.⁹⁹

As discussed previously, *Washington* and its progeny established the defendant's right to present witnesses at trial, but appeared to require only a *rational* justification for the state's application of an evidentiary rule governing admissibility.¹⁰⁰ The Court's apparent deviation from this standard in *Rock* can be attrib-

⁹⁴ See CONSTITUTIONAL LAW, *supra* note 85, at 603.

⁹⁵ See *Rock*, 483 U.S. at 61 ("Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections." (emphasis added)).

⁹⁶ See Edward J. Imwinkelried, *Forensic Science: The Constitutional Right to Surmount Exclusionary Rules Barring the Introduction of Exculpatory Scientific Evidence*, 32 CRIM. L. BULL. 255, 255 (1996).

⁹⁷ The legitimacy of this assumption will be tested further in Section III, in the context of rules governing the admissibility of expert opinion testimony. See *infra* notes 126-73 and accompanying text.

⁹⁸ See *Rock*, 483 U.S. at 58 n.15. But see Peter Westen, *Compulsory Process II*, 74 MICH. L. REV. 191, 203 (1975) (arguing that compulsory process extends to expert opinion testimony based on well-accepted scientific techniques); Charles D. Gill, Jr., Casenote, *The Admissibility of Hypnotically Refreshed Testimony: Rock v. Arkansas*, 30 B.C. L. REV. 573, 593 (1989) (arguing that *Rock* will be extended to defense witnesses other than the accused).

⁹⁹ See *Rock*, 483 U.S. at 61 ("A state's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in a particular case.").

¹⁰⁰ See *supra* notes 73-84 and accompanying text.

uted to its recognition of the defendant's right to testify as fundamental.¹⁰¹ The structure of the Sixth Amendment is amenable to the implication that the defendant has a right of self-representation; more generally, the Sixth Amendment "grants to the accused personally the right to make his defense."¹⁰²

Furthermore, if the predominant theory or purpose of compulsory process is to equalize the position of the defendant and the prosecution at trial,¹⁰³ that purpose is not thwarted by a decision to exclude evidence that is unreliable or only marginally trustworthy. The purpose of compulsory process is neither to diminish the capacity of the prosecution to serve society's interest in obtaining a just and accurate verdict, nor to award the defendant a tactical advantage. Compulsory process serves neutral principles.¹⁰⁴ The Sixth Amendment itself leaves the legislature, federal and state, wide latitude to define the advantages each side is accorded at trial. For example, an evidentiary rule barring a whole category of exculpatory evidence can be characterized as a redefinition of the elements of the offense, having the effect of rendering the prosecution's burden easier to bear.¹⁰⁵ But the doctrines of

*actus reus, mens rea, insanity . . . and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.*¹⁰⁶

^{101.} See *Rock*, 483 U.S. at 53 n.10 ("On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right.").

^{102.} *Faretta v. California*, 422 U.S. 806, 819 (1975). In addition, the right to testify on one's own behalf is "essential to due process of law in a fair adversary process." *Id.* at 819 n.15.

^{103.} See *supra* note 15 and accompanying text.

^{104.} *But see, e.g., Clinton, supra* note 17, at 756 (arguing that in weighing competing interests surrounding admissibility, the balance is struck in the defendant's favor); *Westen, supra* note 15, at 107 (arguing the same point).

^{105.} In a recent case, the Supreme Court held that a state's statutory ban on using evidence of voluntary intoxication to negate the *mens rea* element of a crime did not violate due process, since the use of voluntary intoxication as probative of *mens rea* "is of too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental." *Montana v. Egelhoff*, 116 S. Ct. 2013, 2021 (1996). The Court further noted that although the statute "made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt," this did not impair its constitutionality. *Id.* at 2023.

^{106.} *Powell v. Texas*, 392 U.S. 514, 536 (1968); see also *McMillan v. Pennsylvania*,

Similarly, rules of evidence provide the framework within which these doctrines operate, and have evolved to facilitate and implement this "process of adjustment." In this respect, an evidentiary rule, legislatively created and judicially applied, is entitled to the same degree of deference accorded to the substantive rules that shape its scope and function. Thus, interpreting the Compulsory Process Clause to err on the side of the defendant and compel the admission of potentially unreliable evidence threatens to constitutionalize a standard of reliability and relevancy that, traditionally, legislatures have defined. To appreciate the impact of such an interpretation, it must be examined in the context of the key components of the criminal trial process—the adversary system and the jury system.

A. *Adversarial Posture of a Criminal Trial*

Accuracy, efficiency, and fairness are the hallmarks of comprehensive procedures that construct the framework within which disputes are resolved.¹⁰⁷ As the cornerstone of adjudication in the United States, the adversary system must operate within this framework.¹⁰⁸ One of the primary purposes of the Sixth Amendment is to ensure the defendant a fair opportunity to participate in his/her trial,¹⁰⁹ and thereby preserve the adversarial mode of testing the hypothesis of innocence. Given that the adversary system is firmly established in the United States,¹¹⁰ and that the principle of parity is embodied in the structure of the Sixth Amendment, application of an evidentiary rule which destroys one to the detriment of the other is deserving of heightened judicial scrutiny.

However, the exclusion of, for example, expert testimony based solely on its potential unreliability, does not strike a fatal blow to

477 U.S. 79, 89 n.5 (1986) (holding that a state is free to change its criminal laws, even if, as a consequence, it makes it easier for the prosecution to obtain convictions).

¹⁰⁷. See RONALD L. CARLSON ET AL., MATERIALS FOR THE STUDY OF EVIDENCE 9 (1983).

¹⁰⁸. See *id.* at 10.

¹⁰⁹. See *Washington v. Texas*, 388 U.S. 14, 20 (1967) ("[T]he Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."); cf. Westen, *supra* note 15 and accompanying text (discussing the evolution of the principle of participation by compulsory process of the defendant in trial).

¹¹⁰. See WAYNE R. LAFAYRE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6(b) (2d ed. 1992).

the heart of the adversary system.¹¹¹ On the contrary, rules serve to preserve the integrity of the fact finding process by reducing the distortion with which unreliable evidence may infect the trial process.¹¹² What is fundamental then, is the opportunity to offer expert testimony for admission at trial and to have its admissibility determined through an adversarial hearing designed to evaluate its reliability and relevancy; the Court has never contested *this* means of evaluating the admissibility of defense evidence.

B. Interaction of the Jury System and Evidentiary Rules

An impartial fact finder is a fundamental component of the adversary system, responsible for assessing credibility and assigning weight to the competing evidentiary contentions presented at trial.¹¹³ The modern role of the jury as impartial decision maker contrasts sharply with the early English jury, which had special knowledge of the facts surrounding the case.¹¹⁴ The interrelated function of juror and witness during the thirteenth century obviated the need for rules of evidence;¹¹⁵ not until their roles became distinct were rules required to control the interaction of witnesses and jurors.¹¹⁶

The law of evidence developed as a "set of primary rules of exclusion; and then [as] a set of exceptions to these rules."¹¹⁷ Tests of admissibility center around relevancy and practical consid-

¹¹¹. The Joint Conference on Professional Responsibility noted the proper role of proof in the adversary system: "Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958).

¹¹². See FED. R. EVID. 702 (attempting to prevent such distortion by outlining the circumstances in which an expert may give opinion testimony).

¹¹³. See *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968) ("In every State . . . the structure and style of the criminal process . . . are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.").

¹¹⁴. The foundations of the modern criminal procedural practices of accusation through grand jury indictment and trial by jury have as their forerunner the inquest; the inquest was "an answer or declaration of truth . . . by a body of men from the same neighborhood who were summoned by some official, on the authority of the crown, to reply under oath to any inquiries . . . addressed to them." LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 7 (1968). It was thought that men from the same locality "were most likely to know best the answers to questions relating to" the particular crime charged or claim asserted. *Id.* at 7-8.

¹¹⁵. See 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 178 (1924).

¹¹⁶. See *id.* at 182.

¹¹⁷. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 265 (1898).

erations, such as the likelihood of confusing or misleading the jury through the introduction of evidence likely to be "overestimated by that body."¹¹⁸ This practical aspect of the analysis is the "characteristic thing in the law of evidence; stamping it as the child of the jury system."¹¹⁹

Historically, the defendant was never afforded the unfettered right to present evidence to the jury.¹²⁰ More importantly, he/she was prohibited from introducing evidence that had a tendency to mislead or confuse. The decision to exclude logically relevant evidence rested within the discretion of the trial judge, who was in a better position to evaluate the jury's capacity to comprehend complex evidence.¹²¹ It was predominantly through judicial fiat, not constitutional challenge, that exceptions to exclusionary rules developed;¹²² these exceptions signified the evolving acceptance of the jury as an independent and competent fact finding body.

Furthermore, the Court has always acknowledged the institutional limitations which caution against engaging in a "finely tuned review of the wisdom of state evidentiary rules."¹²³ This is especially true when the rules regulate the admissibility of novel scientific evidence, the reliability of which is speculative and constantly evolving.¹²⁴ As with other subject matter that generates diametric opposition concerning the appropriate means of enforcement, the Court will likely defer to the "laboratory of the states" where the admissibility of expert testimony based on novel scientific evidence is concerned.¹²⁵

¹¹⁸ *Id.* at 266; *see also* FED. R. EVID. 402; FED. R. EVID. 403.

¹¹⁹ THAYER, *supra* note 117, at 266.

¹²⁰ *See* *Benson v. United States*, 146 U.S. 325, 336 (1892) ("[T]he theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.").

¹²¹ *See* *Ornelas v. United States*, 116 S. Ct. 1657, 1663 (1996) ("A trial judge views the facts of a particular case in light of the distinctive features and events of the community. . . ."); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (stating that "the state of mind of a juror . . . lies 'peculiarly within a trial judge's province'" (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985))).

¹²² *See* THAYER, *supra* note 117, at 265.

¹²³ *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *see* *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.").

¹²⁴ *See* *Rock v. Arkansas*, 483 U.S. 44, 65 (1987) (Rehnquist, J., dissenting) ("One would think that this deference would be at its highest in an area such as this, where, as the Court concedes [in the majority opinion], that 'scientific understanding . . . is still in its infancy.'" (quoting *Rock*, 483 U.S. at 61 (second alteration in original))).

¹²⁵ *See, e.g.,* *Montana v. Egelhoff*, 116 S. Ct. 2013, 2021 (1996) ("[N]ot every wide-

Given that the right to present expert witness testimony will be reviewed under a rationality standard, and that the structure of a criminal trial seems to support such deferential review, an examination of the interests embodied in the rules of evidence governing the admissibility of such testimony will illuminate the illusory nature of the right when applied in this context.

III. THE CONVERGENCE OF ADMISSIBILITY STANDARDS GOVERNING EXPERT TESTIMONY AND THE REQUIREMENTS OF COMPULSORY PROCESS

A. Rules Governing Expert Opinion Testimony

The most common role the expert assumes at trial is as interpreter or evaluator of scientific evidence; as such, the expert is called upon to give an opinion derived from the application of scientific theories to the facts of the case.¹²⁶ Generally, both the common law and the Federal Rules of Evidence exclude lay testimony based on opinions and inferences;¹²⁷ testimony based on personal knowledge or observation is viewed as "the best insurance of trustworthy factual findings," since it seems "inherently reliable, and we can be confident that the lay jurors can properly evaluate the weight of the evidence."¹²⁸ The increasing reliance on scientific data,¹²⁹ and the corresponding need to present jurors with a comprehensible interpretation of such evidence, led to the creation of exceptions for expert testimony, such as that embodied in Federal Rule of Evidence 702 ("FRE 702").¹³⁰

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹³¹ the Court distilled the admissibility standard contained in FRE 702.

spread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice.").

^{126.} See CARLSON ET AL., *supra* note 107, at 387.

^{127.} See FED. R. EVID. 701.

^{128.} CARLSON ET AL., *supra* note 107, at 379.

^{129.} One commentator observed that scientific proof had become "the backbone of every circumstantial evidence case." Ward F. Clark, *Scientific Evidence*, in THE PROSECUTOR'S DESKBOOK 542, 543 (Patrick F. Healy & James P. Manak eds., 1971).

^{130.} FED. R. EVID. 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.

^{131.} 509 U.S. 579 (1993).

The Court held that a trial judge “[f]aced with a proffer of expert scientific testimony” must determine whether the “expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.”¹³² Thus, the measure of evidentiary reliability and relevance is the scientific validity “of the principles that underlie a proposed submission.”¹³³ The Rule requires the trial judge to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”¹³⁴

Recall that the defendant must demonstrate that the scientific testimony offered is both reliable and material to trigger constitutional protection.¹³⁵ Thus, a finding of unreliability by the trial court is unlikely to raise a constitutional eyebrow.¹³⁶ In essence,

¹³² *Id.* at 592. Some of the factors that will assist in this determination are the testability of the scientific theory or technique, whether the theory or technique has been subjected to peer review or publication, the potential error rate of the particular scientific technique, the existence of standards regulating operation of the technique, and the general acceptance of the theory or technique. *See id.* at 593-94. These factors are only a representative subset of the “[m]any factors [that] will bear on the inquiry.” *Id.* at 593.

¹³³ *Id.* at 595. Although *Daubert* expressly held that the common law standard governing the admissibility of scientific evidence, known as the “general acceptance test,” was superseded by the Federal Rules of Evidence, many commentators view *Daubert* as vague and “unlikely to revolutionize the law of scientific evidence.” James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After Rock and Daubert*, 1996 U. ILL. L. REV. 363, 395; *see also* Paul C. Giannelli, *Forensic Science: Frye, Daubert, and the Federal Rules*, 29 CRIM. L. BULL. 428, 435 (1993) (noting that state courts are still free to use the “general acceptance test”); *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 259 (1993) (noting that “the reliability inquiry under *Daubert* appears no less vague and manipulable than the *Frye* [general acceptance] standard”); Hao-Nhien Q. Vu & Richard A. Tamor, *Of Daubert, Elvis, and Precedential Relevance: Live Sightings of a Dead Legal Doctrine*, 41 UCLA L. REV. 487, 489 (1993) (arguing that “the doctrine of precedential relevance survives” *Daubert*). In outlining the reliability standard required by FRE 702, the Court appeared to distinguish between the validity of the underlying theory, the validity of the technique applying the theory, and whether the technique was applied correctly in the particular case. *See Daubert*, 509 U.S. at 592-93. The courts are divided, however, over whether all three factors must be established before the evidence is admitted. *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* 33-38 (2d ed. 1993).

¹³⁴ *Daubert*, 509 U.S. at 593.

¹³⁵ *See supra* note 80 and accompanying text. Although some courts phrased the standard in terms of relevancy, reliability and relevancy are not mutually exclusive concepts, especially in the context of scientific testimony; unreliable evidence has no tendency to assist the trier of fact in determining a fact in issue.

¹³⁶ *Cf. Greenfield v. Robinson*, 413 F. Supp. 1113, 1120 (W.D. Va. 1976) (rejecting the plaintiff’s due process argument since “the very reason for excluding hypnotic evidence is . . . its potential unreliability”). Although *Greenfield* was decided before *Rock*, it relies on the same the rationale as *Rock*—“an accused’s constitutional right to testify—would not extend to such out-of-court statements.” 1 GIANNELLI & IMWINKELRIED,

the constitutional standard mirrors that governing admissibility, and a procedure such as FRE 702, which tests the reliability of the evidence prior to exclusion, seems constitutionally permissible. The apparent redundancy of an independent constitutional inquiry is heightened to the extent that the overarching purpose implicit in FRE 702 coincides with that of the Sixth Amendment's Compulsory Process Clause; both ensure that the verdict is a product of an informed decision by the jury.¹³⁷

A reliability standard, however, is not a finite or easily definable concept. The Court acknowledged that the test under FRE 702 must be a flexible one,¹³⁸ but did not undertake to determine the degree of reliability the rule requires. In contrast, the Court in *United States v. Valenzuela-Bernal*¹³⁹ indicated that a "heightened . . . materiality showing [is] required by the compulsory process clause."¹⁴⁰ In *Valenzuela-Bernal*, the Court held that the Government's interest in deporting illegal aliens outweighed the defendant's right to eye witness testimony that may have been relevant to whether the defendant knew he was transporting illegal aliens.¹⁴¹ Thus, a defendant may face greater obstacles to invoking protection under the Compulsory Process Clause than to overcoming the admissibility hurdle of expert testimony rules such as FRE 702.

Assuming the defendant is able to cast an evidentiary exclusion as constitutionally suspect, the interests FRE 702 serve will usually outweigh the right to present expert scientific testimony when reviewed under a rationality standard. Courts have a legitimate interest in safeguarding the integrity of the fact finding process to ensure that a criminal trial preserves its truth-seeking function.¹⁴²

supra note 133, at 336.

¹³⁷ See Imwinkelried & Scofield, *supra* note 81, at 84 (noting that the primary rationale for the expert testimony rules is preventing the jury from "overestimating the probative value of expert testimony"); *supra* notes 113-25 and accompanying text (discussing the evolution of the Sixth Amendment Compulsory Process Clause as jurors became independent fact finders); cf. Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 577 (1988) ("Consequently, if evidence rules are thought to serve their own goals, they will also be thought to further confrontation's goals [of preserving accuracy] and pass constitutional muster, and modern evidence rules will naturally appear to further accuracy.").

¹³⁸ See *Daubert*, 509 U.S. at 594.

¹³⁹ 458 U.S. 858 (1982).

¹⁴⁰ CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 685 (2d ed. 1986).

¹⁴¹ See *Valenzuela-Bernal*, 458 U.S. at 870-73.

¹⁴² See *Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988) (considering this state interest

It has an interest in preserving the integrity of the adversary system, which depends on the admissibility of reliable evidence and the rejection of unreliable evidence.¹⁴³ It also has an interest in the fair and efficient dispensation of justice.¹⁴⁴ Exclusion of expert testimony that is based on scientific methodologies with questionable validity is a rational means of protecting these interests.

[The courts] fear that the lay jurors will assume that virtually all scientific testimony is infallible. If we work from that premise, it makes sense to limit expert testimony to opinions that merit the weight we think that jurors will accord the opinions. If jurors are likely to give scientific evidence certain or conclusive weight, it is arguable that only scientific opinions of that degree of certitude should be admitted.¹⁴⁵

This premise is particularly justified when the expert's testimony is based on probabilistic scientific evidence.¹⁴⁶ Empirical research on juror use of such evidence demonstrated that "if weak evidence in support of a hypothesis follows strong evidence in support of that hypothesis, people tend to move toward a more neutral evaluation: they move toward the non-supported hypothesis."¹⁴⁷ To the extent that unreliable evidence can be character-

valid).

^{143.} See *id.*

^{144.} See *id.*; see also *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) ("The States, of course, do have a *compelling* interest in the integrity of their criminal trials." (emphasis added)).

^{145.} CARLSON ET AL., *supra* note 107, at 400.

^{146.} There is increasing reliance on scientific evidence based on statistical data and probabilistic calculation; blood type, DNA, and hair sample evidence, for example, are derived from such data. See Brian C. Smith et al., *Jurors' Use of Probabilistic Evidence*, 20 LAW & HUM. BEHAV. 49, 49 (1996).

^{147.} *Id.* at 74-75; see also Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 L. & SOC'Y REV. 123, 149 (1980) (arguing that jurors ignore statistical evidence due to the difficulty in processing probabilistic data); William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 LAW & HUM. BEHAV. 167, 181 (1987) (finding that lay people evaluate variations in statistical information differently than experts). *But see* Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials*, 40 AM. U. L. REV. 727, 764 (1991) (finding that "the overall picture of the jury that emerges from the available data indicates that juries are capable of deciding even very complex cases"). Even those who view jurors as competent to interpret complex scientific evidence, however, agree that the empirical data on juror comprehension is equivocal. See, e.g., Michael S. Jacobs, *Testing the Assumptions Underlying the Debate About Scientific Evidence: A*

ized as "weak evidence," the tendency to average the information presented rather than use it inferentially may result in distorted factual conclusions.

Furthermore, expert scientific testimony is less amenable to the more traditional means of assessing credibility—demeanor evidence and cross-examination. The demeanor of a witness is an integral factor in determining the reliability of testimony;¹⁴⁸ this is a distinguishing characteristic of cases like *Washington v. Texas*,¹⁴⁹ *Chambers v. Mississippi*,¹⁵⁰ and *Rock v. Arkansas*,¹⁵¹ where there was an implicit presumption that the jury was capable of assigning weight to the lay testimony. Expert testimony, however, does not derive its credibility from the demeanor of the expert, but from the validity of its underlying scientific principles. The danger that jurors may confound the expert's credible demeanor with the underlying scientific basis for the opinions expressed¹⁵² provides a rational basis for excluding testimony derived from potentially unreliable scientific theories or techniques. While this danger may also be present with lay testimony, the ability to objectively measure or quantify the reliability of the basis of expert testimony provides a concrete reason to exclude the evidence.¹⁵³ In contrast, lay testimony is generally not susceptible to such objective measurements; cross-examination must expose untrustworthy testimony.¹⁵⁴

Cross-examination, however, is ineffective in counteracting the dangers posed by expert testimony. In fact, it may exacerbate juror confusion over complex scientific testimony, for it requires the jury to expediently and unanimously resolve vast amounts of conflicting scientific data over which experts, after perhaps years of study,

Closer Look at Juror "Incompetence" and Scientific "Objectivity", 25 CONN. L. REV. 1083, 1094-97 (1993).

¹⁴⁸ See Smith et al., *supra* note 146, at 75 (finding that the "neighbor's confidence in her identification boosted her credibility and increased convictions").

¹⁴⁹ 388 U.S. 14, 23 ("[T]he State arbitrarily denied [the defendant] the right to put on the stand a witness who was . . . capable of testifying to events that he had personally observed. . . ." (emphasis added)).

¹⁵⁰ 410 U.S. 284 (1973).

¹⁵¹ 483 U.S. 44 (1987).

¹⁵² See *supra* note 147 and accompanying text.

¹⁵³ An expert testifying on the basis of an application of a scientific technique, such as polygraphy, can quantify the trustworthiness of the technique through predetermined standard error rates. Standard error measures the degree of deviation from expected results in any given application of a technique.

¹⁵⁴ See *infra* Part IV.A for a discussion of polygraphy and its utility in detecting deception.

cannot reasonably agree.¹⁵⁵ More importantly, the prosecution's onerous burden of proving guilt beyond a reasonable doubt¹⁵⁶ renders the success of rehabilitative cross-examination unlikely, since unreliable scientific evidence can easily generate a deceptively reasonable doubt.¹⁵⁷ In rejecting the utility of cross-examination to ferret out unreliable scientific evidence, one commentator stated that "when a deviation from [laboratory] protocol renders the results useless for scientific purposes, then they should have no value in law either. Certainly it would grant an arrogant power to the jury to allow it to choose to give weight to an opinion drawn from fatally flawed scientific testing."¹⁵⁸

The presumption of innocence enjoyed by a criminal defendant, and the heightened burden of persuasion allocated the prosecution, reflect an extrinsic social policy that the criminal justice system should bear the risk of acquitting a guilty individual. In essence, an error of under-inclusion is implicit in our criminal system.¹⁵⁹ This does not subordinate, however, the intrinsic policy of furthering accuracy and reliability, as reflected in the evidentiary rules governing the admissibility of expert opinion testimony. The rules of evidence operate independently within this framework to reduce errors, not in favor of the defendant or the prosecution, but in favor of the ultimate truth-seeking function of a criminal trial.

^{155.} See generally *People v. Castro*, 545 N.Y.S.2d 985, 986 (N.Y. 1989) (noting that approximately 5,000 pages of testimony were generated on the reliability of DNA evidence); *People v. Reilly*, 242 Cal. Rptr. 496, 501 (Cal. 1987) (noting that testimony about the reliability of electrophoresis consumed eight days of court time).

^{156.} See *In re Winship*, 397 U.S. 358 (1970) (holding that the reasonable doubt standard has attained "Constitutional stature").

^{157.} In an analogous context, Justice O'Connor noted the role of burden allocation in the fact finding process: "There will always be instances when the factfinding process will be unable to resolve conclusively whether . . . [something] is true or false; it is in those cases that the burden of proof is dispositive." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). This is particularly true in the case of testimony based on novel scientific theories which engender wide skepticism as to their reliability.

^{158.} James E. Starrs, *Recent Developments in Federal and State Rules Pertaining to Medical and Scientific Expert Testimony*, 34 DUQ. L. REV. 813, 837 (1996); see also *State v. Cavaliere*, 663 A.2d 96 (N.H. 1995). In *Cavaliere*, the court excluded expert testimony on child sexual abuse, reasoning that there are no scientifically reliable indicators of abuse. See *id.* at 100. The court stated further that since the diagnosis would be based on an expert's interpretation of a variety of factors that are difficult to critique, the opinion would likely emerge unscathed even after cross-examination. See *id.*

^{159.} See R.S. Radford, *Statistical Error and Legal Error: Type One and Type Two Errors and the Law*, 21 LOY. L.A. L. REV. 843, 844 n.3 (1988) (citing FRED SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 137 (1982)).

B. Exclusion of Expert Testimony Under the Legal Relevance Doctrine

The balancing of competing interests inherent in compulsory process analysis is the predominant characteristic of the common law legal relevance doctrine, or the modern codification of the doctrine in a Federal Rules jurisdiction.¹⁶⁰ Federal Rule of Evidence 403 ("FRE 403") provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹⁶¹

The Rules define "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."¹⁶² Thus, the doctrine reflects policies of fairness, efficiency, and impartial decision making, all of which are integral to the administration of a trial.¹⁶³ It is an additional weapon in the trial judge's arsenal, through which he/she controls the presentation of evidence to the jury.¹⁶⁴

Under a legal relevance analysis, the starting point is identification of the probative weight of the evidence.¹⁶⁵ Analogously, a compulsory process challenge is analyzed on the basis of the strength or weight of the defendant's right—fundamental or nonfundamental.¹⁶⁶ The Rule next directs the judge to identify the prejudicial dangers and balance these against the probative value of the evidence.¹⁶⁷ Similarly, compulsory process analysis entails the balancing of the defendant's right to admit the evidence against valid state or governmental interests protected by the exclusionary rule and its application to a particular item of evidence.¹⁶⁸ It is at this point that the analyses converge, since the valid state or gov-

^{160.} See CARLSON ET AL., *supra* note 107, at 242.

^{161.} FED. R. EVID. 403.

^{162.} *Id.*

^{163.} See CARLSON ET AL., *supra* note 107, at 237.

^{164.} See *id.* (stating that legal relevance is a "shorthand expression for the judge's power to exclude logically relevant evidence that offends [the] policies intrinsic to trial administration").

^{165.} See *id.* at 238.

^{166.} See *supra* note 75 and accompanying text.

^{167.} See CARLSON ET AL., *supra* note 107, at 238.

^{168.} See *supra* notes 41, 59 and accompanying text.

ernmental interests are largely defined by the applicable rule,¹⁶⁹ and the weight assigned them by the trial judge will likely be given deference by a reviewing court.¹⁷⁰ Deference is particularly justified when reviewing an exclusion of scientific testimony, since an appellate court is in no better position to assess conflicting evidence of reliability that may be extremely difficult to quantify.¹⁷¹ The Court implicitly acknowledged this premise in concluding that "it is acceptable to deal with the potential for [undue prejudice] through nonconstitutional sources like the Federal Rules of Evidence," as opposed to constitutional sources.¹⁷²

A defendant, therefore, is unlikely to succeed in surmounting a FRE 403 exclusion of scientific testimony. The dangers the rule guards against have been identified as significant state or governmental interests that may be rationally protected through the exclusionary mechanisms within the discretionary power of the trial judge.¹⁷³

IV. APPLICATION OF EXCLUSIONARY RULES TO CONSTITUTIONAL SCIENTIFIC TECHNIQUES

A. Admissibility of Polygraph Results

One ideal context in which the right to admit exculpatory scientific evidence may be asserted is where the proffered testimony is based on demonstrably reliable and well-accepted techniques, such as fingerprint or blood-stain analysis.¹⁷⁴ Challenging a statu-

^{169.} FRE 403 expressly identifies the probative dangers the government seeks to curtail: undue delay, prejudice, confusion of the issues, and misleading the jury. *See* FED. R. EVID. 403.

^{170.} *See* *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990) (giving the trial judge wide latitude in FRE 403 determinations); *Doty v. Sewall*, 908 F.2d 1053, 1058 (1st Cir. 1990) (giving the same deference); *United States v. Barron*, 707 F.2d 125, 128 (5th Cir. 1983) (giving the same deference); *cf.* *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (holding that a deferential standard of review applies "with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim").

^{171.} *Cf.* *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

^{172.} *Dowling v. United States*, 493 U.S. 342, 352 (1990); *see* *United States v. Lech*, 895 F. Supp. 582, 586 (S.D.N.Y. 1995) (holding that the defendant had "no constitutional right to introduce [polygraph] evidence whose probative value is substantially outweighed by its tendency to confuse and mislead a jury").

^{173.} *See supra* notes 144-47 and accompanying text.

^{174.} *See Imwinkelried, supra* note 96, at 260 (noting that constitutional protection

tory rule of *per se* inadmissibility of certain scientific evidence, especially when the defendant's own testimony is restricted, the precise issue in *Rock v. Arkansas*,¹⁷⁵ is a second opportunity. The strength of the right diminishes, however, when applied to novel scientific techniques and theories of questionable reliability.¹⁷⁶ Even commentators who argue for the extension of *Rock* to witnesses other than the defendant¹⁷⁷ recognize that defense counsel "faces an uphill battle" in attempting to surmount an exclusionary ruling.¹⁷⁸ And it is precisely in this context of shaky scientific evidence that a defendant's right to admit such evidence will most often arise and be most forcibly asserted.¹⁷⁹

For example, does the defendant, after *Rock*, have a constitutional right to admit polygraph results to either demonstrate his/her

should be extended to scientific evidence that courts routinely admit on behalf of the prosecution); Westen, *supra* note 98, at 203 ("[I]t is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, bloodstains . . . and other matters that routinely arise in criminal litigation."). See generally 1 GIANNELLI & IMWINKELRIED, *supra* note 133, chs. 16-17 (discussing the reliability of these techniques).

¹⁷⁵. 483 U.S. 44 (1986).

¹⁷⁶. Examples of such controversial scientific evidence include hypnotically refreshed memory testimony, syndrome evidence (rape trauma and battered woman syndromes), and psychological testimony about the unreliability of eyewitness identifications.

¹⁷⁷. See, e.g., Tacey Clark Humphrey, Comment, *Evidence—Rock v. Arkansas: Hypnotically Refreshed Testimony of a Criminal Defendant Cannot Be Per Se Excluded from Evidence*, 18 MEMPHIS ST. U. L. REV. 297, 309 (1988) (arguing that testimony refreshed by hypnosis is relevant and that since "[t]he defendant's due process rights entitle him to present the relevant and material testimony of any witness," such testimony from witnesses other than the defendant should be allowed); Mark Leen, Note, *Hypnosis and the Defendant's Right to Testify in a Criminal Case*, 1989 UTAH L. REV. 545, 569 ("A tenable argument can be made based on *Rock* that the prosecution's burden of proving the unreliability of the hypnotically refreshed testimony should apply to the testimony of other defense witnesses as well.").

¹⁷⁸. See Imwinkelried, *supra* note 96, at 265. Arguably, the *in terrorem* effect on a trial court of knowing that a constitutional right may be lurking in the background as a potent weapon on appeal may assist a defendant when offering novel scientific evidence at trial. As discussed in Section II, however, if the exclusion was based on the unreliability of the evidence, and the defendant had an opportunity to argue the grounds for admissibility, the constitutional standard is not a stringent one. More fundamentally, the validity of a defendant's constitutional right should not be derived from the purely tactical advantage it may provide, especially when that advantage depends on a speculative assessment of judicial psychology.

¹⁷⁹. In most cases, it is the prosecution that will offer fingerprint or blood evidence that links the defendant with the crime scene or the victim. The defendant usually resorts to attacking the competency of the prosecution's expert and/or the accuracy of the particular tests performed on the evidence; contamination and lack of conformity to testing protocol are frequent arguments that the defense offers to either exclude the evidence as unreliable or to impeach its credibility in the eyes of the jury.

own credibility or to impeach a prosecution witness? The majority view is that expert testimony based on polygraph results is inadmissible, even when the parties stipulate to the contrary.¹⁸⁰ A paucity of authority, however, has held that the defendant has a due process or compulsory process right to admit polygraph evidence when it is crucial to establishing a defense.¹⁸¹ But the cases themselves provide little precedential value, since they have been either overruled or are inconsistent with later cases.¹⁸² Admittedly, most of the cases directly addressing the constitutional issue were decided before *Rock*,¹⁸³ but that decision will likely be narrowly construed. More importantly, it does not seem to alter the evidentiary landscape by providing shelter from the trial court's discretionary power to exclude, especially when viewed in conjunction with prior Supreme Court opinions.¹⁸⁴

Due to the continuing debate over the reliability of both the

^{180.} See 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 244 n.160 (citing cases that so hold).

^{181.} See *McMorris v. Israel*, 643 F.2d 458, 466 (7th Cir. 1981) (holding that the prosecution's refusal to stipulate to the admissibility of polygraph results without offering a valid reason deprived the defendant of due process); *Jackson v. Garrison*, 495 F. Supp. 9, 11 (W.D.N.C. 1979) (finding that the exclusion of polygraph evidence denied the defendant a fair trial), *rev'd*, 677 F.2d 371 (4th Cir. 1981); *State v. Dorsey*, 532 P.2d 912, 914-15 (N.M. Ct. App. 1975) (reversing the trial court's exclusion of polygraph evidence, since the defendant had a due process right to present critical and reliable evidence), *aff'd on other grounds*, 539 P.2d 204 (N.M. 1975); *State v. Sims*, 369 N.E.2d 24, 45-46 (Ohio C.P. 1977) (finding that an implied right to present defense evidence in the Compulsory Process Clause compelled the admission of polygraph evidence). For cases employing a constitutional rationale when the defendant offers evidence for impeachment purposes, compare *United States v. Lynn*, 856 F.2d 430, 433-34 (1st Cir. 1988) (holding that the results of a government witness' polygraph tests were admissible to prove bias), and *United States v. Whitt*, 718 F.2d 1494, 1501 (10th Cir. 1983) (noting the defendant's contention that the prosecution "opened the door" for the admission of polygraph evidence), with *United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 (4th Cir. 1991) (excluding polygraph evidence offered by the defendant against a government witness).

^{182.} See 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 243 (noting the weak precedential value of *Jackson*, *Sims*, and *Dorsey*).

^{183.} *But see* *United States v. Lech*, 895 F. Supp. 582, 586 (S.D.N.Y. 1995) (holding that the admission of polygraph evidence favorable to the defense is not constitutionally compelled); *Misskelley v. State*, 915 S.W.2d 702, 715 (Ark. 1996) (holding that *Rock* is only applicable to the defendant's testimony). One intermediate appellate court in the military justice system, however, acknowledged the constitutional implications of *Rock* when it held that Military Rule of Evidence 707, which barred the admission of all polygraph evidence, *see* MIL. R. EVID. 707, was unconstitutional when applied to defense evidence. *See* *United States v. Williams*, 39 M.J. 555, 558 (A.C.M.R. 1994), *vacated*, 43 M.J. 348, 355 (C.A.A.F. 1994) (finding that the defendant waived the constitutional issue when he failed to testify).

^{184.} *See supra* notes 99-106 and accompanying text.

theory and technique of polygraphy, a defendant seeking admission of polygraph evidence is unlikely to gain much advantage in having the Compulsory Process Clause on his/her side.¹⁸⁵ The theory behind the most common form of polygraph examination, known as the control question ("CQ") technique, is premised on two hypotheses: "(1) the psychological stress caused by the fear of detection produces involuntary physiological responses, and (2) a polygraph examiner, based on these responses as recorded by a polygraph machine, can detect deception."¹⁸⁶ The inference of deception is based upon the examiner's comparison of the measured physiologic responses to control questions (irrelevant to the subject matter of the investigation) with those associated with answers to highly relevant questions.¹⁸⁷ A greater physiologic response to questions about the crime than to the other questions leads to the inference of deception.¹⁸⁸ A predominant criticism of the CQ technique is that changes in physiological reactions may be caused by emotions other than the anxiety of giving a false response, such as "when we are anxious about having to defend ourselves against accusations, when we are questioned about sensitive topics—and, for that matter, when we are elated or otherwise emotionally stirred."¹⁸⁹ This theory, however, is only one of many advanced to explain the probative value of polygraph tests.¹⁹⁰ The lack of consensus over the theoretical basis for the technique stems from the complexity of the testing process, which is not "amenable to easy understanding."¹⁹¹

^{185.} See generally 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 216-17 (canvassing some of the prominent criticisms of polygraph evidence); ANDRE A. MOENSSSENS ET AL., *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* 1196-1219 (4th ed. 1995) (discussing the polygraph technique and its legal status).

^{186.} 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 216.

^{187.} See David C. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 34.

^{188.} See 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 216.

^{189.} Benjamin Kleinmuntz & Julian J. Szucko, *On the Fallibility of Lie Detection*, 17 L. & SOC'Y REV. 85, 87 (1982); see David T. Lykken, *The Lie Detector and the Law*, CRIM. DEF., May-June 1981, at 19, 21 ("[A]ny reaction that you might display when answering deceptively you might also display another time, when you are being truthful.")

^{190.} See 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 216 (citing other proposed theories including the conditioned response theory, the conflict theory, and the threat-of-punishment theory).

^{191.} See OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A REVIEW AND EVALUATION—A TECHNICAL MEMORANDUM*, OTA-TM-H-15 (1983), reprinted in 12 POLYGRAPH 198, 201 (1983).

In addition to the ambiguity surrounding the theory of polygraphy, the technique attempting to apply such a theory is equally controversial and is of suspect reliability:

Two preliminary points are not subject to dispute. First, error rates frequently cited by field examiners are suspect because they are often based on the assumption that polygraph results are correct unless proven otherwise. In many instances no systematic follow-up studies have been conducted to verify the examiner's conclusions, verification criteria are not specified, and improper procedures are used to compute the error rate.

Second, polygraph research is an ongoing process [and] . . . "[o]nly now [in 1988] are superior paradigms being developed which combine the ground truth of the laboratory with the realism of field applications."¹⁹²

Despite the claims of proponents of the technique, that current research demonstrates the accuracy of polygraph tests conducted under highly controlled circumstances,¹⁹³ compulsory process does not mandate a more rigorous showing of unreliability than that demanded under a FRE 702 analysis.¹⁹⁴ Although some argue

¹⁹² 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 225 (footnotes omitted) (quoting Gorland H. Barland, *The Polygraph Test in the USA and Elsewhere*, in *THE POLYGRAPH TEST: LIES, TRUTH AND SCIENCE* 76 (Anthony Gale ed., 1988)). Other concerns over the reliability of the technique include the use of countermeasures by subjects to defeat the test and the lack of standardization of polygraph examiners. See McCall, *supra* note 133, at 421-22.

¹⁹³ See 1 GIANNELLI & IMWINKELRIED, *supra* note 133, at 229 (noting that the accuracy of field examiners ranged from 91-96% in identifying truthfulness and 85-95% in identifying deception). Even with such results, proponents acknowledge that error rates "in polygraph techniques will continue to be a significant consideration for courts considering the admissibility of polygraph results." McCall, *supra* note 133, at 370. Still others recognize that the "best defense one can offer for the continued use of the CQT [control question technique] is that its accuracy is indeterminate." William G. Iacono & Christopher J. Patrick, *Assessing Deception: Polygraph Techniques*, in *CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION* 205, 233 (Richard Rogers ed., 1988).

¹⁹⁴ See *supra* notes 131-37 and accompanying text (discussing the elements of the evidentiary reliability standard announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1992)). It is significant to note that two federal district courts, in light of *Daubert*, have held that the results of a defendant's polygraph test were admissible. See *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995) (giving a sophisticated analysis of validity studies, countermeasures, and the "friendly polygrapher" theory); *United States v. Crumby*, 895 F. Supp. 1354, 1363 (D. Ariz. 1995) ("[P]olygraph evidence may only be used to impeach or corroborate the *credibility* of the defendant."). But see *United States v. Black*, 831 F. Supp. 120, 123 (E.D.N.Y. 1993) (noting that "nothing in *Daubert* would disturb the settled precedent that polygraph evidence is neither

that the use of procedural safeguards to control testing protocol and the ability of the prosecution to cross-examine or present rebuttal evidence are sufficient means of ensuring reliability, a court's exclusion of polygraph evidence would also be a reasonable means of protecting the state or government's interest in screening out unreliable evidence. Under a compulsory process analysis, the governmental interest need not be compelling and the means of safeguarding that interest need not be the least restrictive. In a close case involving exculpatory novel or potentially unreliable scientific evidence, which is precisely when a defendant's right to compel admission is likely to be raised, the difficult issues raised and resolved by a trial court in deciding to exclude expert testimony should not be subjected to potent constitutional scrutiny.

The most likely route to admissibility of polygraph evidence is through statutory interpretation of evidentiary rules, as was done by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹⁵ In that case, the Court required a more sophisticated analysis of the theoretical and technical foundation of polygraphy.¹⁹⁶ In this regard, the Court recognized the distinctive role of the judge:

We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.¹⁹⁷

B. Psychiatric Evidence

Another type of scientific evidence that the defendant commonly offers, and courts frequently reject, is expert testimony concerning the mental state of the defendant. This evidence is proffered to show a lack of conformity to psychological profiles allegedly predictive of the criminal behavior at issue. The defendant may also

reliable nor admissible"). Neither *Crumby* nor *Galbreth*, however, based their decision on constitutional principles or mentioned *Rock v. Arkansas*, 483 U.S. 44 (1986). Both decisions were premised on an interpretation of *Daubert* that required a more sophisticated reliability assessment.

¹⁹⁵. 509 U.S. 579 (1993).

¹⁹⁶. See *id.* at 597.

¹⁹⁷. *Id.*

seek the admission of testimony regarding the psychological fitness of a prosecution witness, such as expert evidence impugning the reliability of eyewitness identifications.¹⁹⁸

The untrustworthiness of psychiatric evidence is the usual ground for its exclusion. One court, in excluding expert testimony concerning the defendant's state of mind, found that "[t]here is no evidence . . . that a psychiatrist . . . has any *scientific knowledge* on which to base an opinion whether the petitioner evinced a depraved mind."¹⁹⁹

If the psychiatric evidence is relied on for the dual inference that the defendant lacks certain behavioral or psychological traits that are correlated with and predictive of culpable conduct, and that he/she acted in conformity with this character and did not commit the crime charged, the underlying theory—criminal propensivity—must be reliable. In *State v. Cavallo*,²⁰⁰ the New Jersey Su-

¹⁹⁸. See generally 1 GIANNELLI & IMWINKELRIED, *supra* note 133, 263-68 (listing state and federal cases that have ruled on the admissibility of expert testimony regarding the reliability of eyewitness identification). The majority of courts have excluded this type of evidence and appellate courts have sustained the exclusions. See *id.* There is some support for the position that expert testimony regarding the unreliability of eyewitness identification, particularly cross-racial identifications, may assist jurors in weighing the credibility of such evidence. See, e.g., Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 311 (1989) (reporting the results of an experiment in which "jurors who heard expert testimony gave more weight to witnessing and identification conditions and less weight to witness confidence"); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 986 (1984) (stating that "[u]nlike expert testimony on many other sources of identification error, testimony concerning own-race effect . . . clearly meets evidentiary standards"). The tentative nature of the psychological research in this area, however, and the danger that jurors might substitute an assessment of the particular perception of the eyewitness(es) in the trial with generalizations about human perceptive abilities should be sufficient to sustain the constitutionality of exclusionary rulings. See *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994) (holding that expert testimony concerning eyewitness identifications must meet the *Daubert* standard "by showing that the expert opinion is based upon 'scientific knowledge' which is both reliable and helpful"); *Moore v. Tate*, 882 F.2d 1107 (6th Cir. 1989) (sustaining the exclusion of expert testimony regarding the reliability of eyewitness identifications and rejecting the defendant's constitutional arguments); *State v. Kemp*, 507 A.2d 1387 (Conn. 1986) (holding the same).

¹⁹⁹. *Haas v. Abrahamson*, 705 F. Supp. 1370, 1375 (E.D. Wis. 1989) (emphasis added), *aff'd*, 910 F.2d 384 (7th Cir. 1990). But see *Hughes v. Mathews*, 576 F.2d 1250, 1255, 1258 (7th Cir. 1978) (holding that a state rule restricting psychiatric testimony to insanity defenses interfered with the defendant's right to present evidence when such testimony was offered to show that a second-degree murder conviction was justified); *Hendershott v. People*, 653 P.2d 385, 397 (Colo. 1982) (finding constitutional error in a trial court's statutory interpretation that permitted mental impairment evidence to negate specific intent but not general *mens rea*).

²⁰⁰. 443 A.2d 1020 (N.J. 1982).

preme Court not only upheld the exclusion of a psychiatrist's testimony that the defendant did not have the "psychological traits of a rapist," but also held that the exclusion did not violate his right to compulsory process.²⁰¹ The theory supporting the evidence was based on two premises: "(1) there exist particular mental characteristics peculiar to rapists, and (2) psychiatrists, by examining an individual, can determine whether or not he possesses those characteristics."²⁰² In finding no general acceptance of these propositions in either the medical or legal community, the court distinguished between the legitimate use of "repetitive, compulsive criminal sexual conduct" to identify those individuals amenable to rehabilitation, and the unsupported use of such data to infer criminal or noncriminal conduct on a particular occasion.²⁰³ As with other scientific theories or techniques, what has proven valid for one purpose may not be equally so for another.²⁰⁴

The lack of scientific validity harpoons any claim that the Sixth Amendment compels admission of such psychiatric evidence. If the prosecution establishes a sufficient record to demonstrate the unreliability of the proffered evidence, a trial court may exclude the evidence as a reasonable means of ensuring the integrity of the fact-finding process of a trial. The Sixth Amendment does not establish a standard of reliability that exempts a defendant from the admissibility requirements of an evidentiary rule. No matter how potent a record the defense creates supporting the admission of psychiatric evidence,²⁰⁵ a trial court's exclusion will be constitu-

^{201.} *Id.* at 1021-22. Although this case was decided before *Daubert*, and involved a state evidentiary rule governing the admissibility of scientific evidence, the focus of the admissibility inquiry rested upon reliability. Scientific evidence is admissible in New Jersey if it "possesses a 'sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of truth.'" *Id.* at 1026 (quoting *State v. Cary*, 230 A.2d 384, 387 (1967)). The court found that the policy of the rule was to "exclude expert evidence when the danger it poses of prejudice, confusion and diversion of attention exceeds its helpfulness to the factfinder because the expertise is not sufficiently reliable." *Id.* It adopted a "general acceptance" standard to measure reliability, but acknowledged that this was not the "only permissible means of demonstrating reliability." *Id.*

^{202.} *Id.* at 1025.

^{203.} *Id.* at 1026.

^{204.} See, e.g., Paul C. Giannelli, *The Twenty-First Annual Kenneth J. Hodson Lecture: Scientific Evidence in Criminal Prosecutions*, 137 *MIL. L. REV.* 167, 182 (1992) (noting, for example, that hypnosis has proven therapeutically useful by refreshing memory, but is not necessarily competent to produce accurate recollection at trial).

^{205.} *But see* Imwinkelried, *supra* note 96, at 270 (arguing that an offer of proof establishing, among other things, the qualifications of the psychiatrist, his/her impartiality,

tional if it is based on a rational reliability assessment.²⁰⁶ In almost all instances of novel or controversial applications of forensic psychiatry, the prosecution will advance a rational basis for exclusion. As the court in *State v. Cavallo* concluded: "The rule of *Washington* and its progeny was not designed to remove from the trial courts, or from the drafters of state evidence rules, their traditional authority to assure the reliability and helpfulness of admitted evidence."²⁰⁷

VI. CONCLUSION

Compulsory Process is not a reprieve from judicial discretion and legislative dictate as to the degree of reliability expected of scientific evidence. It does not tip the scales in favor of admissibility when the defendant offers potentially unreliable scientific evidence, but merely ensures him/her the opportunity to have the evidence assessed. The primary goal of compulsory process is to equalize the position of the defense and prosecution at trial. This goal is served when a trial court or legislature reasonably assesses the reliability of a particular scientific theory or technique; this reliability assessment is the process that is constitutionally compelled. As long as exclusion of the evidence is a rational means of protecting the state or governmental interests in the accuracy of a criminal trial and the integrity of the adversary process, the Constitution will not compel admission. And in most cases where the defendant seeks to admit potentially unreliable scientific evidence, exclusion will be a rational means of safeguarding the relevant interests. Unreliable evidence may corrupt and confuse the fact finding process and has no tendency to assist the trier of fact.

Perhaps *de novo* review of trial court exclusions of scientific evidence would better serve the policy that the trier of fact receive all evidence that is relevant and helpful in determining guilt. The role carved out for the trial court under the Federal Rules of Evidence, however, is as gatekeeper, and scientific evidence must meet some measure of reliability before reaching the jury. As long as

his/her independent verification of pertinent facts, and reliance on generally accepted diagnostic criteria will supply the defendant with a "potent argument for surmounting restrictions to the admission of exculpatory psychiatric testimony").

²⁰⁶ A paradigm for such an analysis is the framework for examining evidentiary reliability that the Supreme Court announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1992). See *supra* note 132 and accompanying text.

²⁰⁷ *Cavallo*, 443 A.2d at 1030.

courts and legislatures remain flexible in their analysis and do not slumber while technological advance transforms the unreliable into the reliable, there is little danger that the Sixth Amendment will reach for the key to the gate.

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