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Admission of Polygraph Results: A Due Process Perspective

Evidence of polygraph results is generally inadmissible in both state and federal courts.[1] The current refusal to admit polygraph evidence originated in decisional law, beginning with a 1923 case, *Frye v. United States*,[2] where the District of Columbia Circuit Court of Appeals rejected expert testimony concerning results[3] obtained using a primitive lie detector.[4] The reason for exclusion was the lack of general acceptance of the detection technique within the appropriate profession or field of science.[5] Modern courts often cite this lack of reliability, as viewed from the perspective of the involved profession or scientific community, when refusing to admit polygraph results.[6]

Contemporary polygraph proponents attempt to lay a foundation showing the evolution of the technique toward greater accuracy, and thus to avoid the *Frye* exclusionary principle.[7] There seems to be a trend, at least in dicta, toward acknowledging the increased reliabil-

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[1] C. McCORMICK, McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 207 (Cleary ed. 1972); J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE 309 (2d ed. 1977); Comment, *The Truth About the Lie Detector in Federal Court*, 51 TEMPLE L. Q. 69, 72 n.13, 94 (1978); Annot., 23 A.L.R.2d 1306 (1952) (Later Case Serv. 1970 & Supp. 1978).

A common exception is their use through stipulation prior to testing. The leading case articulating stipulation requirements is People v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962). *See* J. REID & F. INBAU, *supra* at 309, 325; Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys*, 3 NAT'L J. CRIM. DEF. 107, 138 n.105 (1977); Note, *The Polygraph Revisited: An Argument For Admissibility*, 4 *Suffolk U. L. Rev.* 111, 115 (1969); Annot., 53 A.L.R.3d 1005 (1973 & Supp. 1979).

[2] 293 F. 1013 (D.C. Cir. 1923).

[3] *Id.* at 1014.

[4] The systolic blood pressure test utilized by Marston is concededly a far cry from the sophisticated devices in use today. *See generally* Moenssens, *Polygraph Test Results Meet Standards For Admissibility As Evidence*, in LEGAL ADMISSIBILITY OF THE POLYGRAPH 14, 20 (N. Ansley ed. 1975). For a concise and critical description of William Marston and his technique see Axelrod, *supra* note 1, at 110-13. For a general description of his own work see W. MARSTON, THE LIE DETECTOR TEST (1938).

[5] 293 F. at 1014. The development of the exclusionary principle has been exhaustively treated elsewhere. *See, e.g.*, J. REID & F. INBAU, *supra* note 1, at 310; Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 AM. CRIM. L. REV. 29, 30 (1977); Abrams, *Polygraph Today*, 3 NAT'L J. CRIM. DEF. 85, 86 (1977). Virtually all polygraph cases and commentaries discuss this evolution. Axelrod, *supra* note 1, at 138-40.

[6] See Comment, *supra* note 1, at 77 n.34 (collecting cases).

[7] *See, e.g.*, United States v. Wainright, 413 F.2d 796, 803 (10th Cir. 1969); People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955); People v. Leone, 25 N.Y.2d 511, 307 N.Y.S.2d 430, 255 N.E.2d 696 (1969); C. McCORMICK, *supra* note 1, § 207 n.7.

ity of the modern lie detector.[8] Most courts have rejected the evidence at preliminary stages despite this threshold demonstration of trustworthiness;[9] a minority, however, have been persuaded to admit.[10]

In related attempts to facilitate admission, intercessors have urged that the expert pool from which *Frye* requires acceptance be particularized to include polygraph examiners only.[11] The commentators have also suggested that the general acceptance test be replaced by, or merged into, a balancing endeavor conducted by the trial judge; weighing the probity of the polygraph evidence against its counterweights—time, prejudice and confusion.[12] A few courts have attempted similar inquiries under the Federal Rules of Evidence with varying results.[13] It suffices to note that most jurisdictions continue to exclude polygraph evidence in non-stipulation cases[14] despite vigorous assaults by commentators and the polygraphy community.[15]

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[8] United States v. Alexander, 526 F.2d 161, 166 (8th Cir. 1975):

> It is true that a limited number of federal district courts have sanctioned the admission of such evidence in certain situations and under limited circumstances. However, the disposition of these particular cases on appeal would dispel any conception of a "trend" toward unqualified admissibility in federal courts at the present time.

See Comment, *supra* note 1, at 73 n.15.

[9] *See, e.g.*, United States v. Oliver, 525 F.2d 731, 738 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976) (where the court rejected polygraph testimony despite expert estimate of over 90% reliability); Comment, *supra* note 1, at 80 n.48.

[10] *See, e.g.*, United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972); State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975); *see generally* J. REID & F. INBAU, *supra* note 1, at 316-21; Axelrod, *supra* note 1, at 138; Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 nn.4,5 (1973).

[11] *See, e.g.*, Commonwealth v. A Juvenile (No. 1), 365 Mass. 421, 313 N.E.2d 120 (1974); People v. Williams, 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (1958); J. REID & F. INBAU, *supra* note 1, at 309 n.2; Axelrod, *supra* note 1, at 140 n.116, 144 n.129.

[12] C. MCCORMICK, *supra* note 1, § 204; *see also* Note, *supra* note 10, at 1120, 1139 n.120.

[13] For a favorable balance admitting polygraph evidence see United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972); United States v. Zeiger, 350 F. Supp. 685, 691 (D.D.C. 1972), *rev'd without opinion*, 475 F.2d 1280 (D.C.Cir. 1972). *But see* United States v. Flores, 540 F.2d 432, 436 (9th Cir. 1976); United States v. Alexander, 526 F.2d 161 (8th Cir. 1975); United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974); United States v. Urquidez, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973).

The commentators are scattered in protean array with disagreement regarding the nature of the issue presented and the proper disposition of the appropriate question. *See, e.g.*, C. McCormick, *supra* note 1, § 207; Axelrod, *supra* note 1, at 137 n.100; Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. REV. 187, 188 n.7 (1975).

[14] *See* note 1 *supra*.

[15] *See, e.g.*, Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953); Dabrowski, *The Polygraph Revisited: An Argument for Admissibility*, 6 CRIM. L. BULL. 63 (1970); Ferguson, *Polygraph v. Outdated Precedent*, 35 TEX. B.J. 531

This note will articulate a due process rationale for admissibility of polygraph results when offered by a criminal defendant to indicate his belief in his own innocence.[16] This constitutional argument rests upon an interpretive reading of *Chambers v. Mississippi*[17] and its progeny.[18]

Chambers v. Mississippi

In *Chambers v. Mississippi*,[19] the Supreme Court made what appeared to some commentators and defense advocates to be a significant procedural due process determination.[20] The reverberations of *Chambers* are just beginning to shake the evidentiary bastions of state and federal trial courts.[21]

Chambers involved the exclusion of evidence critical to a criminal defendant by a Mississippi trial judge. The accused sought to cross-examine a witness, Gable McDonald, whom he had called. McDonald had previously confessed to the murder for which

(1972). The polygraph community has waged a frontal assault on admission barriers ranging from reasoned persuasion, *see* J. REID & F. INBAU, *supra* note 1, through concerted advocacy, *see* LEGAL ADMISSIBILITY OF THE POLYGRAPH, (N. Ansley ed. 1975) (a volume designed "to carry the attack to our detractors," Weir, *Introduction, id.* at IX); to unbridled onslaught on the judicial system, *see* R. FERGUSON & A. MILLER, POLYGRAPH FOR THE DEFENSE (1974).

[16] It is an accepted premise among polygraph experts that only the subject's *beliefs* are reflected in his responses and that any psychological deviation from reality will not be recorded accurately. *See* J. REID & F. INBAU, *supra* note 1, at 228, 247-50; Abbel, *supra* note 5, at 37-38 n.33; Burkey, *The Case Against the Polygraph*, 51 A.B.A.J. 855, 856 (1965); Note, *supra* note 10, at 1123 n.16. For a discussion of the uses for which polygraphy evidence may be relevant see notes 92-97 & accompanying text *infra*.

[17] 410 U.S. 284 (1973).

[18] *See, e.g.*, Hughes v. Matthews, 576 F.2d 1250 (7th Cir.), *cert. denied*, 99 S. Ct. 43 (1978); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977); Welcome v. Vincent, 549 F.2d 853 (2d Cir.), *cert. denied*, 432 U.S. 911 (1977); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); Steinmark v. Parratt, 427 F. Supp. 931 (D. Neb. 1977). *See also* United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976); United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974); United States v. Torres, 477 F.2d 922 (9th Cir. 1973). *But see* United States v. Corr, 543 F.2d 1042 (2d Cir. 1976); United States v. Hughes, 529 F.2d 839 (5th Cir. 1976); United States v. Pena, 527 F.2d 1356 (5th Cir. 1976); Maness v. Wainright, 512 F.2d 88 (5th Cir. 1975), *cert. dismissed*, 430 U.S. 550 (1977).

[19] 410 U.S. 284 (1973).

[20] *See, e.g.*, Imwinkelried, *The Constitutional Right to Present Defense Evidence*, 62 MIL. L. REV. 225, 227, 267 (1973); Wynn, *A Due Process Challenge to Restrictions on the Substantive Use of Evidence of a Rape Prosecutrix's Prior Sexual Conduct*, 9 U.C.D.L. REV. 443 (1976); Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual Conduct of the Complaining Witness in cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403 (1975); Note, *Chambers v. Mississippi: Due Process and the Rules of Evidence*, 35 U. PITT. L. REV. 725 (1974); 62 ILL. B.J. 158, 159 (1973).

[21] Prior to *Chambers v. Mississippi* it was generally assumed that courts and legislatures regulated evidentiary rules, 29 AM. JUR. 2d *Evidence* § 9 (1967); Imwinkelreid, *supra* note 20, at 227, without considering a defendant's constitutional rights. *See* cases collected note 13 *supra*. *See also* State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975).

Chambers was being tried. The trial court denied the motion to examine McDonald as an adverse witness, because he had not "point[ed] the finger at Chambers."[22] The defendant then attempted to introduce the testimony of three witnesses, all of whom were prepared to swear that McDonald had confessed the crime to them individually. The trial court rejected these offers as hearsay. The Supreme Court of Mississippi upheld the trial court's evidentiary rulings on appeal.[23]

Justice Powell outlined the resulting situation succinctly:

> As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. . . . Chambers' defense was *far less persuasive than it might have been* given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.[24]

Then, addressing the effect of those rulings on Chambers' constitutional rights, Justice Powell observed:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as *essential to due process.*[25]

Focusing first on the trial court's denial of Chambers' move to cross-examine McDonald, the Court declared:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation. . . . It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. . . . But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.[26]

When Mississippi's voucher rule was judged by the standard enunciated it was found seriously deficient. The Court emphasized the

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[22] 410 U.S. at 292.

[23] *Id.* at 293 (citing Chambers v. State, 252 So. 2d 217, 220 (Miss. 1971)).

[24] *Id.* at 294 (emphasis added).

[25] *Id.* (emphasis added).

[26] *Id.* at 295 (citations omitted).

anachronistic nature of the voucher rule and its potential for subverting "the truthgathering process."[27] The state's complete failure to defend or explain the underlying rule or to bring it into the category of a legitimate state interest which might "override the accused's right of confrontation"[28] was accentuated. Finally, Justice Powell rejected Mississippi's argument that there was "no incompatibility between the rule and Chambers' rights because no right of confrontation exists unless the testifying witness is 'adverse' to the accused,"[29] noting:

> It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. . . . We reject the notion that a right of such substance in the criminal process may be governed by [a] technicality. . . . The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.[30]

Turning to the trial court's refusal to allow Chambers the oppotunity to offer the testimony of three witnesses concerning McDonald's alleged confessions, the Court criticized Mississippi's adherence to a hearsay exception limited to declarations against pecuniary interest. They acknowledged the scholarly debate over declarations against penal interests and the arguments often raised against the reliability of such evidence, but pointed out the assurances of trustworthiness in the particular circumstances of *Chambers* and observed that McDonald was available in court to answer those charges before a jury.[31] The Court concluded that:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In the exercise of this right, 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. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore *persuasive assurances of trustworthiness* and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was *critical to*

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[27] *Id.* at 296 n.8.
[28] *Id.* at 297.
[29] *Id.*
[30] *Id.* at 297-98.
[31] *Id.* at 299-301.

> *Chambers' defense.* In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.[32]

In combination, the Mississippi trial court's application of its traditional voucher and hearsay rules were found to have deprived Leon Chambers of his due process rights.[33] Therefore, the Supreme Court reversed and remanded the case.

APPLYING AND EXTENDING *Chambers* IN THE FEDERAL COURTS

Chambers' ratio decidendi precluded the Mississippi trial court's application of its traditional voucher and hearsay rules from depriving the criminal defendant of an opportunity to confront an obviously adverse witness effectively, and from excluding probative evidence tending to inculpate another. The Court reasoned that the circumstantial trustworthiness of the rejected testimony, coupled with the critical position the cumulative exclusionary rulings occupied in his attempted defense, required the trial court to allow such a presentation to comport with Chambers' due process rights. The conventional evidentiary rules in this peculiar fact situation were suspended[34] because the policy underlying those canons was insufficiently compelling to overbalance the defendant's due process rights.[35]

Chambers seemed to reflect a trend toward opening up the fact-

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[32] *Id.* at 302 (emphasis added).

[33] *Id.* at 302-03. Then, seeking to limit the holding, the Court cautioned:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Id.

[34] The Court did not find Mississippi's evidentiary rules unconstitutional per se but only as applied, 410 U.S. at 302-03. *See generally* 62 ILL. B.J. 158, 159 (1973).

[35] The *Chambers* court expressly recognized the state's right to control its judicial process, but refused to allow the mechanistic application of evidentiary rules to defeat a defendant's right to a just ascertainment of guilt. 410 U.S. at 302-03. The Court did not articulate Mississippi's interest in maintaining its rules in general, but specifically criticized the exclusionary rules invoked as outmoded and inappropriate in the instant case. *Id.* at 296-97, 298-301. It is interesting to note that Mississippi did not seek to establish its interest in the voucher rule, *id.* at 297, and that there is nothing in the opinion to indicate that Mississippi sought to defend its interest in its hearsay rules, but the Supreme Court's criticism of the two rules implies that the rationale of the rule must be sound if a state's policy is ever to be sufficiently compelling to withstand constitutional attack.

finding process. Justice Powell's criticisms of Mississippi's " 'voucher' rule . . . [which] appears to be a remnant of primitive English trial practice," and its "materialistic limitation on the declaration against interest,"[36] left little doubt that stagnant evidentiary rules would be closely scrutinized if they clash with the evolving concept of due process. By subtly synthesizing criminal procedure, evidence and constitutional law,[37] *Chambers* put the legal community on notice that exclusionary rules would be subject to stricter review where they conflict with a criminal defendant's due process rights and the jurisdiction's justification for exclusion is not sufficiently compelling.

Subsequent federal decisions hesitated to employ a similar due process evaluation due to the narrowness of the holding, which emphasized *Chambers'* peculiar facts.[38] The due process argument was raised in various contexts,[39] with vindication of the defendant's rights urged only in dissent.[40] Finally, however, breakthroughs occurred in federal and state courts, and diverse evidentiary barriers were breached when the specific care demanded.[41]

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[36] 410 U.S. at 299. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 217 (1973); FED. R. EVID. 402, *Advisory Committee Note:* "[C]ongressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules . . . ."; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 81 (1954); J. WIGMORE, EVIDENCE, *Preface* (3d ed. 1940); Note, *supra* note 10, at 1120, 1138.

Many states have recognized the need for broader acceptance of relevant evidence. *See, e.g.,* UNIFORM RULES OF EVID., Commissioner's Prefatory Note (1974); N.M.R. EVID. The New Mexico Rules were patterned on the Federal Rules as were the 1974 UNIFORM RULES OF EVID.

[37] Imwinkelreid, *supra* note 20, at 267.

[38] *See, e.g.,* United States v. Corr, 543 F.2d 1042 (2d Cir. 1976); United States v. Hughes, 529 F.2d 839, (5th Cir. 1976); United States v. Pena, 527 F.2d 1356 (5th Cir. 1976); Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975), *cert. dismissed,* 430 U.S. 550 (1977); Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976); 53 WASH. L. REV. 319, 324 n.26, 325 (1978).

[39] *See, e.g.,* United States v. Pena, 527 F.2d 1356 (5th Cir. 1976) (finding that the declarations against interest offered were not reliable enough to admit under a *Chambers* analysis and that mere favorableness to the defense is not dispositive in a due process sense); *accord,* United States v. Homer, 545 F.2d 864 (3d Cir. 1976).

[40] *See* Maness v. Wainwright, 512 F.2d 88 (5th Cir. 1975), *cert. dismissed,* 430 U.S. 550 (1977). "As I perceive the due process principle announced in *Chambers,* it commands that every material source of evidence as to what was said and done by the principle players in this domestic tragedy should be laid before the triers of fact." *Id.* at 93 (Clark, J., dissenting).

[41] *See, e.g.,* Welcome v. Vincent, 549 F.2d 853 (2d Cir.), *cert. denied,* 432 U.S. 911 (1977).

In United States v. Torres, 477 F.2d 922 (9th Cir. 1973) reversible error occurred where the district court refused to allow the defendant to impeach his own witness by introducing relevant and crucial evidence of that witness' prior conviction. Note that this was a criminal prosecution within the federal jurisdiction so that no question of a state's interest arose. The Ninth Circuit partially relied on *Chambers v. Mississippi* in its holding. *Id.* at 924.

In United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974), exclusion of the unavailable declarant's declarations against penal interest was reversible error. This is another federal case where the Eighth Circuit cited *Chambers* to bolster its evidentiary ruling but found it

A notable extension of the *Chambers* doctrine took place in *Welcome v. Vincent.*[42] The Second Circuit ordered that a writ of habeas corpus should issue for a defendant whose due process right to cross-examine a defense witness had been violated by the state trial court, which had relied on New York's voucher rule. The court phrased the issue: "Our question, of course, is not whether the refusal to permit the desired cross-examination was erroneous as an evidentiary matter, but whether it deprived appellant of a fundamentally fair trial in violation of the due process clause of the Fourteenth Amendment"[43] and noted: "In resolving the fair trial issue, our starting point must be the Supreme Court's decision in *Chambers v. Mississippi.*"[44]

The defendant in *Welcome* sought to elicit a prior inconsistent statement during cross-examination, which would inculpate the defense witness, thereby exculpating the accused.[45] The Second Circuit acknowledged *Chambers'* limitation to its own facts, but recognized the fundamental nature of the defendant's due process right of cross-examination.[46] Furthermore, the court found that right dispositive where, as in *Chambers,* the defense would have been far more persuasive had the evidence been admitted.[47] Significantly, they upheld the defendant's right despite the district court's doubts concerning the reliability of the proffered evidence and the lack of the cumulative evidentiary exclusion which the *Chambers'* court emphasized.[48]

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unnecessary to invoke the fifth amendment's due process clause since it rested its holding on evidentiary grounds. *Id.* at 958.

In United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976), the Fifth Circuit invoked *Chambers'* principles to balance the fifth amendment rights of a subpoenaed witness against the sixth amendment and due process rights of an accused, who sought to elicit that witness' testimony when the district judge insufficiently scrutinized the recalcitrant witness' claim.

See also State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975); Kreisher v. State, ___ Del. ___, 303 A.2d 651 (1973); State v. Dickinson, ___ La. ___, 282 So. 2d 456 (1973); Commonwealth v. Hackett, 225 Pa. Super. Ct. 22, 307 A.2d 337 (1973). For a discussion of *Dorsey* see notes 58-68 & accompanying text *infra.*

[42] 549 F.2d 853 (2d Cir. 1977).

[43] *Id.* at 856.

[44] *Id.* at 857.

[45] *Id.* at 856.

[46] *Id.* at 857.

[47] *Id.*

[48] [*Chambers'*] value in the instant case is further diluted by the fact that, by virtue of the hearsay testimony excluded there, the Supreme Court did not have to decide, as we must now, whether a significant restriction on a defendant's examination of a witness who has confessed to the crime is *alone enough* to deny the defendant a fair trial. The Supreme Court . . . stated that the criminal defendant's right of cross-examination is of vital importance.

While *Welcome* reflected the evolution of *Chambers'* due process doctrine it focused solely on the defendant's right to cross-examine. Subsequently, in *United States v. Benveniste,*[49] the Ninth Circuit recognized the defendant's right to present witnesses. Thus, the Ninth Circuit extended *Chambers'* treatment of that fundamental right to constitutional status *by itself* where the requisite reliability and criticality factors were present.[50]

Benveniste dealt with the federal district court's denial of a criminal defendant's offer of a declaration against the penal interest of a witness who was unavailable at trial after invoking her fifth amendment privilege against self-incrimination.[51] The purpose of the offer was to discredit the government informant's testimony regarding the defendant's predisposition to traffic in drugs.[52] The informant's credibility was potentially crucial to the jury's decision on the entrapment defense.[53] Thus, the court, quoting *Chambers,* found that exclusion made the defense "far less persuasive than it might have been" and deprived the accused of exculpatory evidence which he was constitutionally entitled to present.[54]

This situation clearly satisfied *Chambers'* criticality element and the court easily negotiated the remaining reliability hurdle. In examining the offered evidence the Ninth Circuit utilized Rule 804(b)(3) of the Federal Rules of Evidence[55] to find sufficient trustworthiness to admit under a *Chambers* analysis.[56]

Id. (emphasis added). Welcome's inability to bring Cunningham's confession before the jury on direct or indirect examination was not as damaging as it might have been since Cunningham, when called by the defense, "testified, rather remarkably" as to his prior "confession." *Id.* at 856. Thus, the significance of the trial court's exclusion was even less than the *Chambers* trial court's imposition of Mississippi's voucher rule *by itself.*

[49] 564 F.2d 335 (9th Cir. 1977).

[50] The court did not consider the federal government's justification for exclusion. *See* note 41 *supra;* notes 149-60 & accompanying text *infra.*

[51] 564 F.2d at 338. The sought-after witness refused to testify after the government declined to grant her immunity.

[52] The Ninth Circuit defined its entrapment standard as "whether the Government officials implant[ed] in the mind of an innocent person the disposition to commit the alleged offense and induce[d] its commission in order that they may prosecute," *id.* at 340, before considering the effect of the exclusionary ruling.

[53] *Id.* at 342.

[54] *Id.*

[55] (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

FED. R. EVID. 804(b)(3).

[56] 564 F.2d at 341.

Read together, *Welcome* and *Benveniste* demonstrate the applicability of a *Chambers* due process analysis to different fact situations. Both courts extended *Chambers* by finding a due process violation without cumulative evidentiary exclusions. Neither court dealt with assurances of trustworthiness as persuasive as those in *Chambers*. The *Welcome* court upheld the right to cross-examine in a factual setting wherein the critical nature of that evidence was diluted, and *Benveniste* ignored the *Chambers'* balancing of the rights of the accused against the government's interest in exclusion. The common thread among the three cases was the judicial realization that the trial court had excluded arguably reliable evidence, thereby rendering the defense "far less persuasive than it might have been," for no legitimate governmental reasons.

DUE PROCESS AND ADMISSION OF POLYGRAPH RESULTS: THE NEW MEXICO APPROACH

Extrapolation from this *Chambers* line of cases to polygraph exclusions suggests that when polygraph results are found to be reliable and to occupy a critical position in the accused's defense, he has a due process right to present those results absent a valid, and sufficiently compelling, state justification for exclusion.

Due process challenges to the universal exclusion of polygraph results have been suggested by legal writers since *Chambers*[57] and, in at least one state supreme court, upheld, albeit with sparse discussion. In *State v. Dorsey*,[58] the New Mexico Supreme Court found that its prior requirements of stipulation or absence of objection to introduction at trial, upon which admission of polygraph evidence hinged, was, among other infirmities, *"[I]nconsistent with the concept of due process."*[59] The court accordingly overruled its prior decision, *State v. Lucero*,[60] which set forth polygraph admission

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[57] *See, e.g.*, Axelrod, *supra* note 1, at 143.

[58] 88 N.M. 184, 539 P.2d 204 (1975).

[59] *Id.* at 185, 539 P.2d at 205. The court also rejected those requirements because they were:

> (1) Mechanistic in nature . . .
>
> (3) Repugnant to the announced purpose and construction of the New Mexico Rules of Evidence that:
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> "These rules shall be construed to secure fairness in administration * * * and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"; and
>
> (4) Particularly incompatible with the purposes and scope of Rules 401, 402, 702 and 703, N.M.S.A. 1953 (Repl.Vol. 4, Supp. 1973).

Id.

[60] 86 N.M. 686, 526 P.2d 1091 (1974).

prerequisites as to those two requirements but retained three others: "When the court has evidence of the qualifications of the polygraph operator to establish his expertise; . . . to establish the reliability of the testing procedure employed as approved by the authorities in the field; and . . . [t]he validity of the tests made on the subject,"[61] which pertain to the reliability of the evidence.

The court's decision failed to mention *Chambers,* or to articulate any due process reasoning. The New Mexico Court of Appeals did consider *Chambers,* however, in its *Dorsey* opinion.[62] The court summarized the *Chambers'* treatment of the fundamental right to present witnesses and considered the appropriate conditions for admissibility on due process grounds. In their opinion, "The United States Supreme Court held that the statements were made under circumstances of considerable reliability and were critical to Chambers' defense."[63] Phrasing the issue whether "the two requirements of *Chambers* . . . exist in this case," the court accepted the "unchallenged findings of the trial court" on reliability.[64] The trial court excluded polygraph testimony because of *Lucero's* first two requirements but found its "reliability" portion satisfied by defense substantiation of their polygraph results offer.

Turning to the criticality issue the Court of Appeals noted that the prosecutor "did an excellent job of attacking defendant's credibility,"[65] and that polygraph evidence corroborating the accused's testimony "was crucial because the questions and answers go both to defendant's intent and to the question of provocation, and thus, under the instructions, to whether defendant committed murder in the second degree or voluntary manslaughter."[66] Thus, the court found that "[t]he requirements of *Chambers* . . . were met."[67] Therefore, they effectively suspended *Lucero's* first two evidentiary rules because "under the circumstances of this case, the due process requirement in *Chambers v. Mississippi* . . . applies."[68] Presumably the Supreme Court of New Mexico incorporated that reasoning into its terse acknowledgement of Dorsey's due process rights.

The New Mexico approach to admission of polygraph results, as developed in the *Dorsey* opinions, suggests a far more enlightened

[61] 88 N.M. at 185, 539 P.2d at 205.
[62] State v. Dorsey, 87 N.M. 323, 532 P.2d 912 (Ct. App. 1975).
[63] *Id.* at 325, 532 P.2d at 914.
[64] *Id.*
[65] *Id.* at 326, 532 P.2d at 915.
[66] *Id.*
[67] *Id.*
[68] *Id.*

method of analyzing polygraph reliability, on a case-by-case basis, than the blanket exclusionary rule utilized in many jurisdictions. The *Dorsey* approach provides the trial court with a viable means of satisfying *Chambers'* implicit requirement of a determination of trustworthiness. If the requisite reliability is found the court then considers whether the facts satisfy the criticality requirement. If both reliability and criticality factors are sufficient to raise a due process issue, the court should proceed to analyze the importance of the state's interest in its exclusionary rule.

The lower court opinion fails to undertake such a balancing of the defendant's rights versus the state justification for exclusion. The Supreme Court, however, merely abrogated its own exclusionary rule. Dual interrelated rationales for rejecting *Lucero's* requirements may be discerned through careful scrutiny of the opinion. First, the court hinted that exclusion absent stipulation or lack of prosecutorial objection was unreasonable because it denied the fact-finding process useful information, thereby inhibiting the "growth and development of the law of evidence."[69] This attitude reflects *Chambers'* concept of an evolving truthgathering process. Second, the *Dorsey* court may have perceived the anomalous position of a court which accepts evidence when both sides stipulate, or when the prosecution fails to object, but rejects the same evidence when offered by the criminal defendant absent the prosecution's waiver. Such a rule might well fail to withstand a *Chambers* scrutiny for legitimacy, since it arbitrarily rejects testimony considered sufficiently reliable to admit for the same purpose, if the state waives its objections.

EXPANDING *Chambers*

While the New Mexico approach reaches a proper result, the *Dorsey* opinions do not deal with the polygraph opponents' arguments regarding its lack of reliability or other dangers inherent in its use as evidence. The remainder of this note will dispose of those criticisms and concatenate the ratiocination of *Chambers* and its progeny with the offer of lie detector results by the criminal defendant.

[69] 88 N.M. 184, 185, 539 P.2d 204, 205 (1975). See note 59 *supra*.

The Right to Present Witnesses

An argument for admission of polygraph results on due process grounds necessarily calls for an expansive reading of *Chambers*. The advocate must first overcome Justice Powell's caveat that the decision need not rest solely on lack of cross-examination opportunity, since it was the combination of that error with the exclusion of critical testimony that mandated overruling the Mississippi Supreme Court.[70] The Court did, however, characterize the right to present witnesses as fundamental and crucial to a defendant's due process.[71] *Welcome* subsequently found that application of the voucher rule violated a defendant's due process rights even though that evidentiary ruling was not coupled with another constitutional abrogation. In *Benveniste* the Ninth Circuit extended *Chambers* to apply where only the witness presentation right was involved, without mentioning the narrowness of Justice Powell's holding.

Other federal courts, while rejecting evidence after lack of trustworthiness determinations, have indicated in dicta that the right to present witnesses is sufficient to invoke a defendant's due process right to a reasoned review of the offered evidence's reliability and criticality.[72] *Hughes v. Matthews,*[73] a Seventh Circuit opinion, "recognized the due process right of the defendant to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence,"[74] where a state court had rejected psychiatric testimony regarding the defendant's lack of specific intent to commit murder. The *Hughes* court found a violation of the defendant's right to present evidence enough, by itself, to affirm a writ of habeas corpus issued by the federal district court.[75] In *Johnson v. Brewer,*[76] the Eighth Circuit found that the state's failure to permit the defense to impeach the government informant by introducing evidence of his "framing" a defendant in a previous case, similarly violated the defendant's due process rights by itself.[77]

Thus, an expansive reading of *Chambers* has been accepted by several federal courts. Exclusion of polygraph results based on a necessity for cumulative evidentiary deprivations should, therefore,

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[70] 410 U.S. 284, 298 (1973); *accord,* Steinmark v. Parratt, 427 F. Supp. 931 (D. Neb. 1977).

[71] 410 U.S. at 294, 302.

[72] *See, e.g.,* United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978); United States v. Oropeza, 564 F.2d 316 (9th Cir. 1977).

[73] 576 F.2d 1250 (7th Cir. 1978), *cert. dismissed,* 99 S. Ct. 43 (1978).

[74] *Id.* at 1259.

[75] *Id.* at 1255. See notes 122-31 & accompanying text *infra.*

[76] 521 F.2d 556 (8th Cir. 1975).

[77] *Id.* at 562.

not take place if that evidence can satisfy *Chambers'* other requirements. Assuming that *Chambers* would find a due process violation based on the exclusion of testimony by a "mechanistic" application of the hearsay rule without more, the question of polygraph admissibility becomes one of reliability and criticality.

Reliability of Polygraph Evidence

The question of polygraph reliability has been the subject of violent disagreement for years.[78] If a criminal defendant offers such evidence which appears to be critical to his defense, a *Chambers* due process analysis requires the trial court to evaluate that offer, and precludes either a "mechanistic" application of the *Frye* principle[79]—which is as out of date as many voucher and hearsay rules—or exclusion based on non-reliability grounds similar to the *Lucero* requirements rejected in *Dorsey*.

Federal and state courts ought to adopt a *Dorsey*-type inquiry regarding admission of polygraph results. This approach is consistent with their balancing of trustworthiness factors when a declaration against penal interest is offered.[80] Due process considerations

[78] *See, e.g.*, Holmes, *The Degree of Objectivity in Chart Interpretation*, ACADEMY LECTURES IN LIE DETECTION 62-70 (Leonard ed. 1958) (75% estimate of reliability); Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L.C. & P.S. 276-81 (1971); Sternbach, Gustafson & Colier, *Don't Trust the Lie Detector*, 40 HARV. BUS. REV. 127 (1962) (70% estimate of reliability) (based upon Ellson, Davis, Saltzman & Burke, *A Report of Research on Detection of Deception*, distributed by the Department of Psychology, Indiana University, 1952). *See also* Burkey, *supra* note 16, at 856; *The Emergence of the Polygraph*, *supra* note 10, at 1124. Reid and Inbau suggest their *known* errors are "less than 1 percent," J. REID & F. INBAU, *supra* note 1, at 304, and include citation to 84 studies of "the validity of the Polygraph technique and the reliability of the interpretation of Polygraph charts." *Id.* at 420-23. They conclude in their own study that in 87.75% of the cases polygraph examiners could accurately detect guilt or innocence "solely from an analysis of Polygraph records." *Id.* at 389, 391-92.

[79] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). See notes 2-5 & accompanying text *supra*.

[80] The analogy to declarations against penal interest extends beyond the similarity of the trustworthiness debate which has surrounded both types of evidence for years. For a discussion of polygraph reliability, see note 78 *supra*. For discussion of the trustworthiness of declarations against *penal* interest see Chambers v. Mississippi, 410 U.S. 284, 299-300 and notes 27-30 & accompanying text *supra*.

Federal courts have begun to devise methods for evaluating the reliability of those declarations. "First, is the statement so contrary to the declarant's interest in avoiding criminal liability that a reasonable person in declarant's position would not have made the statement unless he believed it to be true? Second, do corroborating circumstances clearly indicate the trustworthiness of the statement?" United States v. Oropeza, 564 F.2d 325, 335 (9th Cir. 1977) (relying on United States v. Barrett, 539 F.2d 244 (1st Cir. 1976) and United States v. Bagley, 537 F.2d 162 (5th Cir. 1976)). *Cf.* United States v. DeBetham, 348 F. Supp. 1377, 1384 (S.D. Cal.), *aff'd*, 470 F.2d 1367 (9th Cir. 1972) (a polygraph hearing was appropriate and an

mandate the same approach to lie detector evidence. Jurisdictions that avoid such evaluations are on notice that the lack of such a procedure may require reversal of criminal convictions either because the rules of evidence are unreasonable[81] or are "mechanistically" applied.

There are three available procedures through which polygraph offers may be filtered, before the jury considers that testimony. At a reliability hearing the court may consider the merits of the particular evidence and balance its relevancy against the possibility of prejudicing, misleading, or confusing the jury. Naturally, the prosecution has an opportunity to challenge the offer at these stages and may, if the results are admitted, also debate their worth before the jury. Ultimately, the judge has occasion to shape the jury's use of the evidence by instructions.

Since objections based on the lack of trustworthiness are so prevalent, an examination of these safeguards of reliability is appropriate. Relevancy challenges to evidence must also be dealt with whenever a defendant's right to introduce corroborative polygraph evidence is in question. Discussion of these issues highlights the unreasonableness of a blanket exclusionary rule when less intrusive alternatives are present and exposes the anomaly of allowing admission of polygraph evidence only by stipulation.

The Reliability Foundation

There is ample precedent for a fair hearing on the validity of polygraph results. The New Mexico approach allows the judge to evaluate:

(1) the qualifications of the polygraph expert,
(2) the reliability of the particular testing procedure utilized, and
(3) the validity of the tests in the particular case.[82]

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arbitrary exclusion was not):

> The court concludes only that a polygraph examiner, having satisfied a particular court that he is qualified as an expert in his field, should be permitted to present foundational evidence to that court demonstrative of the polygraph's substantial reliability and acceptance, in an effort to establish its probative value. . . . The alternative is to continue the unexamined policy of exclusion of such evidence . . . .

Quoted in Axelrod, *supra* note 1, at 140 n.116. *See also* United States v. Oliver, 525 F.2d 731, 736-37 (8th Cir. 1975), *cert. denied,* 424 U.S. 973 (1976) (setting reliability requirements for stipulated evidence).

[81] See notes 140-49 & accompanying text *infra.*

[82] State v. Dorsey, 88 N.M. 184, 185, 539 P.2d 204, 205 (1975).

Many jurisdictions admit the evidence where stipulation is obtained before the test and the trial judge is satisfied as to reliability after consideration of issues similar to the New Mexico factors.[83] The prosecution may challenge the offer on any or all of these grounds at this preliminary stage,[84] and the literature on polygraph admissibility will provide plentiful material for the state's attack on the trustworthiness of polygraph results.[85] Usually the admission of evidence has been within the trial judge's discretion even where stipulation has occurred.[86] This rule corresponds with the federal court standard of review of the trial court's exclusion of non-stipulated polygraph offers[87] and with the appellate standard for declarations against penal interest trustworthiness determinations.[88] Due process requires no more than this reasoned inquiry if there is no abuse of discretion.[89]

Reliability Challenges at Trial

In the stipulation cases it is clear that, where the trial judge has decided to admit the polygraph results, the prosecution must have the right to cross-examine the polygraph examiner as to his qualifications, the testing conditions, the polygraph technique and its inherent reliability and "any other matter deemed pertinent to the inquiry" at the discretion of the trial judge.[90] This opportunity protects the fact-finding process and the state's interest in efficacious and fair prosecution of the accused. Naturally, this procedure would be retained if non-stipulated evidence were admitted on the defendant's behalf.

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[83] Annot., 53 A.L.R.3d 1005, 1008 (1973 & Supp. 1979).

[84] *Id.*

[85] For a polygraph evidence opponent's wealth of arguments at the offer and cross-examination stages see Axelrod, *supra* note 1, at 146-53.

[86] Annot., 53 A.L.R.3d 1005, 1008 (1973 & Supp. 1979).

[87] *See, e.g.*, United States v. Sweet, 548 F.2d 198, 203 (7th Cir.), *cert. denied*, 430 U.S. 969 (1977); United States v. Flores, 540 F.2d 432, 436 (9th Cir. 1976); United States v. Mayes, 512 F.2d 637, 648 n.6 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); United States v. Lanza, 356 F. Supp. 27, 30 (M.D. Fla. 1973).

[88] "Determination of admissibility under Rule 804(b)(3) is left to trial court discretion." United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977) (citing United States v. Guillette, 547 F.2d 743 (2d Cir. 1976)).

[89] *See, e.g.*, United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978).

[90] Annot., 53 A.L.R.3d 1005, 1008 (1973 & Supp. 1979). *But see* State v. Seebold, 111 Ariz. 423, 531 P.2d 1130 (1975) (refusing to allow impeachment of an examiner in a *stipulation* case).

Jury Instructions

The stipulation cases also require the trial judge to instruct the jury concerning the proper use of the admitted testimony.[91] Polygraph results do not tend to prove or disprove elements of the crime in the normal situation, and the instruction should contain this warning. The evidence should be presented only to indicate the defendant's veracity as to his subjective belief about the matter for which admission is sought. The trial court's ability to focus the evidence for the jury at this stage protects the judicial process and would do so whether or not there were a prior stipulation.

Relevancy

Irrelevant evidence is axiomatically inadmissible.[92] Polygraph evidence is relevant as expert testimony corroborating a defendant's denial of guilt or explanation of mitigating circumstances.[93] When it has been screened for reliability, it is useful information for the fact-finder in assessing the defendant's credibility.[94] Where lie detector results conclusively[95] demonstrate that the accused subjectively believes his testimony,[96] this relatively reliable evidence renders his testimonial truthfulness more likely and should be admitted as corroborating evidence.[97]

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[91] *Id.*

[92] FED. R. EVID. 402; C. MCCORMICK, *supra* note 1, § 185.

[93] Both Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978) and State v. Dorsey, 88 N.M. 184, 539 P.2d 204 (1975) represent examples of courts upholding the due process right of a defendant to present evidence relevant to the gravity of the crime rather than to the basic issue of guilt or innocence.

[94] On reliability inquiries see notes 78-90 & accompanying text *supra.* On usefulness see FED. R. EVID. 702, note 116 *infra.*

[95] See State v. Bell, 90 N.M. 134, 138-39, 560 P.2d 925, 929-30 (1977) (post-*Dorsey* New Mexico case making clear that even if the proper foundation is laid the polygraph results will not be admitted if inconclusive as to the defendant's belief in his innocence since such evidence is irrelevant); N.M.R. EVID. 401, 402.

The prosecutor may challenge the defense polygraph tests on relevancy grounds at the time of the offer and may present expert testimony, evaluating the standardized test graphs as to conclusiveness, to demonstrate irrelevancy. For a study evaluating the analysis of polygraph results, from the graphs themselves, by qualified examiners see J. REID & F. INBAU, *supra* note 1, 389 app. A-1. If the reliability factors are satisfied, another expert, sponsored by the prosecution, can examine the particular test for conclusiveness or, as in *State v. Bell,* the defense expert may testify that the results were inconclusive. 90 N.M. at 138, 560 P.2d at 929.

[96] See note 16 *supra.*

[97] C. MCCORMICK, *supra* note 1, § 184 on the relevancy standard, "[T]he most acceptable test of relevancy is the question, does the evidence offered render the desired inference *more probable than it would be without the evidence?*" It is the position of this note that corrobora-

Commentators have suggested, however, that the crucial issue in the admissibility of polygraph results debate is the balancing required by Rule 403 of the Federal Rules of Evidence, which mandates weighing the probative value of relevant evidence *vis-à-vis* the possibilities of prejudice, confusion, or waste of time.[98] Most federal courts, basing their rejection on one or more of the Rule 403 factors, have struck a balance against admission.[99] So long as the trial court's relevancy inquiry is as reasoned as the reliability determination, it might seem that there is no due process mandate to reverse that ruling. To the extent, however, that the counterweights indicating exclusion are justifications for overriding the defendant's right to present witnesses, those governmental interests must withstand close scrutiny.[100]

The danger most frequently stressed by polygraph evidence opponents is the risk of jury overvaluation or confusion in valuation of polygraph results, which threatens the viability of the fact-finding process.[101] Those commentators have suggested that testimonial debate over the technique's accuracy is itself destructive of the jury's reasoned consideration.[102] Such a justification for exclusion is undermined by the trial judge's ability to weed out irrelevant evidence[103] and his duty to clarify the use of polygraph evidence at

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tive polygraph results enhance the defendant's credibility. For an incisive discussion of relevancy and reliability of polygraph evidence see Romero, *supra* note 13, at 200-06.

[98] FED. R. EVID. 403.

> Although relevant, evidence may be excluded if its probative value is substantially outweighted [*sic*] 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.

See C. MCCORMICK, *supra* note 1, § 207; *See also* Coppolino v. State, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968), *cert. denied*, 399 U.S. 927 (1970).

[99] The court in United States v. Alexander, 526 F.2d 161 (8th Cir. 1975), for example, coupled its "doubts about the reliability of polygraphy" with "countervailing policy considerations which militate against the admissibility of unstipulated polygraph evidence at trial." *Id.* at 167-68. This implicit factoring was accomplished without mentioning Rule 403 but the point was unquestionably a fear of jury overvaluation of the results. *Id.* at 167-70. *See also* United States v. Flores, 540 F.2d 432, 436 (9th Cir. 1976) (confusion of issues); United States v. Urquidez, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973) (polygraph debate would consume too much time). For a discussion of the discretionary standard employed by federal appellate courts reviewing the trial court's polygraph decision and its implied relationship to Rule 403 see Comment, *supra* note 1, at 80 n.47, 83-84 n.66.

[100] See notes 140-49 & accompanying text *infra*.

[101] *See, e.g.*, C. MCCORMICK, *supra* note 1, § 207, at n.12: "Judicial reluctance radically to revamp the legal fact-finding process, especially by entrusting key participation to persons not under effective judicial control, is no doubt also a factor."

[102] *See, e.g.*, United States v. Flores, 540 F.2d 432, 437 (9th Cir. 1976); Abbell, *supra* note 5, at 50-51.

[103] FED. R. EVID. 401, 402, 403.

instruction.[104] When coupled with the threshold requirement of a reliability foundation, this judicial capacity to insulate the jury suggests that exclusion may be an unreasonable alternative for due process purposes.

The trial court's consideration should be extended to include the nature of the burden imposed on the proponent of polygraph evidence. The accused need only raise a reasonable doubt of his guilt.[105] Once reliability has been established there is no reason to reject polygraph results because the jury might find them conclusive. Scientific evidence which is variously estimated to be between sixty and one hundred percent reliable[106] ought to be sufficient to corroborate a defendant's testimony. The defendant's credibility is often crucial to his case. Where the results offered are found sufficiently trustworthy at the foundation stage, it hardly seems reasonable to argue that the combination of an accused's testimony and supporting lie detector results cannot legitimately raise that reasonable doubt.[107] For example, in a case where the jury is confronted with a choice between accepting the testimony of the defendant or the main prosecution witness, it seems unreasonable to exclude evidence which has been deemed reliable and relevant because the jurors might overvalue it. If one accepts the reliability figures of the most critical studies, the results which the trial court accepted as relevant and reliable must reach that minimal level. Therefore, the overvaluation argument rests on the proposition that jury acceptance of the results of a scientific technique that is accurate sixty percent of the time for the purpose of raising a reasonable doubt is impermissible because the jury might view these scientific results as conclusive. A rejection of reliable and critical evidence on those grounds ignores the ability of the prosecutor and judge to point out the relative fallibility of the polygraph technique to the jury, underestimates the good sense of the jury,[108] and cannot pass muster as a

[104] Annot., 53 A.L.R.3d 1005, 1008 (1973 & Supp. 1979).

[105] *In re* Winship, 397 U.S. 358 (1970); *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8 (1972).

[106] Note, *supra* note 1, at 116 nn.32 & 33.

[107] *See* W. LAFAVE & A. SCOTT, *supra* note 105, § 8 (discussing the meaning of "beyond a reasonable doubt"). Perhaps the best definition of the burden of persuasion that the accused must meet to raise such doubt is that of Chief Justice Shaw: "It is that state of the case, which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850).

[108] See C. MCCORMICK, *supra* note 1, § 208 for the suggestion that the stipulation cases may provide insight into the fact-finder's ability to evaluate polygraph results. *But see* text ac-

valid state justification for exclusion.

This conclusion is reinforced by the Advisory Committee's Note following Rule 403, which advises: "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction."[109] Their opinion suggests that the trial judge seeking to protect the defendant's due process rights ought to pay attention to reasonable alternatives to exclusion. The Note goes on to suggest the need to consider "[t]he availability of other means of proof [which] may also be an appropriate factor."[110] This implied criticality factor, which was part of the Advisory Committee's report available to the Congress prior to enactment,[111] certainly does not suggest a federal intent to disregard the defendant's needs and renders a Rule 403 exclusion on overvaluation grounds more unreasonable as a judicial justification.[112]

The other primary Rule 403 objection to the admission of relevant polygraph evidence is the significant expenditure of time required to conduct a foundation hearing and to present the issue to the jury.[113] Given the inherent ability of the trial judge to expedite these matters, and the recurring imposition of time-consuming procedures on trial courts to protect a defendant's due process rights,[114] it is difficult to expect such a consideration to rise to the level of a "legitimate interest," to which a defendant's rights must "bow to accommodate."[115] Wherever the law of evidence has developed

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companying notes 161-64 *infra* which condemns postponing utilization of useful evidence at the expense of the presumptively innocent defendant.

[109] FED. R. EVID. 403, Advisory Committee Note, 56 F.R.D. 183, 219 (1973).

[110] *Id.*

[111] *Id. See also Preface* to FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (1975).

[112] The Advisory Committee Note, *supra* note 109, stated that " 'unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 56 F.R.D. at 219. Whether classified under the label 'unfair prejudice' or 'misleading the jury' the danger of jury overvaluation is not a threat to logic since a juror certainly can rationally balance reliability statistics against the imprecise reasonable doubt standard. Thus, the spectre of overvaluation must be based on the hypothetical juror's emotive biases, not his cognitive abilities.

[113] *See, e.g.*, United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975); United States v. Urquidez, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973).

[114] *See, e.g.*, Lego v. Twomey, 404 U.S. 553 (1972) (discussing the due process requirements for a hearing on the "voluntariness" of a confession); Jackson v. Denno, 378 U.S. 368 (1964); C. MCCORMICK, *supra* note 1, § 159 (suggesting that such a hearing should be before a judge other than the trial judge) (citing Owens v. Cavell, 254 F. Supp. 154 (M.D. Pa. 1966)); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1 (1958) (discussing the requirement of prompt presentation of a defendant before a magistrate).

[115] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

methods to evaluate scientific evidence it has been necessary to invest judicial time,[116] with the benefits reaped accruing to the fact-finding process.[117] The enhancement of reasoned decision is no less likely to occur from introduction of reliable polygraph evidence than from other scientific evidence. There is always the possibility that the defense showing at the foundation will convince the prosecution to withdraw the charges, as often occurs when there is pre-trial testing or stipulation.[118] This would save the time and expense of a jury trial and partially offset any unusual expenditures required in the case that goes to jury. Therefore, the overall waste of time in a jurisdiction might not warrant exclusion absent due process considerations;[119] that factor weighs against the reasonableness of the government's justification in a due process evaluation.

Hughes v. Matthews and Exclusionary Double Standards

A basic anamoly exists in those jurisdictions that accept polygraph results upon stipulation but reject the same evidence in any other situation due to unreliability or irrelevancy, for, "if lie detector results are unreliable, this defect is not cured by a stipulation."[120] Similarly, the jury is no more or less prejudiced or misled by stipulated evidence than by nonstipulated. The state justifica-

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[116] *See* FED. R. EVID. 702, 703 (directing the trial judge regarding his ruling after offer of expert testimony). *See also* Romero, *supra* note 13, at 197.

> Although the procedure mandated by Dorsey may seem wasteful of time and effort, this result is not peculiar to scientific evidence. The admissibility of evidence is frequently conditioned on a proper foundation. Moreover, this procedure permits the proponent to introduce scientific evidence while at the same time it allows the opponent to contest its reliability. It is only when there is no longer any real controversy over the reliability and validity of the scientific technique that judicial notice makes this procedure unnecessary . . . .

Id. at 212.

[117] FED. R. EVID. 702 contemplates facilitating the ascertainment of truth, "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 by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." For an admissibility argument for polygraph offers based on their "usefulness" see Axelrod, *supra* note 1, at 154.

[118] *See* J. REID & F. INBAU, *supra* note 1, at 332-33 (citing several cases holding a prosecutor to his promise of dismissal of charges if the defendant "passes" the lie detector test); Axelrod, *supra* note 1, at 155.

[119] While *Chambers* requires a criticality showing, an offer based on a favorable Rule 403 balance does not. Criticality eludes definition, used in a due process sense, when the offered evidence is not extrinsic but goes to credibility. Almost any case might have turned on the failure to admit. Thus, this due process, Rule 403 distinction may be meaningless. Criticality may also be a Rule 403 factor, see notes 110-11 & accompanying text *supra*.

[120] Annot., 53 A.L.R.3d 1005, 1008 (1973 & Supp. 1979).

tion for exclusion on unreliability or irrelevancy grounds in non-stipulated cases may therefore be viewed as unreasonable.[121]

Perhaps a contested *Dorsey*-type hearing requires more time than is necessary at a stipulation foundation inquiry; that differential hardly seems sufficient to mandate a Rule 403 exclusion. This is especially true since the trial judge would be capable of making a more informed decision if the relative merits of the polygraph results in the particular case were presented to him through the adversary process. It is also doubtful that the exclusion of relevant polygraph evidence based upon the jurisdiction's need to conserve time could pass constitutional muster as a valid justification for restricting the defendant's right to present witnesses.

Hughes v. Matthews[122] is instructive as a reasoned approach to the exclusion of evidence as irrelevant and incompetent in violation of a criminal defendant's due process rights. In *Hughes* the defense attempted to introduce psychiatric evidence which would demonstrate the defendant's lack of the specific intent required for a first-degree murder conviction in Wisconsin.[123] The circuit court found that psychiatric evidence was relevant under state law as to "competency to stand trial" and "on the issue of intent to kill."[124] Therefore, the court concluded "that in Wisconsin psychiatric testimony is relevant evidence on issues regarding a defendant's mental state including the question of whether the defendant had the capacity to form specific as opposed to general intent."[125] Turning to competency, the Seventh Circuit noted the use of psychiatric testimony in other areas of the criminal proceeding and its general scientific acceptance, and found "that psychiatric evidence is generally considered competent evidence in Wisconsin."[126] Thus, the court found a violation of the defendant's right to present evidence because " 'the state has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use

[121] See note 150 & accompanying text *infra*. *Compare* United States v. Alexander, 526 F.2d 161 (8th Cir. 1975) which adamantly opposes admission of unstipulated polygraph results *with* United States v. Oliver, 525 F.2d 731 (8th Cir. 1975) which admits stipulated evidence. In effect, this arbitrary distinction allows the U.S. attorney to make a crucial decision regarding the presentation of the defense. *See also* Comment, *supra* note 1, at 89-90.

[122] 576 F.2d 1250 (7th Cir. 1978), *cert. dismissed*, 99 S. Ct. 43 (1978).

[123] *Id.* at 1252.

[124] *Id.* at 1257.

[125] *Id.*

[126] *Id.* at 1258. Interestingly, the court cited Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) for the general acceptance proposition. That standard has long transcended its utilization in polygraphy cases. *See, e.g.*, Romero, *supra* note 13, at 189; notes 2-5 & accompanying text *supra*.

by the defendant.' "[127]

The court acknowledged that "the right of a defendant to present relevant and competent evidence is not absolute and may 'bow to accommodate other legitimate interests in the criminal trial process.' "[128] They interpreted *Chambers* to require that "our third step is to determine whether Wisconsin's justifications for excluding psychiatric testimony on the issue of specific intent withstand close scrutiny."[129] The Seventh Circuit considered those justifications insufficiently compelling but emphasized the narrowness of its holding: "Nor have we attempted to further 'constitutionalize' the law of evidence by constructing a constitutional right to introduce psychiatric testimony."[130] The Seventh Circuit merely "recognized the due process right to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence."[131]

Viewed from the perspective provided by *Hughes,* it seems clear that those jurisdictions which admit stipulated polygraph results for limited purposes should no longer be permitted to exclude the defendant's offer for that same purpose as intrinsically irrelevant. Neither should they reject polygrapher testimony as inherently unreliable where they arbitrarily allow a reliability finding in stipulated cases unless they can justify the dual treatment.[132]

The Criticality Requirement

According to *Chambers,* and the subsequent federal cases interpreting that decision, the trial court, in addition to determining reliability, must look to the particular facts of the case presented to discern the impact of the exclusionary rule on the efficacious presentation of the defense. It is difficult to predict the fact situations that might arise wherein that determination should be made. *Dorsey* represents a recurring situation in which the defense might be entirely dependent on the polygraph results to support the defen-

[127] 576 F.2d at 1256 (quoting Washington v. Texas, 388 U.S. 14, 25 (1967) (Harlan, J., concurring)).

[128] *Id.* at 1258 (quoting Chambers v. Mississippi, 410 U.S. 284, 295).

[129] *Id.*

[130] *Id.* at 1259.

[131] *Id.* In *Hughes* the offer was the *only* evidence the defense sought to present. *Id.* at 1253. Obviously *Chambers'* criticality requirement was satisfied although the court failed to mention it. The polygraph results offered by a defendant might be the *only* evidence available in certain circumstances to corroborate his testimony. See notes 133-39 & accompanying text *infra.*

[132] Whether that justification need be reasonable is discussed in the text accompanying notes 140-49 *infra.*

dant's credibility on crucial issues relating to mitigating factors in sentencing. Had the trial court's exclusion of polygraph results been upheld in that case the defendant would have been precluded from offering relevant evidence corroborating his testimony on the questions of intent and provocation. That evidence might have been dispositive in reducing his conviction from second degree murder to voluntary manslaughter; thus, exclusion could mean the difference between a ten and a fifty year maximum sentence.[133] To envision an argument questioning the criticality of the offer is difficult when the stakes are so high.

As in *Dorsey,* credibility is always at issue where witnesses testify before the court. The defendant's credibility is often critical to the defense and may be directly supported by relevant, reliable polygraph results. Two recent federal cases illustrate the crucial need for determining credibility in a particularly troubling genre of cases.

In *Benveniste,*[134] the court decided that declarations against the penal interest of a third party could be used by the defendant to sustain his version of the facts and impeach the informant's. Interestingly, the *Benveniste* decision rejected the defense claim that the trial court erred in excluding polygraph evidence because there was no abuse of discretion. Since the review of the trial court's consideration of offered declarations against penal interest applies a similar standard, the reader might assume that the reliability evaluation of the two offers by the trial court was adjudged adequate by the Ninth Circuit in the case of the polygraphy offer and inadequate as to the hearsay exception. It follows that the *Benveniste* court considering the same facts, had they been presented with a record indicating a mechanistic exclusion of the polygraph evidence or an arbitrary rejection after a clear reliability showing, would have found an abuse of the trial court's discretion and upheld the defendant's due process right to present such evidence, unless there was a valid governmental justification for such an evidentiary ruling.[135]

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[133] N.M. STAT. ANN. §§ 40A-2-1, -3, -29-3B, -3C (2d Repl. Vol. 1972).

[134] 564 F.2d 335 (1978). See notes 49-56 & accompanying text *supra.*

[135] *Chambers* upheld the defendant's right to present declarations against penal interest, criticizing Mississippi's "materialistic limitation on the declaration-against-interest," 410 U.S. at 299, despite the dominant distrust of that evidence developed through the experiential logic of the common law. *See* Donnely v. United States, 228 U.S. 243 (1931) (Holmes, J., dissenting); C. MCCORMICK, *supra* note 1, § 278; J. WIGMORE, EVIDENCE § 1477 (Chadbourn rev. ed. 1974) ("any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent"). Rule 804(b)(3), *supra* note 55, incorporates a *Chambers* type balancing but establishes no precise reliability level for admission. If a court considers polygraph evidence reliability to fall between 60 and 100% then that level very well might "clearly indicate" trustworthiness.

Johnson v. Brewer[136] provides another example of government reliance on the incriminatory testimony of a hired informant. The court discussed the potential for abuse and bias in any such situation at length, and held that the defendant had a due process right to present evidence of a prosecutor's admission, in a prior case, that the same informant who was the chief witness against Johnson had lied. If the court was willing to suspend the state rule of evidence excluding testimony on the informant's bias,[137] and to ignore the example of the recently enacted Federal Rules of Evidence, 608(b),[138] which would also exclude, it would be difficult to understand or accept the exclusion of polygraph evidence in a similar case.

Where the informant is the only prosecution witness, it is imperative that the defense establish the defendant's credibility and attack the informant's. Corroboration of the accused through polygraphy testimony does both and should be admissible for due process reasons if the offer is deemed reliable and the government fails to articulate a legitimate interest, served by its evidentiary rule, to override the defendant's constitutionally protected rights. Although the informer cases are particularly subject to distrust of prosecution witnesses, a due process right to present polygraphy evidence to buttress the defendant's credibility should be available whenever the result may hinge on the fact-finder's acceptance of a defendant's testimony, and validity of the particular test has been shown. Of course, admission may depend on the legitimacy of the state's interest in exclusion.

The State Justification for Exclusion

Chambers offers little guidance for determining the extent of the government's burden to justify its evidentiary rules when a defendant's due process rights are jeopardized. Justice Powell indicated in dicta, "that the competing [state] interest [ought to] be closely examined" and declared that only a legitimate state interest could overbalance the defendant's due process rights.[139] The Court also admonished, however, that the accused must comply with evidentiary rules that are "designed to assure both fairness and reliabil-

[136] 521 F.2d 556 (8th Cir. 1975). For a discussion of the apparent conflict between *Johnson* and United States v. Alexander, 526 F.2d 161 (8th Cir. 1975) see note 162 *infra*.

[137] *Id.* at 564 (Van Oosterhourt, J., dissenting).

[138] *Id.* See FED. R. EVID. 608(b).

[139] 410 U.S. at 295. It was unnecessary for the Court to weigh a state justification, however, since Mississippi offered no defense of its voucher and hearsay rules. *Id.* at 297.

ity."[140] The state may be required to justify its rule, therefore, by a showing that it is so designed. Although the opinion did not specifically articulate a principle that the state's implementation of an exclusionary rule be reasonable, the Court's criticism of the voucher rule implied that its fault lay in the lack of a rational justification for it as an aid to facilitating fairness and reliability in the fact-finding process. Justice Powell also criticized the failure of the trial judge to consider the circumstances under which the declarations against penal interest were offered, since they fell "well within the basic rationale of the [hearsay] exception."[141] Thus, *Chambers* could be read not only as invalidating unreasonable rules, such as the voucher rule, but as precluding unreasonable refusals to apply rational rules designed to enhance the truth-gathering process, as exemplified by the declaration against penal interest exception. This two-tier rationality requirement may be illustrated by subsequent cases that relied on *Chambers*.

Hughes suggested that Wisconsin's reasons would be upheld unless arbitrary, but seemed to scrutinize the governmental reasoning far more stringently than an arbitrariness test would imply. The Seventh Circuit questioned Wisconsin's "distrust of psychiatric evidence [and prohibition of] admissibility on the issue of intent."[142] The court summarized the rationale of the exclusionary principle as applied in Wisconsin, as a disbelief "in the ability of psychiatry to define the degree of mental abnormality less than insanity."[143] The Seventh Circuit criticized "the validity of a system which views psychiatric testimony as trustworthy evidence as to whether a person is mentally capable of appreciating the wrongfulness of his conduct but untrustworthy to express an opinion regarding a person's mental capacity to form specific intent to kill."[144] They interpreted the Wisconsin decision "as stating that the true reason for excluding psychiatric evidence on the issue of intent . . . is the fear that persons who are legally sane will escape punishment,"[145] and opined that "[t]his is more of a justification for excluding competent evidence than a reason why the evidence is incompetent."[146] The court

[140] *Id.* at 302.

[141] *Id.*

[142] Hughes v. Matthews, 576 F.2d 1250, 1257 (7th Cir. 1978), *cert. dismissed*, 99 S. Ct. 43 (1978). The Seventh Circuit may have applied the arbitrariness standard when discussing relevance, but appeared to treat Wisconsin's legislative and judicial distrust of "psychiatric evidence on the intent issue" as unreasonable or illogical. *Id.* at 1257-58 & n.19.

[143] *Id.* at 1257.

[144] *Id.*

[145] *Id.* at 1258.

[146] *Id.*

thus rejected the state's articulated rationale and the "true reason" for the exclusionary canon in a manner reminiscent of *Chambers'* criticism of the voucher rule. Correlatively, *Dorsey* specifically overruled New Mexico's judicially-formulated rule excluding polygraph evidence on grounds suggesting the unreasonableness of the rule as balanced against the legislative intent to enhance the "growth and development of the law of evidence" in New Mexico.[147] These approaches reflect the *Chambers* scrutiny of the underlying rule for rationality.

Johnson, and other federal decisions that have articulated a reasonableness standard,[148] have found that the application of exclusionary rules in fact situations that clearly established the reliability of the offers, subverted the truthgathering process and were so unreasonable that the state had no legitimate interest in exclusion. Their approach follows *Chambers'* implicit review of the unreasonable application of a rule.

The court applying this two-tier evaluation should look to the reasonableness of the rule first, for obviously, a trial judge cannot apply an unreasonable rule rationally. Then the reviewing court should look to see whether the trial judge applied the rule reasonably or abused his discretion.

Is the Rule Reasonable?

This note takes the position that a reasonable evidentiary rule will withstand due process scrutiny, but that an exclusionary canon which ignores the guarantees of reliability in a given fact situation should be deemed unreasonable. If a defendant's right to a fundamentally fair trial is critically affected the rule should be suspended.

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[147] 88 N.M. 184, 185, 539 P.2d 204, 205. See note 59 & accompanying text *supra.*

[148] *See* Johnson v. Brewer, 521 F.2d 556, 563 (8th Cir. 1975) where the court held:

> In holding that in a case like this where a government prosecutor confesses in open court that the key prosecution witness uses an identical *modus operandi* to become the key government witness in another case, where the informant is a career informant dependent on a continuing relationship with the government, where several different forms of bias may exist and may exist simultaneously, the State has an obligation to permit an inquiry into the initial deliberate lie, we do not fear that we strike even a modest blow against *reasonable state rules of evidence.*

Id. (emphasis added).

The facts in *Johnson v. Brewer* were obviously conducive to overturning the state court's exclusion of evidence. The point is that the particular *situation* of the defendant precluded exclusion because the state's rule was applied unreasonably. *See also* Steinmark v. Parratt, 427 F. Supp. 931, 940 (D. Neb. 1977) noting that "In so holding, this court, as in *Johnson,* has no fear and no intention that it strikes even a modest blow against *reasonable state rules of evidence.*" (emphasis added).

The following examples of government justifications for rejecting polygraph evidence illustrate the application of that principle.

1. Protecting the Judicial Process from Irrelevant, Unreliable Evidence

Much has been written concerning the need to protect the jury from misleading polygraph evidence. Conversely, many commentators have stressed the utility of the polygraph results in aiding the fact-finder.[149] If a jurisdiction admits stipulated polygraph evidence it seems to have accepted the latter premise. It is an arbitrary and clearly unreasonable exercise of their laws of evidence to reject the same offer as unreliable or irrelevant when there is no stipulation and a court applying the due process principle should so hold.

The jurisdiction which admits upon stipulation may justify its exclusion of a non-stipulated offer on the ground that there is more likelihood of expert shopping by the defendant or a greater likelihood of erroneous results of unqualified polygraphers reaching the jury if there has been no prior stipulation. Since the function of the reliability hearing is to filter out generally suspect offers in the stipulation cases, however, is unreasonable for the jurisdiction to refuse to perform the same function where these specific dangers might be evaluated.

Chambers teaches that a jurisdiction may not simply exclude all evidence of one type because some of it is unreliable, unless there is a legitimate state interest furthered by such a rule. Therefore, those jurisdictions which disallow polygraph evidence regardless of stipulation cannot mechanistically apply outmoded case law to an individual offer, without regard to its trustworthiness foundation, absent a valid justification. Since reliability testing is so prevalent and a fair hearing on the trustworthiness issue adequately protects the defendant, it would be unreasonable to deny the defendant's right to present witnesses without some review of the relative validity of the offered testimony.

Congress and the state legislatures might enact such rules codifying the exclusionary principle, either at the instance of the judiciary or of their own accord. A federal court should defer to such a legislative determination if it is reasonable and considers the question of polygraph evidence generically, while rejecting its reliability or rele-

[149] *See generally* J. REID & F. INBAU, *supra* note 1; Tarlow, *Admissibility of Polygraph Evidence*, 26 HASTINGS L.J. 917 (1975); Note, *supra* note 10, at 1138; Note, *supra* note 1, at 126.

vancy, since the obvious purpose of that decision would be that forum's interest in its judicial system. If, however, the adoption of such an exclusionary rule were clearly arbitrary or unreasonable, perhaps relying on outmoded decisional law, the defendant's rights might prevail as they did in *Chambers*. There appears to be no specific statute in any American jurisdiction which expressly forbids the introduction of polygraph evidence nor one that governs its admission.[150]

The analogous area of rape shield legislation has elicited some critical commentary suggesting that the legislative decision[151] rejecting prior sexual history or prior reputation testimony concerning the victim is suspect under *Chambers'* due process analysis.[152] Where the legislative rationale for exclusion rests on formulations external to the primary protective considerations surrounding the trial process, such as rape shield laws,[153] it has been argued that the defendant's interest should prevail where lack of opportunity to cross-examine or introduce evidence would substantially lessen his ability to defend. Where the exclusion rests on legislative or judicial concern for the continued viability of the fact-finding system, as the juridical rejection of polygraph results often seems to,[154] a due pro-

[150] J. REID & F. INBAU, *supra* note 1, at 321 & n.47. *See also* Tarlow, *supra* note 150 (commenting on the failure of the California legislature to pass a comprehensive polygraph evidence regulation in 1973 and expressing the hope that the bill will be enacted); Axelrod, *supra* note 1, at 137.

[151] *See* CAL. EVID. CODE § 1103(2) (West Supp. 1979); MICH. COMP. LAWS ANN. § 750.520(j) (Supp. 1979).

[152] *See* Note, 3 HOFSTRA L. REV., *supra* note 20; Wynn, *supra* note 20.

[153] Rape shield laws are generally designed to protect victims who will thereby be encouraged to prosecute their attackers. Wynn, *supra* note 20, at 444; Note, 3 HOFSTRA L. REV., *supra* note 20, at 407. The Michigan courts have consistently rejected a due process attack. *See* People v. Patterson, 79 Mich. App. 393, 262 N.W.2d 835 (1978); People v. Dawsey, 76 Mich. App. 741, 257 N.W.2d 236 (1977); People v. Thompson, 76 Mich. App. 705, 257 N.W.2d 268 (1977). Judge Cavanagh, concurring in *Patterson*, argued that the statute should be suspended in the critical situation if relevancy were shown. He found no basis for the state justification mentioned above that would outweigh the defendant's rights. He viewed the balance to be struck as between probative value and prejudice to the *prosecution* in its statewide effort to encourage rape victims to come forward. 79 Mich. App. at 394-402, 262 N.W.2d at 836-44.

The relevancy factoring of an exclusionary rule may take place either at a legislative or trial court level. See note 151 & accompanying text *supra*. If that determination is not adverse to the probity of the evidence at the legislative level Judge Cavanagh's concurrence suggests slight deference to that policy determination where the accused's constitutional rights are involved. While this note articulates a reasonableness standard when examining the exclusionary rule's protection of the judicial process it does not reach the issue concerning the burden of justification the state must carry to vindicate a policy decision which may infringe on the defendant's rights.

[154] *See, e.g.*, C. MCCORMICK, *supra* note 1, § 208 n.12.

cess scrutiny should be even more severe since there are practical alternatives for protecting that interest.

2. Saving Time and Money

Many courts and commentators fear an inordinate waste of time and money if the courts are compelled to consider the polygraph issue at both the foundation and presentation stages. As mentioned above, this suggestion rings hollow in those jurisdictions where stipulated results are admissible, especially since that evidence is often contested at both stages by the party for whom the results are unfavorable. Even in a jurisdiction which maintains internal consistency by uniformly rejecting lie detector evidence, it seems inappropriate to require a defendant's due process rights, which have gradually evolved to necessitate various costly and time-consuming procedural devices, to bow to the judiciary's money and manpower constraints. Whether its source is judicial or legislative, it seems clear that such a justification cannot, by itself, overcome the defendant's right to a fundamentally fair trial.

3. Lack of Mutuality

Another objection to the introduction of polygraph evidence by the defendant is the lack of concomitant privileges for the prosecution. This problem is avoided in stipulation jurisdictions where both parties must agree to admissibility before the test is conducted. Thus, any jurisdiction might well seek to justify its exclusionary rule by this lack of mutuality.[155]

If the reason for rejection is the potential unreliability of the polygrapher whom the prosecutor does not agree to before the test, then the solution least disruptive of the defendant's rights inheres in the state's ability to attack the validity of the test during the trial. Furthermore, as a practical matter the defense counsel would be likely to seek a reputable examiner, one well-respected by the legal community.[156]

It is clear that the defendant's fifth amendment right against self-incrimination precludes any reciprocal government-compelled polygraph examination.[157] No valid state justification for abridging the

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[155] See Axelrod, *supra* note 1, at 143.

[156] It would be difficult for a prosecutor to question the reliability of a polygrapher whom he had previously used in investigations or stipulations.

[157] *See, e.g.*, Axelrod, *supra* note 1, at 145 ("there appears to be acknowledgement that a defendant could not be forced to take a lie detector test without fifth amendment conse-

due process right to present witnesses could reasonably be fashioned out of the disability of the prosecution to force a lie detector test upon the accused. Wherever the polygraph evidence is offered to corroborate the defendant's credibility, the main purpose envisioned here, the waiver of that fifth amendment right would enable the prosecution to test the defendant's veracity in the traditional manner, in addition to challenging the polygraphy examination itself. Where the defendant submits to a prosecution-sponsored examination, if there are no constitutional infirmities, there is no reason for a court to reject those results unless the defense successfully challenges their reliability or relevancy or persuades the court to strike a Rule 403 balance against the offer.[158]

The public's interest in punishing criminals has traditionally been viewed as consistent with its interest, reflected in the fifth amendment, in protecting the innocent; a fundamentally fair trial accomplishes both objectives. The function of the prosecutor is to seek justice, not convictions.[159] It is antithetical to that purpose to limit the defendant's right to defend simply because the state cannot exercise the same privilege due to another constitutional prohibition.

CONCLUSION

An application of due process principles to the admissibility of polygraph evidence is an appropriate extension of *Chambers* and

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quences"); Schmerber v. California, 384 U.S. 757, 764 (1966); *accord,* United States v. Zieger, 350 F. Supp. 685, 692 n.33 (D.D.C.) (dictum), *rev'd per curiam,* 475 F.2d 1280 (D.C. Cir. 1972).

For a comment on voluntary testing of suspects *see* Burkey, *supra* note 16, at 857: "To the frequent suggestion that suspects should be permitted 'voluntarily' to take lie tests, the committee replied that as long as notations are made in any official file on an individual that he has refused to take a polygraph test, the examination is in no sense 'voluntary' " (referring to H.R. Doc. No. 198, 89th Cong., 1st Sess. 13 (1965)). "All too often a refusal to take a test is regarded as additional evidence of guilt." *Id.*; *see also* Romero, *supra* note 13, at 189 n.9 for commentary on the fifth amendment and polygraph tests. *Cf.*, Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694, 695 (1961) (possible fourth amendment problems).

[158] See notes 105-12 & accompanying text *supra.* It is possible that a court might be persuaded that the danger of jury overvaluation is more acute when evidence that may be only 60% reliable might be conclusive of guilt beyond a reasonable doubt.

[159] *See, e.g.,* Berger v. United States, 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution *is not that it shall win a case, but that justice shall be done.*

Id. (emphasis added).

necessary to protect the criminal defendant. Cases following *Chambers* have found due process violations where single exclusions have occurred; the fundamental nature of the right to present evidence mandates the same conclusion where lie detector tests are offered, if *Chambers'* other criteria are satisfied. Methods are available to evaluate the reliability of the particular polygraph offer and to balance the relevancy of that evidence against its potential for perverting the truthgathering process. Further safeguards inhere in the prosecution's opportunity to argue the trustworthiness question before the jury, and in the trial judge's ability to limit the jury's use of that testimony by instruction. The necessity of the evidence to the defense is a factual determination with which *Chambers* and subsequent federal cases have had little difficulty.

Upon the resolution of the reliability and criticality issues in the defendant's favor the government has every opportunity to demonstrate its reason for exclusion despite the defendant's due process rights. Naturally, the state's interest in exclusion must withstand some level of scrutiny when invoked to outweigh a fundamental constitutional right. A requirement of rationality coupled with attention to less intrusive alternatives adequately balances those considerations.

Before *Chambers,* deference to a state's evidentiary process was virtually absolute. This abdication of judicial responsibility to protect due process rights was halted by *Chambers* and its progeny. Any interest the jurisdiction has in preserving its fact-finding institutions from suspect evidence, in the form of polygraph results, is sufficiently protected by the procedural safeguards articulated herein, and any external rationale for exclusion must be closely scrutinized to guarantee the criminal defendant a fair trial.

> [A]verages in the administration of justice do not avail the person who is wronged grievously in his own, particular case. The appeal to time and patience may assist in evolving better concepts and techniques for future use of the profession, but it cannot excuse or exonerate our sending an innocent man to the penitentiary here and now. Enlightenment tomorrow or elsewhere will not serve, for his destiny rests in our hands today, and our sense of injustice (for that is what I call it) forbids us to be patient at his cost.[160]

It would be comforting to have a scientific technique which could unquestionably establish a defendant's innocence because of uni-

[160] Cahn, *The Consumers of Injustice,* 34 N.Y.U.L. REV. 1166, 1176 (1959).

versal acceptance of its absolute reliability.[161] As Edmund Cahn points out, however, until that time arrives, if it ever does, criminal defendants need the protection of the judicial system. Our legal heritage is replete with corroboration of a basic tenet of Anglo-American criminal law; the accused must be protected throughout the criminal process because the system is ideologically committed to, and better served by, protecting the innocent than by convicting the guilty.[162] When we view the presumptively innocent defendant's attempt to exonerate himself by corroborative polygraph results from this perspective it is difficult to discover dispositive grounds for denying him that right. When combined with the availability of procedural and adversarial safeguards creatively formulated to protect the judicial process, the rationale for withholding that right seems even less persuasive.

When the *Chambers'* criticality requirement is fulfilled the trial court should consider the due process criteria satisfied by a proper foundation demonstrating reliability and relevancy and undertake a balancing of the government's interest in excluding against the defendant's due process right to a fair trial. Unless that state interest is not susceptible to less intrusive methods of polygraph evidence

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[161] "If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it." J. WIGMORE, EVIDENCE § 875 (2d ed. 1923); *see also* United States v. Alexander, 526 F.2d 161, 167 (8th Cir. 1975) which states:

> If we were satisfied in our own minds about the scientific reliability of polygraph tests and the integrity and responsibility of the examiners to the extent of an almost unimpeachable result, we would eagerly acknowledge the reliability of the machine and embrace its use in court proceedings in the absence of stipulation by the parties.

If due process requires admission of evidence bearing "persuasive assurances of trustworthiness," then it would seem that the near certainty requirement, as articulated in *Alexander*, would violate the defendant's rights. *See* Axelrod, *supra* note 1, at 143. Neither FED. R. EVID. 804(b)(3), *supra* note 55, nor 702, *supra* note 117, nor 403, *supra* note 48, require such certainty. *Alexander* is a leading modern case rejecting polygraph testimony. The exclusion of the results was critical to the defendant since his credibility was directly in conflict with that of the main prosecution witness, 526 F.2d at 162, see notes 133-39 & accompanying text *supra*. It is difficult to reconcile *Alexander* with Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975), discussed *supra* notes 137-39, where the same circuit upheld a defendant's due process right. Had the *Alexander* court been faced with a due process challenge perhaps their result would have reflected Edmund Cahn's concern for the individual defendant.

[162] John Adams, in defense of British soldiers accused of perpetrating the Boston massacre, stated the proposition thusly,

> [I]t may be proper to recollect with what temper the law requires we should proceed . . . we find it laid down by the greatest English judges . . . we are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent person should suffer. The reason is because it is of more importance to the community that innocence be protected than it is that guilt should be punished.

P. SMITH, JOHN ADAMS 124 (1962).

evaluation, blanket exclusionary rules should be suspended where due process requires. The "legitimate interest" which is required before the defendant's rights may be forced to "bow to accommodate"[163] has yet to be articulated by the cases and commentary rejecting polygraph evidence.

THOMAS K. DOWNS

[163] 410 U.S. 284, 295 (1973).