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ARTICLE

THE NEED FOR AN EVIDENTIARY PRIVILEGE FOR THE USE OF LIE DETECTORS IN CRIMINAL CASES: INVESTIGATION AS RISK

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I. INTRODUCTION: THE RISK OF LIE DETECTOR EXAMINATIONS IN CRIMINAL CASES

Lie detector examinations often produce material that can be devastating in the hands of an opponent. This article is concerned both with the production of this material and with the need for a new evidentiary privilege to allow the continued use of lie detectors in criminal investigation. Failure to recognize a new privilege will deprive the criminal justice system of a valuable tool in the resolution of criminal disputes. The widespread use of lie detection[1] makes the development of such a privilege essential.

An attorney usually orders the administration of a lie detector test because he hopes the result will be useful in litigation. The prosecutor may wish to check the veracity of a witness; the defense attorney may hope that if the defendant passes the examination, criminal charges will be dismissed. The evidentiary use of the results may be stipulated. Other uses abound. While defendants frequently seek to admit favorable test results into evidence, a test, however, may harm a given case because of three kinds of information produced: (1) failure of the examination, (2) admission of lying in the course of the examination, and (3) admission of wrongful activity unrelated to the subject matter of the examination. To the extent that this information cannot be concealed from the opponent, lie detectors will have limited usefulness.

While any combination of these kinds of information can occur, the third is particularly troublesome because a lie detector examination of a witness who is absolutely truthful concerning the case being investigated may uncover prior activity that impeaches the subject's credibility as a witness or that exposes him to criminal prosecution. The structure of the examination guarantees the occurrence of these admissions with great frequency,[2] although in practice they are not disclosed by the operator to anyone. The privilege proposed by this article focuses on the use of such information.

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1. *See, e.g., Hearings on the Use of Polygraphs and Similar Devices by Federal Agencies Before the Subcomm. of the House Comm. on Gov't Operations,* 93d Cong., 2d Sess. (1974); STAFF OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., STUDY OF PRIVACY, POLYGRAPHS AND EMPLOYMENT 1 (Comm. Print 1974); J. LARSON, LYING AND ITS DETECTION (1932); J. REID & F. INBAU, TRUTH AND DECEPTION, THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE (2d ed. 1977); Lykken, *Psychology and the Lie Detector Industry,* 29 AM. PSYCH. 725 (1974); Axelrod, *The Use of Lie Detectors by Criminal Defense Attorneys,* 3 NAT'L J. CRIM. DEF. 107 (1977); Note, *The Polygraph as a Dispositional Aid to the Juvenile Court,* 9 NEW ENG. L. REV. 311 (1974).

2. See notes 9-14 and accompanying text *infra.*

Even if attorneys are willing to risk the production and disclosure of damaging admission, the subject may not. The frankness of the subject regarding these admissions is essential to the accuracy of the results. The examination may include a promise by the operator that these unrelated admissions will not be disclosed. If disclosure becomes frequent or well known, a credible promise cannot be given and test results will therefore be less accurate.

After a consideration of the structure of the lie detector examination, three doctrines that may offer protection against disclosure of information revealed in the examination are discussed: the attorney-client privilege; the work-product doctrine; and the fifth amendment bar against self-incrimination. Each of these doctrines is applied to the three kinds of information. As these doctrines do not adequately protect against disclosure, the question of a new privilege is posed; however, for any privilege to be workable, it cannot contradict constitutionally mandated disclosure. Thus, in accordance with the defendant's right to a fair trial, a determination of whether a prosecutor must disclose lie detector information because it is favorable to the defendant must be made. Finally, an evidentiary privilege for lie detectors is proposed, and the prospect of its recognition by the courts is considered in light of judicial treatment of other privileges.

II. How Lie Detectors Produce Admissible Material That Impeaches the Subject

The purpose of the lie detector examination is to determine whether the subject is truthful about a given matter. The subject of the examination can be any person, including witnesses and defendants. The focus of the examination varies accordingly. For example, the lie detector test of a defendant in a murder case will be oriented to determining whether the defendant is truthful when he claims that he did not shoot the victim. The test of an alleged eyewitness will be different, for the focus might then be whether the witness is truthful when he says that he saw the victim on the day of the shooting. In any case, however, the test is given prior to trial.

The accuracy of the examination depends upon the operator's knowledge that he is triggering a specific concern of the subject with each different question that is asked. For the operator to possess that knowledge, more than a simple "yes" or "no" response from the subject is necessary at some point in the exami-

nation. Consequently, the subject must, upon prompting, disclose information that is unrelated to the crime being investigated. This information may be an admission of some wrongdoing unrelated to the crime. If the subject refuses to cooperate, the examination cannot be conducted properly. The operator frequently promises that admissions made by the subject for this purpose will not be disclosed.[3] Unfortunately, the *nature* of the admissions can be crucial in determining whether the operator has come to the correct conclusion in the results of the examination. The present section discusses why confidentiality is maintained or broken for these different purposes of verification and accuracy.

The following definitions will be used in this discussion. A lie detector, also known as a "polygraph," is a machine that accurately measures the blood pressure and breathing rate[4] of the subject of the examination and records these physiological responses as a function of time. The examination consists of several phases.[5] First, there is a waiting period, during which the subject waits in the operator's office. Next, there is the pretest interview, in which the operator and the subject discuss the purpose of the examination, its accuracy, and the questions which the operator will ultimately ask the subject when the machine is connected. During the pretest interview, the actual wording of these questions is discussed and the subject reads an exact copy of what questions will be asked. After the pretest interview, the subject is connected to the lie detector and the operator then asks the subject the prearranged questions, which are answered "yes" or "no." Some discussion with the subject then takes place and another series of questions is asked. This second series of questions tests the ability of the subject to conceal from the operator the identity of several cards that the subject has previously chosen. After this

3. J. REID & F. INBAU, *supra* note 1, at 50, 366. The promise is made most forcefully when the test is administered a second time, when physiological responses are otherwise difficult to interpret. The idea of confidentiality is implicit in the test setting; while an explicit promise is not always made in the early part of the examination, a practice of disclosure would create a reputation for lie detector examinations that would require an early explicit promise for the examination to continue. Since confidentiality generally has been observed, such explicit promises may not always be requested.

4. Other variables such as electrical conductivity of the skin or muscular contraction are sometimes measured as well.

5. For a comprehensive description of lie detector technique, see J. REID & F. INBAU, *supra* note 1, at 1-85. The technique is analyzed in Axelrod, *supra* note 1, at 107-36. Reid's technique is the most prominent and widely used in the country. *See Use of Polygraphs as "Lie Detectors" by the Fed. Gov't: Hearings Before the Subcomm. of the House Comm. on Gov't Operations,* 89th Cong., 2d Sess. (1966).

series, which is referred to as the "card test," and further discussion, the original list of questions is asked again. The questions may be varied according to the discussion that has taken place while the subject was disconnected. Depending on the operator's opinion, these questions may be administered again over a period of several days. The questions are always subject to amendment according to the discussions between the operator and the subject.

In the course of the examination, the subject may admit to activity that is unrelated to the crime in question, but which may, nonetheless, be valuable as a means of impeaching the credibility of the subject. These "unrelated admissions" usually relate to other criminal activity. When the operator examines the recorded physiological responses in the context of the questions asked and the answers received, he can determine whether the subject has been truthful in answering a specific question. This conclusion is called the "result" of the lie detector examination. The person who examines the physiological responses and comes to the conclusion regarding the subject's truthfulness is called the "examiner." Often, the operator and the examiner are the same person.

A. *The Relationship Between the Operator's Questions and the Subject's Physiological Responses*

There is no physiological activity that uniquely accompanies deception.[6] Thus, lie detection cannot be as direct and unequivocal as an X-ray inspection for a crack in an airline wing or a blood test for the presence of a viral antigen. Instead, the lie detector measures some of the physiological concomitants of anxiety. Anxiety can have many causes, only one of which is deception; more-

6. A certain unwillingness to explicitly admit this fact by proponents of the lie detector is understandable in light of the usefulness of mystique surrounding the lie detectors to the success of the technique. Nonetheless, dependence on strict environmental controls, J. REID & F. INBAU, *supra* note 1, at 6, the indistinguishability of a "deception" response from a stress response, J. LARSON, *supra* note 1, at 258, and the responsive nature of the variables measured to nondeceptive activities confirm this assertion. Axelrod, *supra* note 1, at 124-30; Damaser, Shor & Orne, *Physiological Effects During Hypnotically Requested Emotions*, 25 PSYCHOSOMATIC MED. 334 (1953); Simons & Lang, *Psychophysical Judgment: Electro-Cortical and Heart Rate Correlates of Accuracy and Uncertainty*, 4 BIOLOGICAL PSYCH. 51 (1976); Thackray & Orne, *A Comparison of Physiological Indices in the Detection of Deception*, 4 PSYCHOPHYSIOLOGY 329 (1968). Reid and Inbau, however, specifically disclaim such a simple explanation for their technique. J. REID & F. INBAU, *supra* note 1, at 5.

over, deception is not always accompanied by anxiety. The goal of the operator's technique is to structure the lie detector examination in such a way that he can infer deception from the presence of anxiety when a certain question is asked. Specifically, the operator attempts to maximize the anxiety of those subjects who are lying about the matter under investigation at a different time than when he maximizes the anxiety of those subjects who are truthful about the matter under investigation; the goal of the examination is to have all subjects lie about activity which is *not* under investigation, on the theory that those who are lying about nothing else will be maximally concerned about this unrelated lie while those lying about the matter under investigation will be maximally concerned with lies about that crime.

The application of this approach presents two difficulties: the actual measurement of anxiety and the ability to make an accurate inference from the timing of the anxiety. There is no doubt concerning the accuracy of the lie detector in measuring blood pressure and breathing variations, but the operator may also assess anxiety through the subject's unrecorded behavior, such as body movements and "fidgeting." Inferences are difficult for many reasons, one of which is that anxiety, however measured, may be inadvertently created in the subject if the operator adopts an accusatory manner. Thus, the lie detector may record anxiety that stems not from the subject's deception, but rather from the subject's reaction to the operator's behavior. Similarly, the operator's behavior may be shaped by the subject's unrecorded behavior, and therefore recorded responses may fail to explain the dynamics of the examination.[7] To the extent that the subject fails to be forthright about other causes of anxiety or becomes anxious about the investigation for some reason other than deception, the pairing of anxiety and deception is invalid. Knowledge of the communication between operator and subject is crucial to a proper assessment of the impact of these difficulties on the accuracy of the result of a particular examination.

7. This reliance on behavior that is not mechanically measured constitutes a substantial overlap between lie detector technique and general interrogation technique, particularly since it is recognized that an accusatory orientation by the examiner can give rise to physiological responses from a truthful subject that will be wrongly interpreted as deceptive. J. REID & F. INBAU, *supra* note 1, at 17. The examiner who "reads" the behavior of the subject as indicative of deception may thus fulfill his own prophecy by inducing the physiological concomitants of stress. *See* Lykken, *supra* note 1, at 730.

If another operator, an opposing attorney, or the trier of fact is to meaningfully determine the weight to be given the operator's conclusions, the communication between operator and subject cannot be kept confidential. In other words, one cannot check the operator's interpretation of physiological responses without being informed about the rest of the lie detector examination as well. As will be shown in the following subsection, the disclosure of material that the operator promised or the subjects assumed would be kept confidential undermines the accuracy of the examination. Ironically, the process of determining accuracy potentially reduces accuracy.

B. The Interview Technique and its Dependence on Confidentiality

1. The Need for Stimulation.—A subject who is unconcerned about the prospect of detection of deception will not be anxious about lying and will not be susceptible to lie detection. The operator ensures the concern for detection by various "stimulation" procedures throughout the examination. In the waiting period, the subject may peruse written materials that attest to the infallibility of lie detection. In the pretest interview, the operator asserts the accuracy and strength of the lie detector. Later, in the card test, the operator demonstrates the effectiveness of the device. The card test is, of course, rigged, allowing the operator to accurately discern which card the subject has picked, regardless of the recorded physiological responses.[8] The result of this stimulation is frequently a confession to the crime under investigation before any conclusion can be reached on the basis of recorded responses, sometimes even before the lie detector is actually connected to the subject. Direct questioning by the operator in the pretest interview obviates the need for further procedures if the subject admits to lying. At the same time, the operator tries to eliminate spurious causes of anxiety; the purpose of revealing to the subject the exact wording of future questions is to prevent any anxiety that would accompany surprise.

2. The Focus of the Stimulation: Irrelevant, Relevant, and Control Questions.—The questions asked by the operator are de-

8. J. REID & F. INBAU, *supra* note 1, at 42-43. Other control techniques are employed in addition to the card test, such as the "silent answer" test and the "guilt complex" test. *Id.* at 48-50, 127-34, 150.

signed to appropriately manipulate the anxiety of the subject concerning different deceptions. This manipulation is accomplished through the "control question" technique. This technique allows the operator to compare the subject's anxiety on three different kinds of questions: (1) relevant questions, (2) irrelevant questions, and (3) control questions. The relevant question is the one under investigation; more than one relevant question may be present in an examination. An irrelevant question concerns some trivial matter, such as the subject's name or birthdate. The control question is designed to elicit a lie from the subject[9] and is composed by the operator in the course of the pretest interview. Ideally, the subject's anxiety about a deceptive response to the control question serves as a point of comparison for the anxiety that accompanies the responses to relevant questions. If the control question is properly composed, the subect who is truthful on the relevant issue will be more anxious when answering the control question than the relevant question; conversely, the subject who is deceptive on the relevant question will be less anxious about his deception on the control question. If a subject is lying to both the control question and the relevant question, but the control question produces more concern, the operator may erroneously assume that the subject was truthful on the relevant issue. A proper control question is thus essential to the accuracy of the results.

(a) Composing the control question: obtaining unrelated admissions.—Suppose the crime under investigation is the theft of a horse owned by John Smith and the subject is the defendant. The relevant question would be: "Did you steal Smith's horse?" During the pretest interview, the operator might tentatively pose as a control question: "Have you ever stolen anything?" If the subject recently hijacked a railroad car filled with refrigerators, he will have greater anxiety about the control question than the relevant question. After being told that his answer to the control question would be kept secret by the operator and that his cooperation is essential to the accuracy of the examination, the subject might reveal the theft of refrigerators. The control question would then be rephrased as follows: "Besides the incident involving refrigerators, have you ever stolen anything?" Presumably, everyone has stolen something or at least contemplated it at some

9. *Id.* at 28-30.

time. Thus, the operator can assume that a subject who answers these questions negatively is being deceptive. One who answers positively will go through a similar process of admission until the control question must be answered negatively. In the example above, the failure of the operator to make a credible promise of confidentiality would hinder the formulation of an appropriate control question because people are not ordinarily willing to make incriminating statements regardless of whether the admission is more serious than the relevant question. Similarly, regardless of a promise, subjects who expect no confidentiality will not respond properly to the interview technique. Thus, an accurate examination may produce an unrelated admission as an artifact of its procedure.

Not only are the actual words of the control question determined through the pretest interview discussion, but the understanding between the operator and the subject concerning the meaning of the words is determined. The openness of the subject in creating a common definition of prior activity also hinges on the prospect of confidentiality. The same control question can be valid or invalid, depending upon different understandings;[10] one question would produce accurate results and the other would not. Thus, one cannot judge the validity of a control question solely on its content unless confidentiality and its accompanying operator-subject rapport are assumed.

After the pretest interview has ended, the subject is connected to the lie detector and is asked the battery of questions that he has helped formulate. The lie detector records the subject's physiological responses as he answers "yes" or "no" to each of the questions. After the questions are asked the operator reminds the subject that any failure to be truthful will affect the results. He also indicates that if something is bothering the subject, disclosure is essential if an inaccurate conclusion of deception is to be avoided.[11] These remarks by the operator constitute continuing stimulation of the subject's concern that his deception

10. For example, a control question might be worded: "Besides what you have told me, have you ever stolen anything else?" The validity of the control question depends upon what the subject understands it to mean, which in turn depends on the nature of the theft still being concealed.

11. J. REID & F. INBAU, *supra* note 1, at 43, 44, 50. In the earlier edition of their book, Reid and Inbau were more explicit concerning this exhortation. *See* J. REID & F. INBAU, TRUTH AND DECEPTION 30 (1966). The degree of stimulation depends upon the responsiveness of the subject up to this point in the examination.

will be detected. The theory behind this particular stimulation is that the subject who is deceptive about the relevant question will believe detection imminent, and thus, his anxiety concerning the relevant question will be heightened.[12] The subject who is truthful about the relevant question, however, will be more concerned with the control question, since it is the only part of the examination that could register any deception for him. At this point in the examination, before the card test or repetition of the first battery of questions, the subject may further qualify the control question. For example, he may now admit that he stole chickens from a farm several years ago. The control question is then amended as follows: "Beside the two thefts you told me about earlier, have you ever stolen anything?" Through this process, an additional unrelated admission has been obtained. Ironically, it is more likely to come from a subject who is truthful about the relevant question, since his major concern is the control question. Thus, a defendant who truthfully denies criminal involvement and seeks to prove it with a lie detector examination is more likely to make unrelated admissions than is the subject who lies when asked the relevant question.

(b) The conflict of accuracy and confidentiality.—The operator's suggestion that the subject reveal anything bothering him or any deception in the examination places the subject in a difficult position. The subject must either make an unrelated admission that qualifies the control question, or risk the prospect of an unfavorable reading concerning the relevant question. Subjects who are deceptive to the relevant question may infer that an unrelated admission will render a favorable outcome more likely. The ability of the operator to induce cooperation from the subject is evidenced by the high confession rate of those who fail the examination; between fifty and eighty-five percent confess to the operator.[13] These confessions are the outgrowth of the operator's assertion that the lie detector will be able to pierce the subject's effort to deceive. The exhortation to be truthful about the control question is no less powerful.

The subject who is deceptive to the relevant question will

12. J. REID & F. INBAU, *supra* note 1, at 45-47.

13. People v. Barbara, 400 Mich. 352, 395 n.24, 255 N.W.2d 171, 189 n.24 (1977); R. ARTHER & R. CAPUTO, INTERROGATION FOR INVESTIGATORS 161 (1959); C. LEE, THE INSTRUMENTAL DETECTION OF DECEPTION 161 (1953); Trovillo, *Scientific Proof of Credibility*, 22 TENN. L. REV. 743, 748 (1953).

prefer to make unrelated admissions, particularly if they are less serious than the crime under investigation. Ultimately, he may confess to the relevant question as well. Similarly, the subject who is truthful to the relevant question, but who fears being branded as being deceptive, will prefer to make unrelated admissions that are less serious than what he is accused of doing by the relevant question. The truthful subject may be more ready to admit to crimes more serious than the relevant question to the extent he abhors the false accusation, notwithstanding the potentially serious consequences of this approach. Unrelated admissions that concern more serious crimes may occur more frequently for both subjects when the promise of confidentiality is particularly credible. In any case, however, these admissions are less likely than those which are less serious.

The nature of the unrelated admissions bears on the accuracy of the results. Serious admissions indicate that the stimulation procedure has been successful because they show that the subject has come to believe the ability of the operator to extract the truth through the lie detector. Admissions also show that the control question has been properly composed. A series of admissions of decreasing importance supports the accuracy of the results. Thus, to determine the accuracy of the lie detector results, unrelated admissions are essential.

The problem posed by this relationship between the admission and the accuracy of the examination is twofold. To convince an opposing party or the trier of fact of the accuracy of the results, the admissions may have to be disclosed. Conversely, if the examination is performed without a view toward convincing other persons of the subject's truthfulness, those other persons may nonetheless want the unrelated admissions to impeach the testimony of the subject at trial. If opposing parties can regularly obtain these admissions, the operator cannot credibly promise confidentiality; consequently, the accuracy of the examination suffers.[14] The first problem arises when the results of an examination are

14. The author is aware of no empirical data relating accuracy to the loss of confidentiality. The structure of the examination and its underlying theory suggest that the impact is quite substantial. Confidentiality is an extension of the privacy necessary for lie detection related disciplines such as psychiatry and interrogation. *See In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970); R. AUBRY & R. CAPUTO, CRIMINAL INTERROGATION 65 (1965); Fisher, *The Psychotherapeutic Profession and the Law of Privileged Communication*, 10 WAYNE L. REV. 609, 622-23 (1964).

offered into evidence, and the second is posed whenever the opponent attempts to discover material for impeachment. These problems may be mitigated by the terms of an evidentiary stipulation.

(c) The disclosure of unrelated admissions necessary to introduce results into evidence.—The results of lie detector examinations are generally inadmissible as scientific evidence absent stipulation between the prosecution and the defense.[15] In accepting a stipulation the trier of fact gives less scrutiny to the evidence it accepts, deferring to the adversary posture of the parties as a safeguard. The role of unrelated admissions in the use of lie detector results at trial depends upon the nature of the stipulation. Those who emphasize the value of the results and the precision of the lie detector technique would prefer to limit the trier's inquiry to the result itself and to the qualifications of the examiner, and stipulations may be so drafted.[16]

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15. Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence,* 10 WAYNE L. REV. 381 (1964); Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence,* 6 NEW MEX. L. REV. 187 (1976); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694 (1961); Note, *The Emergence of the Polygraph at Trial,* 73 COLUM. L. REV. 1120 (1973); Annot., 53 A.L.R.3d 1005 (1973); Annot., 23 A.L.R.2d 1306 (1952).

16. Reid and Inbau take a very strong position on this point, specifically recommending the following language in a stipulation for the admissibility of results:

> Since the "control question" that is so essential to a diagnosis involves an inquiry into possible wrongdoing (even to the extent constituting a crime) of a type similar to, though almost invariably of a lesser degree than the matter under inquiry, if the case is to be tried by a jury, the actual control question shall not be revealed to the jury, nor shall there be any disclosure of the answer to it . . . there shall be no disclosures of any admissions made to the examiner by the person tested as the examiner was developing and formulating the control question, and this understanding shall prevail even if the case is to be tried by the judge alone.

J. REID & F. INBAU, *supra* note 1, at 344-45. Nonetheless, parties have not always taken their advice. *E.g.,* State v. Stowers, 580 S.W.2d 516 (Mo. App. 1979); State v. Bennett, 17 Or. App. 197, 521 P.2d 31 (1974). In State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972), the stipulation specifically provided for "the admission into evidence of all questions, answers and results of said polygraph test which are applicable and germane to the charge herein of Second Degree Assault . . . whether favorable or unfavorable . . . ." *Id.* at 64 n.1, 497 P.2d at 1345 n.1.

While concern has been expressed that a contrary rule would promote convictions based on the "bad man" brand of related admissions, Reid and Inbau recommend that more serious admissions should not survive the operator's promise of confidentiality. J. REID & F. INBAU, *supra* note 1, at 50 n.56, 366. No standard of "seriousness" is suggested. Stipulations are drawn by the parties through negotiation and may provide for different results. People v. Flowers, 14 Ill. 2d 406, 152 N.E.2d 838 (1958). Moreover, an ambiguous stipulation may be read by the court to encompass only the operator's opinion. State v. Hancock, 164 N.W.2d 330 (Iowa 1969) (Becher, J., dissenting).

In those jurisdictions in which results are admissible through stipulation, courts have nonetheless emphasized the need for full cross-examination and for demonstrating the validity of the results proffered.[17] Given the role that unrelated admissions play in the accuracy of the results, these courts should allow and require disclosure of unrelated admissions as part of the process of determining the weight of evidence. The issue was raised and resolved by requiring disclosure in *State v. Bennett.*[18] The defendant was accused of burglarizing an apartment and attempting to rape the occupant. The prosecution and defense stipulated to the admissibility of the results of a lie detector examination that the police were to administer to the defendant. During the examination, however, the defendant admitted to a similar incident that had occurred several months before the alleged crime. The trial court found that disclosure of the incident was essential to show that the examination had been properly conducted and admitted it over the defendant's objection.[19] The appellate court affirmed.

When a party attempts to lay a foundation for the admission of lie detector results as scientific evidence, absent stipulation, as

17. State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); State v. Lassley, 218 Kan. 758, 545 P.2d 383 (1976); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); *see also* United States v. Zeiger, 350 F. Supp. 685 (D.D.C.) *rev'd,* 475 F.2d 1280 (D.C. Cir. 1972).

18. 17 Or. App. 197, 521 P.2d 31 (1974).

19. Following the defendant's objection concerning the earlier incident, the trial court ruled as follows:

> 10. It was necessary at that point to determine whether the "prior incident" was relevant and material to the testimony of the expert witness reporting on the results of the polygraph examination. All of the 12 questions and answers put to the defendant were received in evidence without objection. Lieutenant Riegel was then asked by me whether he could interpret those answers without reference to the prior incident which, incidentally, had been discussed by the defendant with him during the pretest interview, a necessary part of the examination. Lieutenant Riegel replied that he could not. I then ruled that the original stipulation to receive the results of the examination necessarily encompassed receipt of all matters which were relevant and material to interpret those results. Lieutenant Riegel then testified that while deceptive responses were shown as to the remaining questions, he was not wholly satisfied that the defendant's mind was "cleared" of the prior incident, and hence he could not state that the deceptive responses to the questions concerning [the victim] constituted deception concerning the crime involving her unaffected by the earlier incident.
>
> 11. It was my judgment and remains my judgment that a proper evaluation of the results of a polygraph examination requires the whole picture, not a partial account. The matter of the "prior incident" came up in the first instance because of the careful professional manner in which Lieutenant Riegel conducted his examination and qualified his testimony.

Id. at 202, 521 P.2d at 31-35.

some courts have invited, the judge should allow the opponent to probe the matter of unrelated admissions. No lack of scrutiny by the trier of fact should be excused by the mutual consent of the parties.

C. *The Admissibility of Evidence Derived from Lie Detector Examination*

The lie detector examination can create adverse results, confessions, and unrelated admissions. If all of these were inadmissible, the risk of disclosure would not include the risk of damaging evidence. As previously discussed, the admissibility of the results turns on the stipulation of the parties. The admissions and confessions, however, are independently admissible. Whether they come to the opponent's attention[20] through an offer of proof concerning the results or by some means of discovery, admissions and confessions can profoundly influence the credibility of a witness and the outcome of a case.

Cases focusing on the evidentiary use of confessions and unrelated admissions usually concern a defendant as subject, rather than a witness. Additionally, the control question tends to be similar to the relevant question in the examination, and therefore the unrelated admission is more likely to have an explicitly criminal aspect for the defendant and will be more likely to form the basis of impeachment or prosecution.[21]

The importance of unrelated admissions and confessions overshadows the results themselves as far as police agencies are concerned. While the results may be difficult to place before the trier of fact, admissions and confessions are not. For example, in

20. The usefulness of the lie detector results to the defense often depends upon their publication. The defense attorney who hopes to raise bail money or obtain a favorable plea bargain must notify the appropriate parties of the examination. If an attempt is made to obtain a stipulation of the admissibility of results, the defense attorney usually notifies the prosecutor before the examination is actually taken. Often, it is the "opponent" who arranges the examination. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court noted that defendant admitted to stealing $375 from his employer. The admission took place in a police lie detector examination to determine if the defendant committed a murder. *Id.* at 446, 485.

21. The nature of admissions made by witnesses relates to the control question used. The control question concerns activity similar to the relevant question. For a defendant, the control question concerns criminal activity. For a witness, prior instances of lying or bias against the state or defense are suitable subject material, since the relevant question will concern the truth of his testimony.

State v. Blosser[22] an accused kidnaper-rapist was given a lie detector examination by the state police. No attempt was made to introduce the results, since there had been no prior stipulation. On defendant's motion, the trial court suppressed the use of admissions made during the examination regarding the defendant's escapades with numerous previous women, none of whom had lodged complaints. The defendant also told the operator, during the examination, that he had restrained the victim and forced her to have intercourse. His theory before the trial court was that the inadmissibility of the results, absent stipulation, implied that no other part of the examination could be introduced into evidence. Noting that the lie detector had previously been used as an investigatory device to aid in the securing of admissions, the appellate court held, following the overwhelming majority of jurisdictions that have considered the issue,[23] that admissions, if otherwise

22. 221 Kan. 59, 558 P.2d 105 (1976).

23. *E.g.*, Keiper v. Kupp, 509 F.2d 238 (9th Cir. 1975); Saney v. Montaye, 500 F.2d 411 (2d Cir. 1974); United States v. McDevitt, 328 F.2d 282 (6th Cir. 1964); People v. Flowers, 14 Ill. 2d 406, 152 N.E.2d 838 (1958); State v. Hancock, 164 N.W.2d 330 (Iowa 1969); State v. Blosser, 221 Kan. 59, 558 P.2d 105 (1976); State v. Bowden, 342 A.2d 281 (Me. 1975); State v. Ghan, 558 S.W.2d 304 (Mo. App. 1977); State v. Faller, 88 S.D. 685, 227 N.W.2d 433 (1975); Jones v. Commonwealth, 214 Va. 723, 204 S.E.2d 247 (1974); State v. DeHart, 42 Wis. 562, 8 N.W.2d 360 (1943).

Courts nonetheless have recognized that a lie detector examination is part of the totality of circumstances surrounding a statement from which voluntariness must be determined. State v. Franks, 239 N.W.2d 588 (Iowa 1976) (threats by lie detector operator invalidated subsequent confession); State v. Bowden, 342 A.2d 281 (Me. 1975); Johnson v. State, 31 Md. App. 303, 355 A.2d 504 (1976) (reversing the trial court because the jury did not know a lie detector examination accompanied the confession, a fact essential to a determination of voluntariness); People v. Leonard, 59 A.D.2d 1, 397 N.Y.S.2d 386 (1977) (lie detector examination administered as part of continuing coercive tactics by police). Some courts, however, have been alarmed at the prospect that the jury, in hearing about the existence of a test, will presume the defendant was found to be deceptive, and will convict him on that ground. Ironically, the inadmissibility of the results exacerbates the problem and these courts have allowed proof of a statement only in the absence of any reference to the fact that a lie detector examination was in progress at the time. State v. Varos, 69 N.M. 19, 363 P.2d 629 (1961); State v. Green, 271 Or. 153, 531 P.2d 245 (1975). In *Varos*, the prosecution had introduced the defendant's statement along with its surrounding circumstance, the lie detector examination. In reversing, the court held that

> [t]he statement and the addition thereto are apparently admissible and could have been proven by the state without reference to the test on the machine. The fallacy here was allowing the jury to have the detailed account of the machine and the circumstances of its use, when this evidence could only have had a prejudicial effect on the defendant.

69 N.M. at 22, 363 P.2d at 613. Only two cases have been found that are arguably contrary to the result in *Blosser*. In State v. Cunningham, 324 So. 2d 173 (Fla. Dist. Ct. App. 1975), a Florida defendant charged with robbery took a lie detector test with a stipulation that the results would be admissible. During the test he was asked about previous robberies

competent, are not rendered inadmissible because they are acquired in the course of a lie detector examination.[24] This overwhelming majority has considered the question because confessions are so frequently the product of a lie detector examination.

D. The Need to Protect Against the Disclosure of Admissions

The capacity of the lie detector examination to produce confessions and unrelated admissions from the subject does not exist for the police lie detector operator only. The structure of the examination requires unrelated admissions and creates such a strong feeling concerning the infallibility of the lie detector on the part of the subject that confessions also frequently result in defense examinations. The lie detector has an independent use, however, as a relatively accurate procedure for determining whether the subject is truthful as to a specific question. If an attorney cannot use the lie detector for this purpose without risking the creation of extremely valuable evidence for his opponent, he will be unwilling to use the examination. Moreover, the examination itself would not have adequate confidentiality to produce unrelated admissions. The usefulness of the lie detector to determine the subject's truthfulness, therefore, depends upon the ability of the operator to withstand requests to disclose the subject's admissions, except when the subject allows such disclosure. The ability to withstand disclosure and to thus withhold admissible evidence from a party or from the trier of fact turns

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and any deaths that might have occurred in them. Upon being told by the examiner that a false answer to his question might invalidate the rest of the examination, the subject admitted to a robbery-murder unrelated to the accusation of the pending criminal charge. He was indicted for this separate crime and was convicted through the use of the statements. The appellate court reversed the conviction on the ground that the stipulation referred only to the original case and that the statements in the pretest interview were part of the stipulated "results." The stipulation was construed as precluding the admission of any of the results in any other case. This view of the stipulation is strange in that a prior stipulation for admissibility is only necessary for the operator's opinion of the physiological responses. The Supreme Court of Florida later distinguished the case insofar as it could be held to have prevented the use of otherwise competent admissions by a defendant during a lie detector examination. Burch v. State, 343 So. 2d 831 (Fla. 1977); *accord*, Hostzclaw v. State, 351 So. 2d 970 (Fla. 1977).

A similar exception arose in State v. Thompson, 30 Or. App. 379, 567 P.2d 132 (1977), in which a full confession made during a pretest interview was found to be erroneously admitted. In *Thompson* the court found that defendant reasonably believed that the results, including the interview, would be communicated only to the attorneys and that as a matter of fair play the confession should be suppressed.

24. 221 Kan. at 62, 558 P.2d at 108.

upon the availability of a legal doctrine for that purpose. Arguably, the operator may be prevented from making these disclosures because of the attorney-client privilege, the work-product doctrine, or the fifth amendment bar against compelled self-incrimination. The next section of this article discusses why these doctrines are inadequate to protect confidentiality.

III. Protection of Admissions from Disclosure Under Current Law

In the previous section, it was shown that the lie detector examination frequently gives rise to admissions by the subject concerning the crime under investigation or unrelated criminal activity. The use of these admissions for impeachment and for substantive evidence of guilt makes an examination potentially risky. For example, a defendant charged with one burglary would be ill-advised to attempt to exonerate himself through lie detection if, assuming he passed the examination, he admitted to another burglary, and that admission were available to the prosecution. Another problem with disclosure concerns the accuracy of lie detector results. If a credible promise[25] of confidentiality cannot be made by the operator for unrelated admissions, the physiological responses are difficult to interpret. Therefore, the prospect of disclosure is threatening to both the use and the usefulness of lie detectors. This section examines legal doctrines that may offer protection against this disclosure. Unfortunately, in each case the protection offered is inadequate and hence it is necessary to consider a new privilege specifically designed to protect against disclosure of unrelated admissions.

The process by which one party seeks information in possession of the other is called discovery. In criminal cases the maximum limit to the compelled exchange of information is set by common law and statutes. Statutory discovery has become so broad that other limitations on the exchange of information have become significant.[26] The work-product doctrine limits discovery in such a way that each adversary is given an incentive to find and analyze factual material in the course of preparing for litigation. Nonetheless, only qualified protection is given to informa-

25. See note 3 *supra*.

26. When there is no statutory or common-law provision for discovery it has not been necessary for courts to consider other limitations.

tion thus gathered; the protection dissolves upon a showing by the opponent that the information is crucial for his preparation and is otherwise difficult to obtain.[27] The factors that a court considers in preserving work-product protection are not limited to things known at the time information is gathered. Work-product protection for lie detector examination is thus unsatisfactory because the attorney cannot assess the risk of disclosure before the examination and the operator cannot meaningfully promise confidentiality when he tests the subject. Less qualified protection is available in the form of privilege, but the coverage of lie detection is questionable. A privilege provides protection from disclosure on the theory that a relationship or transaction important in a societal context would be harmed if certain material were revealed. The attorney-client privilege, for example, protects communications between an attorney and a client on the theory that the prospect of disclosure would inhibit the communication of all clients with their attorneys.[28] The privilege thus protects the relationship between an attorney and a client. In terms of predictability of disclosure at the time of communication, an absolute privilege offers an enormous advantage over the work-product doctrine. Once the relationship upon which the privilege is based has been established, the parties can proceed on the assumption that disclosure cannot be compelled. The attorney-client privilege, however, offers little protection for admissions made in the lie detector examination. It does not apply to non-client subjects, and even for clients, the privilege may not apply to communications to lie detector operators. Similarly, the privilege against self-incrimination[29] is inadequate.

Privileges have been disfavored by courts because they exclude reliable evidence. Courts cannot do their job of determining truth without such evidence. The privilege proposed in Section V should escape this judicial hostility because lie detectors aid rather than interfere with the truthfinding process.

There is currently no doctrine or privilege that adequately protects lie detector information from disclosure. This section will examine the trend of discovery toward greater disclosure and the inadequacy of discovery limitations furnished by the work-

27. See Section III.*B*.
28. See Section III.*C*.
29. See Section III.*D*.

product doctrine, the attorney-client privilege, and the fifth amendment privilege against compelled self-incrimination. The question of whether any lie detector information should be immune from disclosure is crucial to the continued use of lie detectors. The answer to that question should, therefore, take into account the usefulness of the device to the criminal justice system; none of the protections considered in this section does so. The consideration of a new specific privilege is, in fact, a consideration of the usefulness of lie detectors. That consideration is a more appropriate process to determine the requisite protection than an attempt to stretch general discovery rules, work-product doctrine, or extant privileges to achieve protection from disclosure.

In the next section, the constitutional limitations on adequate protection are discussed. This section is concerned with doctrines that fail to provide enough protection; the following section[30] considers a doctrine that requires disclosure rather than protecting against it.

A. Discovery Rules

If there were no provision for the exchange of information between parties in a criminal case, it would be unnecessary to consider specific sources of protection from disclosure; the parties could simply refrain from releasing information they had gathered. The evolution of judicial thought toward the proposition that mutual disclosure is both desirable and fair, as well as constitutionally permissible, suggests a hostility to suppression of evidence in the form of protection from disclosure and an attitude of narrowly construing such protection when it is accepted.[31]

Historically, formal discovery in criminal cases was virtually unknown. The prevalent judicial attitude was that discovery was inherently unfair to the prosecution and unnecessary for several reasons.[32] First, a defendant's actual gain was thought to be quite small, since the guilty already knew the facts and the innocent

30. See Section IV.

31. See sources cited in note 32 *infra.*

32. *Compare* State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) *with* State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958). *See generally,* Nakell, *Criminal Discovery for the Defense and Prosecution: The Developing Constitutional Considerations,* 50 N.C.L. REV. 437, 439-49 (1972); Zagel & Carr, *State Criminal Discovery and the New Illinois Rules,* 1971 U. ILL. L.F. 557.

did not need to know.[33] Second, a defendant was likely to abuse what the government gave him by suborning perjury, intimidating witnesses, or perjuring himself.[34] One purpose of discovery, however, was to eliminate unfair adversarial advantage. Since the defendant was thought to have an impenetrable fortress of constitutional protection, precluding any disclosure to the prosecution, discovery by the defense created precisely that disfavored adversarial advantage.[35]

A much narrower view of the defendant's constitutional protection has accompanied the movement towards substantial disclosure by both the defense and the prosecution. Subject to due process standards of reciprocity, the prosecution can compel the defense to disclose many items once thought shielded by the defendant's fifth amendment privilege. Disclosure of witness lists, affirmative defenses, scientific reports, and even witness state-

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33. The defendant would "know" whether or not he was guilty and, therefore, the information the state possessed could hardly, in any unfair sense, surprise him.

The most articulate exposition of this reasoning is found in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953), *discussed in* Brennan, *The Criminal Prosecution: Sporting Event or Quest for the Truth?*, 1963 WASH. U.L.Q. 279. The pessimism of the courts concerning the good faith needed by a defendant for discovery was illustrated in *In re* DiJoseph's Petition, 394 Pa. 19, 145 A.2d 187 (1958), in which the defendant was denied a photograph of fingerprints found on the alleged murder weapon:

> I believe that a person who asserts his innocence of a crime . . . is entitled to examine prosecution exhibits which are reasonably associated with the theory of guilt and of which he probably may be unaware. However, where an exhibit is one of which the accused is entirely cognizant and *already knows* whether it could or could not be an item of incrimination against him, he is not entitled to its inspection if such inspection would hamper the Commonwealth in proceeding with its case . . . . She is the one person who knows whether she used the weapon or not and, therefore, she is not being denied anything which she needs in the ascertainment of the truth.

Id. at 24-25, 145 A.2d at 189 (Musmanno, J., concurring).

34. In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. Another result of full discovery would be that the criminal defendant who is informed of the names of all of the state's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify.

State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953) (citations omitted). An extension of this reasoning was rejected in Brooks v. Tennessee, 406 U.S. 605 (1972), in which the court held unconstitutional a law requiring the defendant to testify before any of his witnesses. The prospect that a defendant could tailor his testimony improperly if he could first hear his own witnesses testify was found to be a legitimate cause of state concern, but not sufficient to justify a burden on his fifth amendment rights.

35. *See* State v. Tune, 13 N.J. 203, 211-12, 98 A.2d 881, 885 (1953).

ments are commonly provided for in discovery rules.[36] While some jurisdictions may still have such narrow discovery rules that all lie detector information can be protected, the majority explicitly allows disclosure of some materials that may include lie detector information or preserves the discretion of the trial court judge to order such disclosure.[37] Protection must be sought from specific doctrines extrinsic to the discovery rules themselves.

B. The Work-Product Doctrine

The scope of the work-product doctrine adopted by a particular jurisdiction indicates its attitude concerning discovery in general and is frequently incorporated in court rules or reflected in the exercise of judicial discretion. Because it offers only a qualified protection, the ambit of which cannot be predicted at the time of the lie detector examination, the doctrine does not sufficiently protect lie detector admissions. The work-product doctrine, however, is important to examine in some detail because it so aptly embraces the arguments for protection, failing only in its limited scope. The qualified nature of its protection has found favor with courts leery of excluding normally admissible evidence such as admissions. These characteristics of the work-product doctrine will be useful in the analysis of the attorney-client privilege, which often protects material that is, coincidentally, work product. To the extent that the same function is carried out by both kinds of protection, the attorney-client privilege should not apply because of its absolute exclusion of relevant evidence.

1. The Purpose and Definition of Work Product.—The adversary system assumes that each side will diligently investigate the facts of a dispute and will carefully analyze the relevant law.[38] The exchange of information between parties is useful be-

36. The federal courts and most state courts now formally provide for the routine exchange of many items that the parties intend to present at trial, including the names of prospective witnesses, scientific reports, and physical evidence. *See generally* Wardius v. Oregon, 412 U.S. 470 (1973); FED. R. CRIM. P. 16; Zagel & Carr, *supra* note 32. This apparent reduction of the defendant's protection was cited by the Supreme Court of California in providing for state discovery of medical reports the defendant intended to introduce at trial. Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). The scope of the fifth amendment privilege is more closely examined in section III.*D.*

37. Zagel & Carr, *supra* note 32, at 562-71 & 600 app. A.

38. *See Developments in the Law: Discovery*, 74 HARV. L. REV. 940, 1032 (1961). *See also* Eagan v. DeManio, 294 So. 2d 639 (Fla. 1974).

cause it maximizes the information likely to be presented to the trier of fact. Nonetheless, the exchange also poses a problem for the adversary system. Vigorous investigation and analysis of a case is deterred if the fruits of one side's labor are automatically available to the opponent. *Hickman v. Taylor*[39] resolved this conflict by protecting material prepared for litigation from disclosure unless the opponent could show that it was essential to his preparation and that it was difficult to obtain independently; *Hickman* characterized the protected materials as "work product."

In civil cases, the trend toward comprehensive discovery has narrowed the scope of work product.[40] In criminal cases, however, the doctrine applied is broader than that in civil cases, yet narrower than the version that first appeared in *Hickman. Hickman* indicates the largest scope of materials that will receive protection under the work-product doctrine. Interjurisdictional variation of the scope of work product is substantial because the doctrine is not constitutionally based; the doctrine can thus be freely changed by statute or court decision. In some form, it explicitly or implicity influences many criminal discovery decisions.[41] Broadly defined, work product is material prepared by or for an attorney specifically for the purpose of litigation. As will be seen, different kinds of this sort of material have received varying protection in criminal discovery.

2. Hickman v. Taylor.—*Hickman* was the first Supreme Court test of the civil discovery rules enacted in 1937. In the aftermath of a tugboat accident, suit was brought on behalf of one of the deceased crewmen. The defense attorney interviewed the witnesses to the sinking; some of the interviews were tran-

39. 329 U.S. 495 (1947).

40. *See* FED. R. CIV. P. 26; Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study,* 1976 U. ILL. L.F. 895, 903.

41. *E.g.,* State v. Edgecombe, 275 So. 2d 740 (La. 1973), *cert. denied,* 415 U.S. 1075 (1973) (all of prosecutors' materials presumptively privileged); State v. Hicks, 515 S.W.2d 519 (Mo. 1974) (police reports obtainable because of defendant's showing of materiality and unfairness of denial); State v. Tackett, 78 N.M. 450, 432 P.2d 415 (1967), *cert. denied,* 390 U.S. 1026 (1968) (defendant must show particularized need to discover prosecutor's material); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972) (prosecutor's investigative materials need not be disclosed); Stidham v. State, 507 P.2d 1312 (Okla. Crim. App. 1973) (availability to cross examine witness at preliminary hearing obviates defense need to discover witness statement in prosecutor's file). *But see* Craig v. Superior Court, 54 Cal. App. 3d 416, 126 Cal. Rptr. 565 (1976) (denying the applicability of work product to California criminal discovery).

scribed but others were not. Shortly thereafter, the witnesses testified at a public hearing concerning the accident. What the plaintiff sought, under the new rules, was to have the defense attorney provide a copy of the written interviews and reduce to writing the oral interviews he had conducted. The defense objected on the grounds that an attorney's files were not the proper subject of discovery and that the new rules should not be so interpreted.

The Court did not see itself as fashioning new doctrine, but rather as restating that which was already implicit in the discovery process prior to the rules—discovery should enhance the adversary system of trial.[42] The Court feared that the availability of an attorney's files would discourage him from writing things down and from giving full advice to his clients.[43] The discoverability of the attorney's advice, research, and strategy would deter him from developing or communicating them fully, because his efforts would assist his opponent. Moreover, requiring the defense attorney to reduce oral interviews to writing would inevitably compromise his role as an officer of the court, since he might be called as a witness for impeachment or corroboration. At the same time, the Court did not wish to allow one party to withhold important material that might affect the accuracy of the factfinding process. Thus, even work product could be disclosed if the opponent were able to show that the material was essential to the adequate preparation of the case and that it could not otherwise be obtained without undue hardship.

Two distinct policies are suggested by the scope of material *Hickman* includes in work product. One policy is the encouragement of each party to vigorously investigate its case. Thus, a party should not generally benefit from the efforts of his opponent, lest indolence be rewarded. Any material, regardless of its source, is protected by this policy. The second policy is the preservation of an attorney's privacy concerning his mental impressions of his case. An attorney haunted by the prospect of having his strategic memoranda disclosed will be a less effective advocate. Moreover, no benefit relevant to the merits of the case will accrue to the opponent if this sort of invasive discovery is allowed. Courts have given greater deference to the second policy[44] and the

42. 329 U.S. at 509-11.
43. *Id.* at 510-11.
44. *See* People v. Moore, 50 Cal. App. 3d 989, 994, 123 Cal. Rptr. 837, 840 (1975);

Supreme Court has recently characterized it as lying at the core of the work-product doctrine.[45] Protection of verbatim accounts of witness interviews is predicated almost entirely on the first policy; protection of internal legal memoranda is based on both the first and the second.

In keeping with its analysis, the Court in *Hickman* found the witness interviews to be within the scope of work product.[46] To decide whether the interviews were nonetheless discoverable, the Court still needed to determine whether they were essential to the plaintiff's preparation and unavailable absent undue hardship. As these were the only witnesses, the substance of their statements was essential to preparation. Concerning the availability of the material to the plaintiff, the Court noted that the witnesses were still accessible for interview and the text of their public statements was a matter of public record. The decision in *Hickman* therefore declined to allow plaintiff to discover defendant's work product.[47]

Contrary to the holding of *Hickman,* many jurisdictions have removed witness statements from the scope of work-product protection in criminal discovery.[48] A party who intends to call a

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Note, *Discovery: New Jersey Work-Product Doctrine,* 1 RUT.-CAM. L. REV. 346, 348 (1969); Comment, *Basic Survey of Work Product in Federal and State Jurisdiction in Civil and Criminal Proceedings,* 35 TENN. L. REV. 474 (1968). *But see* United States v. Brown, 478 F.2d 1038 (7th Cir. 1974) (I.R.S. investigation case in which an attorney's notes were arguably more than impressions, were a unique source of information for the Internal Revenue Service, and were therefore not absolutely protected). *See also* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 187 (M.D. Fla. 1973); Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

45. In United States v. Nobles, 422 U.S. 225 (1975), the Court held that requiring disclosure of an investigator's notes from witness interviews implicated the work-product doctrine. Although the Court ultimately held that any protection afforded by the doctrine was waived by having the investigator testify concerning the substance of the interview, the Court discussed the doctrine at some length. After reviewing *Hickman,* the Court noted that "at its core, the work product doctrine shelters the mental process of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Id.* at 238. *Accord,* Goldberg v. United States, 425 U.S. 94, 106 (1976).

46. 329 U.S. at 509.

47. *Id.* at 512.

48. *See* Zagel & Carr, *supra* note 32, 600 app. A (I)(B) & (II)(G). The subservience of the work-product doctrine to legislative decision is shown by Goldberg v. United States, 425 U.S. 94 (1976), in which the government resisted certain discovery under 18 U.S.C. § 3500 (1976) and contended that the statute should incorporate work product as an inherent limitation on defense discovery. The Act requires the prosecutor to tender to the defense the written statements of witnesses who have already testified on direct examination. The government's position was that certain statements reflected discussions between

witness at trial must frequently make advance interviews with that witness available to opposing counsel. To the extent that the material gathered for trial can be characterized as analysis or as the product of an attorney's mental process, it is more likely to have work-product protection. Thus, scientific tests of witnesses and of physical evidence may receive greater protection than mere witness interviews.[49]

3. The Application of the Work-Product Doctrine to Lie Detectors.—Lie detector information is arguably part of the attorney's work product because it is prepared for him with particular litigation in mind. The examination is composed of both an interview and an expert analysis of that interview, each of which may receive work-product treatment.[50]

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witnesses and government attorneys that would suggest the government's legal analysis of the case. The Court looked to legislative history and rejected any incorporation of the doctrine in the Act. 425 U.S. at 101-02. It also refused to temper its construction of the statute to preserve work-product protection, since the plain wording of the Act did not suggest any such protection. *Id.* at 102. Although *Goldberg* may be said to have construed the Act to coincidentally avoid confrontation with the mental processes aspect of the doctrine, its priorities are clear. Moreover, the Act itself, in providing prosecution witness statements to the defense, is inconsistent with the *Hickman* work-product rule, which would otherwise require the defense to show the statements were important and otherwise unavailable. *See* Craig v. Superior Court, 54 Cal. App. 3d 416, 126 Cal. Rptr. 565 (1976). Alternatively, the work-product doctrine can be viewed as subservient to the discretion of the trial court judge to allow adequate cross-examination of witnesses. *See* United States v. Nobles, 422 U.S. 225, 249 (1975) (White, J., concurring).

49. Although not as frequently reported, instances of witness testing by police and prosecution are common. Often the defendant in a case was merely a witness when he took a police lie detector test. After his confession during the test, he became a defendant. Concerning prosecutorial examination of witnesses, *see* Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972); State v. Taylor, 139 N.J. Super. 301, 353 A.2d 555 (1976).

50. The work-product treatment of lie detector information is suggested by the reasoning of cases that presumptively shield from discovery the fruits of the prosecutor's investigation. *See* McCorvey v. State, 339 So. 2d 1053 (Ala. Crim. App. 1976) ("investigator's product" prevents disclosure of defendant's statement taken by police investigator); Berger v. Superior Court, 105 Ariz. 473, 467 P.2d 61 (1970); Corbin v. Superior Court, 103 Ariz. 465, 445 P.2d 441 (1968); People v. Moore, 50 Cal. App. 3d 987, 123 Cal. Rptr. 837 (1975); Colebook v. State, 205 So. 2d 675, 682 (Fla. Dist. Ct. App. 1968) *vacated and remanded on other grounds sub nom,* Jones v. Florida, 394 U.S. 720 (1969); Curtis v. State, 518 P.2d 1288 (Okla. Crim. App. 1974). In Rose v. State, 427 S.W.2d 609 (Tex. Crim. App. 1968), the court found that a statement authored by the prosecutor to "guide" the witness in testimony was protected as a form of work product. *Cf.* United States v. Barber, 296 F. Supp. 795, 801 (D. Del. 1969) (protecting "internal" F.B.I. memoranda). In many of these instances, courts have highlighted the mental process aspect of an investigator's work, particularly in the case of police officers. *E.g.*, State v. Winsett, 57 Del. 344, 200 A.2d 237 (1964), holding that

[t]he results of polygraph tests, blood tests, and fingerprint examinations . . .

The maximum available protection of both the admissions and the results of a lie detector examination will be achieved if three obstacles can be surmounted. First, the gathering of information by the operator, rather than by the attorney himself, must not diminish protection. Second, the material must be shown to possess the characteristics of work product. Third, it must be unlikely that the opposing party can make an adequate showing to overcome work-product protection. In considering these issues, it should be borne in mind that even if all the difficulties are resolved, a legislative decision requiring disclosure will prevail.

Since criminal attorneys freely use investigators, the utilization of the work-product doctrine to encourage vigorous investigation would be meaningless if only the material that the attorney gathered personally were protected.[51] Besides lie detection, considerable forensic expertise has developed for criminal cases. Except for those experts the party intends to call as witnesses at trial, most jurisdictions make no provision for discovery; they group experts and investigators with attorneys, under the same work-product umbrella.[52] Lie detector operators should be treated similarly, even though they may not be regularly employed investigators, since their independence from the attorney is essential to the accuracy of their results because of their need to appear neutral to the subject.[53] An independent expert, who is not a

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> are developed factually by the police as investigators. This is to say that they are obtained by the police *qua* police in their investigation of crime. This kind of information, in its broadest sense, arises out of the analytical or investigative phase of police effort. It is the work product of detection, at least as distinguished from the mere gathering or collection of tangibles which could be done by anyone physically present at a given time and place.

Id. at 349, 200 A.2d at 239. *Accord,* Feehery v. State, 480 S.W.2d 649 (Tex. Crim. App. 1972) (laboratory testing of seized drug).

51. United States v. Nobles, 422 U.S. 225, 238-39 n.13 (1975).

52. In the federal system, for example, the Federal Rules of Criminal Procedure provide that

> [u]pon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and *which are material to the preparation of the defense* or are intended for use by the government as evidence in chief at the trial.

FED. R. CRIM. P. 16(a)(1)(D) (emphasis added).

53. An operator who presumes the subject is lying is likely to act in an accusatory fashion, thereby impeding any valid assessment of the subject's anxiety and rendering the operator ineffective. J. REID & F. INBAU, *supra* note 1, at 17.

regular part of the prosecution or defense "team," should be protected to encourage accurate investigation.[54]

Assuming the work-product character of the examination, the question of the scope of the protection suited to that activity remains. A stronger case can be made for protecting the results of lie detector examinations than for protecting other statements made in the course of the examination. The rationale for protecting the results depends in part on the limited admissibility of the results as evidence and in part on the degree to which the results can be likened to an attorney's mental impressions.

(a) Application to results.—Absent stipulation, lie detector examination results have rarely been admitted in criminal cases.[55] Work-product protection for the results is very strong because in the absence of an evidentiary role the results can rarely be shown to be important in the preparation of the opponent's case. The result of the examination is simply the conclusion that the witness is being truthful or deceptive in response to a specific question. It is functionally identical to an attorney's mental impression. Its usefulness will be limited to a strategic consideration by the attorney of the desirability of calling the witness and of the necessity of establishing facts through alterna-

54. Reid and Inbau assume, based upon the federal rule, that the umbrella would not extend to lie detector experts. J. REID & F. INBAU, *supra* note 1, at 346. The contrary result is indicated by United States v. Nobles, 422 U.S. 225, 239 (1975). United States v. McKay, 372 F.2d 174 (5th Cir. 1967), demonstrates an earlier, less expansive approach to work product.

55. *E.g.*, State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); Codie v. State, 313 So. 2d 754 (Fla. 1975); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 730, 216 N.W.2d 8 (1974). Other jurisdictions have approved admission of the results on an episodic basis, upon being swayed by equitable considerations resulting from a *fait accompli* agreement from which one of the parties seeks to withdraw. *E.g.*, United States v. Oliver, 525 F.2d 731 (8th Cir. 1975) *cert. denied*, 424 U.S. 973 (1976); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); State v. Towns, 35 Ohio App. 2d 237, 301 N.E.2d 700 (1973). A few instances also exist in which individual courts have admitted results on the ground that an adequate foundation for expert testimony had been established, United States v. Zieger, 350 F. Supp. 685 (D.D.C. 1972), *rev'd*, 472 F.2d 1280 (D.C. Cir. 1973); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972), or have provided for the possibility that an adequate foundation for lie detector expert testimony could be established. Commonwealth v. A Juvenile, 365 Mass. 421, 313 N.E.2d 120 (1974). A number of federal circuits have, as an abstract matter, underscored the plausibility of supplying an adequate foundation for unstipulated lie detector results under the Federal Rules of Evidence. See note 164 *infra*. It is clear, however, that a trial court will generally not be reversed for exercising discretion against admission. United States v. Glover, 596 F.2d 857 (9th Cir. 1979); United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

tive means. It has no relation to the merits of the case; rather, it is simply an impression of the credibility of the witness. For the purpose of discovery, the results are indistinguishable from memoranda between co-counsel concerning their personal impressions of the credibility of each potential witness. Aside from insight into the party's strategy, which the doctrine does not indulge, the only legitimate value the results hold for the opponent would be the incentive to engage in further investigation concerning the credibility of the witness tested. If the determination of the credibility of the witness were essential to the opponent's preparation for litigation, the incentive probably would be unnecessary in most instances anyway,[56] since investigation would already be complete.

The effort to admit lie detector results as scientific evidence absent stipulation has been overwhelmingly unsuccessful. Should the effort be successful[57] in the future, however, lie detector results would be important evidence of a witness' credibility. In that unlikely circumstance, a party might be able to show a need[58] for the results in preparing his case that would outweigh work-product protection. This determination would be made on a case-by-case basis.[59]

(b) Application to admissions. —Unlike results, admissions

56. When the results clearly point to specific further investigation which is likely to be fruitful, the need of the party may be adequately satisfied. If, for example, a bank teller fails the lie detector test when he claims no surveillance cameras were operating during a robbery, the defendant's attorney will make a special effort to find the films. The party would have to know the result, however, to make the showing to begin with. Under Brady v. Maryland, 373 U.S. 83 (1963), the prosecutor may be obligated, in effect, to make this determination himself and disclose the results if they promise to have a sufficiently favorable effect on the defendant's case. See Section IV *infra.*

57. *See* note 166 *infra.* None of the jurisdictions recognizing a potentially adequate foundation for results has ever reversed a conviction for failure to admit results. Since these courts have, in practice, made lie detector results inadmissible, their position must be viewed as functionally equivalent to one of actual inadmissibility in the application of the work-product doctrine.

58. An opposing party may be entitled to work product even though the only anticipated value of the material is to impeach a particular witness. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

59. The availability of alternative sources of information raises the spectre of the witness being subjected to a second examination, sponsored by the opposing party. Assuming the willingness of the witness, the second test may not be as accurate as the first. Given the accusatory nature of the examination, the reliability of multiple testing may be low, and the dynamics of the first examination may be significant in assessing the accuracy of the subsequent examination. Moreover, an examination of a hostile or unwilling witness is likely to engender emotions that interfere with accurate results.

made during the course of an examination do play an evidentiary role at trial, regardless of stipulation. Admissions are independently admissible to impeach the witness or to show his guilt. Thus, in any given case, disclosure will turn on the ability of the opponent to show materiality of the admissions and the difficulty of obtaining equivalent information. This burden might be satisfied by demonstrating the probability that admissions suitable for the purpose of impeachment have been made. The importance of the material sought will depend upon the role of the witness in the case and the availability of alternative sources of information. Each of these factors is difficult to predict at the time the examination is being given. An alternative source of information will often be unavailable in criminal cases because of the hostility that may exist between parties and witnesses. Frequently, the victim of a crime will talk only to the police and prosecution. In the absence of any other opportunity for the opponent to interview a witness, admissions made to the operator may constitute a unique source of impeachment. As compared with results, admissions are more susceptible to a showing of necessity and unavailability that overcomes the protection of the work-product doctrine. Additionally, the protection available in most jurisdictions will be minimized by the absence of any role of the attorney's mental processes in the statements.

(c) The recording of admissions.—Underlying this discussion of the protection of witness admissions is a secondary question concerning the form of the admissions, *i.e.,* whether they have been written down. Some unrelated admissions may be explicitly incorporated into the modified control question. Otherwise, the operator's final report will generally contain no recitation of the subject's statements during the course of the examination. There is some indication that more may be preserved by the operator than is contained in his report.[60] In any event, failure to record these statements may not foreclose the prospect of disclosure.

Although there is no case on point, a lie detector operator presumably would be vulnerable to a grand jury subpoena. Some

60. As a rule, operators are encouraged to keep written records of the examination other than their final report. "In view of the value of pretest interview responses and behavior of the subject for test and overall diagnosis purposes, *it is important that appropriate notes be taken by the examiner as he proceeds with the interview.* It is unrealistic to expect a reliance on memory alone." J. REID & F. INBAU, *supra* note 1, at 24 (emphasis added, citation omitted).

operators might "forget" the witness' statements, but others would not.[61] Since the nature of unrelated admissions is critical to the process of interpreting the physiological responses, one would expect many operators to be able to recall precisely what those admissions were. Finally, jurisdictions that do not ordinarily provide for the reduction to writing of oral statements may require transcription when the likelihood of use of those statements is so high that failure to record them is tantamount to the suppression of evidence or the avoidance of discovery in bad faith.[62] Application of this reasoning to lie detector operators would preclude the protection of admissions through the operator's failure to record.

(d) The shortcomings of the work-product doctrine.—The subject's admissions will not be protected if an adequate showing of materiality and unavailability is made. Materiality may be shown on a case-by-case basis. Moreover, whatever protection the doctrine does supply is subject to legislative change and the trend has been toward increasing disclosure. Finally, to the extent that the deficiencies of the work-product doctrine may be thought to apply only to information written down, characteristics of the examination process suggest that more is written down than the operator reports and that reduction of witness admissions to writing would be relatively accurate.

At present, the only regular procedure for the admission of lie detector results is by stipulation. Application of the work-product doctrine to such stipulations is unnecessary because the parties can draft stipulations to include or exclude underlying

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61. Other professions, such as psychiatry, have been confronted with the temptation to avoid legal difficulties in this fashion when asked for "confidential information."

> Actually, where a psychiatrist is subpoenaed, the attorney does not await his testimony or records with bated breath. The records, if any, are illegible and cryptic; and many psychiatrists say that since records are rarely kept they could destroy theirs without arousing suspicion. In lieu of records, if called as a witness, the psychiatrist is not apt to be a friendly one.

Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Misguided Hope*, 23 CATH. U.L. REV. 649, 653 (1974).

62. People v. Manley, 19 Ill. App. 2d 365, 311 N.E.2d 593 (1974); State v. Burri, 87 Wash. 2d 175, 550 P.2d 507 (1976). In construing the Jencks Act, courts have recognized the possibility of prejudice to the defendant from a bad faith failure to record or preserve evidence. United States v. Head, 586 F.2d 508 (5th Cir. 1978); United States v. Terrell, 474 F.2d 872 (2d Cir. 1973). *Accord*, Corbin v. Superior Court, 103 Ariz. 465, 445 P.2d 441 (1968).

statements if they desire. Under present law, the results are adequately protected by work product.

Work-product concepts are used by many courts in deciding criminal discovery issues.[63] While some test results and statements during examinations may escape discovery under this doctrine, a substantial number will not. Lie detector examinations are usually made in advance of trial, when it is impossible to predict whether the opponent can make an adequate showing to overcome work-product protection. The doctrine thus does not provide sufficiently predictable protection for the attorney to assess the risk of an examination at the time he orders it or for the operator to promise confidentiality when the test is given. To the extent a prediction could be made, there would still be a class of cases that pose unacceptable tactical risks of subsequent disclosure for the use of the device. It is therefore appropriate to question the scope of protection that will be available for lie detector examinations in the future; the need for a special privilege derives in part from the ambiguous nature of the protection that is currently available.

C. The Attorney-Client Privilege

The purpose of the attorney-client privilege is to encourage the client to communicate fully with his attorney.[64] Statements made in confidence by a client to his attorney cannot be disclosed absent a waiver from the client.[65] The promise to the client that

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63. *See* note 41 and accompanying text *supra*.

64. Fisher v. United States, 425 U.S. 391, 403 (1976); C. McCORMICK, McCORMICK ON EVIDENCE § 87 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961). Although commentators have frequently asserted that the attorney-client relationship should be protected as an instance of personal intimacy or friendship, courts have not been responsive to changing the scope of the privilege. *See* Fried, *The Lawyer as Friend: The Moral Foundation of the Lawyer Client Relation*, 85 YALE L.J. 1060 (1976); Gardner, *A Reevaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 317 (1963); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 489 (1928).

65. Wigmore's formulation is that the privilege exists

(1) Where legal advice of any kind is sought
(2) from a professional legal adviser in his capacity as such,
(3) the communication relating to that purpose,
(4) made in confidence
(5) by the client,
(6) are at his instance permanently protected
(7) from disclosure by himself or by the legal adviser,
(8) except the protection be waived.

8 J. WIGMORE, *supra* note 64, at § 2292. *See also* C. McCORMICK, *supra* note 64, at §§ 87-

nothing he says will be repeated by the attorney without permission encourages the client to be forthright. The privilege operates to prevent both discovery and admission of relevant, reliable evidence, a quality to which courts have been hostile.[66]

The scope of the privilege represents a compromise between the need for evidence and the need for free attorney-client communication. The compromise, however, must endeavor to take a categorical rather than a case-by-case approach. Otherwise, an attorney could not meaningfully assure his client that communications would be kept confidential.[67] A client hesitant to communicate because of fear of disclosure will not be reassured by the statement that as long as other factors in his case develop along certain lines, unknown at the time of the communication, his confidence will be honored. The predictability of the attorney-client privilege protection stands in contrast to the unpredictability of work product.[68]

The attorney-client privilege is attractive to proponents of the protection of lie detector information because of its absolute nature. Once the requirements of the privilege are satisfied, protection is given regardless of the materiality of the information or

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97. Many states have codified the privilege in their statutes. *E.g.*, CAL. EVID. CODE § 954 (West 1968); IOWA CODE ANN. § 622.10 (West Supp. 1979-80); N.J. STAT. ANN. 2A: 84A-20 (West 1976).

66. "The purpose of the privilege is to encourage clients to make full disclosures to their attorneys . . . . However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." Fisher v. United States, 425 U.S. 391, 403 (1976). *See* Gardner, *supra* note 64. Concerning the judicial unwillingness to allow privileges to withhold relevant evidence from the fact finder, see note 148 *infra*. Also pertinent is the Supreme Court's response to the invocation of executive privilege by former President Nixon regarding the "Watergate" tapes.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974).

67. A categorical approach has not been available for the psychotherapist-patient privilege. *See In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970), which concerns a relationship requiring instant reassurance of privacy comparable to that of attorney and client. The attorney-client privilege has been criticized for its evidentiary cost, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 468-73 (1977), implicitly raising the possibility that the attorney-client privilege is excessively tolerant of the working conditions of attorneys because it is invented and perpetuated by attorneys themselves.

68. See notes 57-60 and accompanying text *supra*.

its unavailability to the opponent. Satisfying the requirements, however, is difficult. The privilege provides no protection at all for those who are not clients. In criminal cases, only the defendant can be a client; no statements from prosecution witnesses or from other defense witnesses would be covered. Reliance on the attorney-client privilege for protection would automatically reduce the scope of lie detector subjects to defendants alone. Moreover, considerable ambiguity exists concerning the application of the privilege to lie detector admissions, even from the defendant himself, since these admissions are made to the lie detector operator rather than to the attorney. Virtually no precedent exists[69] to extend the privilege to communications made to lie detector operators and an analysis of precedent regarding communication to other experts suggests that such an extension is doubtful.

Arguably, communications made to the lie detector operator by the defendant should receive the same protection under the privilege as statements made directly to the attorney. Statements[70] made to the attorney ordinarily are privileged. The opera-

69. The Michigan Court of Appeals quite recently published its decision on this issue in People v. Marcy, ___ Mich. App. ___, 283 N.W.2d 754 (1979) (released October 10, 1979), in which it construed Michigan legislation to privilege communications between a lie detector operator and a subject that arose in an examination ordered by the subject's attorney. Alternatively, the court held the attorney-client privilege applied to lie detector operators in such settings. While the result reached by the court is contrary to the author's expressed doubts, it does follow the uncritical trend of Michigan case law in this regard, shown in People v. Hilliker, 29 Mich. App. 543, 185 N.W.2d 831 (1971) and Lindsay v. Lipson, 367 Mich. 1, 116 N.W.2d 60 (1962). *See* text accompanying notes 88 through 92 *infra*. Notably, the court responded to a clear signal from the Michigan legislature to protect, albeit somewhat broadly, lie detector information, *see* note 142 *infra* and accompanying text. This signal may explain the failure of the court to grapple seriously with the distinction between investigators and experts regarding the attorney-client privilege, or with the subsequent question of necessity for communication. *See* note 76 and text accompanying notes 79-100 *infra*. Moreover, as can be gleaned from the statutes of other states, see note 76 *infra*, a statute safeguarding the confidentiality of lie detector information may become tantamount to legislative expansion of the attorney-client privilege. Notwithstanding the loss of reliable evidence, courts will of course accede to such legislative decisions of policy.

70. The substance and purpose of a statement can remove it from the protection of the attorney-client privilege, even if it is made directly and privately to the attorney. When the client's communication is made in furtherance of a crime or a tort, the privilege does not apply. United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); C. McCORMICK, *supra* note 64, at § 95; J. WIGMORE, *supra* note 64, at §§ 2298, 2299. The limitation is particularly troublesome when the communication concerns some ongoing or future criminal activity. Whether the attorney ignores such a communication, advises the client against the activity, intercedes anonymously on behalf of the victims, or acts blatantly to prevent the activity depends upon an unresolved

tor is merely a surrogate for the attorney, who, if he had the operator's special training and experience, would perform the lie detector test himself. The admission made to the operator is therefore, arguably, a communication made in confidence; it is a privileged communication, and its substance should not be revealed, whether by subpoena, discovery or court order.

To understand the difficulty with this argument, various limitations on the attorney-client privilege must be discussed. Statements that are not made in confidence do not receive protection under the privilege. Confidentiality is at the heart of the privilege; if there were no fear of disclosure on the part of the client, no privilege would be necessary in the first place. Thus, the presence of third persons generally precludes the operation of the privilege. For example, in *Bolyea v. First Presbyterian Church of Wilton,*[71] the privilege was held not to apply to a discussion between a client and his attorney at which three of the client's acquaintances also were present. The acquaintances had simply accompanied the client for lunch and then proceeded

question of the attorney's obligation to his client, his ethics, and the public safety. *See* Calan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System,* 29 RUT. L. REV. 332, 334, 389-93 (1976); Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege,* 47 A.B.A.J. 708, 710 (1961); Annot., 16 A.L.R.3d 1029 (1967). The answer may lie in the seriousness of the crime and the certainty of its execution. The prospect of an attorney's indictment for withholding such information may prompt voluntary disclosure, and thus the issue may constitute more of a de facto limitation on the privilege than might ultimately be necessary as a matter of law. Such an indictment occurred but was dismissed in People v. Belge, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1976). The attorney withheld his client's communication of a recent murder. The certainty of future dismissals is severely questioned by Justice Jason's dissent in that case. Unpublished opinions and documents in the case are collected in P. KEENAN, TEACHING PROFESSIONAL RESPONSIBILITY, MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE, 235-300 (1979).

Lie detector operators are particularly susceptible to this problem because they are more likely than attorneys to receive communications of ongoing and future criminal activity, particularly if it is unrelated to the crime under investigation. The attorney has no need for such communication and its ambiguous ethical ramifications. He may even tacitly discourage the client from disclosing crimes unrelated to the instant accusation. In any event, the client will usually not be anxious to reveal such information to his attorney. The operator, however, must know the thoughts that produce anxiety. The thought of a future or ongoing crime is just as important to the interpretation of physiological responses as the thought of a past crime. Any attempt to limit those disclosures threatens the validity of the examination. The operator encourages the disclosures of these crimes and induces the subject to cooperate. To the extent that the attorney-client privilege provides only weak protection for such disclosures, the privilege will be even more deficient when such statements are made to the lie detector operator, rather than to the attorney.

71. 196 N.W.2d 149 (N.D. 1972).

down the street with him in his search for an attorney. The court held that

> [t]he privilege of the attorney-client relationship is grounded upon the necessity of providing for every client a freedom from any apprehension in discussing the most personal matters with his attorney, and to encourage the client freely to communicate with his attorney without fear of disclosure. However, if the client chooses to make or receive his communication in the presence of a third person, it ceases to be confidential and, therefore, the client is not entitled to the protection afforded by the rule.[72]

The lie detector operator is not the attorney, and communications made to third persons generally destroy the privilege. Lie detector operators, however, might arguably be part of an exception to this strict view of confidentiality, along with other experts who examine clients. While the case law concerning certain other experts is well established, its extension to lie detector operators is open to doubt.

An analysis of third-party exceptions to the confidentiality requirement of the attorney-client privilege begins with interpreters. There is no controversy over the proposition that a defendant who needs a foreign language interpreter to communicate with his attorney can speak freely with the interpreter and that what is said will be covered by the privilege as though the client were speaking privately and directly to the attorney himself.[73] The interpreter operates in a mechanical fashion. He merely provides the client with the same degree of communication that a typical, English-speaking client would have.

A more difficult application of the privilege arises when third parties are present to provide emotional security so that the client can be expansive with the attorney. Thus, wives, mothers, and siblings arguably can be privy to attorney-client discussions without compromising the privilege. Courts have not agreed on the impact of the presence of such third parties on the claim of privilege.[74] McCormick's position,[75] that a third party reasonably nec-

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72. *Id.* at 153-54.

73. United States v. Kovel, 296 F.2d 918 (2d Cir. 1963); C. MCCORMICK, *supra* note 64, at § 91; 8 J. WIGMORE, *supra* note 64, at §§ 2292, 2312-2321.

74. See cases cited in 8 J. WIGMORE, *supra* note 64 at § 2311 n.6.

75. As to relatives and friends of the client, the results of the cases are not consistent, but it seems that here not only might it be asked whether the client reasonably understood the conference to be confidential, but also whether the presence of the relative or friend was reasonably necessary for the protection of

essary for the client's protection should not vitiate the privilege, makes sense out of the factual situation, but does not accurately predict the results in a given case. One reason for the failure of courts to be completely responsive to this reasoning may be the difficulty of preserving the rationale underlying the privilege. The privilege is predicated on the need for confidentiality. Although some confidential communications could occur in the presence of third parties, many, like those in *Bolyea,* seem to fly in the face of the notion that without secrecy the client would feel too embarrassed to speak. The sheer number of communications covered by the privilege would be much higher if the presence of third parties were not generally thought inconsistent with confidentiality. The evidentiary cost of the privilege, however, would no longer be tailored to its purpose.

Experts[76] who interview the client on behalf of the attorney

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the client's interests in the particular circumstances.

C. MCCORMICK, *supra* note 64, at § 91. *See also* 2 J. WEINSTEIN, EVIDENCE ¶ 503(a)(4)[01] (1975). A similar approach is suggested by Proposed Federal Rule of Evidence 503(a)(4), which Congress did not enact. Sometimes the matter is resolved by conceptualizing the third person as a "confidential agent" of the client, McCaffrey v. Estate of Brennan, 533 S.W.2d 264, 267-68 (Mo. 1976), or in terms of whether the substance of the communication was regarded by the client as not confidential by virtue of subsequent repetition to others. Solon v. Lichtenstein, 39 Cal. 2d 75, 79-80, 244 P.2d 907, 910 (1952); Workman v. Boylan Buick, 36 A.D.2d 978, 979, 321 N.Y.S.2d 983, 986 (1971).

76. Most jurisdictions extend the attorney-client privilege to the personnel of the attorney's office, including secretaries, law clerks, and investigators, regarding their communications with the client. *E.g.,* State v. Tapia, 113 N.J. Super. 322, 273 A.2d 769 (App. Div. 1971); Aldrich v. Catel Service Co., 51 Misc. 2d 16, 272 N.Y.S.2d 582 (1966); Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387 (1967); Steele v. Stewart, 41 Eng. Rep. 711 (1844); Ross v. Gibbs, 8 L.R. 526 (1869); CAL. EVID. CODE § 954 (West 1968); IOWA CODE ANN. § 622.10 (West Supp. 1979-80); N.J. STAT. ANN. § 2A: 84A-20 (West 1976); N.Y. CIV. PRAC. LAW § 3101(b)-(d) (McKinney 1970); WIS. STAT. ANN. § 905.03 (West 1975). *Contra,* San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962); Calahan v. Newsday, Inc., 228 N.Y.S.2d 504 (Sup. Ct. 1962). Experts have been treated separately. *See* notes 87-96 and accompanying text *infra.*

Lie detector operators are more likely to be treated as investigators and hence extensions of the attorney, when legislation specifically designates them as such, rather than as experts, *see* NEV. REV. STAT. §§ 648.011, -.012, -.200, -.210 (Repl. Pps. 1977), or if subject-operator communications are declared to be "privileged," MICH. COMP. LAWS ANN. § 338-1728 (1970). The Michigan law was recently so construed in People v. Marcy, ___ Mich. App. ___, 283 N.W.2d 754 (1979). *See* note 69 supra. Other existing legislation indicates some protection of information given to lie detector operators, if characterized as investigators, without explicitly indicating the ability of an investigator to resist questions before grand and petit juries. *E.g.,* ME. REV. STAT. tit. 32, §§ 6060, 6062.2.D (1964); MINN. STAT. ANN. § 326.336 (subd. 4) (Cum. Supp. 1979); TENN. CODE ANN. §§ 24-116, 62-2702(7) (Cum. Supp. 1978).

The rationale for different treatment of experts and investigators under the attorney-client privilege is nowhere stated. The fact that today's criminal investigators possess

have characteristics of both the interpreter and the friend. The privilege has been applied in this circumstance through the reasoning used for interpreters. There are, however, unique costs attached to the application of the privilege to these experts. For example, a psychiatrist does more than merely "interpret" the language of psychopathology; the psychiatrist adds his own knowledge and conclusions, and also makes his own observations.[77] Consequently, the application of the attorney-client privilege to psychiatric interviews has the effect of insulating from disclosure items that, by their nature, are not germane to the

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special skill and expertise in matters such as photography tends to blur further an otherwise difficult distinction. Both experts and investigators are immersed in a particular case, and possess information properly protected by the work-product doctrine. The distinction between expert and investigator has as its operational significance, for the attorney-client privilege, the necessity of communication from the client. One characterized as an investigator need not make that showing to partake of the privilege; an expert must.

The following distinction is suggested. An expert should be treated differently than an investigator because of the independence of the expert vis-à-vis the attorney. The attorney makes only a few categorical demands of the expert, whose primary function is to formulate an accurate opinion of some aspect of the case in terms of his special expertise. The investigator may be directed step-by-step by the attorney to locate a witness, take certain pictures, or ask certain questions; the expert is asked to form an opinion about a matter, such as the mental state of the defendant, and at that point, ceases to take direction from the attorney. This distinction shows that the expert is not really a member of the attorney's "team," and not really the attorney's representative to the client. Under this definition, the lie detector operator is clearly an expert, and not entitled to treatment as the extension of the attorney as an investigator would be, under the privilege.

Alternatively, one can view the exceptional treatment of investigators as third parties under the privilege as part of the policy that such persons be necessary for client communication to the attorney, on the theory that under the system most attorneys use, an attorney cannot physically make every client interview himself, or have every communication with the client in the course of the case. Investigators, therefore, are usually in the regular employ of the attorney. Investigators may be necessary to expand the number of communications that *can* be made to the attorney by the client; however, the use of experts has a different function. Experts are not simply for communication, but for analysis of the client. As long as the expert is not also necessary for communication, client communications should not be privileged; analysis of the client is not, by itself, the focus of the attorney-client privilege. In any event, the unresolved nature of this issue lends doubt to the usefulness of the attorney-client privilege to protect lie detector information, particularly when courts are generally unwilling to expand privileges. Since that unwillingness is responsive to the loss of evidence, the prospect that justice can be done with a less costly privilege makes expansion even less likely. The application of the attorney-client privilege would seclude a greater quantum of information from courts (particularly confessions to the matter under investigation) than would the evidentiary privilege proposed in Section V *infra*.

77. Friedenthal, *Discovery and Adverse Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 464-66 (1962). The expert receives unwarranted protection from disclosure extending to his own opinions that are not communicative as well as to his observation of the noncommunicative aspects of the client.

policies of the privilege. In civil cases, this criticism is mitigated by the likelihood of disclosure of statements given to the expert by way of deposition.[78] In criminal cases, the decision to protect an expert as an intermediary of communications poses a greater evidentiary cost. Without an expert, only two sources of the client's statement exist — the client and the attorney. Because of the fifth amendment, the client cannot be deposed. The attorney cannot be compelled to disclose the client's statements because of the privilege. The decision to include the expert under the privilege is therefore extremely significant. Not only may statements made to the expert be protected, but those between the expert and attorney may be protected as well. While the substance of these communications may be disclosed in civil cases, these alternatives are not available in criminal cases.

1. The Application of the Attorney-Client Privilege to Experts.—There is virtually no case law applying the attorney-client privilege to lie detector examinations. Communications made by a defendant to a psychiatrist in the course of an interview arranged at the request of the attorney, however, will be protected by the privilege.[79] The purpose of such an interview is presumably to allow the attorney to better understand the prospect of a particular defense or legal maneuver concerning the client's condition. In most cases, an expert consulted by the client at the request of the attorney is, absent a subsequent waiver, treated as an extension of the attorney and therefore the client can talk as freely with that expert as he could with the attorney, retaining his protection under the privilege.

The precedent of treating some experts as attorneys, for purposes of the privilege, is unlikely to be extended to lie detector operators because of their unique role in criminal litigation. Under the extant precedent, it is necessary to distinguish between the need for an expert to assist in the preparation for trial and the need for an expert to act as a conduit of communication from the client to the attorney. The first need does not implicate the policy of the attorney-client privilege.

The spirited gathering of evidence and the vigorous planning of strategy are indeed worthy of encouragement, but not under

78. *See* FED. R. CIV. P. 30, 33, 36.

79. United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); State v. Mingo, 77 N.J. 576, 392 A.2d 590 (1978); State v. Kociotek, 23 N.J. 400, 129 A.2d 417 (1957).

the rubric of the attorney-client privilege. The work-product doctrine is exactly suited for those purposes.[80] More importantly, the work-product doctrine affirmatively sets limits on the weight these purposes should be accorded, balancing the necessity of protection from disclosure against the materiality and unavailability of the evidence. To apply the attorney-client privilege to this end is not only redundant, but also in direct conflict with the policy of the work-product doctrine to preserve the availability of an attorney's materials under the appropriate circumstances.

In *Hickman v. Taylor,*[81] the Supreme Court explicitly rejected the application of the attorney-client privilege for this reason.[82] Had it thought otherwise, the Court would not have discussed the alternative availability of the material sought. The lower court had addressed at great length the contrary proposition and held the privilege applicable.[83] Prior to the enunciation of the work-product doctrine, courts often had implemented work product policies under the rubric of the attorney-client privilege, at times candidly admitting that the privilege was not directly pertinent.[84] After *Hickman,* the need for another label to provide work-product protection no longer existed. Proper application of the attorney-client privilege to experts, therefore, depends upon the necessity of the expert for attorney-client communications and cannot rely solely on the work-product policy of encouraging preparation for litigation.

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80. See Section III.*B.*

81. 329 U.S. 495 (1947).

82. *Id.* at 508.

83. The reason for the frank extension of [the attorney-client] privilege beyond testimonial exclusion rests on the same foundation that the rule of evidence does. It is the same foundation upon which we base the immunity of the judge for his official acts in that capacity. It is found again in the nonliability of the judge, counsel and witnesses for defamation for what they say in the trial of a lawsuit. In none of these instances is the immunity based on the convenience of the individual judge, lawyer or client. It is, rather, a rule of public policy, and the policy is to aid people who have lawsuits and prospective lawsuits. Those members of the public who have matters to be settled through lawyers and through litigation should be free to make full disclosure to their advisers, *and to have those advisers and other persons concerned in the litigation free to put their wholesouled efforts into the business while it is carried on.*

Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945) (emphasis added, citations omitted).

84. *See In re* Grand Jury Proceeding, 473 F.2d 840 (8th Cir. 1973). For a collection of cases, see Annot., 139 A.L.R. 1250 (1942). The distinction between the two doctrines and the judicial preference for work product as allowing more evidence and as being responsive to the peculiarities of the individual case is set forth in Dudek v. Circuit Court, 34 Wis. 559, 150 N.W.2d 387 (1967).

The distinction between these two different functions of an expert has not been starkly presented previously because an expert who is needed for communication is almost invariably also useful in the attorney's preparation for trial. Among those experts who examine clients, only the lie detector operator performs the preparation function without the communication function. The precedent concerning experts has made reference to the preparation function, but has never found that function, by itself, a sufficient condition for the invocation of the attorney-client privilege.

The leading case on the extension of the attorney-client privilege to experts is *City & County of San Francisco v. Superior Court.*[85] James Hession sought to recover damages from the City of San Francisco for an alleged injury to his nervous system. He was examined by a doctor according to the wishes of his attorney. The city sought a writ of mandamus in the California Supreme Court to contest the trial court's ruling that the doctor's opinion, which was based on the interview with the client, was protected from discovery by the attorney-client privilege. Justice Traynor found no physician-patient privilege applicable since the examination was not for the purpose of treatment and disclosure, therefore, would not deter other patients from being forthright with their physicians when seeking treatment. Construing the statutory attorney-client privilege, Justice Traynor reviewed prior authority on the use of interpreters and messengers and concluded that the section of the statute referring to clerks and secretaries impliedly authorized the privilege for doctors as well:

> [W]hen *communication* by a client to his attorney regarding his physical or mental condition *requires* the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed . . . .[86]

Justice Traynor's approach can be viewed as a pragmatic realization that, in a modern world, an attorney must be able to "communicate" with his client in a variety of languages, many of which require expert training to adequately understand. It is not enough, in an era of great advances in medicine, to simply question the client on his impressions of the cause and conse-

85. 37 Cal. 2d 227, 231 P.2d 26 (1951).

86. *Id.* at 237, 231 P.2d at 31 (emphasis added, citations omitted).

quence of an injury. A meaningful account of a client's physical condition can only be communicated through the application of medical training the lawyer does not possess. The nature of the confidential communications to be protected must keep pace with the times if the attorney-client privilege is to continue to be of social value. Nonetheless it is important to note the limitation Justice Traynor placed upon the extension of the privilege: the expert's assistance must be required for communication. *City & County of San Francisco* protected the doctor's interview against disclosure because to do otherwise would have handicapped the client's ability to communicate effectively with his attorney. Some of the information that the doctor might otherwise have been required to reveal, including certain observations and opinions, was protected because it was inextricably intertwined with the client's communications. The existence of this extra information does not diminish the necessity of the expert for communication between the client and his attorney.

The progeny of *City & County of San Francisco* has formulated additional reasons for extension of the attorney-client privilege to experts. A sensible result is reached by these opinions in extending the privileges to particular experts,[87] but it does not follow that the attorney-client privilege will apply to lie detector operators or that this reasoning is sufficient to support the privilege.

This trend is illustrated by a comparison of two Michigan cases, *Lindsay v. Lipson*[88] and *People v. Hilliker*.[89] In *Lindsay*, the

87. Weinstein construes Proposed Federal Rule of Evidence 503(a)(3), which provides that "[a] representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services," as representing an extension of the clerk or secretary conduit function to any expert retained for litigation. The expert who interviews the client at the behest of the attorney is the attorney's agent and hence the attorney-client privilege protects communication from client to expert and from expert to attorney. 2 J. WEINSTEIN, *supra* note 75, at ¶ 503(a)(3)[01]. No cases are cited that directly consider this proposition nor is the matter of necessity for communication discussed as central to the rule. Weinstein does note, however, that the existence of other federal limitations on access to expert's information renders the applicability of the attorney-client privilege "somewhat academic." *Id.* The majority of the case law has emphasized the requirement of necessity. *See* United States v. Kovel, 296 F.2d 918 (2d Cir. 1963), and cases cited in note 79 *supra*. Courts have at times deemed the expert so essential to the theory of the case, as, for example, a scientist in patent litigation, that they treat the expert as co-counsel for reasons that are admittedly beyond those of the attorney-client privilege. *Compare* Lalance & Grossjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563 (S.D.N.Y. 1898) *with* United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975) *and* State v. Mingo, 77 N.J. 576, 392 A.2d 590 (1978).

88. 367 Mich. 1, 116 N.W.2d 60 (1962).

89. 29 Mich. App. 543, 185 N.W.2d 831 (1971).

Michigan Supreme Court held privileged the testimony of a doctor who was hired specifically for litigation and who examined the plaintiff:

> Had Mrs. Lindsay possessed the *requisite* training and skill to make an accurate appraisal of her physical condition and to draw reasonable conclusions therefrom as to probable future developments, any communication by her to her attorney of such appraisal and diagnosis would without question have been privileged and she could not have been examined as a witness with reference thereto. To accomplish the desired result the attorney representing her deemed it necessary to employ a medical expert to act for him and his client and to convey to him on behalf of his client the information he needed to properly prepare his pleading and to try the cases that the party intended to institute.[90]

The significance of the doctor as a necessary link in communication is clear. Because the patient lacked the doctor's expert training, the attorney needed the doctor to comprehend medical information given by the client. In construing *Lindsay,* however, *Hilliker* changed the emphasis in the reasoning behind the privilege. The defendant in *Hilliker* complained that at trial the prosecutor elicited testimony from a psychiatrist who had initially examined Hilliker at the request of the defense attorney; the psychiatrist's report was highly unfavorable and the defense elected not to call him to the stand. The appellate court held this testimony to have violated the attorney-client privilege.

> [S]ince the privilege clearly extends to confidential communications made directly by the client to the attorney, there is nothing to dictate a different result where the communication is made to the attorney by an agent on behalf of the client, such as a doctor or a psychiatrist. In these complex times, the attorney-client privilege would be greatly eroded unless the client is allowed to communicate through an expert whose services are needed to prepare for trial.[91]

No emphasis was placed on the necessity of the expert for communication, although *Lindsay* was cited. Instead, the court ignored necessity for communication and turned to the usefulness of the expert in preparing the case as the major rationale for the

90. 367 Mich. at 5, 6, 116 N.W.2d at 63 (emphasis added).
91. 29 Mich. App. at 547, 185 N.W.2d at 833.

extension of the privilege. No distinction is made between the convenience or usefulness of having the psychiatrist as a conduit of information, and the necessity of having him as a conduit. Although the court in *Hilliker* might have done more to underscore the communications aspect of the *Lindsay* case, the result reached is nonetheless consistent with *Lindsay*. Perhaps the court was overly indulgent in framing the rationale of the privilege because it seemed unfair for the prosecution to take advantage of the defense investigation. To the extent the court sought to discourage the prosecutor from engaging in tactics that would deter the defense from developing its case, the court's concern embodied the policies underlying the work-product doctrine. Using the attorney-client privilege, however, with its more absolute protection of relevant evidence, is contrary to the work-product policy of allowing disclosure upon an adequate showing. An expansion of the attorney-client privilege without reliance on facilitation of communication was, therefore, inappropriate.

A similar trend is evident in *United States v. Alvarez*.[92] In *Alvarez* an attorney sought successfully to have a psychiatrist appointed at court expense to determine the competency of defendant, who was charged with kidnapping and related conspiracy charges. Through the reciprocal nature of discovery in federal criminal cases,[93] the government received a copy of the report of this psychiatrist. The report indicated an opinion that defendant was sane at the time of the offense and made reference to statements made by defendant during the course of the psychiatric examination. Over defendant's objection, the psychiatrist testified for the government, using the statements made in the psychiatric examination as part of his testimony. As one of several[94]

92. 519 F.2d 1036 (3d Cir. 1975).

93. Wardius v. Oregon, 412 U.S. 470 (1973); FED. R. CRIM. P. 12.2, 16.

94. "The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. If the expert is later used as a witness . . . the cloak of privilege ends." 519 F.2d at 1046. Obviously, the court is also concerned with the question of effective assistance of counsel; the sixth amendment issue requires separate analysis beyond the scope of this article. The court, however, frames this policy as part of the attorney-client privilege. The need for a psychiatrist as a conduit of communication would have by itself resolved the case with precisely the same result. *See* State v. Mingo, 77 N.J. 576, 392 A.2d 590 (1978). Also cited in *Alvarez* was United States v. Kovel, 296 F.2d 918 (2d Cir. 1963). *Kovel* concerned the use of an accountant, but it was framed in terms of the necessity for communication:

> Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant

bases for its reversal, the Third Circuit cited *City & County of San Francisco* for the proposition that an attorney should not have to risk the creation of an adverse witness in the process of fully considering the insanity defense. This policy, though sound, does not flow directly from *City & County of San Francisco.* An approach that preserves the necessity-of-communications aspect of the attorney-client privilege still requires the conclusion reached in *Alvarez* because, notwithstanding the risk of creating an adverse witness, a psychiatrist is necessary for communication to the attorney from the client.

A more appropriate response to the fear that defense investigation will be deterred by the adverse use of experts previously consulted is found in *Pouncy v. State.*[95] The prosecution successfully deposed defendant's psychiatrist. Although the court made reference to the attorney-client privilege in its reversal of the conviction, its analysis reveals that it actually applied the work-product doctrine. The court considered significant the previous consultation of the psychiatrist as part of the attorney's preparation for an insanity defense. It determined that there was no dearth of experts available to the state, even though this particular psychiatrist was now unavailable. It also determined that the unavailability of this defense expert to the prosecution did not so encumber the prosecution that the public interest in a well-informed trier of fact was undermined.[96] These limitations on privilege make the action of the Florida court in *Pouncy* analytically similar to an application of the work-product doctrine, rather than the attorney-client privilege. The protection offered was concerned with the materiality of the information and the accessibility of alternative sources, both of which are irrelevant to the attorney-client privilege.

> . . . while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege any more than would that of the linguist . . . . [T]he presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

296 F.2d at 922.

95. 353 So. 2d 640 (Fla. 1977).

96. Concern was raised, although not, according to the appellate court, supported by the record, that the defense psychiatrist might have had the only meaningful opportunity to perform a psychiatric interview to determine insanity at the time of the offense, because of the difficulty of making such a determination through an interview after a substantial amount of time has elapsed. The defendant's memory may be faulty; his symptoms may change. In this case, the defense psychiatrist obtained an interview almost immediately after the offense, but no showing of any difficulty for the state's psychiatrists was made. *Id.* at 642.

Pouncy also presents a certain irony. Although its discussion of the expert's role in preparation for litigation is more consistent with the work-product doctrine than the attorney-client privilege, it ignores the role of the psychiatrist as a necessity for communication. Conditioning the confidentiality of a psychiatric interview on the vagaries *Pouncy* considered reduces the predictability of protection other courts have established for those interviews.

2. The Application of Attorney-Client Privilege to Lie Detectors.—What *Hilliker, Lindsay, City & County of San Francisco, Alvarez,* and *Pouncy* show is that application of the attorney-client privilege to experts makes sense only to the extent that the expert is necessary for communication. They also display the courts' concern that, if one party can freely use the evidence and information gathered by the other, the full investigation of a case may pose unacceptable risks to the attorney. Additionally, the extension of the privilege to experts has been commended as aiding the attorney in the best preparation of his case. None of these additional concerns has changed the result of a single case; every expert protected has also been necessary for communication. Therefore, although these cases might superficially appear to support a general rule for experts that will apply to lie detector operators, they should not be construed as dispensing with the necessity-of-communication requirement. Since the other concerns are protected by other doctrines,[97] it would be anomalous if an expert unnecessary for communication was protected by the attorney-client privilege.

The difficulty of characterizing the lie detector as a necessary conduit of communication to the attorney centers around the characterization of the subject matter being communicated. The privilege has been construed to protect information communicated through experts when the experts were necessary for that task. With the lie detector expert, the information can be characterized in two ways. Either it is the physiological concomitant of truth and deception or it is simply the "yes" or "no" answer to the relevant question posed by the operator to the subject. If it is assumed that the privilege focuses on the first characterization, the operator's conclusion concerning the meaning of the physiological responses appears to be within the privilege.[98] His exper-

97. See notes 38-49 and accompanying text *supra.*

98. This view apparently is accepted by Reid and Inbau. J. REID & F. INBAU, *supra* note 1, at 347-48.

tise clearly is necessary for the physiological responses to have any communicative value at all for the attorney. Statements made in furtherance of that necessity, for example, admissions of unrelated crimes, would be protected as inseparable from the communications themselves and necessary to their interpretation by the expert. Under the contrary view, however, the client is able to bypass the operator's expertise and communicate the truth directly to the attorney, thus obviating any necessity for the operator.

A third party who acts as a conduit for a communication is not necessarily essential to the communication. The determination of necessity depends on the differences between the third-party communication and the communication that the client himself could make directly to the attorney. A comparison of the two views shows the operator should not be deemed necessary. One difference between communication of the expert's opinion and the client's forthright statement is the ability of the attorney to convince others outside the attorney-client relationship of the client's veracity. That difference is clearly irrelevant to the policy behind the privilege. Other differences concerning the attorney's belief of what the client says or the attorney's ability to extract information from an unwilling client are similarly outside the realm of the policies of the privilege. In short, since there is no advantage in terms of the rationale underlying the privilege for one communication over the other, an equivalent means of communication through an expert cannot be the focus of any necessity to communicate under the privilege.

The purpose of a lie detector examination is to determine whether the subject is truthful. As far as the physiological responses are concerned an expert is necessary to convey them meaningfully to the attorney. Those readings, however, are not the proper focus of necessity. What the client could himself tell the attorney does not gain necessity because it comes through an alternative form. An English-speaking client who also speaks Spanish with the same facility as English would have less of a claim to the use of a Spanish interpreter than would a client who spoke only Spanish. The expert may render a valuable service by supplying an alternative means of communication by which the attorney can verify statements made directly to him by the client; nonetheless, that value is not part of any of the policies providing protection against disclosure. Similarly, the fact that additional evidence or expert opinion useful in plea bargaining may be gathered is not

part of the policies of this privilege.

Assuming the latter view of what is communicated through the operator, the difficulty of applying the privilege to lie detector operators is apparent. Nothing prevents the client from telling the truth to his attorney; no special expertise is required either by the client or his attorney. Indeed, the attorney-client privilege was meant to relieve the client's fear of disclosure, not to preclude the client's conscious, voluntary decision to consult with the lawyer as he sees fit. To the extent that the attorney does not trust the client, the policy of the privilege is inapplicable, since it is centered upon the client's willingness to make a confidential disclosure rather than the lawyer's need to verify it. It bears repeating that this distinction is important because, although other protection is available for this material, it is not as categorical or absolute as the protection provided by the attorney-client privilege.

It is also important to bear in mind here the distinction between the facilitation of communication and the development of evidence useful at trial. Both the psychiatrist and the lie detector operator may be useful to produce admissible expert evidence. That kind of utility, however, is irrelevant to the inquiry posed by the attorney-client privilege. The psychiatrist communicates to the attorney information that the client would convey if he had the perception and expertise to do so. The lie detector operator, on the other hand, is not necessary in any interpretive capacity for the client to communicate truthfully with his attorney.

Even if the operator is not deemed necessary for the client's communication with the attorney, the operator might be thought to fall within the ambit of the privilege because he facilitates communication, as would a relative or friend present at the attorney-client interview. Of course, the attorney is not present in the lie detector examination.[99] The operator might still be thought of as functionally comparable to a friend or relative. This characterization, however, is questionable. A typical client must be presumed able to communicate with his attorney if he so wishes. Who, then, is being aided by the examination? It is not the client, but rather the attorney who seeks to verify what the client has told him. In that instance, the examination does not foster the relationship of trust and confidentiality between an

99. His presence would constitute a distraction and invalidate the examination.

attorney and his client that the privilege contemplates. Indeed, if the client is truthful, the examination is merely a search for useful results. If the client is not truthful, it is a means to overcome a decision by the client to withhold information from his attorney.[100] In that circumstance the examination would give rise to a deceptive response or an admission in the course of the examination. If the client ultimately told the attorney what he told the operator, or if upon being confronted with deceptive results he confessed to the attorney, the examination could not be said to have given him the emotional security to confess. Assisting the attorney in extracting information from the client is substantially different from allowing the client to communicate what he actually wishes to disclose to the attorney. The former function is not the purpose of the privilege. Thus, regardless of the client's truthfulness, the examination does not further the purpose of the attorney-client privilege.

Statements made by the defendant during the examination present a more complicated question. Although the defendant could easily communicate such statements to the attorney without the expert and that communication presumably would be protected if made directly, these statements develop only as artifacts of the quest for the operator's opinion of the defendant's veracity. Moreover, it is material that the client would in many instances neither want to nor need to divulge these to the attorney. Suppose the client is charged with the crime of assault with a deadly weapon and he reveals to the operator a similar assault he has committed. This other assault, factually unrelated to the present charge, has as its only role in the examination the prospect that it will create a physiologically manifest concern for which the operator must be able to account. This problem suggests as strong an argument for the protection of the information as it does for the independence of that protection from the attorney-client privilege. As the artifact of the quest of something not itself protected, the artifact cannot receive protection under the attorney-client privilege. The revelation of other crimes, for

100. Attorneys may occasionally use the lie detector to induce confessions by their clients for their "own good," to facilitate guilty pleas, or even to disguise the attorney's shortcomings in solving the client's legal problems. The extension of the attorney-client privilege to third-party experts focuses on the client's ability to communicate, but not his willingness. Indeed, to the extent free communication with the attorney is desired, the lie detector examination is inapposite.

example, is not withheld from the attorney for fear of disclosure, nor is it necessary for communication of truthfulness regarding the substance of the lie detector examination. It is necessary for the accuracy of the test, but the test is not necessary to communicate the truth. For the purpose of communication, the examination itself and all of its artifacts are unnecessary and unprivileged. On the other hand, if the operator is perceived as necessary for communication, these incidents will be privileged as part of the ensuing protection for they would be necessary to interpret the responses.

The attorney-client privilege cannot be relied upon to shield the operator from inquiry concerning the results of the examination or the statements made during examination. To the extent existing case law supports such an application, it represents an unjustified extension of the policies underlying the attorney-client privilege. Nonetheless, the extension has not been criticized because this case law, narrowly viewed, yields outcomes consistent with those from the traditional application of the privilege. Given the policies of the attorney-client privilege, the lie detector examination should not be characterized as necessary for attorney-client communication. The high evidentiary cost that a categorical privilege such as the attorney-client privilege exacts on the quest for truth central to the trial of a criminal case indicates that courts will be critical of any expansion of the privilege. While this criticism may not guarantee any particular result in a given case, it underscores the need to look for other sources of protection.

The purpose of this discussion has not been to prompt disclosure of lie detector information. Rather, its purpose has been to recognize that the attorney-client privilege is ill-suited to the protection of that information. The subject of the examination may be a witness rather than a client and thus be unable to avail himself of the privilege. The cases that have extended the privilege to other experts are unlikely to apply to the lie detector operator. Finally, the existing precedent does not present the kind of reliable confidentiality necessary for accurate lie detector results and the kind of safety desired by attorneys who wish to use the lie detector.

D. The Application of the Fifth Amendment

The fifth amendment privilege against compelled self-

incrimination affords no meaningful protection for the confessions, unrelated admissions, or results of lie detector examinations. The amendment focuses on the extent to which the government can extract evidence from the defendant. In general, only testimonial evidence[101] that is directly compelled from the defendant is covered.[102] Since the privilege is personal to the defendant,

101. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 764 (1966).

102. The fifth amendment also poses a broader question than whether the defendant has been compelled to produce testimonial evidence. The amendment is concerned with the balance between the government and the individual in the prosecution of a criminal case. *See id.* at 762. That concern, however, has not led courts to suppress evidence compelled from the defense, regardless of its testimonial character, or relationship to the defendant, as long as the defendant himself was not compelled to give testimonial evidence. Forcing the defendant to model clothing for the victim of a crime, Holt v. United States, 218 U.S. 345 (1911), to furnish voice exemplars, United States v. Dionisio, 410 U.S. 1 (1973), or to supply his blood for an intoxication test, *Schmerber*, has been held consistent with the amendment's protection, even though the defendant supplies crucial evidence that is used to incriminate him. A minority of the Court has attempted to afford protection in this circumstance. *E.g.*, United States v. Dionisio, 410 U.S. at 31 (Douglas, J., dissenting); United States v. Wade, 388 U.S. 218, 243-46 (1967) (Black, J., concurring and dissenting); Schmerber v. California, 384 U.S. at 773 (Black, J., dissenting). The position taken in these opinions is that the defendant cannot be forced to help the prosecutor in any way, testimonial or otherwise, because of the balance of resources and the burden of proof that rest with the prosecutor. A few state courts have been more solicitous of the question of balance. In California, the defendant cannot be forced to supply the prosecutor with anything that tends to incriminate him. Craig v. Superior Court, 54 Cal. App. 3d 416, 126 Cal. Rptr. 565 (1976). *Cf.* State v. Scott, 519 P.2d 774 (Alaska 1974); Keller v. Criminal Court, 262 Ind. 420, 430, 317 N.E.2d 433, 439 (1974) (DeBruler, J., concurring and dissenting); Blaisdell v. Commonwealth, 372 Mass. ____, 364 N.E.2d 191 (1977). *But cf.* State v. Hardin, 558 S.W.2d 804 (Mo. App. 1977) (attorney's interview with witness not protected by fifth amendment).

In United States v. Brown, 501 F.2d 146 (9th Cir. 1974), the Ninth Circuit presented a strong argument, marshalling federal precedent, that the fifth amendment protected evidence gathered by the defendant, at least insofar as the evidence concerned the state's prima facie case. The Supreme Court rejected the approach, however, when it reversed *Brown, sub nom.* United States v. Nobles, 422 U.S. 225 (1975). The resolution of this argument suggests that the Supreme Court will not be receptive to alternative boundaries on the state's ability to build a prima facie case using evidence developed by the defense, even though the defense does not intend to introduce that evidence. Some lower courts have set these boundaries as a means of guaranteeing adequate investigation and effective representation for the defendant. The policy implicated is similar to that underlying the protection of work product: to avoid deterring the defendant from developing his case or exercising other constitutional rights. Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978); United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Theriault, 440 F.2d 713, 716-17 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied*, 411 U.S. 984 (1973); Collins v. Auger, 428 F. Supp. 1079 (S.D. Iowa 1977); State v. Mingo, 77 N.J. 576, 392 A.2d 590 (1978). *Cf.* Brooks v. Tennessee, 406 U.S. 605 (1972) (improper to burden decision to testify with requirement that defendant testify before his other witnesses); Simmons v. United States, 390 U.S. 377 (1968) (improper to burden fourth amendment rights with waiver of right to remain silent).

it offers no protection for prosecution witnesses. Moreover, as long as the defendant is not compelled to take the examination, the privilege is not available to him either.

1. The Compulsion is Not Directed to the Defendant as a Person.—What the defendant says in the course of an examination constitutes a statement like any other and is clearly testimonial in character. The interpretation of the physiological tracings given in response to questions from the examiner is arguably testimonial as well.[103] Once the defendant has willingly taken a lie detector examination, however, this information, which could not have been compelled directly from him, can be obtained from the person who now possesses it, the lie detector operator. The compulsion to produce testimonial information thus no longer would be placed on the defendant,[104] but rather on the operator.

In *Mingo* the Supreme Court of New Jersey found that allowing the testimony of the defendant's handwriting expert to be used by the prosecution made defense investigation so risky it would interfere with effective assistance of counsel. Although the court found the error harmless, it is not clear from the opinion what role the crucial nature of the handwriting evidence in the case played in the court's analysis. The defendant was charged with rape. The victim claimed she was lost and initially approached the assaillant for directions. She gave the police the handwritten directions she received. The policy of the court to "safeguard the internal strategic process of the defense," 77 N.J. at 587, 392 A.2d at 595, is an amalgam of the work-product doctrine and the right to effective assistance of counsel under New Jersey and federal law.

103. Schmerber v. California, 384 U.S. 757 (1966).

104. A number of recent Supreme Court cases has decisively settled this issue. In Couch v. United States, 409 U.S. 322 (1973), the Court held that a taxpayer could not invoke the fifth amendment to avoid a subpoena directed at her own records, which were in the custody of her accountant, because the compulsion of the subpoena operated on the accountant and not the taxpayer. *Id.* at 329, 336. Similarly, in Fisher v. United States, 425 U.S. 391 (1976), a taxpayer was held unable to invoke the fifth amendment for records held by his attorney because the compulsion to disclose rested on the attorney himself. *Id.* at 399.

Fisher also cast a dim light on the notion expressed in Boyd v. United States, 116 U.S. 616 (1886), that the fifth amendment, having as one of its policies the protection of privacy, should be useful to protect private papers. The matter is of interest to lie detector subjects since a close, personal, private exchange may be said to take place. *See* note 167 and accompanying text *infra*. Without explicitly holding that private, testimonial documents are not protected by the fifth amendment by virtue of their substance, the Court implied that the substance would bring no special consideration under the fifth amendment:

> Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment's protection against searches without warrant or probable cause and against subpoenas which suffer from "too much indefiniteness or breadth in the things required to be 'particularly described' " . . . the First Amendment . . . or evidentiary privileges such as the attorney-client privilege.

Without the ingredient of direct compulsion,[105] the defendant's fifth amendment claim would fail. If some other evidentiary privilege, such as the attorney-client privilege, were available for the operator, the information might be protected.[106]

2. The Admissibility of Results and the Waiver of Privilege Concerning Remaining Information.—If the law were to change and admit unstipulated lie detector results as evidence of credibility, a defendant who passed the examination, but who had made incriminating unrelated admissions, would want to proffer the results but not the admissions. The prosecution would seek to cross-examine the operator on a variety of subjects, including the withheld information. Whatever privilege under the fifth amendment the defendant had would be waived, at least to the extent necessary to afford adequate cross-examination.[107] Thus, the fifth amendment would not operate to shield the admissions once the results were admitted.

3. The Inadequacy of the Fifth Amendment.—Because subjects take lie detector examinations willingly, the fifth amendment has little impact on the disclosure of what is learned.

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425 U.S. at 401 (footnotes and citations omitted). *See id.* at 428-30 (Brennan, J., concurring); State v. Grove, 65 Wash. 2d 525, 398 P.2d 170 (1965) (denying fifth amendment protection to a letter written from a jailed husband to his wife).

105. Under most circumstances, when the defense is compelled to produce certain information pursuant to subpoena or discovery rules, no direct compulsion is thought to act on the defendant. The defendant's answer to these orders reveals not only the substance of the material sought, but the acknowledgment that the material exists. Ordinarily, that acknowledgment is of no significance, since the nature of the material is previously known by the prosecution. Fisher v. United States, 425 U.S. 391, 410-12 (1976). A number of courts have indicated, however, that requiring the defendant to acknowledge the existence and nature of scientific tests that the defendant does not intend to introduce in evidence is in effect a compulsion of testimonial material barred by the fifth amendment. People *ex rel.* Bowman v. Woodward, 63 Ill. 2d 382, 349 N.E.2d 57 (1976); *see* People v. District Court, 187 Colo. 333, 531 P.2d 626 (1975). Since lie detector examinations must often be advertised to be effective, whether to obtain favorable plea bargains, lower bail, or cooperation from family members, this reasoning will often be inadequate to protect the defendant's lie detector information.

106. In Fisher v. United States, 425 U.S. 391 (1975), the Court indicated that evidence possessed by the defense attorney was not protected by the fifth amendment, even if it would have been protected in the defendant's hands. *Id.* at 409. The need to encourage full attorney-client communication, however, requires that the defendant not be penalized for talking to his attorneys. Thus, material for which the defendant could claim fifth amendment protection does not lose its protection if it is communicated to the attorney within the attorney-client privilege. The effect of this ruling is that the client incurs no incremental risk of disclosure by communicating with his attorney.

107. C. McCormick, *supra* note 64, at § 31. Concerning the necessity of some disclosures for adequate cross-examination, see notes 15-19 and accompanying text *supra*.

If lie detector results ever become admissible absent stipulation, the defendant may argue that protection of lie detector information is part of his right to an adequate investigation. An attempt to use the results at trial, however, would waive even that protection of statements made in the course of the examination. At present, there is no fifth amendment protection at all.

IV. The Role of the Prosecutor's Duty to Disclose Evidence Favorable to the Defense

The prior section was concerned with the extent of protection of lie detector information offered by the work-product doctrine, the attorney-client privilege, and the fifth amendment. Protection is necessary for the use and usefulness of lie detectors, and these devices are inadequate to guarantee this protection; therefore, a separate privilege is needed. Before considering that privilege, however, another inquiry must be made. The protection of lie detector information by a judicially or legislatively created privilege is meaningful only to the extent that privilege is not contrary to the Constitution. Whenever the Constitution would require disclosure of lie detector information, a privilege without a constitutional basis cannot be invoked to prevent disclosure. This section is concerned with situations in which constitutionally mandated disclosure would contravene any claim of privilege. As will be seen, the frequency of such a conflict is sufficiently small that consideration of a new privilege is meaningful.

A. Constitutionally Compelled Disclosure by the Prosecution

The defendant's constitutional right to a fair trial imposes a duty on the prosecution to disclose certain evidence favorable to the defense. To the extent that lie detector information from the examination of prosecution witnesses must be disclosed under this doctrine, a privilege could not be claimed by the prosecution and it would therefore be discouraged from testing its witnesses. A consideration of the doctrine and its application to results, unrelated admissions, and confessions shows that the duty to disclose favorable evidence will have little practical impact on the functioning of a lie detector privilege.

Information that the prosecution is obligated to disclose is generally referred to as *Brady* material, after the case of *Brady*

v. Maryland.[108] In *Brady*, defendant was held to have been denied his right to a fair trial when the prosecutor failed to disclose a confession by a codefendant that corroborated defendant's claim that the codefendant was primarily responsible for the victim's death. Because of the nondisclosure, defendant was prejudiced when sentenced.

Brady and the cases that have followed it stand for the principle that the prosecutor's constitutional role in the criminal justice system is more than that of a mere advocate.[109] The prosecutor has a responsibility to make the trial into a vehicle for truth; therefore, he should not withhold evidence that would tend to exculpate the defendant.[110] When the prosecutor or persons closely associated with the prosecution possess favorable evidence, it should be disclosed. Failure to do so,[111] however, actually

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108. 373 U.S. 83 (1963).

109. The classic statement of this position is found in Berger v. United States, 295 U.S. 78 (1935), in which the prosecutor's behavior at trial was so egregious that it prompted a new trial. The prosecutor obtained a conviction through misstatement, innuendos, and badgering. The Court stated:

> 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. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

110. United States v. Agurs, 427 U.S. 97 (1976); Moore v. Illinois, 408 U.S. 786, 809-10 (1972) (Brennan, J., dissenting); Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967). This proposition did not originate with *Brady*. *See* Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

111. The *Brady* doctrine is meant to redress wrongful withholding of evidence. As a practical matter, the defendant must discover, before or after trial, that the prosecutor indeed has favorable evidence; if it is forever kept secret, intentionally or not, the prosecutor's error cannot be reviewed. The withholding would still be a constitutional violation. This factor is equally applicable to the work-product doctrine or to any aspect of discovery. See notes 59-62 and accompanying text *supra*.

The fact that *Brady* material is not written down does not alter its character. For example, when it becomes known after conviction that the police withheld pretrial knowledge of an alternative suspect, the reduction of the knowledge to writing plays no factor in the analysis. Cannon v. Alabama, 558 F.2d 737 (5th Cir. 1977); Lee v. United States, 388 F.2d 737 (9th Cir. 1968); Lee v. State, 573 S.W.2d 131 (Mo. App. 1978). *Cf.* United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (2d Cir.), *cert. denied*, 406 U.S. 924 (1972); Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969).

The *Brady* obligation is consistent with an obligation to preserve favorable informa-

tion. In McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977), *cert. denied,* 434 U.S. 966 (1978), defendant was taken to jail covered with blood and bruises. He had been arrested for murder and his attorney sought to photograph him to preserve corroboration of his statement that he himself had been mugged, probably by the real murderers. The superintendent of the jail refused permission, and McDonald was subsequently convicted of murder. After spending three years in prison, McDonald was vindicated. The real murderer confessed, and McDonald was freed. He promptly sued, *inter alia,* the jail superintendent. In refusing to dismiss the civil rights claim, which was based on 42 U.S.C. § 1983 (1976), the Seventh Circuit commented:

> A defendant's right to prepare the best defense he can and to bring to the court's attention any evidence helpful to this case is constitutionally protected. The Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 101 L. Ed. 2d 215 (1963) recognized the right of a defendant to have access to exculpatory evidence in the hands of the prosecutor. We believe a defendant also has the right to preserve possibly exculpatory evidence and to the extent the government or its agent frustrate such preservation, the defendant has a constitutional claim.

557 F.2d at 603.

A similar issue arises when the prosecution or its agents destroy, rather than merely fail to preserve, otherwise discoverable evidence. Even when material is destroyed in the course of routinely transferring it to another form, as from rough notes to a neat report, the prospect of favorable evidence remains. For example, in United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975), the court disapproved of the destruction of rough notes of an F.B.I. interview of an eyewitness to an alleged bank robbery. Although the interview was routinely reported elsewhere,

> [I]t seems too plain for argument that rough notes from any witness interview could prove to be Brady material. Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case.

Id. at 427. One of the elements in assessing the appropriate sanction for the erroneous failure to preserve evidence is the bad faith of the police. *See* note 118 *infra.* As the court in *Harrison* notes, such an appraisal is quite difficult without knowing the substance of what could have been preserved. 524 F.2d at 432. Although the issue of preservation has not been strictly tied to the *Brady* obligation to disclose, the two naturally arise when evidence that could have been favorable is destroyed or not preserved. *See* United States v. Vella, 562 F.2d 275 (3d Cir. 1977), *cert. denied,* 434 U.S. 1074 (1978); United States v. Harris, 543 F.2d 1247 (9th Cir. 1976); United States v. Terrell, 474 F.2d 872 (2d Cir. 1973). These courts found that a routine practice of destruction and reliance on other sources does not necessarily excuse the failure to preserve *Brady* material. *See* Augenblick v. United States, 393 U.S. 348 (1969); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (destruction of a contemporaneous tape recording of an alleged narcotics sale held to contravene *Brady*); *see also* United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971) (opportunity for defendant to interview witness "suppressed" by the prosecution mitigates *Brady* prejudice). When physical evidence is involved, courts are more willing to speculate on the helpfulness of the evidence to the defendant, in addition to the question of bad faith. *See* United States v. Sewar, 468 F.2d 236 (9th Cir. 1972), *cert. denied,* 410 U.S. 1026 (1973); United States v. Consolidated Laundries, 291 F.2d 563 (2d Cir. 1961); United States v. Heath, 147 F. Supp. 877 (D. Hawaii 1957), *appeal dismissed,* 260 F.2d 623 (9th Cir. 1958); People v. Eddington, 53 Mich. App. 200, 218 N.W.2d 831 (1974) (good faith/unintentional loss of glass particle excused); State v. Graig, 169 Mont. 150, 545 P.2d 649 (1976) (no bad faith in loss of portions of nightgown in rape case and therefore police technician could testify); State v. Canaday, 90 Wash. 2d 808, 585 P.2d 1185 (1978) (en banc) (no admissible evidence could be derived from lost items).

deprives the defendant of a fair trial only if the withheld evidence is sufficiently material to his innocence and the persons in possession of it are sufficiently associated with the prosecution.

The *Brady* doctrine will be considered applicable in this section to information favorable to a defendant that can arise in the course of the prosecutor's lie detector examinations. As will be seen, these may not necessarily constitute *Brady* material. First, the result of the examination could be that the witness is lying in response to the relevant question, which is usually the accusation of the defendant. Second, the witness may make an admission unrelated to the relevant question, but useful to impeach his credibility if he testifies at trial. Third, the witness could make a confession to the relevant question. In that instance, the witness would admit to the operator that his initial statement to the police, upon which the relevant question was based, was a lie. These three prospects represent the three kinds of lie detector information discussed earlier. Additionally, the witness may tell the operator information about the case that was not previously disclosed to the prosecution. This new information could be anything from a confession of the crime itself to a lead concerning further evidence.

1. Prosecutorial Control.—To apply *Brady* at all, it must be shown that the prosecution or someone sufficiently closely connected with the prosecution has control over the item favorable to the defense. In this regard, persons working as part of the prosecution team have been treated as equivalent to the prosecutor; police fall into this category.[112] Since many of the prosecutor's examinations will be performed by operators who are members of the police force, the information they gain will be deemed to be in the prosecutor's control. In the event the operator is an independent tester working on a case-by-case basis for the prosecution, the same conclusion should be reached. Because of the nature of his task, he will be better apprised of the intricacies of the case than would most forensic police experts.[113] He needs as good a background as possible on the focus and status of the investigation in order to properly formulate the questions in the examination. In fact, inadequacies of the operator's background informa-

112. Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964). The matter has virtually ceased to be worthy of mention in later cases. *See* United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976).

113. J. REID & F. INBAU, *supra* note 1, at 11.

tion may invalidate his results.[114] He has more complete information than other forensic experts who work in a police uniform. A ballistics expert, for example, need not know the time of day or place of a shooting to match up a rifle with a bullet. While it might be unfair to saddle a *Brady* obligation on an independent expert who could not recognize when evidence is favorable to the defense, the independent lie detector operator is so well informed that no unreasonable burden exists. He knows as much about the prosecutor's case as does any police lie detector operator or even any other policeman, and his work is done at the prosecutor's bidding. Moreover, his function is to directly help the process of prosecution.[115] For these reasons, he should be viewed as falling within the ambit of the prosecutor's control. In other discovery settings, various independent experts working for the prosecution have been treated, for purposes of their work, as equivalent to the prosecutor for discovery purposes.[116]

2. The Favorable Nature of the Prosecutor's Information: Materiality.—The *Brady* doctrine requires disclosure only if the

114. In United States v. Lanza, 356 F. Supp. 27 (M.D. Fla. 1973), *aff'd,* 489 F.2d 554 (5th Cir.), *cert. denied,* 421 U.S. 909 (1975), a defendant was prosecuted as part of a gambling conspiracy. Evidence showed that he helped finance loans for the operation. A specific $30,000 loan was shown. That information was not made available to the operator, however, and the relevant questions in the examination were: "Did you *give* money to Harlan Blackburn for the operation of illegal gambling activities?" and "For illegal purposes, did *you give* money to Harlan Blackburn?" *Id.* at 31 (emphasis added). Defendant passed the test. No stipulation was made concerning admissibility, but the defendant attempted to lay a foundation for the operator's conclusion that the defendant truthfully denied criminality. The court refused the results as evidence on the ground that the questions were flawed by the ambiguity of "loan" and "give" and the ambiguity of the purpose of the money for a "loan" or for an "illegal gambling operation." *Id.* at 32.

115. Those agencies that work to help the prosecutor are the ones that come into direct contact with exculpatory evidence. *Brady* imputes the same obligation to those investigating on the prosecution's behalf that it imposes on the prosecutor. Any other approach would severely dilute the operation of *Brady*, making it dependent on the whim of the investigators. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1977) (concerning Bureau of Narcotics and Dangerous Drugs). The fact that the prosecutor's work is accomplished by a particular compartment of government that does not ordinarily prosecute does not alter the reality of the situation; the persons with evidence are acting with the prosecutor. Thus, while the Postal Service may not ordinarily be an "arm" of the prosecution, its cooperation in the bribery prosecution of one of its employees renders its personnel files within the *Brady* range of control. United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973). Lack of such cooperation may produce the opposite result for a government agency not linked systematically to prosecution. United States v. Weidman, 572 F.2d 1199 (7th Cir. 1978), *cert. denied,* 99 S. Ct. 87 (1979). *See* United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977) (preparation of a probation report not considered prosecutorial activity).

116. *See* United States v. Nobles, 422 U.S. 225, 239 (1975); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Zagel & Carr, *supra* note 32, at 600, app. A(I)(F) & (G).

items in question are sufficiently favorable to the defense; such evidence is said to be material to the defense. The question of adequate materiality is more complicated than that of control. Information or items that would be helpful to the defendant's case are not necessarily material to the extent that withholding them will deprive the defendant of a fair trial. To determine the materiality of withheld evidence courts consider both the level of the impact of the evidence on the trial and the level of obligation that the prosecutor failed to meet. In *Agurs v. United States*[117] the Supreme Court enunciated three categories of prosecutorial withholding, and three corresponding standards of materiality. The categories of prosecutorial action[118] can be viewed as three issues:[119] (1) whether the prosecutor knowingly allowed the use of perjured testimony or false evidence at trial, (2) whether he withheld exculpatory evidence even though the defendant specifically requested it, and (3) whether he withheld exculpatory evidence in the absence of a specific request. The categories are ranked in order of the prosecutor's dereliction of his duty. The standards of materiality that apply to these three categories can likewise be stated as the three corresponding issues that follow:[120] (1) whether there is any reasonable likelihood the false testimony could have affected the judgment of the jury; (2) whether the suppressed evidence might have affected the outcome of the trial; and (3) whether the omitted evidence creates a reasonable doubt that did not otherwise exist. Once the prosecutor's action is categorized the corresponding standard of materiality is applied. For exam-

117. 427 U.S. 97 (1976).

118. Although the Supreme Court has steadfastly denied the relevance of the prosecutor's good faith in deciding on the propriety of a new trial, Agurs v. United States, 427 U.S. 97, 110 (1976); Brady v. Maryland, 363 U.S. 63, 87 (1963), the *Brady* doctrine in effect punishes the excesses of the prosecution. Not surprisingly, therefore, courts have implicitly and explicitly continued to place emphasis on the prosecutor's good faith. See note 111 *supra*. In United States v. Disston, 582 F.2d 1108 (7th Cir. 1978), the court stated:

> [A]lthough good faith or bad faith of the prosecutor is irrelevant if the evidence is material, the good faith or bad faith may well bear on the materiality determination . . . . "[A] court should be less inclined to hold unproduced evidence immaterial or to hold the non-production of admittedly material evidence harmless error if the prosecutor's failure to reveal the evidence was not in good faith . . . ."

Id. at 1112 (citations omitted). *See* United States v. DePalma, 461 F.2d 240 (9th Cir. 1972); Lessard v. Dickson, 394 F.2d 88, 91 (9th Cir. 1968) (*sub rosa* use of the prosecutor's good faith).

119. Agurs v. United States, 427 U.S. 97, 103-14 (1976).

120. *Id.*

ple, if the prosecution knowingly uses perjured testimony, the defendant is entitled to a new trial if the perjury gave rise to a reasonable likelihood that the judgment of the jury was affected.

B. The Application of Brady *to Lie Detectors*

1. The Knowing Use of False Evidence.—The standards applicable to the knowing use of perjury are most favorable to the defendant. With respect to lie detector examinations, the only instance in which the first standard of materiality is clearly appropriate is when the witness admits to the operator that his original statement to the prosecutor was a lie and the prosecutor nonetheless calls the witness to testify to his original statement. If, as is more likely, the witness is not called to testify to that proposition, the admission no longer falls in the first category since no false evidence will be elicited from the witness at trial. Arguably, the same analysis applies when the witness makes no such statement to the operator but fails the examination. Although one might hope that such a witness would not be used by the prosecutor, the results raise the question of how certain the prosecutor must be that his witness is perjuring himself before the first standard applies. The only reported cases applying the first standard concern conclusive evidence of falsehood or perjury,[121] as, for example, when the witness testifies that no promise of leniency has been made but the police or prosecution have actually made such promises. Since the reliability of the examination to show perjury is considerably lower than the reliability of direct personal knowledge of a prosecutor or policeman, these cases do not support the use of the first standard. Failure of the test merely impairs the credibility of the witness, as would a prior statement showing bias against the defendant. As such, for a new trial to be granted, the withholding of the failing result would have to be held to have either affected the outcome of the trial or to have created a reasonable doubt that did not otherwise exist.

In the event that, during the lie detector examination, the

121. See note 110 *supra*. When the first category has been applied for the prosecutor's knowing use of false evidence, there has been no dispute concerning the knowledge of the prosecution that the material was false. The potential inaccuracy of the lie detector would prevent the defendant from arguing that the prosecutor knew the witness was testifying falsely because the witness failed the lie detector test. In Moore v. Illinois, 408 U.S. 786 (1972), the Court accepted the prosecution's characterization of "mistake" when the testimony of one of its witnesses regarding the defendant was proved untrue after trial.

witness admits that he initially lied when he spoke to the police, the prosecution may nonetheless call him to the stand to testify to his revised account of the crime. The only *Brady* problem would be the discoverability of the prior inconsistent statement. Although that statement would receive second or third category treatment, depending on the presence of a specific request, the statement would not affect the impact of *Brady* on a lie detector privilege. The matter would be irrelevant to any exchange between the subject and the operator.

Assuming the prosecutor's witness passes the lie detector test, he may make statements that impeach his credibility but do not relate to the factual content of the proposed testimony. The concern here is with admissions of prior misconduct, as well as admissions of bias toward the defendant. As this material involves no palpably false testimony by the witness, the first category, which accords the greatest indulgence towards the defense, is inapplicable. No knowing use of perjury could be expected. It remains to determine how *Brady* has been applied to impeachment evidence.

2. The Withholding of Evidence that Impeaches the Witness: Admissions of Prior Criminal Activity Unrelated to the Crime.—Evidence that impeaches the witness is not sufficiently material for *Brady* treatment if the defense is already aware of substantial additional impeachment evidence. Depending on the presence of a specific request,[122] a new trial will be granted because of the withholding of impeachment evidence only if it might have affected the outcome of the trial or if it would have created a reasonable doubt that did not otherwise exist. If credibility of the witness has effectively been impeached without withheld evidence the impact of the prosecutor's error is merely cumulative.[123] Thus, withholding evidence of one conviction when several others are known does not deprive the defendant of a fair

122. In *Agurs,* a request for *Brady* material was characterized as too general to specifically apprise the prosecution of its duty. 427 U.S. at 107. Some ambiguity remains concerning when a request is specific. *Compare* Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978) (a request for "impeaching material" does not specifically request letters written by prosecutor that had the effect of rewarding witness cooperation) *with* United States v. McCrane, 547 F.2d 204 (3d Cir. 1976) (a request for impeaching material specifically calls for the promises made to prosecution witnesses). Presumably, a request for impeaching statements made by the subject of an examination would be sufficiently specific to include the appropriate lie detector information.

123. *See* Ostrer v. United States, 577 F.2d 782 (2d Cir. 1978).

trial. Since cross-examination usually aims with some success at the credibility of the witness, courts have been sparing in the application of *Brady* to impeachment material.[124] Some courts have even held that impeachment is not contemplated by *Brady* because it is not directly favorable to the defendant;[125] they have applied a more stringent due process standard for a new trial. This position is untenable in light of the cases following *Brady* concerning perjury. The harm to the defendant in those cases is that the trier of fact lacks evidence of the unreliability of the witness rather than evidence that directly declares the defendant's innocence. The majority of jurisdictions has explicity held *Brady* applicable to the withholding of evidence that impeaches the prosecutor's witness.[126] These cases have also indicated, however, that impeachment evidence is presumed to be less significant than other evidence and is only rarely characterized as material. For example, in *Calley v. Calloway*[127] the attorney representing Lieutenant Calley, accused of perpetrating the My Lai massacre, sought transcripts of privileged testimony by prosecution witnesses before a Senate subcommittee. The sole stated purpose of the request was to obtain material to impeach the witnesses at the upcoming trial. Applying *Brady* after the conviction, but rejecting the motion for a new trial, the Fifth Circuit held that

124. *Id.* at 782; United States v. Weidman, 572 F.2d 1199 (7th Cir. 1978), *cert. denied,* 99 S. Ct. 87 (1979); United States v. Judon, 567 F.2d 1289 (5th Cir. 1978); United States v. Brady, 566 F.2d 649, 656 (9th Cir. 1977), *cert. denied,* 435 U.S. 965 (1979); Annunziato v. Manson, 566 F.2d 410 (2d Cir. 1977) (knowing presentation of perjured testimony); United States v. Cantri, 557 F.2d 1173 (5th Cir. 1977); Evans v. Janing, 489 F.2d 470 (8th Cir. 1973).

125. United States v. Martin, 565 F.2d 362 (5th Cir. 1978); United States v. Miller, 499 F.2d 736 (10th Cir. 1974); United States v. Harris, 462 F.2d 1033 (10th Cir. 1972) (a court should instead inquire if the trial was unacceptably unfair); McDonald v. State, 553 P.2d 171, 180 (Okla. Crim. App. 1976); *see* United States v. Flores, 540 F.2d 432 (10th Cir. 1976). *Contra,* United States v. Ostrer, 577 F.2d 782 (2d Cir. 1978); United States v. Weidman, 572 F.2d 1199 (7th Cir.), *cert. denied,* 99 S. Ct. 87 (1978); United States v. Brady, 566 F.2d 649 (9th Cir. 1977), *cert. denied,* 99 S. Ct. 79 (1978); United States v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967); People v. Rutherford, 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal. Rptr. 261 (1974); Nelson v. State, 59 Wis. 2d 474, 208 N.W.2d 410 (1973). Courts taking this position have relied on Moore v. Illinois, 408 U.S. 786 (1972), in which the withholding of evidence that impeached a witness to an alleged inculpatory statement by the defendant was held not sufficiently prejudicial for a new trial. The Supreme Court noted that the evidence withheld did not specifically impeach the identification of the defendant as the murderer. *Id.* at 797. These other courts appear to have confused this factor of impact on the trial with the separate question of whether evidence is favorable and therefore pertinent to the inquiry necessitated by *Brady.*

126. See note 125 *supra.*

127. 519 F.2d 184 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976).

> [w]hen *Brady* is invoked to obtain information not favorable on the issue of guilt or innocence, but useful for attacking the credibility of a prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the non-disclosure to require reversal.[128]

The court went on to analyze the role of each witness at trial for whom impeachment was sought and concluded that since the evidence withheld could not be found to be of a "crucial, critical, highly significant nature,"[129] adequate materiality had not been established.

Further indication that mere impeaching statements will not be discoverable under *Brady* derives from the treatment given requests for prior criminal convictions of prosecution witnesses. Courts have been unwilling to invoke a per se rule of disclosure, although many have required pretrial discovery of criminal records as a matter of discretion.[130] The decision by the prosecutor

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128. 519 F.2d at 222.

129. *Id.* at 223.

130. *E.g.,* United States v. Battisti, 486 F.2d 961 (6th Cir. 1973); United States v. Conder, 423 F.2d 904, 910 (6th Cir. 1970), *cert. denied,* 400 U.S. 958 (1971) (*Brady* obligation to disclose criminal records ripens, if at all, at trial); United States v. Frumento, 405 F. Supp. 23 (E.D. Pa. 1975); United States v. Jepson, 53 F.R.D. 289 (E.D. Wis. 1971); Lewis v. United States, 393 A.2d 109, 116-17 (D.C. App. 1978) (citing cases discussing *Brady* obligation to disclose witness criminal records). The obligation to produce is distinct from the obligation to produce in advance of trial. Criminal records generally require little additional investigation to uncover, thus, the timing of their delivery has not been a subject of much discussion in light of *Brady. See* United States v. Conder, 423 F.2d 904 (6th Cir. 1970), *cert. denied,* 400 U.S. 958 (1971); United States v. Trainor, 423 F.2d 263 (1st Cir. 1970) (impeaching material need not be disclosed before trial); United States v. Bloom, 78 F.R.D. 591, 616-17 (E.D. Pa. 1977) (accelerated discovery advisable because of complex nature of case); United States v. Frumento, 405 F. Supp. 23 (E.D. Pa. 1975); United States v. Leta, 60 F.R.D. 127, 131 (M.D. Pa. 1973). The court in United States v. Cobb, 271 F. Supp. 159 (S.D.N.Y. 1967) expressed the problem this way:

> We recognize that although *Brady, Giles,* and *Napue* and similar decisions have dealt solely with suppression of evidence at trial rather than before trial, the object of the Due Process Clause and the Fourteenth Amendment is to assure a fair trial to the accused and that there may be instances where disclosure of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense, particularly if it were to open the door to witnesses or documents requiring time to be marshalled and presented.

Id. at 163 (footnotes omitted). *See* United States v. Baxter, 492 F.2d 150, 174 (9th Cir.), *cert. denied,* 414 U.S. 801 (1973) (equating prejudicial delay with suppression); United States v. Goldman, 439 F. Supp. 337, 349 (S.D.N.Y. 1977); State v. McGee, 91 Ariz. 101, 370 P.2d 261, *cert. denied,* 371 U.S. 844 (1962); Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); State v. Thompson, 50 Del. 456, 134 A.2d 266 (1957)

to withhold disclosure of these statements, in accordance with a promise of confidentiality or a privilege, would not often come into conflict with his obligations under *Brady*.[131]

Similar treatment might be expected for the obligation to disclose the result that a witness failed the examination. If results were admissible[132] they would bear strongly on the credibility of the witness. Unlike impeaching statements of prior criminal activity or bias, the results would be focused on a specific factual statement by the witness and entitled to more indulgence by the court. Results are not generally admissible, however, and most courts that have confronted the issue have simply held that information that is not itself admissible cannot be favorable to the defendant.[133]

3. The Prospect of Defense Investigation.—The position that the inadmissibility of lie detector results precludes *Brady* treatment is unfortunate and is inconsistent with the position of a number of courts that analyze materiality in terms of what

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(results denied to defendant without reason); Anderson v. State, 241 So. 2d 390, 395 (Fla. 1970), *modified on other grounds*, 408 U.S. 938 (1972); Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972); State v. Christopher, 149 N.J. Super. 269, 373 A.2d 705 (App. Div. 1977).

In *Zupp*, Justice DeBruler concurred but disagreed with the analysis of the majority, stating that the information in the exam should be treated as witness statements for purposes of discovery. 258 Ind. at 631, 283 N.E.2d at 593 (DeBruler, J., concurring).

131. Moreover, the distinction between prior convictions and prior criminal acts clarifies the insignificance of the impact of *Brady* on lie detector privilege. First, the prosecutor frequently learns of prior convictions of his witness through other sources. The use of the lie detector thus would not add to the amount of *Brady* material in the case. Second, prior acts, in contrast with convictions, are frequently inadmissible for the purpose of impeachment and therefore may not be considered *Brady* material. Thus, neither convictions nor prior criminal acts disclosed in the examinations are likely to give rise to any additional *Brady* obligation that would interfere with a lie detector privilege.

132. A few courts have held that when the prosecution uses the lie detector as an investigative device, it is estopped from denying admissibility on the grounds of reliability. Under *Brady*, the results are then discoverable. United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971); State v. Christopher, 134 N.J. Super. 263, 339 A.2d 239 (Law Div. 1975), *rev'd*, 149 N.J. Super. 269, 373 A.2d 705 (App. Div. 1977).

133. With respect to the *Brady* treatment of lie detector results, Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); Anderson v. State, 241 So. 2d 390 (Fla. 1970); and Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972), equate inadmissibility with immateriality. *See generally* United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971). With respect to other kinds of evidence, courts have treated admissibility as a telling, if not decisive, factor, Stokes v. State, 402 A.2d 376 (Del. 1979); United States v. Sedgwick, 345 A.2d 465 (D.C. App. 1975), a view consistent with the lack of any prosecutory obligation to develop information that is otherwise unfavorable to the defendant. See note 135 *infra*.

other evidence that withheld information may produce,[134] rather than solely in terms of the evidentiary value of the information itself. Although *Brady* has not been interpreted to require the prosecutor to develop evidence for the defendant,[135] it has been applied when the item withheld points to specific fruitful investigation by the defense.

In *Grant v. Alldredge*[136] defendant was convicted of bank robbery and sought a new trial on the ground that the government withheld eyewitness identification of an alternative suspect to the alleged crime. The materiality standard was applied not to the materiality of the simple misidentification, but rather to what a skilled attorney might be capable of developing from the withheld evidence. In construing an earlier Second Circuit opinion, the court held that

> [i]t is instructive to note that the phrase "developed by skilled counsel as it would have been" does not necessarily restrict the scope of our inquiry to show how the "added item" would have been used at the trial itself but would rather seem to be of sufficient latitude to permit us to examine how defense counsel might have utilized his knowledge of the "added item" *in preparation* for the trial.[137]

In reversing the conviction, the court discussed the logical inquiries the defense attorney would have made upon being informed

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134. This distinction was made for lie detector results in State v. Young, 89 Wash. 2d 613, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978).

135. United States v. Walker, 559 F.2d 365 (5th Cir. 1977) (location of witness); United States v. Beaver, 524 F.2d 963 (5th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976) (no obligation for prosecutor to investigate techniques of fingerprint identification when information was equally available to the defendant); United States v. Gonzales, 466 F.2d 1286 (5th Cir. 1972) (location of a witness the defendant wished to interview); Commonwealth v. Lewinski, 367 Mass. 889, 329 N.E.2d 738 (1975) (government need not have tested alleged sperm sample in murder victim when there was no expectation of a result favorable to the defense).

136. 498 F.2d 376 (2d Cir. 1974).

137. *Id.* at 381 (emphasis in original) (citations omitted). *See* United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975); Lee v. State, 531 S.W.2d 131 (Mo. App. 1978). In United States v. DeMarco, 407 F. Supp. 107 (C.D. Cal. 1975), the withheld evidence was prejudicial under *Brady* not because it was admissible, but because it would have helped the defense argue that crucial prosecution evidence was inadmissible. The prosecution presented to the jury an account of the defendant's admission, but it withheld evidence showing that the admissions made were actually by the defendant's attorney and should thus have been inadmissible. *See* Lee v. United States, 388 F.2d 737 (9th Cir. 1968); *see generally* Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355 (1975); Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U.L. REV. 835, 859 (1978).

of the misidentification and the likelihood of their success in producing new evidence.

For the purposes of *Brady* a lie detector result showing that a witness lied to a specific inquiry may be, in the circumstances of the case, more like a factual statement by the witness relating to the crime than a statement used for impeachment. It may thus point to obvious and fruitful investigation by the defense and should be so treated.[138] A witness may state that only one other person, the defendant, was present at the crime. The witness may then fail an examination for that proposition. Knowledge of that failure would prompt special questions and inquiries by the defense on the assumption that another witness exists. The existence of lie detector results available to the defense under *Brady*, however, poses no problems for a lie detector privilege since the protected confidentiality concerns unrelated admissions made in the course of the examination and not the results themselves.

4. Additional Information Provided by the Witness.—A remaining consideration is what *Brady* treatment is appropriate to statements made by the witness in the course of the examination that relate directly to the crime being investigated. Assuming the witness is not called to testify to this proposition, the statement itself nonetheless may be discoverable. If the witness has inculpated himself and in so doing has exculpated the defendant, the course of the prosecution would be expected to change,

138. Some courts have recognized the aid in investigations that lie detectors provide. In Commonwealth v. Talley, 456 Pa. 574, 318 A.2d 922 (1974), the Supreme Court of Pennsylvania approved a trial court's denial of funds for a lie detector expert to test the defendant on the ground that the results would be inadmissible. Justice Nix, concurring in result only, noted:

> It was asserted that these tests would better enable defense counsel to evaluate the evidence with regard to appellant's intent and capacity in determining his criminal responsibility. The question presented is whether there was any basis for refusing those procedures in the preparation of the defense. The request for these tests was clearly reasonable under the circumstances. The extensive use of the tests by the prosecution in criminal investigation indicates that they are recognized investigatory tools.

Id. at 580, 318 A.2d at 926 (Nix, J., concurring in result). Other courts have recognized the investigative potential for the defendant to be tested and noted that admissibility may be accomplished, with proper foundation, in the defendant's test. Commonwealth v. A Juvenile, 365 Mass. 421, 313 N.E.2d 120 (1974); People v. Barbara, 400 Mich. 352, 255 N.W.2d 171 (1977) (usefulness in motion for a new trial); State v. Shaw, 90 N.M. 540, 565 P.2d 1057 (1977). It is but a short step to consider the lie detector tests of others as useful to the defendant and admissible under *Brady* as leading to favorable evidence.

thereby eliminating *Brady* obligations to this defendant.[139] Moreover, after such a statement the prosecution would probably attempt to corroborate the truth of the statement and continue to further interrogate the witness; a subsequent confession may include a waiver of any lie detector privilege.

If the witness does not inculpate himself, but instead makes a statement that tends to prove part of the defense theory, *Brady* would apply to the statement.[140] This conclusion presents no substantial conflict with a lie detector privilege because such a statement is unlikely to be made solely to the lie detector operator. The lie detector presumably is particularly powerful in securing admissions from the subject; concerning background information to the crime, however, the police or other investigators have already obtained the same information from the witness. If they have, there may be *Brady* obligations, but the obligations do not burden the use of a lie detector privilege because of their applicability to all the persons on the prosecution team that have talked to the witness. Since the prosecutor already has *Brady* obligations with respect to these other persons on the prosecution team that have talked to the witness; since the prosecutor already has *Brady* obligations with respect to these other persons, a lie detector examination poses no incremental risk to his case in this respect.

In sum, the lie detector is unlikely to give rise to *Brady* information with sufficient frequency to render a privilege for the prosecutor's witnesses unworkable. The results themselves, if discoverable notwithstanding their inadmissibility, do not pose a threat to the confidentiality of unrelated admissions. Statements that are merely impeaching are not frequently required to be revealed. Cases in which the witness makes a confession to the crime are unlikely to continue to trial, but when they do, those statements likely have lost their privileged character through further interrogation. Finally, statements about facts of the case are likely to be revealed to other police as well as to the lie detector operator; unlike admissions, there is no reason to suppose that

139. Once the prosecution shifted to the confessing witness, the present defendant would no longer be prosecuted.

140. It is assumed this statement is sufficiently favorable to warrant *Brady* treatment, as when the defendant pleads self-defense to an assault charge and seeks to show peculiar aggressive activity by the victim, and the subject-witness discloses that the victim appeared to be under the influence of a hallucinogen.

the operator is more likely to receive such information than other police investigators. Moreover, if the witness admits to the operator that he is lying in response to the relevant question of the examination and either does not subsequently testify or subsequently testifies in a manner consistent with his last statement, the *Brady* problem exists not with respect to his statement to the operator, but only with respect to his prior inconsistent statement to the prosecutor or police. Thus, the burden that *Brady* would actually place on a lie detector privilege is probably very small.

V. A PROPOSED EVIDENTIARY PRIVILEGE—PROTECTING THE ACCURACY AND UTILITY OF THE LIE DETECTOR EXAMINATION IN CRIMINAL CASES

A. The Necessity of Privilege

The use of lie detectors in the criminal justice system depends upon the availability of protection for the confidentiality promised by the operator to the subject. If the promise cannot be made by the operator or if the subject otherwise fears disclosure of unrelated admissions, the test will be less accurate.[141] If attorneys cannot test witnesses without risking the creation of admissions that will be used for impeachment or subsequent unrelated prosecution, the test is less likely to be used. Since the promise of confidentiality does not encompass confessions to the matter investigated, and such confidentiality is unnecessary for the accuracy of the examination, the privilege would not cover such statements.[142] The doctrines currently available to preserve confidentiality are not sufficient. The attorney-client privilege, work-product doctrine, and fifth amendment provide protection that is

141. See notes 8-14 and accompanying text *supra*. The absence of a credible promise or a reasonable assumption of confidentiality impedes the formation of a proper control question and enhances the possibility that the operator will draw an erroneous inference from the subject's anxiety.

142. The obtaining of confessions is not essential to the accuracy of the examination. Operators can be instructed to avoid confessions. The frequency of examinations designed to elicit a confession rather than a reliable result is not going to be affected by the proposed privilege. A privilege to protect confessions stands on weaker ground than one concerned only with unrelated admissions because no promise of confidentiality is made to the subject in that regard and because no impairment of the control question is at stake. Such a privilege would serve only one purpose—to encourage the use of lie detectors by eliminating *any* possible adverse consequence. Lie detectors are not different from other, unprivileged, forms of investigation in their ability to produce damaging information; such a privilege is thus unlikely to be recognized.

either too narrow or too unpredictable for the widespread use of lie detection. Thus, more protection is needed.

B. The Proposed Privilege

The reason extant doctrines are not adequate for the protection of the lie detector operator's promise of confidentiality is that they are not directly concerned with the merits of lie detection for the criminal justice system, but rather with their related, yet distinctive interests, such as the relationship between attorney and client. An evidentiary privilege for lie detectors, drafted to match the need to protect confidentiality, is the most appropriate way to achieve this protection. The decision to recognize such a privilege is simply the decision to continue an important practice of criminal investigation.

The following privilege satisfies the need to protect confidentiality but imposes a minimal evidentiary cost on the criminal justice system:

> No statement made by the subject of a lie detector examination shall be disclosed by the operator if the statement is not related to the specific matter under investigation, unless the subject gives his permission. Waiver of the privilege is a necessary condition for the admission into evidence of the results of the examination. An operator may consult with his fellow experts in arriving at his conclusion without violating the privilege.

This privilege could be created either judicially or legislatively. Since the motivation behind the privilege will be more apparent to persons within the criminal justice system, as opposed to those in the legislature, judicial approaches to the concept of privilege are pertinent. Legislatures may, of course, create an evidentiary privilege, but they are unlikely to do so in this case without encouragement by the judiciary.[143]

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143. The Supreme Court has, however, discouraged Congress from expanding the evidentiary privileges currently recognized. Congress has nonetheless been responsive to concerns outside the immediate environs of litigation. The Supreme Court's Proposed Federal Rules of Evidence 501-510 (1974) recognized a limited number of traditional privileges and provided:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
>
> (1) Refuse to be a witness; or
>
> (2) Refuse to disclose any matter; or

C. *The Judicial Approaches to Privilege*

An evidentiary privilege is a rule that forbids, in an absolute or qualified way, the admission of otherwise relevant evidence on the ground that some value external to the specific litigation will be compromised. For example, a statement made in confidence by client to attorney is privileged because of the need to protect and nurture attorney-client communications. Similarly, at common law, one spouse could not testify against the other, particularly concerning confidential communications between them, for fear of creating dissension that would upset the intimacy of mari-

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(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Proposed Fed. R. Evid. 501 (1974).

After a debate in which many argued that courts should be free to protect confidential relationships in a broader way than allowed by the proposed rules because of the importance of the humanitarian values implicated, Congress instead passed the present Rule 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. *See Proposed Rules of Evidence: Hearings Before the Special Comm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary,* 93d Cong., 1st Sess., 101 (1974); 2 J. WEINSTEIN, *supra* note 75, at ¶ 501[01]-[02]; Black, *The Marital and Physician Privileges: A Reprint of a Letter to a Congressman,* 1975 DUKE L.J. 45; Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach,* 64 GEO. L.J. 613 (1976); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today,* 31 TUL. L. REV. 101 (1956). Many comments were made to the House Committee that the proposed system of privileges was too narrow to protect confidential relationships and that the judiciary should not have the only input to the evaluation of privileges since state and federal legislative input were also appropriate. *E.g., Proposed Rules of Evidence: Hearings Before the Special Comm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, supra* at 142 (Justice Goldberg); *id.* at 158 (Attorney Halpern); *id.* at 200 (Attorney Spielberg); *id.* at 246 (Judge Friendly).

The judicial hostility to evidentiary privileges, see notes 148-49 and accompanying text *infra,* may partly rest on the greater salience to the courts of the costs rather than the benefits of excluding evidence. The proposed privilege will not have this problem: its benefits should be obvious to courts because lie detector examinations directly aid in the resolution of disputes. A number of state legislatures have indeed granted privilege, if not protection, to lie detector information. See note 75 *supra.*

tal trust.[144] Additionally, if a journalist always can be compelled to reveal his confidential sources, the coverage of current events will suffer; to protect the public's interest in being informed, therefore, the newsman has a qualified privilege to resist such disclosure. The protection varies with the facts of the case and the nature of the information withheld.[145]

The nature of the values these three privileges protect is diverse. In varying degrees, however, they share certain characteristics possessed by the proposed privilege for lie detector examinations. Each privilege furthers a valuable relationship. Each involves a communication made in confidence that, if routinely disclosed, will demean the relationship. The diversity of the factual settings of these privileges prompts one to ask why there is not a great profusion of evidentiary privileges that share these two characteristics. Although this set of privileges is by no means exhaustive, the law has been hostile to the concept of privilege because of the incidental loss of reliable evidence to the trier of fact;[146] a profusion of privileges would operate to make much evidence unavailable at trial and thus would impair the socially valued ability of courts to resolve disputes fairly. With a little ingenuity, one can design a privilege for almost any case. In 1937, for example, an investor charged with fraudulently manipulating stock prices resisted the production of his records kept by his stockbroker on the ground that his relationship to his brokers would be harmed and the records, thus, should be privileged. In rejecting the claim, Judge Learned Hand noted that

> [a] broker is indeed an agent, and as such a fiduciary; he is bound to act for his customer, and not to betray to others what he may learn in the course of his duties. On the other hand the duty to disclose in a court all pertinent information within one's control, testimonially or by the production of documents, is

144. 8 J. WIGMORE, *supra* note 64, at §§ 2228, 2322.

145. Although an absolute privilege by way of the first amendment to the United States Constitution is no longer available, Branzburg v. Hayes, 408 U.S. 665 (1972), courts still treat newsmen's research as having a qualified privilege. *See id.* at 710 (Powell, J., concurring); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); Wright v. Patrolmen's Benevolent Ass'n, 72 F.R.D. 161, 163 (S.D.N.Y. 1976); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975); Note, *Protection from Discovery of Researchers' Confidential Information:* Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 9 CONN. L. REV. 326 (1977).

146. See notes 148-49 and accompanying text *infra.*

> usually paramount over any private interest which may be affected. There are of course the traditional privileges touching communications made in certain confidential relations; but a broker's customer is not a client, a penitent, a patient or a spouse. Therefore, although we assume, as we do, that the conduct of investigations under these statutes is subject to the same testimonial privileges as judicial proceedings, it will not serve McMann; he must erect a new privilege ad hoc. The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme. Very near the end in the hierarchy of values which might dictate such a privilege would be the secrecy of a man's speculations upon a stock market in an inquiry into the existence of trade practices which a statute has condemned.[147]

Courts similarly have rejected or tempered the operation of other claims of privilege because of interference with the collection of evidence.[148]

1. Wigmore's Test.—The judicial reluctance to expand the number of evidentiary privileges reflects the sentiment of Wigmore,[149] whose criteria for the recognition or privilege are regularly cited.[150] Wigmore's test is stringent, and its use shows the

147. McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937).

148. The fact that one may have good reason not to testify has seldom been an acceptable excuse. For example, betraying the confidence of a friend, though philosophically repugnant, is not the ground of privilege. United States v. Worcester, 190 F. Supp. 548 (D. Mass. 1961). Embarrassment or social disgrace was never widely accepted as a privilege and currently has few judicial adherents. *See* J. WIGMORE, *supra* note 64, at §§ 984, 986, 987; Carr v. Department No. 1, Second Judicial Dist. Ct., 76 Nev. 403, 356 P.2d 16 (1960). *See also* United States v. Shoenheinz, 548 F.2d 1389 (9th Cir. 1977) (refusing to honor an employer-stenographer claim of privilege); *In re* Grand Jury Proceedings, Detroit, Mich., Aug., 1977, 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978) (narrowly construing attorney-client privileges so as to preclude protection for communicating officer of corporation). See note 66 and accompanying text *supra*.

149. For more than three centuries it has been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Harwicke) has a right to every man's evidence. When we come to examine the various claims of exception, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

8 J. WIGMORE, *supra* note 64, at § 2192 (footnotes omitted).

150. *E.g.*, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963); *In re* Capeda, 233 F. Supp. 465 (S.D.N.Y. 1964); Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739 (E.D. La. 1962); Ernst & Ernst v. Underwriters Nat'l Assur. Co.,

emphasis courts have placed on the value of reliable evidence. Only if the following four factors are satisfied by a relationship does Wigmore accede to the recognition of a privilege that protects related communications from disclosure:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one in which the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of the litigation.[151]

Wigmore's test invites a comparison of the benefits that flow from protecting the privileged relationship and the costs of the privilege to the litigation. For Wigmore's privileges the only cost is the loss of reliable evidence, a prospect that Wigmore found abhorrent. These costs and benefits are usually ambiguous, and they vary each time a privilege is considered within the context of a given case. Wigmore responded to these uncertainties with a preference for the admission of relevant evidence and the majority of courts has followed him. Since many of the uncertainties will not apply to a lie detector privilege, Wigmore's preference should not be invoked; rather, a fresh comparison of costs and benefits should be made.

Wigmore's preference is manifest in his test. A communication shielded by privilege must have been made in confidence. While it is true that the disclosure of a confidential communication may inhibit a relationship, the relationship can also be harmed when its communications are not made in confidence. Consider the friendship relationship. A communication made in a crowded tavern would not be considered confidential. If one friend were to repeat this conversation verbatim the next morning to the speaker's business associates and family, however, the friendship probably would suffer. Similarly, Wigmore requires

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___ Ind. App. ___, 381 N.E.2d 897 (1978); State v. Martin, ___ S.D. ___, 274 N.W. 2d 893 (1979); Adams v. State, 563 S.W.2d 804 (Tenn. Crim. App. 1978); State v. Driscoll, 53 Wis. 2d 699, 193 N.W.2d 851 (1972).

151. 8 J. WIGMORE, *supra* note 64, at § 2285 (emphasis in original).

that the relationship be one that society "sedulously fosters." A comparison of costs and benefits cannot stop with the assessment of only one side of the balance. In theory, a moderately valuable relationship could pose a minimal evidentiary cost for protection. Finally, the requirement that confidentiality be essential to the protected relationship sets a high standard of materiality between the protected communication and the injury to the valued relationship. No similar prerequisite exists for the concomitant evidentiary cost. Thus, only those disclosures that would seriously damage the relationship are eligible for comparison with the evidence excluded, notwithstanding the importance of that evidence. Two other doctrines that concern disclosure are far more responsive to the materiality of the evidence than Wigmore's criteria. The work-product doctrine[152] and the *Brady* doctrine[153] both focus on the importance of the evidence to a specific case. More important evidence is more likely to be disclosed under those doctrines. Wigmore has in effect assumed that the evidence is very valuable.

Wigmore's manner of taking into account confidentiality, the importance of the protected relationship, and the connection between the two, does not amount to a simple bias against privilege or in favor of admitting reliable evidence. His approach is better explained by his exclusive concern with privileges that protect relationships whose value is wholly external to the litigation process. In other words, the value of the relationship is outside the realm of the criminal justice system or any other judicial system. Marital privileges, for example, protect marriages. Their only connection with litigation is the coincidence that material germane to the marriage is also germane to particular litigation that usually has nothing to do with the substance of the marital relationship. The coincidental connection between the privileged relationship and the protected evidence forces a court considering the privilege to take one of two steps. In computing the cost of the privilege, a court must either make presumptions about the value of the evidence in question, as Wigmore has done, or it must measure the value of the evidence against the value of the relationship on a case-by-case basis. The latter approach is untenable because to make such a balance disclosure of the protected com-

152. See notes 47-48 and accompanying text *supra*.

153. See notes 117-20 and accompanying text *supra*.

munication would be necessary.[154] The very harm the privilege sought to prevent would become incident to the invocation of the privilege. Moreover, the decision to protect a specific communication in one case might change in the next case if the communication in the latter case were more important to the trier of fact. The privilege would thus lose some of its major contributions to protection: certainty and uniformity. Alternatively, the decision made in any one case to exclude evidence is hindered by the notion that precedent is supplied for the next case, which may be entirely different. Thus, a judge suppressing evidence in a shoplifting case may be concerned that he will set a precedent with regard to the specific communication and that the same communication may later prove relevant to a murder case. For Wigmore's privileges, there is no way to predict the ultimate evidentiary cost of protecting a specific communication.

An additional problem with the case-by-case approach is that the protection afforded by the privilege is intended to affect not just the very relationship in front of the court, which is a *fait accompli,* but all similar relationships. The decision to avoid deterring confidential communications by protecting them with a privilege is a decision to further a common human relationship and is based upon the social value of all the instances of that relationship, not upon the value of one particular instance. A case-by-case consideration of the merits of the particular relationship before the court, therefore, is inappropriate.[155] Wigmore's

154. Occasionally, the nature of the evidence or its consequences may be known well enough without disclosure that a better idea of the cost in evidence and to the relationship can be gained. Thus, in Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977), *cert. denied,* 439 U.S. 820 (1978), a married couple sought to resist an order to produce documents regarding income tax returns on the ground that each spouse would be harming the other in court, contrary to the policy of the common-law marital privilege against adverse spousal testimony. The court, in requiring production, noted that the documents were not likely to be of an intimate nature. Similarly, in United States v. Doe, 478 F.2d 194 (1st Cir. 1973), the court refused to recognize a marital privilege concerning conversations because each spouse was the recipient of transactional immunity and thus could not supply evidence that would cause any criminal penalty to the other. A grant of transactional immunity to a witness guarantees that the witness will not be prosecuted for the crime under investigation. Absent the prospect of prosecution, there can be no incrimination. See note 157 and accompanying text *infra.*

155. On occasion, the nature of the crime charged is relevant to the relationship itself. In those instances, courts may decline to apply the privilege. The decision to protect even those privileged relationships which are relatively unworthy does not require that courts allow the privilege to destroy the very value of the relationship it should protect. *E.g.,* United States v. Cameron, 556 F.2d 752 (5th Cir. 1975) (policy of family harmony should

resolution of this matter is to asume the evidence covered by the privilege is valuable and to balance that assumed value against the social value of the relationships similar to the one before the court. For the privileges that concerned Wigmore,[156] his solution is quite reasonable.

2. Reconsideration of Wigmore's Approach to Privilege in Light of the Nature of Lie Detection.—The proposed lie detector privilege does not present the same analytical problems as the privileges Wigmore considered. The evidentiary cost of excluding lie detector evidence is predictable and largely self-limiting. The assumption that the evidence lost is valuable or that the cost of the privilege is high is not appropriate to the analysis of a lie detector privilege. More importantly, the relationship between costs and benefits is different for lie detection because the benefits of the relationship are directly concerned with the costs of losing evidence: both costs and benefits influence the ability of the trier of fact to resolve disputes fairly. Wigmore's privileges constitute a special kind of evidentiary situation in which the protected relationship does not aid in the resolution of disputes; however, the value of lie detection consists principally in the resolution of disputes. Wigmore's analysis takes the view that reliable evidence is of inherent value to the trier of fact. Wigmore's more general concern, however, is with the fair resolution of disputes. As long as the protected relationship has no impact on that concern, other than through the operation of the privilege, the distinction between evidence as inherently valuable and evidence as only part of the goal of dispute resolution is not important. For a lie detector privilege that distinction is crucial. The wisdom of a lie detector privilege is dependent on the same analysis as the use of a testimonial immunity to acquire evidence from a witness[157] or a decision to invoke supervisory powers to exclude

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not, by prohibiting spousal testimony, help man accused of raping his daughter). See cases cited in note 70 *supra* (abuse of attorney-client relationship).

156. Wigmore considered privileges concerning the following relationships according to the standard set forth in his treatise: attorney-client, 8 J. WIGMORE, *surpa* note 64 at §§ 2290-2329; husband and wife, *id.* at §§ 2332-41; jurors and others, *id.* at §§ 2345-64; physician and patient, *id.* §§ 2380-91; and priest and penitent, *id.* at §§ 2394-96. He was critical of the physician-patient privilege, but found the rest consistent with his four-part standard. He considered numerous other privileges unjustified, including those concerning communications to parents, bankers, accountants, and trustees. *Id.* at § 2286. Legislatures are, of course, free to privilege any matter by statute as long as no constitutional right is impaired.

157. Most jurisdictions have statutes enabling the prosecutor to confer, through the

confessions made during illegal detention.[158] In each case, the criminal justice system can be seen as foregoing the use of certain evidence to enhance the ability of the system as an effective institution for the resolution of criminal issues. The focus in these matters, as for a lie detector privilege, must exceed the courthouse walls and look to the efficiency of police, prosecution, and defense, particularly since so many criminal cases never proceed to trial.

(a) The evidentiary cost of the proposed privilege.—The evidentiary cost of a lie detector privilege can be calculated with much more precision than that of other privileges. When communications are made in the course of privileged relationships, such as treatment in psychotherapy, their scope is broad. It is difficult to determine what kind of use a communication might be put to at some later date, both for the members of the relationship and for the court that may subsequently be confronted with the issue. The communication is unlikely to take the form of an admis-

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court, testimonial-use immunity or transactional immunity on a witness. *E.g.,* People v. Denson, 16 Ill. App. 3d 230, 305 N.E.2d 263 (1973); State v. Mufich, 216 Kan. 297, 532 P.2d 1301 (1975); Bowie v. State, 14 Md. App. 567, 287 A.2d 782 (1972); People v. Gentile, 47 A.D.2d 930, 367 N.Y.S.2d 69 (1975); 18 U.S.C. §§ 6002, 6003 (Supp. 1979); ILL. ANN. STAT. ch. 38, §§ 106-1, 106-2 (Smith-Hurd 1970) (transactional); KAN. STAT. ANN. § 22-3415 (Vernon 1974) (transactional and testimonial use); MD. ANN. CODE art. 27, §§ 23, 24, 39, 262, 371, 400 (1976 & Michie Cum. Supp. 1979); N.Y. CRIM. P. LAW §§ 50.20, 50.10 (McKinney 1971) (transactional).

Typically, the witness is unwilling to testify about a certain matter for fear of self-incrimination. These statutes allow the prosecutor to remove this fear, permitting the matter to be fully investigated. The usual result is that someone other than the witness is charged with crime. Under testimonial-use immunity, the witness is assured that nothing he says or anything that is the fruit of what he says will be used against him. Thus, an accomplice in a bank robbery may testify under immunity that he was the getaway driver and that the principal is another person. Neither that testimony nor the fruits of any investigation spurred by that testimony can be used against the witness. If independent evidence exists, however, such as a prior confession or a videotape recording, the witness can be prosecuted for his role in the robbery as long as no use is made of the testimony he gave under immunity. Under transactional immunity, the witness is guaranteed that, regardless of any independent evidence, his testimony about a crime completely precludes his prosecution for that crime. In the above example, the witness could no longer be prosecuted for bank robbery if he were given transactional immunity, notwithstanding the existence of independent incriminating evidence. Testimonial-use immunity is sufficient to avoid the fifth amendment bar against self-incrimination; transactional immunity need not be granted to compel a witness to testify. Kastigar v. United States, 406 U.S. 441 (1972).

158. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). *See generally* Hill, *The Bill of Rights and the Supervisory Powers,* 69 COLUM. L. REV. 181 (1969).

sion.[159] That form implies an obvious use, incrimination, to which the communication may ultimately be applied. The lie detector privilege is concerned specifically with admission. Given the natural aversion one has for self-incrimination, it reasonably can be assumed that a person who fears to reveal the wrongdoing that is the subject of the examination will not voluntarily reveal wrongdoing that is even more serious. The examiner is not engaging in an open-ended discussion about the subject's day-to-day activities, but rather is utilizing a technique designed to elicit unrelated admissions. The implication of those admissions is immediately apparent both to the subject and to the operator. Therefore, for any given case, it is likely that the admissions obtained, though perhaps useful in evidence, do not cost the court evidentiary matter that creates difficulty for the resolution of a more serious crime. In other words, the cost of excluding the evidence covered by the proposed lie detector privilege will generally concern evidence of a lesser crime than the one under investigation.

Unlike the evidence generated by other relationships, the lie detector relationship does not bear a coincidental connection to the value of the protected evidence that it creates. Exceptions to this expectation may occasionally arise. For example, an examination given to a burglary suspect may yield an admission to an unrelated murder. No privilege, however, operates with respect to one relationship and one case at a time; by definition, privileges exist with reference to the thousands of other relationships entered into by other persons who have nothing to do with the litigation at hand. The attorney-client privilege is invoked to encourage communication between all clients and attorneys, even though the specific attorney-client relationship protected by the party invoking the privilege may not be unusually valuable or may not be as important as the crucial evidence involved. Similarly, the proposed lie detector privilege is concerned with the value of the widespread use of lie detection rather than protecting

159. An exception to this rule is the priest-penitent communication, which has a high probability of incriminating the penitent. The social value of this relationship is extremely high, however, and is widely considered worth its cost. The assumption that valuable evidence is kept from the trier of fact is very accurate, but the countervailing value is high enough that forty-four jurisdictions endorse the privilege. United States v. Mullen, 263 F.2d 275 (D.C. Cir. 1959); 2 J. WEINSTEIN, *supra* note 75 at ¶¶ 506[01]-[03]; 8 J. WIGMORE, *supra* note 64, at § 2394.

any one relationship at the cost of the specific evidence involved therein.

Wigmore's test compares the value of the relationship to evidence that, by assumption, is inherently valuable. For lie detectors, a more appropriate assumption is that the evidence lost concerns a criminal dispute less important than the one whose resolution was originally sought through the lie detector examination. This second assumption is important as a qualification to Wigmore's scheme because of the ambivalence some segments of society have shown for the use of lie detection.[160] If the cost of the privilege is inherently small, the protected relationship need not be "sedulously fostered" by society for the privilege to be appropriate. For Wigmore's privileges, it is unwise to contemplate a small cost because of the coincidental connection between the protected relationship and the relevant evidence.

In addition to amending Wigmore's appraisal of the cost of the privilege, courts should reexamine his approach to computing the benefit. As is the case with costs, a reexamination of the benefits makes a lie detector privilege more consistent with Wigmore's concerns and more appropriate for official recognition.

(b) The benefits of the proposed privilege.—For Wigmore's privileges, it is appropriate to ask what society stands to lose if the corresponding relationships are not encouraged. This inquiry is analytically distinct from the value of the evidence withheld by the privilege. To evaluate fully the cost of the lie detector privilege to the criminal justice system, it is necessary to go beyond the notion that reliable evidence is inherently valuable and to ask whether the system, as a resolver of disputes, would suffer. In a like manner, the benefits of a lie detector privilege focus on the criminal justice system: Unlike the privileges Wigmore considered,[161] virtually all of the value of the lie detector examinations used by defense and prosecution attorneys belongs inside, rather than outside, the system. The value of lie detection is its aid to the ultimate goal of the criminal court—the fair resolution of criminal charges. The lie detector materially helps the just prose-

160. *See Hearings on the Use of Polygraphs and Similar Devices by Federal Agencies Before the Subcomm. of the House Comm. on Gov't Operations, supra* note 1; *Polygraph Control and Civil Liberties Protection Act: Hearings on S. 1845 Before the Subcomm. on the Constitution of the Senate,* 95th Cong., 1st & 2d Sess. 1 (1977-78).

161. The one privilege that might satisfy this criterion is the attorney-client privilege, discussed in Section II.C. *supra.* Since it passes even Wigmore's test, its viability does not depend on this consideration.

cution and defense of criminal charges, notwithstanding its moderate evidentiary cost. Since the value of lie detection to the system more than justifies the cost of the privilege to the system, the system should allow the privilege.

Defense attorneys and prosecutors have shown a willingness to subject witnesses and defendants to lie detector examinations as part of the process of investigation.[162] The test has been useful in screening suspects and determining whether to use witnesses. Police departments frequently have used them, especially in situations in which important matters are not readily susceptible to ordinary kinds of proof, such as when issues of consent or uncorroborated identification arise. Accurate investigations and confidence in the truthfulness of witnesses are the foundation upon which the criminal court rests. More accurate investigations insure that those who are actually brought to trial are more likely to be fairly accused and tried. Moreover, the prospect of admissions suggests an enhanced societal ability to resolve pending criminal matters with highly efficient investigations. To the extent that those same matters do not clog the courtrooms, the court is better able to deal fairly with matters that must be resolved judicially. In addition, this increase in efficiency has a subtle way of abating some of the unavoidable injustices in the system. Quicker resolution, for example, lessens the possibility that an indigent defendant who cannot raise bond money will

162. *Hearings on the Use of Polygraphs and Similar Devices by Federal Agencies Before the Subcomm. of the House Comm. on Gov't Operations, supra* note 1, at 414 (testimony of Henry S. Dogin, Deputy Assistant Attorney General, Criminal Division, Department of Justice); J. REID & F. INBAU *supra* note 1, at 296-303; Axelrod, *supra* note 1, at 153-61; McInerney, *Routine Screening of Criminal Suspects by the Polygraph (Lie-Detector) Technique,* 45 J. CRIM. L.C. & P.S. 736 (1955); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System* 26 HASTINGS L.J. 917, 957-74 (1975); Trovillo, *Scientific Proof of Credibility,* 22 TENN. L. REV. 743, 758 (1953).

In People v. Reagan, 395 Mich. 306, 235 N.W.2d 581 (1975), the court held the prosecutor bound by his bargain to dismiss charges upon the defendant's passing a lie detector test. With regard to the generality of the practice, the court took "judicial notice of the fact that polygraph use by prosecutors' offices, principally prior to the issuance of a complaint, is not uncommon, and indeed is a useful investigatory device." *Id.* at 313, 235 N.W.2d at 584-85. In rejecting a similar agreement only because of the lack of a judicial imprimatur on the arrangement, the Supreme Court of Nebraska stated: "We do not want to do anything to discourage the use of the polygraph as it is a useful tool in police and prosecutorial work and no doubt results in many determinations not to prosecute." State v. Sanchell, 191 Neb. 505, 510, 216 N.W.2d 504, 508 (1974). The prevalence of the lie detector in these arrangements is further illustrated by Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979), and Annot., 36 A.L.R.3d 1280 (1971).

psychologically deteriorate while awaiting trial, making his conviction more likely without respect to actual guilt.

It is true that a privilege regarding admissions will at times operate to the detriment of unrelated cases. In most cases, however, the system will have benefited from the use of lie detection in a more serious criminal dispute than the one from which the privilege withholds evidence. This proposition derives from the likelihood that the subject will more readily make admissions that are less serious than the relevant question put by the examiner. Moreover, with regard to both the relevant question and the crime of the unrelated admission, there will be an investigatory gain of information without harming otherwise available evidence of an unrelated offense. Indeed, although the admission made may not be available for prosecution concerning the unrelated offense, the examination will facilitate the exercise of prosecutorial discretion in the unrelated crime. Pending charges may be dropped against one person when another has admitted to the unrelated crime. Finally, to the extent one views the examination as a way to obtain confessions and unrelated admissions rather than as an accurate truth-finding device,[163] investigators can simply obtain waivers from their subjects and proceed much like any police officer does after giving *Miranda*[164] warnings to a suspect about to be interrogated. The accuracy of the results may be lowered, but the investigatory function of the exam would be preserved. More importantly, an accurate device to screen subjects and witnesses would still be available.

Given the above considerations, it would be appropriate for courts to hold that, in general, unrelated admissions made to the lie detector examiner in the course of a lie detector examination would be protected by a privilege against disclosure, waivable by the subject. There are, however, some situations in which the operation of such a privilege would be unwise, and these must be considered to determine whether, even with a privilege, the keeping of confidentiality will harm the courts' functioning.

D. Limitations on a Lie Detector Privilege

The purpose of a lie detector privilege is to protect the value of lie detector examinations to the criminal justice process. If

163. *See* Axelrod, *supra* note 1, at 132-33 and cases cited in note 23 *supra*.
164. Miranda v. Arizona, 384 U.S. 436 (1966).

there is no intention to admit the results of the examination into evidence, the shielding of lie detector information from the opposing party in a criminal case is appropriate. The admission of the results changes this conclusion, however, because of the powerful impact the results may have on the outcome of a case and the corresponding need to allow for adequate direct and cross-examination. Since most courts have refused to admit the results of defendants' examinations into evidence,[165] this problem does not currently arise. A number of problems in the operation of a privilege would accompany a change in the current law, although they exist at least potentially in those jurisdictions in which the defendant can attempt to lay the foundation[166] for the lie detector operator as an expert witness.

The relationship between unrelated admissions and the validity of the lie detector results was discussed *supra.*[167] The trier of fact simply cannot assess the accuracy of the operator's conclusion without knowing the role of these admissions in the examination, nor can an expert hired for the court or the opposing party. If admission of results requires disclosure of the protected information, a waiver is necessary. In the simplest case, the defendant will seek admission of the results. He is free to waive his privilege. Courts might decide to limit the nature of the waiver to its specific purpose. For example, a defendant charged with robbery might waive the privilege. He might have admitted to an unrelated shoplifting in the course of his examination. Should his waiver be construed to preclude the use of his shoplifting admission for an unrelated prosecution? This problem could be resolved as part of a stipulation between the parties. Since virtually all current admissions of results are pursuant to stipulation, it is a simple matter for the parties in a criminal case to address both this matter and admissibility. Should the parties disagree on this issue, the decision of the court to allow a limited waiver affects the willingness to proffer results. This kind of limited waiver has

165. See note 15 and accompanying text *supra.*

166. The willingness of many courts to allow an attempt at an adequate foundation, *e.g.*, United States v. Mayes, 512 F.2d 637 (6th Cir.), *cert. denied,* 422 U.S. 1008 (1975); United States v. Infelice, 506 F.2d 1358 (7th Cir. 1974), *cert. denied,* 419 U.S. 1107 (1975); United States v. DeBetham, 470 F.2d 1367 (9th Cir. 1972), *cert. denied,* 412 U.S. 907 (1973); United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied,* 396 U.S. 1009 (1970), has only rarely led to an actual admission without stipulation. *See* Masri v. United States, 434 U.S. 907 (1977) (White, J., dissenting from denial of certiorari).

167. See notes 8-14 and accompanying text *supra.*

been widely applied to statements made in the course of psychiatric examinations.[168] For the same reason that the privilege represents an appropriate assessment of the criminal justice system's use for lie detectors, limited waivers should be allowed. They are only crucial, however, to extend the common use of lie detectors from an investigatory to an evidentiary role.

If the subject is not the defendant, more problems attend the use of results for evidence. The defendant may be eager to place favorable results before the court because his freedom depends on it, whether or not he is allowed a limited waiver. Other witnesses are in no such position. They stand to gain nothing directly if the results of their examination are used on behalf of the defense or the prosecution. The fear of punishment for their unrelated admissions may be a strong motivation. That fear can be mitigated by the prosecutor. He can offer testimonial immunity. In other words, he can assure the witness that statements made in the course of the lie detector examination will not and cannot be used to prosecute the witness. Any prosecution witness who volunteered to take the exam probably seeks, for a variety of reasons, to help the prosecutor. This offer of immunity will thus frequently give rise to a waiver. The prosecutor may also be willing to make such offers to defense witnesses who have taken the examination if prior arrangement has been made to admit the results. A prosecutor anxious to test defense witnesses and willing to stipulate to the admissibility of the results is also likely to take those steps that give rise to the waiver essential to the admission of the results.

When the prosecution opposes the introduction of the results and a limited waiver is not allowed by courts, witnesses, and in some cases defendants, may be unwilling to consent to disclosure of their unrelated admissions. The present loss of the evidentiary role of lie detection, absent stipulation, is not a great one, since presently none exists. The value of lie detector examinations has been in their investigative role. The proposed privilege would preserve that role. As courts increase their experience with stipulated results, a meaningful evaluation of a broader evidentiary role of lie detectors can be made.

168. Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978); *see* 18 U.S.C. § 4244 (1976).

E. The Absence of a Privilege

The alternatives to a privilege are inadequate. The subject's expectation of confidentiality is not constitutionally protected.[169] If courts wish to allow some protection for lie detectors short of recognizing a new privilege, they might extend precedent for lie detector information in the work-product area. Recognition of lie detectors as important investigatory devices that usually do not yield, absent stipulation, admissible evidence that is crucial to the case, may lead courts to regularly exclude lie detector information as work product. A more extreme view is to consider protected all of the defense investigation that the defendant does not intend to present as evidence; thus, the defendant is not deterred from a constitutionally adequate preparation for his case. The problem with the first approach is that it is not sufficiently predictable. The second approach suffers because it is too expansive. Because of the trend toward greater disclosure in criminal discovery, courts are unlikely to completely shut out so much information. The latter approach also leaves inadequate protection for prosecution witnesses who take the examination.

The proposed privilege for statements made during a lie detector examination should be recognized or created by the judiciary because lie detectors are useful to the criminal justice system and are precariously used without a privilege. The ordinary hostility of courts to the evidentiary loss that most privileges entail is inappropriate to a lie detector privilege because the criminal justice system will benefit appreciably by use of lie detectors to better resolve criminal charges. A privilege need not be seen as an obligation to use lie detectors, since only willing

169. One seemingly attractive possibility is that the intimacy or confidentiality between the subject and operator reaches such a point that it is constitutionally protected as privacy under Griswold v. Connecticut, 381 U.S. 479 (1965). That argument, when applied to the more complete, long term trust inherent in psychotherapy, Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175 (1960), has met with an uneven welcome, *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970); Note, *Psychotherapy and* Griswold: *Is Confidence a Privilege or a Right?,* 3 CONN. L. REV. 599 (1971), and is unlikely to extend to a short relationship without traditional precedent or widespread practice. See note 104 and accompanying text *supra.*

The fact that lie detection, unlike psychiatry, is not the sole practical avenue to present a particular kind of defense means a person is unlikely to face a Hobson's choice of taking the test or waiving a constitutional right to a defense. Consequently, the entreaty by the operator to reveal embarrassing or incriminating information may not be unconstitutionally unfair. *See* Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978); Collins v. Auger, 428 F. Supp. 1079 (S.D. Iowa 1977).

subjects can be accurately tested. A privilege nonetheless would allow those attorneys and policemen who now use the test to continue to do so with maximal accuracy.

VI. Conclusion

The lie detector examination is, at present, a useful investigatory device that aids the criminal justice system in its resolution of disputes. Unfortunately, a byproduct of the lie detector technique is the frequency of admissions to unrelated crimes by the subject. To maintain the accuracy of the device and its strategic attractiveness, the confidentiality of these admissions must be protected. Otherwise, the examinations will become less accurate and ultimately will become largely a means of obtaining material to impeach the subject's credibility. It will then serve no large or useful role, given the prerequisite that the subject of the examination be willing.

Meaningful protection of confidentiality is not available through the usual criminal-law doctrines of discovery, work product, attorney-client privilege, and fifth amendment bar against self-incrimination. An evidentiary privilege is needed to allow both the defense and the prosecution to use lie detectors. In contrast to these other doctrines, a specific privilege will settle the policy question of the usefulness of lie detectors. Since the evidentiary costs of the privilege proposed will generally be smaller than the benefits conferred by the use of accurate lie detection, the privilege should be created. The evidence excluded will usually regard a less serious matter than the crime under investigation.

If lie detection leaves the realm of investigation and creates admissible evidence in the form of an expert's opinion of the truthfulness of a witness, the privilege must be waived as a condition of admissibility. The role of courts as resolvers of disputes is not furthered when highly persuasive evidence is received without meaningful cross-examination. For the results of the lie detector, such cross-examination includes the otherwise privileged information. Absent the admission of results, however, the privilege is a proper way to protect the useful role lie detectors presently play in the criminal justice system.