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The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo

Lee J. Radek*

In 1923, the Court of Appeals for the District of Columbia held that the results of a lie detection examination were inadmissible as evidence in court because:

[j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.¹

Since that time, the admissibility of this type of "scientific" evidence has been reexamined on many occasions. Those arguing that a progressive increase in accuracy of the polygraph technique should justify the admission of this evidence in their case have met with little success in the 49 years following the *Frye* decision.² Most cases which refuse to admit polygraph results do so on the basis of *Frye*, but fail to follow its rationale and examine whether the accuracy of the technique has so

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1. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

2. See 23 ALR 2d 1306.

improved as to become acceptable in the scientific community. Because the *Frye* case left open the possibility that at some future time the "lie detector" would become so accurate and accepted as to be admissible, it is desirable that the legal community should periodically examine this scientific phenomenon with a view toward when, if ever, that future time referred to in the *Frye* case will be at hand.

THE POLYGRAPH MACHINE

The Polygraph itself serves the purpose of recording changes in breathing, heartbeat, blood pressure, and Galvanic Skin Reflex. The latter measurement is a test of the skin's electrical resistance, which changes with excitement and from perspiration. This indicator is generally considered to be highly accurate under laboratory conditions, but less precise in practical application.³ The change in breathing is detected by a hose which is strapped around the subject's chest, and/or abdomen, and the pulse and blood pressure are measured by a standard medical blood pressure cuff. The Galvanic Skin Reflex is sensed by placing two electrodes on the body, usually on the hand, through which a small current is passed. Some devices are equipped with movable arms, thigh supports, and footboards. These are designed to detect deliberate muscle constrictions which may alter the blood pressure when a subject attempts to "beat the machine."

All of these sensing devices, in turn, are connected to pens which make their marks on a moving graph. It is the impressions left by these pens upon the graph, along with several less tangible observations, which the operator utilizes in making his determination. A complete history of the development of this machine is available from several sources.⁴

THE POLYGRAPH TECHNIQUE

The theory behind the "Polygraph technique" is that a fear of detection will cause certain involuntary responses in a subject if he is attempting to conceal the truth during questioning. Ideally, a sample graph of one who is attempting deception will show an increase in blood pressure, a quickening of the pulse, a higher Galvanic Skin Reflex, and breathing which is either heavier than the norm, or which is

3. REID & INBAU, TRUTH AND DECEPTION, 220 (1966).

4. E.g., REID & INBAU, *supra*, at 1-3; 26 J. CRIM. L. & CRIMINOL. 878 (1939); MARSTON, THE LIE DETECTOR TEST (1938).

suppressed at the time of the false answer with a noted release after the untruth is given. In reality, however, operators may rely upon any of these indicators when accompanied by some or none of the others.

In addition to interpretation of the graph, the operator also relies on various behavior patterns during the test which are indicative of "truth tellers" or "liars."⁵ He also considers whether there was a deliberate

5. The following are some examples of characteristics of liars as opposed to truth tellers, as set forth by REID & INBAU, *supra* n.2:

—During the pretest interview;

—"A truth-telling subject of average or better than average intelligence will usually respond immediately, by making some such statement as: 'Look, I didn't have anything to do with it; I'm as anxious as you are to have the guilty person found out.' On the other hand, a lying subject usually will not display such frankness or interest; he is rather prone to speak evasively or in generalities about the matter in question. Many times he will, in contrast to the truth-telling subject, squirm around in the chair, look away from the examiner, cross his legs, use his hands as though trying to dust something off his clothes, or engage in other similar physical activity." *Id.* at 13.

—"He should then be urged to name the person he suspects. Usually a truthful subject who harbors any suspicions will name the person or persons he suspects; the untruthful subject will seldom identify another person as a suspect. Some inferences of truthfulness are also permissible whenever, in such case situations, a subject, in response to an examiner's appropriate question, names one or more of the group as being a person whose own scruples would not permit him to do the thing under investigation. And some inference of untruthfulness is warranted whenever a subject is evasive in his answer or whenever he fails to place any one of the group above suspicion. No definite conclusions should be drawn, of course, from any of these inferences." *Id.*

—"Another helpful pretest question is one based upon whether the subject ever 'thought' about doing anything similar to, or the same as, the act under investigation. For instance, in a murder case in which the victim was shot to death, the subject should be asked: 'Did you ever think about shooting or killing anyone, even though you didn't? If so, I want you to get this off your mind before the test.' The characteristic answer of a person who did not do the killing is: 'I never thought of shooting or killing anyone.' His answer is emphatic and unequivocal, for even though he may have had a fleeting thought along that line, he interprets the examiner's question to mean a serious, deliberate thought of killing someone. On the other hand, a lying subject is likely to respond by saying: 'Sure, I've thought about doing things like that; everyone does. But I didn't do it.'" *Id.* at 14.

—"Except when the circumstances indicate the possibility of the innocent subject's prints being there, he will usually say: 'No, there's no reason why my fingerprints (or footprints) should be there.' A lying subject, on the other hand, is inclined to offer an explanation of their presence (e.g., 'Well, I may have handled a beer bottle or a glass in his house, or I may have walked by First and Main Street recently'). In other words a lying subject may seek to forestall any incriminating inference from such a fingerprint or footprint. He may feel impelled to offer an explanation. A truth-telling person, however, will experience no such concern." *Id.* at 13-14.

—"A truth-telling subject will usually make a strong denial that he was anywhere around the time of the crime. . . . A lying subject, on the other hand, will usually stall with his answer, indulge in bodily movements such as squirming around and then finally deny being present at the scene." *Id.* at 14.

—"A truth-telling person will not be upset by the suggestion of fingerprint or footprint implications, whereas a liar will probably manifest considerable concern by such reactions as a delay in his answer, by looking away from the examiner, or by squirming around in the chair." *Id.*

—"Other possible indications of lying produced by the card test itself are: (a) an answer of 'yes' during the test, when the chosen card question was asked, even though the subject had received clear and emphatic instructions prior to the test that he was to say 'no' to all card questions; and (b) a subject's refusal, after the test, to acknowledge that the identified card is the one he had actually chosen." *Id.*

attempt to "beat the machine" in making his decision.⁶

While his interpretation of the examination data is the activity of the Polygraph operator which is most often scrutinized and publicized, an equally important function is the manner in which he actually conducts the test. Great care must be taken to exclude extraneous stimuli which

—"Untruthful subjects are usually late for or hesitant to agree to a reexamination." *Id.* at 34.

—"Another characteristic behavior pattern of untruthful subjects is the efforts they make through other persons to influence the examiner into a belief in their truthfulness. They may have asked a clergyman or personal friend or someone else to contact the examiner on their behalf, to tell about his fine family background, good character, or reputation. A truthful subject will seldom, if ever, make this kind of effort." *Id.*

—"Untruthful subjects generally seem more hurried in their departure from the interrogation room or laboratory, but at the same time they may pause for a quick handshake with the examiner or even offer an apology to him for having caused him 'so much trouble.' Truthful subjects ordinarily are reluctant to leave; they seem to prefer to persevere until cleared by the test, and this is especially so where they have been interrogated as though they were actually lying. The truthful subject even may offer to take a 'truth-serum' test or some other kind of test to establish that fact." *Id.*

The authors do, however, qualify the use to be made of these characteristics:

—"No final conclusions should be drawn from the subject's answers or reactions which we have pointed out as indications of probable deception or truthfulness. Nevertheless, they are very helpful as factors to be considered in the ultimate decision to be made of truthfulness or deception. At the very least, they may place the examiner on his guard against a positive opinion based upon the test results as one whenever these pretest answers and reactions point to an opposite indication." *Id.* at 15.

6. The importance placed upon attempts to "beat the machine" as being indicative of deception is evident in the following excerpts from REID & INBAU, *supra* n.2:

—"During all of the pretest interview, the examiner should continue to make notes regarding the subject's comments and behavior. Particular attention should be paid to the matter of whether or not he is coughing or sniffing during the pretest interview. If no such activities occur during the interview but they do occur during the test, that fact is indicative of a possible attempt to distort the Polygraph tracings, which in turn may be indicative of deception with respect to the matter under investigation." *Id.* at 15.

—"The contraction and tension to which we have referred may result from a truth-telling person's continued apprehension of physical hurt or some other factor. But in instances where this condition persists, despite the above described arm adjustment procedure, the examiner should view it as suggestive of probable deception on the part of the person who cannot relax or who is afraid to relax for fear that the instrument will record his true reactions to the test questions. In contrast, a truth-telling subject will cooperate and follow the examiner's instructions, so that ultimately a satisfactory recording is obtainable." *Id.* at 26.

—"The card test may also have the effect of encouraging a lying subject to reveal his deception by trying to distort his Polygraph tracings on his third or subsequent tests, by muscular movements or respiration distortions." *Id.* at 86.

—"Another advantage of scheduling reexaminations with this difficult group of subjects is the interim development in the minds of some untruthful subjects of an idea to attempt to distort the Polygraph tracings when next examined, which, in itself, is a very reliable criterion of deception." *Id.* at 34. And:

—"A subject who is lying about the matter under investigation will adopt either one of two attitudes during his Polygraph examination. He may follow the examiner's instructions regarding each test procedure and make no attempt to interfere with the administration of the test or to distort the tracings. In such instances deception is diagnosed from the various kinds of physiological responses which were previously described and illustrated. The other course of action that may be taken is to be uncooperative with respect to the test procedure and/or to attempt to distort the Polygraph tracings by one means or another, or he may try both. *What such subjects fail to realize is that their evasive conduct itself is just as significant of their deception as the responses that are revealed in the tracings of lying subjects who do not seek to evade detection by that process.*" [Emphasis added]. *Id.* at 153.

will affect the results. These distractions can be objective physical ones such as objects or people in the examination room, or the manner in which a question is asked; or they may be more subjective such as a question which has a double meaning, or is misunderstood by the subject. While the physical makeup of examination rooms is greatly standardized by more prominent operators today, the formulation of the questions must always be less uniform in order to be pertinent to the particular case. Although some *methods* of question formulation have been somewhat standardized; such as the control question (one to which the subject will probably lie), the guilt complex question (one which accuses the subject of a fictitious crime), and the peak of tension test (a fact known only to the guilty party inserted among irrelevant data), the construction of precise *questions* which will be relevant to the case at hand, and which are capable of being answered with a yes or a no, must necessarily vary with each interrogation. For this reason, complete standardization and uniform review of each test are impossible.

OBJECTIONS TO THE TEST

There have been recent claims that objective standardized review is not only possible but is a widespread practice among Polygraph operators,⁷ but the subjective nature of this type of examination formulation and interpretation would seem to preclude such a possibility. Unlike most other types of scientific evidence, the polygraph operator is not encouraged by his profession to remain objective and to exclude personal bias from the examination. Instead, he is called upon to make an initial determination as to guilt or innocence, to proceed on the basis of that determination, to use his varied experiences in formulating questions designed to show that a liar is lying, and is instructed to use

7. "[A] system is set up where remote supervision can be exercised over examiners where the person that is reviewing the work of another examiner does not have to have been there during the time of the actual examination. In other words, the degree of standardization has been worked toward and I feel now achieved to where one expert in the field should adequately be able to read the charts of another expert with no significant deviation so far as their conclusions are concerned." Testimony of Cleve Backster at hearing in the nature of an offer of proof in the military trial of CPT Medina, p.24.

Mr. Backster, who conducts many tests and operates a school for polygraph operators in New York City, is also well known for his theories that plants communicate and feel emotions. He has demonstrated this theory on several television shows by attaching the Galvanic Skin Response electrodes to plant leaves and then threatening them with fire or a scissors. This activity has resulted in a threat of expulsion from the American Polygraph Association. (See New York Times, Mon., Nov. 22, 1971, § 6 at 45).

this determination in interpretation of the subject's responses.⁸ Aside from psychiatry, the science of Polygraphy is probably the most subjective type of examination to be considered by the courts as to admissibility. The psychiatrist, however, is required to have much more extensive education than is the Polygraph operator, and is called upon to make much more general conclusions than whether a subject attempted deception in his answer to a particular question.⁹ Also unlike psychiatry, the presence of a Polygraph machine promotes an impression of objectivity, yet the fact that it is not susceptible to objective review lessens the probability of conflicting opinion.

Another area of question with relation to the Polygraph technique is the qualifications of the Polygraph examiners.¹⁰ Despite many crusades within and without the Polygraph industry to have states establish licensing and character requirements, there is only limited legislation in this area.¹¹ The industry has formed The American Polygraph Association to promote the maintenance of minimum requirements, but membership in this organization is not considered to be vital to the operation of a lie detection business. Even those most adamant in their esteem for the process of lie detection admit that only qualified operators can hope to attain any degree of success in accurately testing with the Polygraph. These proponents also claim that unqualified examiners will eventually lose all their business when news of their inaccurate test results becomes known. It would seem to logically follow, however, that the inaccurate examiner who usually finds an accused is telling the truth would become most popular with defense counsel who

8. *E.g.*:

—“The pretest interview affords the examiner an opportunity to ‘size up’ the subject and thereby prepare more meaningful and understandable test questions than would be the case if routinely done without reference to the particular subject to be tested.” REID & INBAU, *supra*, n.2 at 16.

—“Where the previous line of questioning produces tentative indications of deceptions, the examiner should then suggest the possibility of the occurrences being the result of an accident. . . .” *Id.* at 14.

—“Pretest questions of this type are good ‘bait’ for the lying subject.” *Id.*

“In his search for an effective control question the examiner will take into consideration the behavior symptoms which a subject may display as he is being questioned about the controls under consideration for use during the test. For instance, if a question that the examiner has in mind for a control is asked a subject and he hesitates with his ‘no’ answer, or looks away from the examiner, or squirms around in the chair, crosses or uncrosses his legs, or brushes his clothes with his hand, any one of these actions will be suggestive of the effectiveness of that question for control purposes; in other words it is a question that is a bothersome one.” *Id.* at 125.

9. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 707 (1961).

10. In the April 8, 1964 edition of the Los Angeles Times, Prof. Fred Inbau was quoted as saying: “Eighty per cent of the people who administer tests do not measure up to standards we feel are required.” 50 A.B.A.J. 1130.

11. See 32 ALR 3d 1324.

might wish other clients to take an examination; and that those unqualified examiners who usually find that an accused has lied would receive much business from the prosecution.

Another contention of lie detection proponents in relation to the unqualified examiner is that the method of cross-examination is a sufficient tool to point out to a jury the inadequacies of these operators. However, since the industry itself cannot agree on what qualifications are needed to insure competency in an examiner, it would seem unlikely that all unqualified operators would be exposed to a jury through this technique.¹² Cross-examination would also result in the side effect of confusing the jury.

Possibly the most insurmountable drawback involved in the admission of Polygraph evidence is its great prejudicial effect upon a jury. Our society, with its deep respect for limitless technology, tends to believe that machines do not lie, and to listen to a machine more than the opinion of an expert. This fact, along with the myth of a machine in

12. See Skolnick, *supra* n.9, at 707:

"Before permitting the results to be admitted as evidence in any case, however, the courts should require the following: (1) That the examiner possess a college degree. (2) That he has received at least six months of internship training under an experienced, competent examiner or examiners with a sufficient volume of case work to afford frequent supervised testing in actual case situations. (3) That the witness have at least five years' experience as a specialist in the field of Polygraph examinations. (4) That the examiner's testimony must be based upon Polygraph records that he produces in court and which are available for cross examination purposes." See also REID & INBAU, *supra* n.2, at 257. Whereas the qualifications of graduates from Mr. Reid's school are similar to those listed above, the other major Polygraph school, run by Cleve Backster in New York City, requires far less for entrance of students:

"Applicants not sponsored by law enforcement agencies must be at least 21 years old, have at least 60 credits from any college, and 'must successfully meet certain standards as determined from a personal interview evaluation which must be completed no later than during the week preceding the scheduled class applied for.'"

"Prospective students sent by 'federal or local law enforcement' agencies must have a letter of sponsorship, and a high school diploma or equivalency certificate." *The Lie Detector, Guilty Until Proven Innocent*, Report on Invasion of Privacy in America by AFL-CIO Maritime Trades Dept., 82-83 (1970) [hereinafter cited as AFL-CIO REPORT]. Backster's course is six weeks long and costs a tuition fee of \$500.00. The Reid course costs \$1200.00, and lasts for six months.

Government standards also differ:

"Polygraph examiners trained by the government learn 'lie-detector' techniques at the United States Army Military Police School at Ft. Gordon, Ga. Governed by the Department of Defense, the curriculum and admission standards are established under a directive issued in the wake of the 1964 Moss Subcommittee hearings."

"According to the directive, a candidate must be a citizen, at least 25 years old. The applicant must have either a baccalaureate degree from an accredited college and two years of investigative experience with the government, or the equivalent of two years of college at an accredited institution and five years of experience investigations for the government."

"Training takes between seven and twelve weeks, depending on the agency sponsoring the trainee."

"Department of Defense examiners must complete a six month apprenticeship following the basic training." AFL-CIO REPORT, *supra*, 85-86.

which a giant red light with the word "LIE" emblazoned across it ignites to the chagrin of the evil villain who has attempted a falsehood, tends to cause the average man to place a credence in the infallibility of a lie detector which it does not deserve. At most, Polygraph examination is entitled to status of any other expert testimony of opinion. It is the expert who makes the determination of lie or truth and the machine is only one tool which he is taught to use in making this decision. It is doubtful that an instruction along these lines would sufficiently impress upon a jury the fact that there really is no such machine as a "lie detector." Indeed, the admission into evidence of Polygraph results accompanied by such instructions would put the courts on the horns of a new dilemma. Much of the high degree of accuracy claimed by proponents of the Polygraph is dependent upon the subject's sincere belief that the *machine* is infallible. In fact, examiners are instructed to be certain to impress upon their subjects before the test that "the machine does not lie."¹³ On the other hand, for this type of evidence to be properly admissible without undue prejudice, it would be necessary to establish, in the minds of the public, that the machine, in fact, is only a tool in the hands of a fallible expert. To establish this knowledge, however, would decrease the accuracy of the Polygraph technique proportionately.

The highly prejudicial character of Polygraph evidence is also due to its very nature. Testimony of a Polygraph operator will most often be the determinative factor in a case. Traditionally, it has always been the function of a jury to base its finding of fact upon credibility of witnesses. Polygraph evidence, unlike other evidence of credibility and impeachment, does not merely aid the jury in this determination, but purports to decide veracity as to the crucial issue in a case. The admission of such evidence would replace the most vital present function of a jury with a "trial by lie detection." It is this fact which distinguishes Polygraph evidence from other types of scientific tests. Because lie detection would so often be solely determinative of the central

13. Skolnick, *supra* note 9, at 704-5; INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION*, 15 (3rd ed. 1953); and the following from REID & INBAU, *supra* n.2.

—"Upon completion of all instrument adjustments, the examiner again should say to the subject: 'If you're telling the truth the lie detector will show it; if you're not, it will show that too.'" *Id.* at 26, and

—"All of the subsequent case illustrations regarding the application of the various 'stimulation' procedures establish that unless a person is concerned over the possibility that his deception will be detected, his Polygraph records will not disclose that deception." *Id.* at 50.

issue in a case, its admissibility must depend upon a much higher degree of accuracy than other forms of tests and conclusions.

It is the accuracy of the Polygraph technique which has most often been examined by the bench and bar, and which has been most strongly defended by Polygraph proponents. Despite numerous recent claims of high accuracy and susceptibility to objective review, there remain some serious doubts as to whether lie detection has become so accurate as to warrant its admission into evidence. Figures vary as to how accurate the technique is in actual practice,¹⁴ but attempts at scientific evaluation reduced to percentage of accuracy are highly questionable. Lie detection does not lend itself to mathematical evaluation of accuracy for several reasons.

Due to the subject matter of lie detection interrogations, many situations will arise in which it may never become known whether or not the subject was definitely lying, or whether he was telling the truth. Many "surveys" base their accuracy figures on examinations which are subsequently verified by confessions.¹⁵ Even confessions, however, are not guaranteed evidence of undoubted guilt. On the other hand, an acquittal or dismissal of a criminal charge is obviously not absolute evidence that the accused did not commit the act, or that he told the truth. Since final and infallible determination as to whether or not the lie detection test was accurate is impossible, a true quantitative analysis of accuracy is also impossible.

Even if true percentage figures were ascertainable, such figures can be misleading. As one commentator notes, even if the claims of leading proponents that the Polygraph technique is 95% accurate are true, a great number of errors in a given sample may occur. To demonstrate this the following example is given: If 1,000 subjects were given the exam, and if 25 of those attempted to lie, and if the machine were 95% accurate, then the results would show $(.95 \times 25 =)$ 24 liars, with one "beating the machine"; and $(.05 \times 975 =)$ 49 truth tellers erroneously called liars.¹⁶ As emphasized above, when the re-

14. *E.g.*,—95%—REID & INBAU, *supra* note 2, at 234.

—75%—Office of Naval Research Study at Stanford Research Inst. in 1964.

—"close to 70%"—Professors Richard A. Sternbach, Lawrence A. Gustafson & Ronald L. Colier in HARV. BUS. REV. cited in New York Times, Nov. 22, 1971, § C at 45.

—10-25% error—People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955).

15. INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION, 110-11 (3rd ed., 1953).

16. Skolnick, *supra* note 9, at 717.

sults are so often determinative of the central issue—in a criminal case, guilt or innocence—such a degree of error is not permissible.

THE LEGAL STATUS OF POLYGRAPH EVIDENCE

As previously noted, the primary case denying admissibility to Polygraph evidence is *Frye v. United States*.¹⁷ Since that time, lie detection has generally been held inadmissible among those jurisdictions considering the matter.¹⁸

Most of the cases which exclude Polygraph results enunciate the principle from *Frye*, that lie detection

has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.¹⁹

Because this rationale is the primary foundation for the current status of lie detection evidence, *i.e.*, inadmissible, the arguments for admissibility in the past, present and presumably, the future, focus upon increased accuracy of the Polygraph technique. It would seem that the proponents have an argument based upon valid concepts. It cannot be denied that accuracy in the process of lie detection has indeed increased, and it would seem that if improved accuracy is the only object which bars the admissibility of such evidence, that bastion is steadily, if slowly, falling. Testimony of prominent Polygraph operators indicates that current test results compare favorably with other scientific experiments such as psychiatric examinations. Indeed, due to wide acceptance of the science of lie detection among prosecutors, defense attorneys, police, employers, and others, a convincing argument can be made that the time when the technique has gained wide acceptance has arrived.

The cases show, however, that despite claims of a trend toward admissibility, the great body of law continues to consider the science of lie detection as inaccurate to a degree which would preclude admissi-

17. 293 F. 1013 (D.C. Cir. 1923).

18. The more recent Federal decisions which hold such evidence to be inadmissible include: *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952); *Marks v. United States*, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *McCroskey v. United States*, 339 F.2d 895 (8th Cir. 1965); *United States v. Bando*, 244 F.2d 833 (2nd Cir. 1957), *cert. denied*, 355 U.S. 844 (1957); *United States ex rel. Szocki v. Cavell*, 156 F. Supp. 79 (W.D. Pa. 1957); *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959); *United States ex rel. Sadowy v. Fay*, 189 F. Supp. 150 (S.D.N.Y. 1960); *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964); *United States v. Tremont*, 351 F.2d 144, 146 (6th Cir. 1965), *cert. denied*, 383 U.S. 944 (1966).

19. 293 F. 1013 at 1014.

bility. It is due to this fact that those seeking recognition of Polygraph evidence in the courts have formulated strong arguments to show a very high degree of accuracy. It follows from this that most comments which display a scepticism of the Polygraph usually are based upon the formulation of an argument that the technique is inaccurate.

If there is any trend in the area of Polygraph evidence, it is that those advocating the position that the technique is achieving high accuracy are becoming more convincing than those who deny this conclusion. Among the elite Polygraph operators who promote admissibility, there is complete regard for, and confidence in each others' efficiency. Though this position ignores the fact that there are still many unqualified operators, it is possible that a foundation consisting of an array of prominent operators might so impress a court with the accuracy of the technique, that a decision allowing for complete admissibility might be reached.

There is a line of cases which hold Polygraph evidence to be admissible in cases where its admissibility has been stipulated before the examination was taken. These cases are based on an assumption of risk rationale, however, and the courts generally require additional safeguards such as qualifications of the examiner being scrutinized under cross examination.²⁰

In addition to other objections in regard to admitting Polygraph results into evidence, there arises in criminal cases another problem, one of constitutional considerations. In *Schmerber v. California*,²¹ the United States Supreme Court stated in dictum:

Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard,' *Counselman v. Hitchcock*, 142 U.S. 547, 562.²²

This characterization of Polygraph evidence as "testimonial" raises numerous problems of constitutionality with regard to the protection

20. See, e.g. *Herman v. Eagle Star Ins. Co.*, 396 F.2d 427 (9th Cir. 1968). For a survey of state cases which also generally hold that polygraph evidence is inadmissible, see 23 ALR 2d 1306.

21. 384 U.S. 757 (1965).

22. *Id.* at 764.

against self incrimination afforded by the Fifth Amendment. If Polygraph evidence is testimonial, the result of admissibility would not be merely to prevent coercion in forcing one to take a test, but a defendant's private test would seem to become undiscoverable, and grave questions of voluntariness of physiological responses would arise. Under current law, a confession obtained as a result of a Polygraph determination that the subject was lying, when that subject freely volunteered to take the examination, is not considered involuntary.²³ Yet it can hardly be said that the actual responses of the examinee's body were voluntarily and freely given, even if one was anxious to take the test. These responses are, by definition, involuntary.

Thus, the situation might arise where the only admissible Polygraph evidence in regard to an examination taken by a defendant would be that where he has been found to be telling the truth. If the evidence were held to be testimonial, the Fifth Amendment would preclude the introduction of a Polygraph examination given by the government because the results would be involuntary testimonial incriminating evidence; and a test taken at the instigation of the defendant, which he failed, would be undiscoverable as incriminating testimonial evidence.

THE PROPER VIEWPOINT

As noted above, the main thrust of those arguing for admissibility has been to establish that the Polygraph technique has achieved such a high degree of accuracy as to become accepted among the scientific and law enforcement community. A corollary of this position is the argument that the governmental agencies have no grounds to deny the accuracy or admissibility of lie detection since many of these agencies rely upon Polygraph examinations in making prosecutorial decisions. This latter argument is easily answered by pointing out that prosecutors often use hearsay and other forms of inadmissible evidence when making the decision of whether or not to prosecute an individual. It would be folly for the courts to rule as admissible all facts considered by the prosecutor when making his decision.

On the other hand, the tenacious insistence that the machine remains unreliable and unaccepted seems doomed to failure. The position that the technique is inaccurate has gradually weakened, while the arguments for its reliability have gained momentum.

The proper test for the issue of whether Polygraph evidence should be admissible is that of relevance. The traditional test for relevance is

23. *United States v. McDevitt*, 328 F.2d 282 (6th Cir. 1964).

to consider the probative value of the evidence and to weigh this against its counterfactors, in this instance, prejudice and confusion of the jury. Evidence should be considered relevant only if the probative value is so great as to overcome the harm done by any and all of these counterfactors. When viewed in this light it becomes apparent that Polygraph evidence should remain inadmissible.

The *Frye* case and arguments which attack inadmissibility on its rationale are aimed only at one side of the scale—probative value. By holding that the technique was not so accurate as to be generally accepted, the *Frye* court actually decided that the probative value of lie detection was not significant enough as to warrant admissibility. Those who seek to establish that the technique has reached the point where it is considered to be accurate, are saying that Polygraph evidence has increased its probative value. Arguments which attempt to answer Polygraph proponents on this ground have lost strength with continued development and accuracy of the technique.

It is the other side of the balance, however, which should establish the continued inadmissibility of Polygraph evidence. The question of whether continued accuracy has caused the probative value of Polygraph evidence to reach a point which outweighs its counterfactors must continue to be answered in the negative.

Whereas the admission of evidence concerning Polygraph tests given to a witness is less harmful, evidence of a Polygraph test given to an accused in a criminal case is highly prejudicial. No other form of evidence is as likely to be completely determinative of guilt or innocence than is a test by a lie detector. Polygraph evidence does not merely aid a jury in its determination of credibility. Instead, it purports to tell the jury whether or not an accused has lied in proclaiming his innocence.

Because of the highly prejudicial nature of this type of evidence, admissibility must be predicated upon a much higher degree of probative value than that possessed by other forms of tests. Although a high degree of accuracy in the use of the Polygraph might be admitted, the risk that an error by the Polygraph operator might be the only basis for acquittal or conviction requires that those results should be correct beyond a reasonable doubt. No such claim is made by proponents, especially in the light of the existence of many unqualified operators.²⁴

24. "We profess no infallibility for the Polygraph Technique. . . ." REID & INBAU, *supra* note 2, at v.

In seeking to dilute this prejudicial effect, proponents of lie detection advocate cross examination and jury instruction to show that the operator is unqualified and that the technique is not foolproof. This position, however, brings about the existence of the second counterfactor to be considered in relation to relevance—jury confusion. A prime reason for the requirement of relevancy is to avoid embroiling the jury in the determination of collateral issues. Allowing for the admissibility of Polygraph evidence, subject to cross examination and credential inspection of the operator would convert a criminal trial into a trial of the Polygraph operator. The determination of guilt or innocence of the accused would be dependent upon how well the operator who interpreted the test results stands up under cross examination. The convincing operator could, himself, convict or acquit, and the unconvincing one might be so disbelieved as to cause an outcome which was contrary to his testimony.

Due to the magnitude of the prejudicial nature of lie detection evidence, and due to the fact that cross examination and jury instruction merely add other counterfactors to this type of evidence, it becomes apparent that a very high degree of probative value would be required to render Polygraph tests admissible. Indeed, it would appear that the counterfactors are of such weight as to preclude admissibility until such a time that universal and complete accuracy is possible. No matter how great the probative value of the technique becomes, the perils of prejudice and jury confusion require that the evidence remain inadmissible as irrelevant until the machine becomes virtually infallible or until these counterfactors can be eliminated. Elimination of the prejudice, however, resurrects the problems of jury confusion, and of the dilemma which occurs when a decrease in confidence will also result in a decrease in accuracy.

For these reasons, the position of the legal profession and the judiciary should be renewed opposition to the admissibility of Polygraph evidence. Future analyses, however, might be more effectively based upon the true relevance test of probative value weighed against counterfactors, rather than on the ground that the machine and technique remain experimental and inaccurate. Thus, arguments aimed at showing the technique as susceptible to error should be understood as indicating that this fact reduces the probative value of the evidence in any single case; and then the counterfactors should be construed as outweighing that probative value.

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