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United States v. Ridling: The Polygraph Breaks the "Twilight Zone."

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RECENT DEVELOPMENTS

United States v. Ridling: The Polygraph Breaks the "Twilight Zone."

In 1923, Dean Wigmore made the observation that "if [science] ever devise[s] a psychological test for the valuation of witnesses, the law will run to meet it." That same year, however, the United States Court of Appeals for the District of Columbia, in the first appellate court decision dealing with the admissibility of lie detector results, chose to run in the opposite direction. In Frye v. United States, the court held that the lie detector had not achieved the requisite degree of scientific recognition to merit admission as a reliable piece of scientific evidence. This decision became the cornerstone upon which a substantial body of case law opposed to the admission of lie detector evidence was subsequently built. Despite the weight of authority against the admission of such evidence, a number of recent federal court decisions strongly suggest the initiation of a trend towards judicial recognition of the scientific validity of the polygraph technique. This article will examine the rationale behind this new development in the law of evidence in light of the traditional grounds used to exclude the results of polygraph examinations.

In United States v. Ridling, District Judge Charles W. Joiner ruled that the defendant in a perjury case was entitled to submit testimony of several polygraph experts that, based on their opinions and interpretations of the results of polygraph tests, the defendant had made his statements before a grand jury in the belief that they were truthful. In view of the weight of judicial precedent militating against the decision, Judge Joiner held such evidence admissible subject to the satisfaction of a number of stringent conditions: (1) the defendant must submit to a polygraph examination conducted by a court-appointed examiner chosen from a list of mutually ac-

1. J. WIGMORE, EVIDENCE § 875 (2d ed. 1923).
2. 293 F. 1013 (D.C. Cir. 1923).
cepted names submitted by the parties; (2) test results must be reported to the court and to counsel for both parties; (3) the court-appointed examiner will be permitted to testify upon a determination that the defendant is testable and that the test results reveal whether the defendant is lying or telling the truth; and (4) conversely, if the court-appointed examiner is unable to ascertain whether or not the defendant is telling the truth, none of the polygraph evidence is admissible.8

The court ruled Ridling’s evidence admissible upon an initial finding that the polygraph was a reliable instrument for recording the physiological responses of an individual to stress and that “the scientific psychological basis for the polygraph examination [was] well established.” Judge Joiner considered the historical development of polygraphy into an organized, well-recognized profession and took note of the widespread use of the polygraph by private industry, the armed forces, governmental security organizations, and most law enforcement agencies. The opinion made a significant observation that cases involving the issue of perjury were most aptly suited for the use of polygraph evidence:

A perjury case is based on ‘willfully’ or ‘knowingly’ giving false evidence. . . . [T]he polygraph examination is aimed exactly at this aspect of truth. A subject . . . may be honestly mistaken as to a fact and, if he answers according to his honest belief, the operator will interpret the results as being a truthful answer.7

The court confronted the traditional dangers inherent in the admission of such testimony. The very standards that Judge Joiner laid down for the admission of polygraph evidence went directly to the need of insuring that the polygraph examiner be a highly skilled and qualified expert well versed in the theory and application of the polygraph technique. By exercising its power to appoint experts,8 the court reasoned that it would insure a truly objective interpretation of the results of the polygraph examination. The district court found the polygraph evidence to be relevant as information going directly to the issue of the defendant’s state of mind at the time of the testimony before the grand jury.9 Insofar as the evidence was in violation of the hearsay rule, the court reasoned that the polygraph examiner’s interpretation of the polygraph record went to the truthfulness of the defendant’s prior statements, thus falling within the “state of mind” exception to the hearsay rule.10

6. Id. at 93.
7. Id.
8. FED. R. CRIM. P. 28; FED. R. EVID. 706.
10. Id. at 99.
The *Ridling* decision is one of several recent federal court decisions that discuss in detail the probative value of polygraph evidence. In *United States v. DeBetham*, the defendant was charged with unlawful possession of narcotics, stemming from a search of the car in which he was driving at the Mexican-American border. The owner of the car, Charles Bland, testified that he and DeBetham had driven to Mexico with the intention of smuggling heroin into the United States. In rebuttal, the defendant attempted to introduce evidence of the results of several polygraph tests in support of his contention that he had met Bland while traveling through Mexico and that he was unaware of the presence of heroin in the automobile. Noting that most past appellate decisions had rejected the admission of polygraph evidence without examining in detail other evidence presented to justify its admission, District Judge Gordon Thompson, Jr. thoroughly examined the premises underlying the traditional policy of rejection, arriving at the conclusion that the standard set for the admission of polygraph evidence was much higher than the normal standard for admission of scientific evidence in general. Arguing for application of the normal standard of admissibility of the results of polygraph examinations, the court reasoned that

... a polygraph examiner, having satisfied [the] court that he is qualified as an expert in his field, should be permitted to present foundational evidence ... demonstrative of the polygraph's substantial reliability and acceptance, in an effort to establish its probative value. The procedure contemplated would permit the reception of testimony concerning the particular polygraph test sought to be admitted only after these initial hurdles have been cleared, and provides for the exercise of sound judicial discretion in the course of this inquiry. Nevertheless, Judge Thompson, considering himself "constrained" by past decisions of the ninth circuit, in the end excluded the defendant's polygraph examination results from evidence.

In *United States v. Zeiger*, the defendant, an employee of the Federal

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12. "Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." C. McClomick, LAW OF EVIDENCE § 203 (2d ed. 1972). "All that should be required as a condition [for the admission of scientific evidence] is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications." 3A J. Wigmore, EVIDENCE § 990 (3d ed. Chadburn rev. 1970). See Kaplan, The Lie Detector: An Analysis of Its Place in the Law of Evidence, 10 WAYNE L. REV. 381, 390-93 (1964) [hereinafter cited as Kaplan].
13. 348 F. Supp. at 1384.
Food and Drug Administration, was prosecuted for assault with intent to kill a government secretary. Subsequent to a pre-trial evidentiary hearing, District Judge Barrington D. Parker allowed into evidence expert testimony on the results of a polygraph exam administered to Zeiger shortly after the alleged crime had been committed. As in both the *Ridling* and *DeBetham* decisions, the court applied the general standard of admissibility. On the basis of the expertise of the polygraph examiner and testimony by several polygraph experts and psychologists verifying the accuracy of the polygraph, Judge Parker accepted the defendant's polygraph evidence. In response to claims that absolute scientific verification of the validity of the polygraph technique in detecting truth or deception was lacking, the court noted that it was not "concerned with satisfaction of [the] scientific standard of validity, but with the legal standard of whether there [was] agreement as to a degree of sufficient quality to assure probative value." However, the court of appeals—reluctant to reverse the strong precedent of exclusion established by the *Frye* decision—summarily reversed the order granting admission.

I. *The Theory of the Polygraph*

One of the chief misconceptions concerning the polygraph machine is that it somehow automatically signals the presence of truth or deception in the examinee's response to certain questions. In reality, the polygraph merely records on a graph the degree of certain specific physiological changes, i.e., pulse rate/blood pressure, respiratory rate, muscular activity, and galvanic skin reflex, occurring during the polygraph examination. These data are in turn analyzed by the polygraph examiner who compares the graphic record of the subject’s physiological variations with the questions presented to the examinee during the course of the examination, and who ultimately determines whether or not the test subject has answered the questions truthfully. Thus, the polygraph examination is in fact a complex relationship among the examiner, the examinee, and the test instrument. While the polygraph machine certainly is an essential ingredient, it is the polygraph examiner—who interviews the examinee, designs the test questions, and interprets the polygram—whose expertise is much more crucial to an accurate diagnosis of the polygraph examination.

16. *Id.* at 690 n.26.
The fundamental premise underlying the polygraph theory may be summarized as follows: A conscious attempt to deceive normally produces emotional conflict which is revealed by a corresponding variation in the individual's physiological state. These variations (in blood pressure, breathing, and pulse rate) are readily discernible by the sensitive polygraph instrument. Thus, the theory of polygraphy rests upon a dual assumption that (1) there exists a definite relationship between conscious deception and a subject's psychological state; and (2) this psychological state is ultimately linked to the subject's physiological state.

The polygraph examination procedure commences with a pre-test interview between the subject and the examiner in which the subject is acquainted with the nature of the polygraph machine, the test procedure, and the precise order and nature of the questions that he will be expected to answer. This interview also gives the examiner an opportunity to evaluate the subject's unconscious behavioral reactions to the test environment and to observe any behavior that may have an effect upon the nature of the polygraph record of the subject's physiological state. Test questions drawn up by the examiner are classified as either "relevant," "irrelevant," or "control" questions. Relevant questions deal directly with the crime being investigated. Irrelevant questions have no bearing on the investigation and are employed primarily to obtain a subject's normal reaction pattern. Control questions concern an act of wrongdoing of the same general nature as the crime under investigation; these are designed to elicit a deceptive response from the subject. The rationale behind the employment of relevant and control questions is that the truthful subject will experience greater emotional conflict when confronted with a control question than he will when he is presented with a relevant question. Conversely, the deceptive or lying subject will react more strongly to the relevant questions than to the control questions in the examination.

The probative value of polygraph evidence is present in any case wherein the ultimate issue to be decided involves the truth or falsity of either party's allegations. The evidence is not presented in an attempt to decide for the

19. Id. at 196.
20. Id. at 10-16.
21. Id. at 16-21. Each question is phrased specifically to elicit either an express "yes" or "no" answer. Assignment of each question to a specific area of the polygram enables the examiner to study the subject's physiological response to each question. A sample polygraph examination would consist of ten questions. Relevant questions would be assigned to positions 3, 5, 8, and 9; irrelevant questions to positions 1, 2, 4, and 7; and control questions to positions 6 and 10. Id. at 21.
22. Id. at 125. Normally a sequence of tests, each one approximately three to five minutes in duration, is required before a definite diagnosis can be made.
court or the jury the ultimate verdict of guilt or innocence. Rather, it deals with "... a collateral fact as to the [polygraph] examinee's awareness of, and belief in personal participation in the act in question." Thus, most proponents argue that interpretation of polygraph test results by a competent examiner should be dealt with in the same manner as expert testimony in the fields of psychology, psychiatry, medicine, and the sciences in general. As the court in the *Ridling* decision noted, polygraph evidence is most helpful when dealing with the issue of perjury. Another area in which the courts are beginning to recognize the probative value of such evidence involves cases in family law dealing with divorce, child custody, and paternity actions. The common element in all these case situations is the issue of credibility to be given to particular allegations or testimony of the parties in interest.

II. The Precedent for Exclusion

Most federal and state courts have traditionally refused to admit into evidence in criminal cases the results of polygraph tests on behalf of either the defense or the prosecution. Various reasons have been given to justify this exclusion, some of which being that the evidence is inadmissible as hearsay, that the polygraph cannot be "cross-examined," that no foundation had been laid for admission, or that such evidence would be viewed by a jury as being conclusive. The most prevalent reason for exclusion is that espoused by *Frye v. United States*—that the polygraph technique has not achieved the degree of general scientific acceptance required to warrant legal recognition of the polygraph as a reliable method of ascertaining truth or deception.

*Frye* was the first appellate court case to consider the question of admitting the results of polygraph tests into evidence. The defendant was accused of and convicted of second degree murder. The issue on his appeal was the exclusion by the trial court of the results of a systolic blood pressure

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31. 293 F. 1013 (D.C. Cir. 1923).
deception test\textsuperscript{32} offered by Frye as evidence of his innocence. The appellate court affirmed the decision holding that the lie detector had not attained the degree of accuracy and reliability generally required of scientific evidence. The court reasoned:

Just 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.\textsuperscript{33}

Most subsequent court decisions excluding polygraph evidence have echoed the Frye standard of "general scientific acceptance,"\textsuperscript{34} and several cases in particular have interpreted the Frye rationale to require a stricter standard of acceptability for polygraph evidence than for other types of scientific evidence. In 1933, the Wisconsin Supreme Court in State v. Bohner\textsuperscript{35} reiterated the Frye opinion in rejecting evidence of the test results of a Keeler polygraph,\textsuperscript{36} noting:

While [the polygraph] may have some utility at present, and may ultimately be of great value in the administration of justice, it must not be overlooked that a too hasty acceptance of it during this stage of its development may bring complications and abuses that will overbalance whatever utility it may be assumed to have. The

\textsuperscript{32} The lie detector device used in Frye measured only the subject's blood pressure and was in no way as diversified an instrument as the present-day polygraph. In this respect, the Frye court was probably justified in excluding the evidence.

\textsuperscript{33} 293 F. at 1014 (emphasis added). The Frye decision was factually wrong since another person subsequently confessed to the murder three years after Frye had begun serving his prison sentence. See 14th Annual Report of the New York Judicial Council 265 (1948), reported in Wicker, The Polygraph Truth Test and the Law of Evidence, 22 TENN. L. REV. 711, 715 (1953).

\textsuperscript{34} Six of the eleven federal circuits have specifically rejected the admission of polygraph evidence. The following states have likewise ruled for exclusion: Alaska, Arizona, California, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

\textsuperscript{35} 210 Wis. 651, 246 N.W. 314 (1933).

\textsuperscript{36} The Keeler polygraph was the first of the modern-day lie detector machines designed to record simultaneously a number of different physiological responses. REID & INBAU 3.
present necessity for elaborate exposition of its theory and demonstration of its practical working, in order to convince the jury of its probative tendencies, together with the possibility of attacks upon the soundness of its underlying theory and its practical usefulness, may easily result in a trial of the lie detector rather than the issues in the cause.\textsuperscript{37}

The standard of admissibility espoused by Bohner added the element of "possible attacks" on the theory of polygraphy, thus implying that a standard greater than "general scientific acceptance" was required before the results of polygraph examinations could be introduced as evidence. \textit{People v. Forte}\textsuperscript{38} likewise interpreted \textit{Frye} as requiring of the polygraph a higher standard of admissibility:

We cannot take \textit{judicial notice} that this instrument [the polygraph] is or is not effective for the purpose of determining the truth. Can it be depended upon to operate \textit{with complete success} on persons of varying emotional stability? The record is devoid of evidence tending to show a \textit{general scientific recognition} that the pathometer possesses efficacy.\textsuperscript{39}

\textit{Forte} thus introduced the criteria of "judicial notice" and assurance of complete success into the standard of admissibility, an element clearly contrary to the general degree of scientific acceptance necessary for the admissibility of scientific evidence.\textsuperscript{40} It may well be argued that these cases create a standard of admissibility for the polygraph that requires not only general scientific acceptance but also general scientific \textit{infallibility}.

In view of the general rule of exclusion, courts usually have refused collateral evidence of polygraph examinations where such evidence makes reference to the fact that a test was conducted\textsuperscript{41} or to the willingness\textsuperscript{42} or refusal\textsuperscript{43} of the subject to submit to such a test. However, a failure of opposing counsel to object to the introduction of such evidence or to move for a mistrial may act as an effective waiver of the right of exclusion.\textsuperscript{44}

\textbf{A. Stipulation As A Ground for Admission}

While the general rule is for total exclusion of polygraph evidence, a minority of jurisdictions presently allow admission of polygraph test results

\begin{itemize}
\item \textsuperscript{37} 210 Wis. at 658, 246 N.W. at 317-18 (emphasis added).
\item \textsuperscript{38} 279 N.Y. 204, 18 N.E.2d 31 (1938).
\item \textsuperscript{39} \textit{Id.} at 206, 18 N.E.2d at 32 (emphasis added).
\item \textsuperscript{40} \textit{See} Strong, Questions Affecting the Admissibility of Scientific Evidence, 1970 U. ILL. L.F. 1, 9 (1970).
\item \textsuperscript{41} \textit{People v. Aragon}, 154 Cal. App. 2d 646, 316 P.2d 370 (1957).
\item \textsuperscript{42} \textit{State v. Anderson}, 261 Minn. 431, 113 N.W.2d 4 (1962).
\item \textsuperscript{43} \textit{State v. Driver}, 38 N.J. 255, 183 A.2d 655 (1962).
\item \textsuperscript{44} \textit{REID & INBAU} 245. \textit{See} Jenkins v. United States, 251 F.2d 51 (5th Cir. 1958).
\end{itemize}
where both parties have stipulated that the evidence could be used by either side.\textsuperscript{45} People v. Houser\textsuperscript{46} was the first important appellate court decision to uphold the admission of polygraph evidence where there existed a signed, written stipulation. The court held that the defendant was bound by the stipulation he had signed with his attorney's approval to permit use by either side of the results of a polygraph exam. Denying the defendant's appeal that the evidence was inadmissible, regardless of the presence of a stipulation, the court reasoned that

\begin{quote}
[i]t would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth. . . .\textsuperscript{47}
\end{quote}

In State v. Valdez,\textsuperscript{48} the Arizona Supreme Court likewise held that evidence of the results of polygraph exams were admissible upon stipulation subject to the following procedural limitations:

1. Existence of a written stipulation signed by the defendant and counsel for both sides attesting to the defendant's voluntary submission to the test and the right of both parties to admit into evidence at trial the polygram record and the examiner's diagnosis of the results.

2. Absolute discretion of the trial judge to admit or exclude the evidence, regardless of the stipulation.

3. Upon admission, the right of opposing counsel to cross-examine the polygraph operator as to

   (i) his experience and training,

   (ii) the nature of the test conditions,

   (iii) the degree of accuracy and probability of error in the polygraph technique, and

   (iv) other issues determined by the trial judge to be relevant to the case.

4. Jury instruction to the effect that the polygraph evidence only goes to

\textsuperscript{46} 85 Cal. App. 2d 686, 193 P.2d 937 (1948).
\textsuperscript{47} Id. at 695, 193 P.2d at 942. Contra, Stone v. Earp, 331 Mich. 606, 606, 50 N.W.2d 172 (1951).
the issue of the defendant's truth or deception at the time of the examination—not to the issue of defendant's guilt or innocence. Its probative weight is for the jury to decide.\(^4\)

The significance of the *Valdez* decision is that it was the only decision prior to *United States v. Ridling* to set down a list of specific guidelines on the proper procedure and circumstances under which the results and expert testimony regarding polygraph examinations could be admitted into evidence. The decision went further in substituting the practice of judicial discretion for the rule of absolute exclusion of polygraph evidence, thus permitting the presentation of expert testimony to lay a foundation to establish the reliability of the polygraph technique.

The rationale behind the practice of admitting stipulated polygraph evidence while, at the same time, excluding similar evidence without a stipulation rests primarily on practical, as opposed to theoretical, considerations. The presence of a stipulation usually suggests that neither party has a particularly strong case against the other. Where neither side is able to win on a preponderance of the evidence, a greater chance exists that the jury or the court may reach an incorrect or arbitrary decision.\(^5\) Stipulation manifests the intention of the opposing attorneys to gain a decision based upon more than meager and contradictory evidence. In addition, the stipulation in itself is indirect evidence that the polygraph examiner named therein possesses a satisfactory degree of professional competence since the examiner presumably meets the approval of both opposing attorneys.\(^6\)

A more theoretical outlook on the distinction between stipulated and unstipulated polygraph evidence reveals the dilemma sometimes confronted by the courts in electing between honoring the practice of stipulation and upholding the strong judicial policy of exclusion:

A court with a deep and compelling philosophy against admission of polygraph data may find the policy and procedural arguments for honoring such a stipulation insufficient to overcome the court's intrinsic objections to such evidence. Conversely, a properly-executed stipulation may supply a basis for limited admission of polygraphic evidence when the court is less philosophically hostile and is willing to use the stipulation as a tool to break the solid wall of stare decisis.\(^7\)

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49. *Id.* at 283-84, 371 P.2d at 900-01.
III. A Reexamination of the Rule of Exclusion

The Frye rule of exclusion, followed by its strict interpretation in later court opinions, clearly set a higher standard of admissibility for the polygraph in comparison with the general standard imposed upon other types of scientific evidence. One consequence of this development was the failure of most all subsequent polygraph cases to examine closely the efforts of the parties involved to lay an adequate foundation for the admission of polygraph evidence under the Frye standard of admissibility. Beyond mention of the Frye rule and prior cases of exclusion, most polygraph cases have provided few reasons, if any, for summarily rejecting unstipulated polygraph evidence.\(^5\)\(^3\)\(^3\)\(^3\) Other factors that have influenced these court decisions include the lack of uniform professional standards for polygraph examiners, the presence of abnormal physiological and/or psychological symptoms in the examinee, the prejudicial effect of polygraph evidence on the jury, and the possible violation of the defendant’s constitutional privilege against self-incrimination.

A. Frye Reconsidered

Most legal scholars agree that the Frye court was justified in excluding lie detector results from evidence. The year was 1923, and the science of polygraphy was in its infancy.\(^5\)\(^4\) Whether or not polygraphy has become an established field of science and technology in the fifty years since Frye and has occupied a position capable of satisfying the standard of “general scientific acceptability” is the primary issue today.\(^5\)\(^5\)

As stated previously, polygraph theory rests essentially upon the twofold premise that 1) conscious deception affects a person’s psychological state of mind which in turn is reflected in the person’s physiological state, and 2) this physiological state may be accurately recorded by a polygraph instrument.\(^5\)\(^6\) While most scientists acknowledge the ability of the polygraph to measure the degree of a person’s physiological changes,\(^5\)\(^7\) the major area of

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56. See notes 18-19 supra and accompanying text.
57. Supra note 53, at 1381.
dispute has been the validity of the premise that there is a measurable relationship between conscious deception and a person's physiological state.\(^5\)

This criticism is, for the most part, an unavoidable consequence of the empirical nature of the development of polygraphy. Discovery of the fact that truth or deception was measurable in terms of a person's physiological condition was made long before a rational scientific explanation of this phenomenon.\(^6\)

Nevertheless, science, as well as the courts, has recognized at least a limited validity and usefulness in the polygraph technique for conducting criminal investigations.\(^6\)

In view of the duty of the courts to discover all pertinent facts surrounding the occurrence or transaction at issue, the general standard employed to determine the admissibility of evidence accepts all facts of probative value that are relevant to the issue to be decided,\(^6\) subject to a number of policy factors that may weigh against its admission—i.e. the danger of unfair prejudice to the party's position, the confusion of issues, and the danger of misleading the jury.\(^6\) It is left to the discretion of the trial judge to weigh the value of the relevant evidence against the possible prejudicial effects of its admission. Normally, the general standard of admissibility is applied to scientific evidence after the party offering such evidence has shown: 1) that the method employed to obtain the evidence has gained general scientific recognition; 2) that the test has been conducted in a manner evidencing the achievement of an accurate result; and 3) that the examiner conducting the test and interpreting its results satisfies the requirements of an expert witness.\(^6\)

Assuming that the court admits the evidence, the jury considers the degree of scientific recognition of the test theory in determining the amount of weight it will attach to the scientific evidence in deciding the issue(s) of the case. Thus, the issue of the reliability of the scientific evidence goes to its weight and not to its admissibility.

A review of the *Frye, Bohner,* and *Forte* cases clearly reveals that the courts require a higher standard of admissibility in the case of polygraph evidence:

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58. Skolnick 700-02.
59. A similar situation exists with the revitalized medical practice of acupuncture. Physicians acknowledge the usefulness of the technique in relieving pain, but they remain unable to explain the scientific reasons behind the success of the treatment. *See generally NEWSWEEK,* Aug. 14, 1972, at 48.
60. REID & INBAU 234.
61. FED. R. EVID. 401.
62. FED. R. EVID. 403.
63. United States v. Ridling, 350 F. Supp. at 94-95. *Contra,* State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947), where the court felt that the analogy between polygraph evidence and other types of scientific evidence was invalid because the polygraph apparatus records psychological data while other types of scientific instruments record physical data.
Rather than considering the probative value of the evidence to see if it is *prima facie* admissible and then the policies which weigh against admission, the courts assume that the evidence should be excluded *unless* it is shown that the lie detector has received "general scientific acceptance" or is "infallible." In this way, the courts fail to identify the policy considerations against admission and hinder constructive attempts to provide safeguards against the dangers feared.\(^{64}\)

The requirement of "general scientific acceptance . . . among physiological and psychological authorities" imposed upon polygraph evidence by the *Frye* decision goes more towards the higher standard of proof required for judicial notice of fact than towards the standard of admissibility of scientific evidence.\(^{65}\) Most court decisions subsequent to *Frye* have summarily rejected attempts to introduce such evidence, having decided that the polygraph technique failed to meet the standard required for judicial notice, and failed to subsequently test the utility of the evidence against the general standard for admissibility.\(^{66}\) In addition to the imposition upon polygraph evidence of a higher standard of admissibility, the courts have interpreted *Frye* as restricting the requirement of general scientific acceptance to experts in the fields of physiology and psychology, even though the main holding of the case calls for "general acceptance in the particular field in which it [the polygraph] belongs."\(^{67}\)

However, the present trend is for the courts to grant judicial recognition to scientific evidence if there is general acceptance by those who specialize in that particular field of study.\(^{68}\) In the field of polygraphy, John E. Reid

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64. Kaplan 394.
65. The courts generally use judicial notice to declare the truth of an assertion without requiring formal proof in the form of oral and written testimony. Judicial notice serves as a catalyst to the trial procedure by deciding, in place of the jury, the truth of facts generally so recognized by counsel for both sides. By definition, such a finding requires a stricter standard of admission than that required for the general admission of scientific evidence. Where the court determines that the truth of a particular assertion is debatable, it generally leaves the issue of truth for the jury to resolve. *See generally* C. McCormick, *Law of Evidence* ch. 35 (2d ed. 1972).
66. Professor McCormick analyzes the situation in the following manner:
"General scientific acceptance" is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. . . . If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.
68. Reid & Inbau 237. *See* People v. Williams, 164 Cal. App. 2d 858, 331 P.2d
and Fred E. Inbau, two of the leading authorities on the polygraph, have affirmed that the accuracy and reliability of the polygraph technique is of a high degree and compares quite favorably to other judicially recognized types of scientific evidence, such as psychiatric testimony in insanity proceedings, medical testimony regarding medical diagnosis, and testimony by handwriting, fingerprinting, blood-testing, and ballistics experts. While courts must not limit acceptance of polygraph evidence solely to general proof of its high degree of precision, a comparison of polygraph accuracy to that of other types of scientific testimony warrants a careful consideration of the relevancy of polygraph evidence before it is summarily excluded.

B. The Polygraph Examiner

It is generally acknowledged that the accuracy of polygraph evidence in the discovery of truth and deception depends greatly upon the expertise displayed by the polygraph examiner in making a proper analysis of the test results. The examiner's ultimate decision as to whether or not the test subject was telling the truth results from not only an examination of the polygram record, but also a combination of factual information. In actual practice, the examiner takes into account information regarding the case under investigation as well as the subject's behavioral symptoms and attitudes observed before, during, and after the examination. "... [The examiner] is afforded the ... opportunity to evaluate the attitude of the subject and to make allowances for [any possible] condition which could cause an error in interpretation of [p]olygraph records." Because of his crucial role in interpreting the polygraph test results, emphasis is placed upon the achievement of a high degree of professionalism, training and experience.

Aside from the objection of the strong prejudicial effect of polygraph evidence on the jury, critics of the polygraph have expressed great concern over the absence of mandatory standards of training and education to ensure a high degree of examiner competence; and this in turn is an important reason for the lack of support for the use of polygraph evidence among many attorneys and judges. Most polygraph examiners are either private practitioners or are employed by the federal, state, or local government or by law enforcement agencies. Only a minority have college degrees, and many lack an adequate understanding of the underlying theory of the poly-

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69. REID & INBAU 254-57.
70. Id. at 257. See Skolnick 707.
71. Horvath & Reid 281.
Polygraph Evidence

While the problem of examiner expertise is well recognized, the polygraph profession has been unable to do much more than to suggest standards to be adhered to by its members. In view of the magnitude of this problem, a number of states have passed legislation regulating polygraph examiners. While this legislation goes a long way towards alleviating the problem of examiner incompetence, the statutes are uniformly insufficient in their failure to specify any requirement of study in the sciences of psychology and physiology. The absence of any experience in this area of study significantly diminishes the value of the requirement of a bachelor's degree. Nevertheless, such legislation has greatly aided the polygraph profession in its quest to insure a high degree of competency among its examiners.

Recent studies clearly establish that a qualified examiner is much more ac-
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Curate in diagnosing truth or deception from analysis of polygraph records than is an inexperienced examiner. Professional and legislative regulations serve as useful guides for the courts in determining not only whether a polygraph expert is qualified to testify at trial but also whether the polygraph evidence is ultimately to be accepted.

C. The Polygraph Examinee

Many critics of the polygraph technique express concern over the danger of an innocent subject obtaining an adverse judgment from a mistaken examiner because of the presence of some physiological or mental abnormality. They contend that an accurate test diagnosis is possible only where the examinee is in good mental and physical condition at the time of the test and that any physiological problems—such as irregular blood pressure, heart disease, respiratory disorders, extreme nervousness, anxiety, anger, or nervous tension—undetected by the examiner can lead to a “false positive diagnosis.” While it may be true that the presence of such irregularities will affect the readings produced by the polygraph, proponents maintain that these factors are readily ascertainable by a competent examiner, either from the readings themselves or from the visible demeanor of the test subject, and that the examiner will subsequently consider the presence of such abnormalities in his overall analysis of the test results. A well-trained, experienced polygraph examiner conducting the test of a possibly abnormal subject, either alone or in the company of a competent psychologist, should be able to recognize the presence of any physiological or psychological conditions and take their presence into account in arriving at a diagnosis. In addition, most investigations into the degree of accuracy of the interpretation of polygraph test results indicate that the polygraph examiner is more inclined to mistakenly find a guilty subject innocent than he is to find deception on the part of an innocent subject. In other words, the margin of error actually favors the guilty examinee.

D. The Jury

Perhaps the strongest objection to the admissibility of polygraph evidence is one that does not even deal with the issue of the reliability or accuracy

76. Horvath & Reid, 281. See also Reid & Inbau 234.
77. Highleyman, supra note 55, at 60-61.
78. Reid & Inbau 184-202. The authors recognize that certain classes of individuals—i.e. young children, intoxicated or drugged individuals, persons suffering from serious heart disease, idiots, and imbeciles—are unfit subjects for examination. Psychotics are usually recognized during the examination, while psychopaths and psychoneurotics normally produce inconclusive test results.
79. Horvath & Reid 279.
of the evidence. Rather, the objection lies in the overbearing prejudicial
effect of the evidence, notwithstanding its probative value, on the jury and
the concomitant tendency of the jury to treat such evidence as conclusive
proof of the defendant's guilt or innocence without deciding the case on all
its merits. District Judge Irving R. Kaufman expressed this sentiment clearly
in United States v. Stromberg:80

The most important function served by a jury is in bringing its ac-
ccumulated experience to bear upon witnesses testifying before it,
in order to distinguish truth from falsity. . . . It is the basic
premise of the jury system that twelve men and women can har-
monize those variables and decide, with the aid of examination
and cross-examination, the truthfulness of a witness. . . . I
am not prepared to rule that the jury system is as yet outmoded.
I still prefer the collective judgment of twelve men and women
who have sat through many weeks of trial and heard all the evi-
dence on the guilt or innocence of a defendant.81

This prejudicial potential may be alleviated to a certain degree by restrict-
ing the scope of the examiner's testimony to the veracity of the defendant's
answers to the relevant questions of the polygraph exam. The examiner
should never be permitted to express his opinion as to whether or not the
subject is guilty or innocent of the crime charged against him.82 A vigorous
cross-examination of the polygraph examiner should expose relevant inade-
quacies in the testimony of the witness and subsequently lessen its impact
on the jury. Additional information concerning the degree of the examiner's
qualifications, the nature of the test conditions, a professional opinion as
to the possibility of error in his interpretation, and the possible presence of
adverse physiological and psychological factors should aid the jury in plac-
ing the polygraph examiner's testimony in its proper perspective. In addi-
tion to cross-examination of the examiner, the jury should be instructed both
prior to and subsequent to the admission of the polygraph evidence to the
effect that: 1) the examiner's conclusions must not be considered as proof
of any element of the crime; 2) the jury should consider this evidence in con-
junction with all other evidence presented to the court; and 3) the jury must
disregard the polygraph evidence if they find that the defendant failed to vol-
untarily consent to the examination.

While cross-examination and accurate jury instruction go a long way to-
wards alleviating the prejudicial impact of polygraph evidence on the jury,
normally the trial judge will ultimately decide whether or not the probative

81. Id. at 280. See also People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307
value of the examiner's testimony outweighs its prejudicial nature under the circumstances of the particular case.

E. Fifth Amendment Limitations

The testimonial nature of the polygraph examination proceeding necessitates consideration of the impact of such evidence vis-à-vis the defendant's constitutional privilege against self-incrimination. In *Schmerber v. California*, the Supreme Court upheld the involuntary extraction of a blood sample from a hospital patient suspected of drunken driving to determine the level of alcoholic content. Rejecting the petitioner's claim that the invasion was in violation of his privilege against self-incrimination under the fifth amendment, the Court held that the privilege applied only to "evidence of a testimonial or communicative nature" and not to evidence obtained solely from exposure of the suspect to physical observation or scientific examination. The court indirectly alluded to the status of polygraph evidence in relation to the fifth amendment:

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.

Aside from this brief allusion to the polygraph in *Schmerber*, no court has as yet acted specifically on the issue of whether or not the results of polygraph examinations are within the scope of protection furnished by the fifth amendment. Nonetheless, the *Schmerber* dicta makes rather tenuous the assertion that polygraph evidence is analogous to fingerprints, blood tests, and line-up identifications in that the evidence is "physical" rather than "testimonial" in nature. The basic theory of polygraphy that links the examinee's physiological changes to his psychological state of mind interprets such readings as being basically communicative.

Assuming that an individual has the right under the fifth amendment to

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84. Id. at 761.
85. Id. at 764.
86. Id.
87. Skolnick 725.
refuse to take a polygraph test, he likewise has the right to waive his privilege against self-incrimination, assuming that he has received clear and adequate warning that the results of such a test could be used against him. Thus a suspect who so voluntarily consents to take a polygraph test may be considered to have intelligently waived his privilege against self-incrimination.

The objection to admission of polygraph evidence on these constitutional grounds is, for the most part, academic since a polygraph examination cannot produce truly reliable results without the full cooperation of the examinee. The Ridling opinion expands on this fact to argue that polygraph evidence falls outside of the fifth amendment privilege:

With the polygraph, there can be no coercion at the time the test is taken if it is to be a valid test. The evidence offered is the opinion of the expert that the witness is or is not telling the truth when he voluntarily makes a statement. It is another way of supporting or attacking credibility. It is not a violation of the privilege against self-incrimination.

In the event that the courts decide to apply the fifth amendment to the polygraph test, polygraph evidence presented by the prosecution should be accompanied by a formal written stipulation signed by the defendant, his counsel, and the prosecuting attorney. Such a stipulation should attest to the suspect’s knowing and intelligent waiver of the privilege against self-incrimination through his voluntary submission to the polygraph examination and his agreement to the admissibility of the subsequent test results in evidence—either against him or on his behalf. A further safeguard would be to allow counsel for the examinee to examine the test questions prior to their use or to be present during the examination in order to observe the polygraph technique and the results of the test.

**IV. Conclusion**

In the fifty years since *Frye v. United States*, precedents have been established in the state and federal courts opposed to the admission of the results and interpretation of polygraph examinations into evidence. Most cases subsequent to *Frye* have erroneously interpreted that decision as requiring

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a higher standard of admissibility in the case of polygraph evidence than in the case of other forms of scientific evidence. The Ridling, DeBetham, and Zeiger decisions, when presented side-by-side, reflect a present mood of the courts to take a closer look at the rule of rejection set forth in the Frye decision and to admit expert testimony presented in an attempt to lay an adequate foundation to reveal the general reliability of the polygraph technique and to establish the probative value of polygraph evidence.\(^3\) As a consequence, the issue of admissibility is being decided, not on the traditional criterion required for judicial notice of fact, but rather by the general standard of admissibility: 1) evidence of a generally recognized theory behind the practice; 2) presence of a competent examiner; 3) proof of proper test procedure; and 4) a ruling by the trial judge that the probative value of the evidence succeeds in counterbalancing its prejudicial character.\(^4\)

In United States v. Ridling, Judge Joiner made extensive use of the new proposed Federal Rules of Evidence in arriving at his decision to admit the evidence of the polygraph experts' opinions.\(^5\) Until these rules have been in force for a period of time, the exact nature of their impact on the use of polygraph evidence cannot be adequately measured. However, there appears to be a general consensus that the new rules will broaden the range of admissible evidence where it can be shown that the evidence sought to be admitted is relevant.\(^6\)

Since polygraph evidence was first declared inadmissible in 1923, the polygraph profession has matured into an established field of science. While the precise boundaries of its underlying theory have not been completely mapped by the scientific community, enough knowledge has been obtained through extensive scientific study and investigation to confirm the belief that

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\(^3\) None of the three decisions felt constrained by stare decisis from considering the issue of the reliability of the polygraph technique. Each case referred to United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969) in support of the presumption that the issue of acceptability had to be considered in each individual case. United States v. Ridling, 350 F. Supp. at 94; United States v. DeBetham, 348 F. Supp. at 1380; and United States v. Zeiger, 350 F. Supp. at 687 n.5.

\(^4\) See notes 61-63 supra and accompanying text.

\(^5\) Judge Joiner stressed that the evidence satisfied the requirements of relevancy under Fed. R. Evid. 401, that the court had the power to appoint polygraph experts under Fed. R. Evid. 706, and that the main consideration in support of admission was the ability of the evidence to aid the jury in its search for truth—Fed. R. Evid. 702.

the polygraph can render an invaluable service in the detection of truth and deception. This faith in the utility of the polygraph technique is manifested by its extensive use by government, private industry, and particularly law enforcement agencies. A growing number of courts have recognized the value of the polygraph in the pre-trial stages of criminal and civil litigation. In many cases, the decision of whether or not to initiate further investigation or to prosecute a suspect rests squarely on the outcome of a polygraph examination. Thus, while most courts have excluded polygraph evidence at trial, the results of such tests have at times carried the pervasive effect of conclusive evidence of one's guilt or innocence at the pre-trial stage.

United States v. Ridling may well be one of the first federal court decisions to herald the arrival of judicial recognition of polygraph evidence. Depending on one's point of view, the opinion is either an overdue acknowledgement of the usefulness of the polygraph in the discovery of truth or an erosion of the function of the jury as the ultimate finder of fact. The rate at which the courts will follow the Ridling decision depends primarily upon how well the polygraph profession is able, either on its own or by the aid of legislation, to increase the overall level of competence among its members. While the court in DeBetham discounted the necessity of regulatory legislation of polygraph examiners, it is fairly certain that most courts will balk at making general use of polygraph evidence in the absence of legislation requiring the uniform examination and licensing of polygraph operators.

Timothy J. Reagan

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98. 348 F. Supp. at 1386.