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FORUM

FULTON v. STATE AND *ANDERSON v. STATE*: INSURMOUNTABLE BARRIERS FOR THE POLYGRAPH

In recent years, a discernable trend has arisen toward admitting polygraph results in criminal trials where the prosecution and defense stipulate prior to testing that the test results will be admissible regardless of the outcome.¹ This approach was previously adopted by Oklahoma,² as well as other states,³ despite the fact that polygraphic evidence which is unstipulated to has generally been held inadmissible.⁴ Recently, this dichotomy has been eliminated in Oklahoma by the holdings in *Fulton v. State*⁵ and *Anderson v. State*.⁶ In these two cases the Oklahoma Court of Criminal Appeals banned the use of polygraphic evidence at trial, even though its admissibility had been agreed to by both the prosecution and the defense.

In *Fulton*, the defendant was charged with first degree murder. During its case-in-chief, the prosecution attempted to introduce testimony concerning the polygraphic examination of a witness for the state. Upon objection by the defense, the trial court excluded the testimony. During the state's rebuttal, however, extensive testimony regarding the polygraph test was admitted over the objections of defense counsel. Although it is unclear from the opinion, it would appear that no stipulations were made by counsel. Even so, the court stated: "[I]n light

1. See, e.g., Comment, *The Polygraphic Technique A Selective Analysis*, 20 DRAKE L. REV. 330, 340-43 (1971).

2. *Castleberry v. State*, 522 P.2d 257 (Okla. Crim. App. 1974); *Jones v. State*, 527 P.2d 169 (Okla. Crim. App. 1974).

3. See, e.g., *State v. Valdez* 91 Ariz. 274, 371 P.2d 894 (1962); *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); *State v. McNamara*, 252 Iowa, 19, 104 N.W. 2d 568 (1960); *State v. Fields*, 434 S.W.2d 507 (Mo. 1968).

4. *Carson v. State*, 529 P.2d 499 (Okla. Crim. App. 1974); *Mullins v. Page*, 443 P.2d 773 (Okla. Crim. App. 1968); *Leeks v. State*, 245 P.2d 764 (Okla. Crim. App. 1952); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951).

5. 541 P.2d 871 (Okla. Crim. App. 1975).

6. 551 P.2d 1155 (Okla. Crim. App. 1976).

of the potential unreliability of polygraph examinations *at this time*, we feel that *in all future cases* the introduction into evidence of polygraph examination results for any purpose, even if admitted upon stipulation of all parties, will be error.⁷ By retreating to a rule of total inadmissibility, the court avoided the more difficult question concerning the standards that should be applied to determine the admissibility of polygraphic evidence.⁸

Ten months later in *Anderson*, the defendant, who was charged with rape, requested permission to take a polygraph examination. The request was denied and the defendant was subsequently convicted. On appeal the defense argued that the refusal to permit the defendant to take the test constituted reversible error.⁹ The court of criminal appeals affirmed the conviction, reiterating its position taken in *Fulton*. In both cases, the court referred to the potential unreliability of the polygraph, basing this opinion on its prior decisions.¹⁰ To properly understand the rejection of polygraph evidence by the Oklahoma Court of Criminal Appeals, it is therefore necessary to examine the history of polygraphic evidence from its emergence in the criminal justice system to its present status in Oklahoma.

Emergence of the Polygraph as an Evidentiary Device

Some fifty-five years ago, the American criminal justice system was

7. 541 P.2d at 872 (emphasis added).

8. Although beyond the scope of this article, the reader should be aware of the inherent theoretical controversies surrounding the standards for admission of polygraphic evidence. In the first instance, most courts apply a judicial notice standard to the admission of polygraphic evidence, whereas several commentators have argued that an expert witness standard should be applied. See, e.g., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 203 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

Moreover, if a judicial notice standard is to be maintained, the controversy surrounding the proper tests for judicially recognizing facts must be settled. One position, expounded by Maguire and Morgan, would allow judicial notice of facts that are indisputably certain. J. MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW (1947); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944). The Wigmore-Thayer approach would grant recognition to those facts that are more probable than not and allow the opponent to present contrary evidence to the jury. 9 J. WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2567 (3d ed. 1940); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 308 (1898).

Analysis of the polygraph as an evidentiary tool would tend to favor the application of the Wigmore-Thayer approach, since it allows the recognition of polygraphic evidence but subjects it to the test of cross-examination and thereafter allows the jury to weigh its validity. The Maguire-Morgan approach would tend to force the polygraph to assume the aura of conclusiveness.

9. 551 P.2d at 1159.

10. See *id.*

confronted with the first crude polygraph in *Frye v. United States*.¹¹ With few exceptions,¹² the appellate courts of this country have subsequently relied on the rationale of *Frye* in excluding polygraph evidence in state and federal criminal trials.¹³

In *Frye*, the Court of Appeals for the District of Columbia decided that any testimony based on or derived from a polygraph test as it was conducted at that time¹⁴ should be excluded from trial. Reasoning from a somewhat scientific viewpoint, the court stated:

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 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.¹⁵

Implicit in the court's analysis were three assumptions: (1) that at some point the polygraph must be recognized as evidence; (2) that to be acceptable in the courts, the polygraph proponent must make a sufficient, though not conclusive, showing of general acceptance in the relevant scientific field; and (3) that a sufficient showing of general acceptance was lacking at that particular time. Thus, the polygraph admissibility question was left open for future decisions, within a framework of scientific progress.

Subsequent decisions by criminal courts, however, have failed to

11. 293 F. 1013 (D.C. Cir. 1923).

12. See, e.g., *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972); *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

13. For an analysis of the polygraph prior to *Frye*, see J. REID, & F. INBAU, *TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE* 3-5 (1966).

14. The instrument used in *Frye* tested only systolic blood pressure. See 293 F. at 1013. Therefore, it did not have the accuracy and reliability of the modern four channel equipment which also test for pulse rate, respiration rate and galvanic skin response. Comment, *The Polygraphic Technique A Selective Analysis*, 20 *DRAKE L. REV.* 330, 330-31 (1971). Thus, the *Frye* court can be seen as having rationally excluded testimony concerning a crude scientific device fraught with potential accuracy and reliability defects.

15. 293 F. at 1014 (emphasis added).

properly consider the state of modern science in the polygraph area and have relied simply on the specific ruling in *Frye*.¹⁶ The courts have failed to recognize that since *Frye* there have been significant advances in the science and training of polygraph examiners,¹⁷ as well as tremendous improvements in polygraph equipment over the simple blood pressure device in *Frye*,¹⁸ With such new evidence available, the present exclusion approach taken by most courts appears unfounded and unwise.

THE POLYGRAPH'S HISTORY IN OKLAHOMA

In 1951, some twenty-eight years after the *Frye* decision, the Oklahoma Court of Criminal Appeals was faced with its first opportunity to rule on the admissibility of polygraphic evidence in *Henderson v. State*.¹⁹ Unfortunately, after a lengthy but scientifically unsound dissertation, the court chose to ignore the evolving state of the art in polygraphic equipment and followed the rationale and test enunciated in *Frye*.²⁰ The significance of the *Henderson* decision lies in the court's reasoning prior to its retreat to the *Frye* rationale. The court first looked to the New York case of *People v. Forte*,²¹ quoting with approval the issue addressed by that court and its resolution: "Can it [the polygraph] be depended upon to operate with complete success on persons of varying emotional stability? The record is devoid of evidence tending to show a general scientific recognition that the pathometer [polygraph] possesses efficacy."²²

16. It should be noted that later Oklahoma decisions excluding testimony concerning polygraphic testing used the same statistics relied upon in the seminal polygraph case in Oklahoma, *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951), even though the statistical data was at that time outdated. See notes 27-30 *infra* and accompanying text.

17. With the establishment of the American Polygraph Association as an organization devoted to research and development and the increase of training facilities such as the Keeler Polygraph Institute, there has been a rapid evolution in polygraph equipment and a significant increase in trained examiners. Further, as of 1972, fifteen states had passed mandatory minimum licensing requirements for polygraph examiners. See Romig, *Status of State Polygraph Legislation in July 1972*, in LEGAL ADMISSIBILITY OF THE POLYGRAPH 44-53 (N. Ansley ed. 1975).

18. See Norvath, *Verbal and Nonverbal Clues To Truth and Deception During Polygraph Examinations* and Ansley, *Capillary Responses As A Polygraph Channel* in LEGAL ADMISSIBILITY OF THE POLYGRAPH 189-219, 257-96 (N. Ansley ed. 1975).

19. 94 Okla. Crim. 45, 230 P.2d 495 (1951).

20. *Id.* at 502-04.

21. 279 N.Y. 204, 18 N.E.2d 31 (1938).

22. *Id.* at 206, 18 N.E.2d at 32.

Despite the *Frye* rationale, the court in *Henderson* appeared to be asking for complete success, or 100% accuracy; a degree of reliability beyond the capability of any humanly conceived device. One of the reasons offered by the court in holding that polygraphic evidence should be excluded from trial was that the machine's readings were only 75% accurate.²³ This analysis has two major flaws. First, the court assumed, after citing the 75% accuracy rating, that the other 25% constituted true error. This assumption, however, is incorrect. Of the remaining 25%, there is a portion of readings which are inconclusive, because the results do not provide a deviation significant enough for the examiner to accurately read.²⁴ In such a situation, the examiner will not give a definite reading, but will term it inconclusive. This is not error, but rather no evaluation at all.

Furthermore, in considering the 25% of the readings that were not completely accurate, the court failed to inquire into whether this error factor tended to exonerate a guilty person or convict an innocent person. It has been shown that in almost all polygraph errors, the error lies in the machine's failure to detect a lie rather than its miscategorization of a truth as a lie.²⁵ Finally, it should be noted that the standard the court applied to the admissibility of polygraphic evidence was not one of general admissibility of evidence, but rather one of judicial notice.²⁶

After concluding that the polygraph's degree of accuracy was deficient, the *Henderson* court went on to note an extensive list of emotional, mental and physical factors which give rise to difficulties in the reading and interpretation of polygraph charts.²⁷ Although such factors may have been problematic with the first crude polygraphs, they have been isolated and dealt with through the improvement of polygraph equipment and the higher level of competency of trained polygraph examiners.²⁸

In its final analysis before adopting the *Frye* rationale, the court looked for support from Dean Wigmore, who was highly critical of the

23. 94 Okla. Crim. —, 230 P.2d at 501.

24. Horvath & Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L.C. & P.S. 276, 278 (1971).

25. *Id.* at 279.

26. Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 383-86 (1964).

27. 94 Okla. Crim. —, 230 P.2d at 501-02.

28. Note, *The Polygraph Revisited: An Argument for Admissibility*, 4 SUFFOLK L. REV. 111, 119-23 (1969) [hereinafter cited as *The Polygraph*].

polygraph in his treatise on evidence.²⁹ It is arguable, however, that the court's reliance on Wigmore was somewhat misplaced. In the first instance, the comments of Dean Wigmore were woefully outdated; his work was published in 1931, long before much of the polygraph research and development took place. Secondly, Dean Wigmore's comments were made about the polygraph test being used in the 1930s, a simple blood pressure test similar to that used in *Frye*.³⁰ As previously pointed out, no serious comparison could be made between the blood pressure polygraph and the four channel machine in use at the time *Henderson* was decided.

After looking at the history of the polygraph, the court concluded, as had the court in *Frye*, that the polygraph had not "attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendant in its hands."³¹

In succeeding years, the court of criminal appeals frequently confronted the issue of admissibility of polygraphic evidence.³² However, until the decisions in *Fulton* and *Anderson*, the court continued to reiterate the language of *Frye* or rely on its own past decisions without explanation.

UNDERLYING RATIONALE FOR EXCLUSION

A close reading of *Fulton* and *Anderson*, as well as prior cases in Oklahoma, reveals three broad areas of criticism of polygraph evidence which are typically posited as grounds for exclusion. These areas may best be categorized as: (1) scientific criticisms; (2) jury system criticisms; and (3) constitutional criticisms.

Scientific Criticisms

1. The polygraph does not have scientific validation (reliability).

Since the *Frye* decision, the argument that polygraphic evidence is unreliable has been adopted frequently in criminal decisions. Although rationally founded at the time of *Frye*, this argument has been

29. 94 Okla. Crim. —, 230 P.2d at 503.

30. See J. WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* 615-21 (2d ed. 1931).

31. *Id.* at 504.

32. See cases at notes 2 and 4 *supra*.

rendered virtually obsolete by technological developments in the polygraph field. It has been noted that:

The leading text in this field, written by judicially recognized experts, represents a professional study of over 35,000 subjects and covers a span of some thirty-three years. The authors agreed that "[t]he percentage of *known* errors . . . is less than one percent." Of further consequence is the fact that "the relatively few errors that do occur favor the innocent, since the known mistakes in diagnosis almost always involve a failure to detect the lies of the guilty subjects rather than a finding of lying on the part of a truth-telling, innocent person." This type of reliable study cannot be ignored in any inquiry into the legal status of the polygraph.³³

This type of long term reliability study with its report of a low incidence of error should be a strong indication of the reliability and scientific validity of the polygraph and should fairly answer the courts' criticisms in this regard.

Regarding the apparently strict requirement of scientific reliability, courts are asking more of the polygraph than of any other expert testimony adduced at criminal trials. Courts never require, for instance, that a psychiatrist be virtually one hundred percent accurate before he is allowed to testify. All that is required is that he must be qualified as an expert. No more should be required of the polygraph examiner. Any defects or deficiencies in either the scientific device or the examiner should come to light on cross-examination. F. Lee Bailey has stated that:

It may be argued that dealing with polygraph experts at a trial is no different than dealing with any other expert. The polygraph tracings mean nothing without the examiner's testimony regarding his interpretation of the tracings. His testimony is subject to cross-examination, his qualifications and methods employed are subject to attack, and other experts might be employed to refute his testimony.³⁴

These checks and balances have proven effective with other expert witnesses and should be equally effective with the polygraph expert. It is suggested that the polygraph has a level of reliability sufficient to justify admissibility. Any error that might occur can be checked and controlled by the traditional tools of advocacy.

33. *The Polygraph*, *supra* note 29, at 117 (emphasis in original) (footnotes omitted).

34. F. BAILEY, INVESTIGATION AND PREPARATION OF CRIMINAL CASES 199 (1970).

2. *Because of the lack of scientific validation, the polygraph has not attained the scientific acceptance required by the Frye decision.*

Although the court in *Frye* concluded that relevant scientific fields for polygraph evidence were psychology and physiology,³⁵ it should be emphasized that the polygraph has more recently developed a field and science of its own.³⁶ Consequently, the limited definitions in *Frye* should be modified to include those people working in the "science of polygraphics." Further, the use of the polygraph is widespread in law enforcement, government and private industry. With such widespread use, it must be concluded that the polygraph is in a field of its own and should be measured accordingly.

Once these parameters are delineated, courts have generally viewed the next step as a determination of whether the polygraph has gained sufficient standing and acceptance to justify admitting it as evidence. However, such an inquiry seems improper to determine admissibility. As pointed out by Professor McCormick:

"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. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. 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.³⁷

The "general scientific acceptance" approach has no standing in light of legal theory and should be abolished. However, even if this standard is retained, it arguably has been met by the reliability figures previously related and the widespread use of the polygraph by law enforcement, government and private industry.³⁸ In either event, this criticism seems unjustified as an explanation for the absolute exclusion of polygraphic evidence at trial.

35. 293 F. at 1014.

36. See notes 17-18 *supra* and accompanying text.

37. MCCORMICK, *supra* note 8, § 203, at 491 (footnotes omitted).

38. *The Polygraph*, *supra* note 29, at 111.

3. *The polygraph is scientifically unacceptable because extraneous factors may invalidate the results and there is a potential of beating the machine.*

Factually, it cannot be denied that extraneous factors, such as any physiological or psychological abnormalities of the examinee, may cause deviations in test results. However, such criticism is abated by the degree of competency of the examiner. A trained, competent examiner should recognize physiological and psychological abnormalities and should make the appropriate adjustments.³⁹ Such factors should not pose a problem concerning the admissibility of polygraphic evidence if state legislative bodies are willing to establish high standards for examiner competence. Further, defects in the examination process may be used as damaging impeachment tools for the cross-examiner.

The polygraph has also been criticized because of the belief that the machine can be beaten. This criticism is of minimal significance:

The lie detector's critics set forth numerous methods which allegedly may be used to "beat" the device. Among those most often cited are the ability to consciously control mental sets and attitudes, rationalization of the event, breathing control, muscular movements and psychological evasion. There is little doubt that the instrument not only can be but has been "beaten." However, the type of person capable of this feat is a very rare individual.

Furthermore, the modern polygraph has built-in safeguards against the common physical attempts to distort the results. The "evasive conduct itself is just as significant . . . as the responses that are revealed in the tracings of lying subjects who do not seek to evade detection by the process." The remaining psychological attempts are successful too infrequently to seriously affect the reliability of the polygraph examination.⁴⁰

The incidence of "beating" the polygraph is likely to occur with no greater frequency than that of "beating" a jury. In any event, this criticism should not preclude admissibility of polygraphic evidence, but rather is a matter properly for a jury to consider in deciding what weight is to be given to the polygraphic evidence.

Jury System Criticisms

1. *Use of the polygraph invades the province of the jury by determining the ultimate issue of guilt or innocence.*

39. *Id.* at 121.

40. *Id.* at 123-24 (footnotes omitted).

This type of criticism is the natural result of using a judicial notice standard to determine the admissibility of polygraphic evidence. Because the standard is so high, polygraphic evidence, if admitted, carries a conclusive image. This criticism is best answered by addressing two questions: (1) Does the polygraph inherently invade the province of the jury, and (2) Is the polygraph the only scientific device that seeks to determine the ultimate issue?

In response to the first question, if courts continue to follow the standard of judicial notice, the polygraph must inevitably invade the province of the jury with its conclusive nature.⁴¹ However, if the polygraphy and the polygraph examiner are accorded the same treatment by the courts as that given any other expert witness, a system may yet be devised whereby the polygraph is not given conclusive status and its results would be admissible.⁴² Under such a system, the polygraph examiner would be present for cross-examination and his credibility, and that of his interpretations, could be loosely scrutinized and impeached.

Furthermore, the jury could be given a strong and enlightening instruction on use of the polygraphic evidence during their deliberations.⁴³ The court could instruct that, as with the opinion of any other expert witness, the evidence may be given great weight, little weight or may be totally disregarded as the jury sees fit. As one court has noted:

The problem which has traditionally caused the courts the greatest concern . . . is the possibility that the jury might consider the examiner's opinion to be so conclusive on the issue of guilt or innocence as to intrude upon and usurp its historical role and prerogatives. The question is whether the feared tendency of the jury to attach exaggerated significance to the examiner's testimony can be controlled. Carefully conducted trial procedure can offer opportunities to alert the jurors to the value and limitations of polygraph technique. It is contemplated that the foundation for the examiner's opinion will be required to include sufficient information to enable the jury to make an intelligent evaluation. Vigorous cross-examination of the examiner and other expert witnesses will expose inadequacies which may have affected the

41. See note 8 *supra*.

42. This provision is subject, of course, to the qualification of the polygraph examiner as an expert and a foundation laid as to the conditions surrounding the examination. For an analysis of the qualification of an expert, see McCORMICK, *supra* note 8, § 13.

43. *The Polygraph*, *supra* note 29, at 123.

results of a particular examination. Instructions to the examiner and to the jury can also clarify and distinguish the role that each is to play. . . . After considering the basis of the examiner's opinion and the other foundational material presented, the jury may perform its customary duty of attaching whatever significance to the opinion that it believes is warranted.⁴⁴

As outlined, the foregoing procedure establishes a framework around which a rational and legally acceptable system may be developed for the admissibility of polygraphic evidence.

Regarding the second question, the polygraph cannot be considered the only scientific device which seeks to resolve ultimate issues of fact. In paternity proceedings, the use of blood grouping tests certainly relate to the ultimate issue.⁴⁵ In addition, in criminal extortion cases where threats are made over the telephone, voiceprint analyses offer an answer to the ultimate issue in contention.⁴⁶ In drug use and drug possession cases, the Nalline test also goes to the ultimate issue of use or possession of particular drugs.⁴⁷ These are but a few examples of how science encroaches upon the dominion of the legal system; yet few people would seek to exclude such knowledge from the record on the basis that it invades the province of the jury.

2. *The admission of the polygraph as a judicial tool will ultimately mean the demise of the jury system.*

Some critics foresee the day when, instead of a jury, the accused will stand before a machine that unerringly decides issues of guilt or innocence.⁴⁸ These critics lack the capacity to visualize a system whereby the polygraph takes its place along side other tools of science currently employed in jury trials.

A system which requires a proper foundation for the introduction of polygraphic evidence, demands a high level of competence for polygraph examiners and gives the jury complete freedom to weigh and evaluate polygraphic evidence does not mean the demise of the jury system; to the contrary, it calls for increased reliance on the jury and higher reliability of jury verdicts.

44. *United States v. Zeiger*, 350 F. Supp. 685, 691 (D.D.C.) *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972) (footnotes omitted).

45. See McCORMICK, *supra* note 8, § 211.

46. See, e.g., *State v. Hedman*, 291 Minn. 442, 192 N.W.2d 432 (1971).

47. See, e.g., *People v. Williams*, 164 Cal. App. 2d 858, 331 P.2d 251 (1958).

48. *United States v. Ridling* 350 F. Supp. 90, 98 (E.D. Mich, 1972).

*Constitutional Criticisms**1. The use of polygraph violates the fifth amendment privilege against self-incrimination.*

This criticism ignores the realities of polygraphic evidence. A valid polygraph examination cannot be taken from an unwilling subject. The results would not be susceptible to interpretation because of the coercive psychological atmosphere surrounding such a test. The polygraph test can be administered only to a willing, voluntary subject.

Moreover, the fifth amendment privilege against self-incrimination may be waived if it is made knowingly, intelligently and voluntarily.⁴⁹ So long as these rights are clearly made known to the subject and a valid consent is obtained, the test itself could be considered a valid waiver of the privilege. Even if consenting to the test is not itself a valid waiver, there would be little judicial difficulty in informing the subject of his rights and obtaining a sworn, signed waiver of his rights after consultation with counsel. Just as an accused may waive his right against self-incrimination and make a valid confession,⁵⁰ so should one be free to waive this right and subject himself to polygraph examination. A rational system, premised on the idea that one must be informed of his rights, given time to analyze his situation, and allowed to consult with counsel before his rights are waived, should fully protect the rights of willing subjects as well as those not wishing to be tested.

2. The use of the polygraph violates the sixth amendment rights to cross-examination and confrontation.

According to one court, "the weight of authority . . . give[s] other cogent reasons for its inadaptability as an instrument of evidence in the trial of cases, such as the impossibility of cross examining the machine."⁵¹ Under similar reasoning, blood tests, x-rays, fingerprints and drug analysis tests could not be used as evidence, since these devices cannot respond verbally to cross-examination. To the contrary, however, all of these scientific devices are regularly admitted as evidence in any court. Clearly, the polygraph, like any other scientific device or test used by the legal system, may be confronted and cross-examined by counsel simply by requiring the polygraph examiner to testify. The polygraph is merely a machine which, if kept in proper

49. See *Miranda v. Arizona*, 384 U.S. 436, 475-79 (1966).

50. *Id.*

51. *Henderson v. State*, 94 Okla. Crim. 45, 52, 230 P.2d 495, 502 (1951).

working condition, accurately records physiological reactions.⁵² It is the examiner who must be confronted and subjected to the rigors of cross-examination as the interpreter of the recorded data. Just as there is no advantage in introducing into evidence a fingerprint or a bullet without calling an expert to interpret the analysis of the proffered evidence, a polygraph chart, by itself, is equally meaningless without explanation. While the present procedure of total polygraphic exclusion sidesteps this issue, an approach should be developed whereby polygraph tracings would be admissible only after a proper foundation was laid by the testimony of the expert, without comment upon the ultimate issue of guilt or innocence.⁵³

A PROCEDURE FOR THE ADMISSION OF POLYGRAPHIC EVIDENCE

The development of a rational and legally acceptable procedure for the admission of polygraphic evidence may take one of three forms: (1) judicial decisions; (2) a joint effort by the judiciary and state legislatures; or (3) action taken solely by state legislatures. Under any of these three forms of action, the criticisms previously discussed compel the following requirements: (1) a high level of examiner competency; (2) the use of superior equipment; (3) strict evidentiary rules and jury instructions; and (4) strict standards for the waiver of constitutional rights.

The first two requirements may be met in one of two ways. First, the courts could require, in establishing a foundation for the introduction of polygraphic evidence, that certain levels of competency and minimal machine capabilities be established. This approach, however, leaves to each trial judge's discretion the decision of whether such requirements are met.

The second approach provides a more rational answer. Legislation should be drafted and approved setting high minimum standards for licensing polygraph examiners and high minimum standards for equipment. Presently in Oklahoma, the polygraph examiner is governed by statutes passed in 1971.⁵⁴ However, these statutes do not establish sufficiently high standards to protect against less than minimal

⁵². *The Polygraph*, *supra* note 29, at 112-13.

⁵³. See *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972).

⁵⁴. OKLA. STAT. tit. 59, §§ 1451-1476 (1971 & Supp. 1976).

competency.⁵⁵ The statutes require only a two channel polygraph,⁵⁶ although the science has developed several other reliable channels which are included on many new polygraphs.⁵⁷ The statutes also establish minimum educational standards for operator licensing by requiring polygraph examiners: (1) to have a baccalaureate degree from an accredited university or, in the alternative, a high school diploma and five years experience; (2) to be a graduate of a board certified polygraph examiners course followed by a six-month internship; and (3) to pass a board examination. These standards initially appear sufficient; however, it has been suggested that a minimum of two years of college should be required and that the training course be extended to six months.⁵⁸ Establishing a high licensing and examination standard for polygraph examiners would insure more confidence by courts faced with the decision of whether to allow polygraph experts to testify at trial.

To meet the third requirement, the courts or legislatures should establish well-defined courtroom procedures for the admission of polygraphic evidence. These procedures should include testimony as to the qualifications of the operator as an expert in the field; a description of the equipment used and the environment at the time of testing; the examiner's opinion of the physiological and psychological state of the individual examined; an explanation of the subject's rights and his waiver thereof; whether the results of the test were conclusive; and a recital of the questions asked of the subject and his responses. All of this information should be taken by the court in camera but should be recorded and made part of the trial record. The trial judge could then rule on the admissibility of the polygraphic evidence based on his satisfaction as to expertise and relevancy as balanced against the possibility of prejudice.⁵⁹ This ruling should be considered a final order and subject to interlocutory appeal. Of course, if the court decides to admit the evidence, the expert should be called as a witness.

Moreover, the expert should be allowed to testify about the subject's reactions to the questions and to express his expert opinion as

55. Comment, *Polygraphic Evidence: The Case for Admissibility Upon Stipulation of The Parties*, 9 TULSA L.J. 250, 264-67 (1973).

56. OKLA. STAT. tit. 59, § 1454 (1971).

57. Comment, *The Polygraphic Technique A Selective Analysis*, 20 DRAKE L. REV. 330, 330-31 (1971). See notes 17-18 *supra* and accompanying text.

58. Comment, *Polygraphic Evidence: The Case for Admissibility Upon Stipulation of The Parties*, 9 TULSA L.J. 250, 267 (1973).

59. See McCORMICK, *supra* note 8, § 185.

to the truthfulness of the responses. The polygraph examiner should not be allowed to give his conclusions as to the subject's guilt or innocence and should be instructed of this restriction prior to taking the witness stand. An interim instruction should be made to the jury promptly after the first polygraph expert testifies as to their freedom to weigh and evaluate expert testimony. Such an instruction would give the jury time to evaluate the testimony of the expert before making a decision. More importantly, it would make the jury aware that the polygraph is not conclusive evidence and that they should remain objective until all the evidence has been heard.

When instructing the jury prior to their adjournment for deliberation, the judge should instruct the jurors as to the consideration they should give to polygraphic evidence. Either by legislative or judicial fiat, a standard mandatory polygraphic evidence instruction should be adopted. Such an instruction might read:

The polygraph is just a machine. It depends on a human operator to interpret its data and is therefore, like any other human development, not infallible. You have heard the qualifications of the experts who have testified here and you have heard their interpretations based on their training, knowledge and experience. But this evidence does not decide the issue of guilt or innocence. That decision is in your power. You are to weigh and evaluate the testimony of each of the polygraph experts which testified here. You may decide whether to believe them or not. You may give their testimony much significance, little significance or even no significance. That decision and the decision as to guilt or innocence are decisions only you, the jury, can make based upon all the evidence before you.

The major points to be covered in the polygraph instruction are that polygraphic evidence is only expert opinion and may be fallible, that the jury has the task of weighing and evaluating those opinions, and that the jury may reach a conclusion opposite that reached by the polygraph expert. Such an instruction should respect the polygraph, but not deify it, and should clearly advise the jury of its powers in relation to polygraphic evidence.

Because of the inherent distrust of the polygraph and the fears of its awesome potential, any waiver of the right against self-incrimination should be strictly construed. The procedure for the admission of polygraphic evidence should include a mandatory means for waiver of this right. Prior to testing, the subject should be taken before a judge,

sworn, and advised of his right not to take the test. Then, if he wishes to be tested, his statement of his waiver of his right against self-incrimination should be made. All of this should become a matter of record and appended to the transcript of the trial. This proposed procedure should protect a subject from being coerced into taking a test and simultaneously protect the court and the prosecutor from later attacks as to the validity of the waiver.

CONCLUSION

The history of the polygraph, both in Oklahoma and across the nation, has been one of judicial exclusion based on an unreasonable standard, outdated statistics and outmoded equipment. Many criticisms of the polygraph have been raised; however, both logical analysis and reference to current technology demonstrate that these criticisms can be effectively answered. The polygraph has come of age and the time has come when the courts must reconsider their position on its role in the courtroom.

Proponents of the polygraph must be prepared to meet judicial criticism leveled at the machine by the courts and must propose a rational and legally acceptable standard to replace outmoded precedent. Modern evidentiary proposals concerning polygraph evidence must withstand time-honored criticisms, be legally sound and judicially workable. Such a system must strive and attain high levels of examiner competency, equipment superiority and test validity. Finally, it must furnish safeguards against constitutional violations and yet not insulate the defendant from the swift and proper administration of justice.

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EDITOR'S NOTE: Since the original text of this comment was prepared, the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals have addressed issues in the polygraphic evidence area. In Hames v. Anderson, 48 O.B.J. 2333 (1977), the Oklahoma Supreme Court, per Justice Lavender, was faced with the question of whether reference to a witness' willingness to take a polygraph test in a civil jury trial constituted reversible error. Without expressing an opinion as to the admissibility of polygraphic evidence, the court held that although reference to the willingness of a witness to submit to a polygraph examination

was incompetent, such evidence must be prejudicial to constitute reversible error. The court concluded that no such prejudice was shown. Dissenting in Hames, Justice Hodges cited to criminal case law excluding polygraphic evidence and argued, by analogy to the prejudice accompanying references to insurance in civil trials, that references to a polygraph were prejudicial and therefore constituted reversible error.

In State v. Cook, 49 O.B.J. 159 (1978), the Oklahoma Court of Criminal Appeals, per Justice Brett and joined by Justice Cornish, held that although the results of a polygraph test were inadmissible, a trial judge in a criminal nonjury trial may consider the defendant's willingness to submit to a polygraph examination. In resolving this question, the court expressly avoided a reconsideration of the holdings in Fulton v. State, 541 P.2d 871 (Okla. Crim. App. 1975), and Henderson v. State, 230 P.2d 495 (Okla. Crim. App. 1951), generally emphasizing the "increased scientific reliability of the polygraph." Although the Hames and Cook decisions may be read as introducing a greater degree of judicial tolerance toward polygraphic examinations in Oklahoma, whether recent technological advancements in the polygraph area will result in its eventual admissibility at trial must be left to future decisions.