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Evidence -- How Some Courts Have Learned to Stop Worrying and Love the Polygraph

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Evidence—How Some Courts Have Learned to Stop Worrying and Love the Polygraph

Courts have traditionally viewed the polygraph or "lie detector" with suspicion. Although the polygraph is widely used in non-judicial areas and in pre-trial investigation, test results have not been admissible as evidence in court.[1] However, three recent trial court decisions—*United States v. Ridling*,[2] *United States v. Zeiger*,[3] and a paternity proceeding styled *A v. B*[4]—have reexamined the issue and have ruled that expert testimony interpreting polygraph results is admissible.

Ridling was a prosecution for perjury.[5] Defendant sought to have admitted into evidence the results of a polygraph test he had taken voluntarily. After a pre-trial evidentiary hearing, the court ruled that polygraph results were admissible on the limited issue of the defendant's veracity.[6] However, the court conditioned admissibility on defendant's subjecting himself voluntarily to a second test to be conducted by a polygraph examiner appointed by the court.[7]

Defendant in *Zeiger* was charged with committing an assault with intent to kill while armed and other related offenses.[8] After granting a hearing on the admissibility of the results of a polygraph test given by the police but favorable to defendant, the court ruled in favor of its general admission and allowed the expert to testify on the substance of defendant's answers to factual questions about the crime as well as to defendant's truthfulness on each answer.[9]

In *A v. B*, a paternity proceeding, the court had ordered that both parties submit to a polygraph test before trial, but the results were not to be given to the court.[10] When the mother testified that respondent was the father, respondent sought to introduce the results of the polygraph

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[1]*See generally* Bailey, Book Review, 1 SUFF. L. REV. 137, 138 (1967), in which the author strongly argues that the time has come for the courts to allow admission of polygraph evidence.

[2]350 F. Supp. 90 (E.D. Mich. 1972).

[3]350 F. Supp. 685 (D.D.C. 1972).

[4]___ Misc. 2d ___, 336 N.Y.S.2d 839 (Fam. Ct., Niagara Co. 1972).

[5]350 F. Supp. at 92.

[6]*Id.* at 98.

[7]*Id.* at 96-97.

[8]350 F. Supp. at 686.

[9]*Id.* at 691.

[10]___ Misc. 2d at ___, 336 N.Y.S.2d at 840. Since the respondent's only defense was that the mother had had relations with other men, the trial court apparently hoped that if the polygraph results showed the mother was truthful in her allegation that the respondent was the only conceivable father, the parties would settle. *Id.* at ___, 336 N.Y.S.2d at 844.

test. After a hearing, the court allowed the polygraph examiner to testify that the polygraph indicated that the mother was telling the truth when she admitted during the examination to having sexual relations with other men at the approximate time of conception.[11]

The purpose of this note is to analyze these cases to discern the probative value of polygraph results, the evidential standard that should control admissibility of polygraph evidence, and the issues on which polygraph evidence may be particularly helpful to the trier of fact.[12]

The modern polygraph[13] measures various physiological responses[14] of the subject on graphs which run continually throughout the course of the examination.[15] These responses do not automatically ap-

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[11] *Id.* at ____, 336 N.Y.S.2d at 841-42.

[12] The issue of fifth amendment guarantees against self-incrimination was not of immediate concern in the context of these cases. In both *Ridling* and *Zeiger* the defendants were seeking to introduce the evidence; *A v. B* was a civil action. Consequently, this note does not attempt to discuss fifth amendment issues which would be involved in criminal actions in which the prosecution is seeking to introduce polygraph results unfavorable to a defendant. However, it should be pointed out that *Ridling* stated that the prosecution could introduce unfavorable polygraph evidence which was obtained under the proper conditions when the character of a defendant was in issue. *See* note 60 *infra*.

[13] The development of the modern polygraph can be traced back to 1895 when Cesare Lombroso experimented with the correlation between lying and changes in blood pressure and pulse by means of a "hydrosphymograph." J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE 1 (1966) [hereinafter cited as REID & INBAU]. This is the first recorded use of a scientific device to measure deception. However, there are existing reports that Indians used a deception test based on the premise that lying inhibited the secretion of saliva in the mouth—an accused was ordered to chew rice and if it stuck to his gums he was considered guilty. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 696 (1961).

[14] The present polygraph records not only blood pressure and pulse but also respiration and galvanic skin reflex or electrodermal response. REID & INBAU 2-3. In 1945 it was discovered that blood pressure changes sufficient to upset the accuracy of the test could be caused by unobserved muscle activity. An instrument was then devised for recording this activity in addition to the previously mentioned physiological responses. *Id.* at 3.

[15] A typical polygraph examination takes about one hour. Highleyman, *The Deceptive Certainty of the "Lie Detector,"* 10 HAST. L. J. 47, 55 (1958). This is the approximate length for the entire examination; each separate test usually lasts only five minutes. Note, *The Polygraphic Technique: A Selective Analysis*, 20 DRAKE L. REV. 330, 332 (1971). Since the detection of veracity depends on the variations in the subject's physical reactions, care must be taken to insure that extraneous factors such as unexpected noises do not cause false readings. REID & INBAU 5-6. The examination itself consists of a series of oral questions to which the subject must answer "yes" or "no." Questions concerning the matter under investigation are interspersed with irrelevant questions. The examiner places the number of the question and a symbol indicating the answer given on the recording graph as each question is asked so that later the reactions corresponding to each type of question can be readily compared. *Id.* at 27. Several runs of the test are made to insure that a responsive norm for the subject is established and to allow the examiner to adapt his

pear on the graph labelled as "truth" or "lie"; a determination of truth or deception can only be made by a competent examiner's analysis of these responses. Such determinations are based on the premise that variations in these physiological responses as questions are answered by the subject are an indication of his truthfulness:

> [T]he act of lying leads to conscious *conflict*; conflict induces *fear* or *anxiety*, which in turn results in clearly measurable physiological change. . . . The theory contains two fundamental assumptions: first, a regular relationship between lying and certain emotional states; second, a regular relationship between these emotional states and changes in the body.[16]

Those who oppose admission of polygraph evidence have argued that the premise is invalid.[17] In support of their argument they state that erroneous interpretations can be caused by such factors as mental or physical abnormalities; subject unresponsiveness; emotional tension, fear, or anxiety; and unqualified examiners.[18] Although these contentions probably explain the causes for the errors made in some tests, they do not contradict the high degree of accuracy that the polygraph has been shown to possess. Furthermore, although critics have generally argued that the accuracy of the test is no better than seventy to eighty percent,[19] other studies have shown an accuracy rate of over ninety percent.[20] Witnesses testifying in favor of admission in *Zeiger* all

questioning to prior responses of the subject. Reruns are continued until the subject's responses consistently indicate either truth or deception. Highleyman, *supra* at 55-57.

[16]Skolnick, *supra* note 13, at 699-700 (emphasis in original).

[17]*Id.* at 701-02.

[18]*See generally* Highleyman, *supra* note 15, at 57-61. *But see* REID & INBAU 168-203. The observation of the subject by the examiner and the recordings on the graph itself help to prevent any errors due to an abnormality of the examinee. *Id.* at 202. However, an experiment using groups of "normal," "neurotic," and "psychotic" subjects tended to show that polygraph examiners are less likely to correctly interpret, much less identify, persons suffering from severe mental abnormalities. Heckel, Brokaw, Salzberg, & Wiggins, *Polygraphic Variations in Reactivity Between Delusional, Non-Delusional, and Control Groups in a "Crime" Situation*, 53 J. CRIM. L.C. & P.S. 380, 383 (1962). This has led some commentators to suggest that additional controls be used to guard against error due to subject eccentricity. *See* note 58 *infra*. The repetition and length of the testing procedure tend to reduce excess anxiety or tension. REID & INBAU 174. Since the proper functioning of the polygraph depends on a conscious awareness of the truth and fear of detection, any lack of such consciousness is likely to produce only an inconclusive result. *Id.* at 168.

[19]MCCORMICK ON EVIDENCE § 207, at 506-07 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

[20]For example, the authors of the leading study on polygraphic technique report that in over 35,000 actual cases the percentage of known error was less than one percent and that about five percent of the remainder constituted inconclusive tests. REID & INBAU 234.

claimed that their tests had produced very accurate results; one testified that there were only six errors in the 2,400 tests he had conducted that were subject to verification.[21] Even the psychologist who testified for the prosecution in *Zeiger* admitted that he would place the accuracy of the polygraph at a minimum of eighty-five percent.[22] Furthermore, a large part of the ten to twenty-five percent comprising non-accurate results represents not erroneous determinations but merely tests that produced inconclusive results.[23]

Despite the concurrence of opinion that polygraph evidence is reliable enough to be of some probative value, it has met almost unanimous exclusion in court. The first attempt to introduce such evidence came in 1923 in *Frye v. United States*.[24] In that case defendant sought to introduce an expert to testify to the results of a systolic blood pressure deception test,[25] a forerunner to the modern polygraph. The court, in excluding the evidence, said:

> 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*.[26]

Since *Frye*, virtually all other courts across the country have reached the same result, and most of these have relied on the polygraph's failure to meet the *Frye* standard of "general acceptance."[27]

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[21]350 F. Supp. at 689.

[22]*Id.* at 689-90.

[23]Note 20 *supra*.

[24]293 F. 1013 (D.C. Cir.1923).

[25]*Id.* at 1013.

[26]*Id.* at 1014 (emphasis added). It is of interest to note that another person subsequently confessed to the crime for which the defendant in *Frye* was convicted. *See* Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711, 715 (1953).

[27]*See, e.g.*, United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); Marks v. United States, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); People v. York, 174 Cal. App. 2d 305, 344 P.2d 811 (1959); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951); Grant v. State, 213 Tenn. 440, 374 S.W.2d 391 (1964); Davis v. State, 165 Tex. Crim. 456, 308 S.W.2d 880 (1957); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). The only *reported* exception was a trial court decision, People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d

Furthermore, courts have not allowed the use of polygraph evidence in civil cases[28] and have found reversible error when collateral references are made to the test.[29] The only exception is that some courts have allowed the opposing parties to stipulate before the test is administered that the results could be admitted into evidence.[30]

Although *Zeiger* reiterated the rule in *Frye*, its restatement of that rule amounted to a decision not to apply it.[31] *Ridling* referred to the "general acceptance" rule explicitly but refused to apply that standard.[32] *A v. B* did not refer to the rule at all. The refusal of all three courts to apply the *Frye* standard stemmed from the interpretation that it had received in subsequent cases. The courts have interpreted "general acceptance" as requiring proof that the reliability of the polygraph is so high that a court would be justified in taking judicial notice of the validity of the polygraph test.[33] Furthermore, the failure of the "general acceptance" standard to enumerate any guidelines for admission has been criticized:

> The *Frye* standard . . . tends to obscure . . . proper considerations by asserting an undefinable general acceptance as the principle [sic] if not sole determinative factor. The ultimate purpose of the *Frye* rule, the prevention of the introduction into evidence of specious and unfounded scientific principles or conclusions based upon such principles, is certainly unobjectionable. It is questionable, however, whether the *Frye* rule, with its introduction of a basic inconsistency into the law of evidence, is essential to the purpose. Most of the considerations which have apparently moved the courts to apply the *Frye* doctrine to various scientific principles may be adequately accomodated within the usual rules . . . .[34]

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348 (Queens Co. Ct. 1938), but this decision was impliedly overruled by People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938). For a discussion of numerous *unreported* trial decisions that have allowed admissibility, see Ferguson, *Polygraph v. Outdated Precedent*, 35 TEX. B.J. 531 (1972).

[28]*E.g.*, Aetna Ins. Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951).

[29]*E.g.*, State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962) (mentioning that defendant refused to take test); Leeks v. State, 95 Okla. Crim. 326, 245 P.2d 764 (1952) (mentioning that defendant took lie detector test).

[30]*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). *But see* Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961).

[31]350 F. Supp. at 686-88.

[32]350 F. Supp. at 94-95.

[33]*See* MCCORMICK § 203, at 491; Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 385-86 (1964).

[34]Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 14 (1970).

Thus, critics of the *Frye* standard have urged that the traditional standards of expert qualification and of balancing logical relevancy against exclusionary policy considerations not only are sufficient safeguards but also enable the courts to determine under what circumstances the admissibility of polygraph evidence would be proper.[35] As *Ridling* pointed out, under traditional standards a proper foundation in a particular case would require a showing that: (1) the premise on which the evidence is based rests on a valid principle of science so that the introduction of such evidence would be of aid to the trier of fact; (2) the expert witness testifying is sufficiently qualified in the particular field of concern; (3) the application of the polygraph test in the specific case under consideration properly followed all applicable procedures to insure that the particular test is reliable; and (4) the probative value of the polygraph evidence in the particular case in which it is sought to be introduced overcomes any policy reasons for exclusion.[36] This sequential approach enables a court to consider objectively the separate factors involved in a decision on the admissibility of polygraph evidence instead of forcing it to consider the whole problem at one time as the "general acceptance" standard has required.

Ridling stated that the admissibility of polygraph evidence in general "requires that the opinion of the expert be relevant to the issue before the Court. The acceptance of the basic theory is a part of the process of making the evidence relevant."[37] *Zeiger* interpreted *Frye* as demanding only "general acceptance among the experts that current polygraph technique possesses a degree of reliability which satisfies the courts of its probative value."[38] Thus, both the *Ridling* and *Zeiger* courts required preliminary proof that the general theory of the polygraph be "accepted." By requiring such proof, however, neither court was demanding that the polygraph be demonstrably infallible. The proof required was only that necessary to show that the introduction of polygraph evidence makes "the desired inference more probable than it would be without the evidence."[39] Since both courts found the polygraph to be reliable, both held it to be of probative value.[40]

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[35]*See* MCCORMICK § 203, at 491. *See generally* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 395-98 (1952).

[36]350 F. Supp. at 94-95.

[37]*Id.*

[38]350 F. Supp. at 688.

[39]MCCORMICK § 185, at 437 (emphasis omitted).

[40]350 F. Supp. at 690; 350 F. Supp. at 95.

After determining that polygraph evidence in general can be of probative value, *Ridling, Zeiger*, and *A v. B* then balanced the particular relevancy of polygraph evidence in the cases before them against the policy reasons for excluding the evidence—fear that the trier of fact will take the evidence as conclusive,[41] dislike for testimony that usurps the traditional function of the jury,[42] and concern that collateral material likely to cause jury distraction and to waste time will be introduced. The courts' fear of the effect of polygraph evidence on the minds of the triers of fact is what originally led them to require, in effect, that the polygraph be infallible.[43] But the *Ridling* and *Zeiger* courts decided that by using limiting instructions and by permitting extensive cross-examination pointing out to the jury the polygraph's shortcomings, the trial judge could adequately control the jury's perception of the polygraph's reliability.[44]

As to the usurpation question, *Zeiger* noted that, although the government in *Frye* had argued the point on appeal, the court "made no comment in agreement with this position, but on the contrary, indicated that at some point 'the evidential force of the principle must be recognized.' "[45] Furthermore, as Professor Strong pointed out:

> Traditionally, even ordinary expert testimony on "ultimate issues" has been judicially frowned upon. If incursion upon the jury function is viewed as a serious objection, many scientific principles suffer from the liability that they are commonly and necessarily incorporated into devices or tests the results of which, unlike expert opinion, cannot be broken down into less conclusory but still helpful data.[46]

The fear of causing jury distraction to unnecessary collateral issues does not truly arise by the mere admission of polygraph evidence; when analyzed, the fear is that the main issue would take a back seat as the parties attempt to prove or disprove the utility of the polygraph and that

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[41]*See, e.g.*, Highleyman, *supra* note 15, at 63: "[T]he use of 'lie detector' evidence invites confusion between (1) the reliability of the objective physiological facts which are recorded by the polygraph, and (2) the reliability of the subjective inferences of truth or deception which are drawn from those facts by the examiner."

[42]*See* Strong, *supra* note 34, at 13.

[43]*See, e.g.*, People v. Davis, 343 Mich. 348, 72 N.W.2d 269 (1955) (seventy-five to ninety percent accuracy held insufficient); People v. Forte, 279 N.Y. 204, 206, 18 N.E.2d 31, 32 (1938) ("Can [the lie detector] be depended upon to operate with complete success on persons of varying emotional stability?").

[44]350 F. Supp. at 691: 350 F. Supp. at 98.

[45]350 F. Supp. at 691-92 n.32.

[46]Strong, *supra* note 34, at 13.

the admission of polygraph results with respect to one witness would necessitate that all witnesses be subjected to it. The first consideration is valid only in the sense that the introduction of any complicated and disputed testimony will be followed by other supporting or contradicting evidence; however, the court has the power to minimize this result by limiting the extent of supporting or contradicting testimony.[47] The second concern—that all witnesses testifying would be required to submit to a polygraph test—is one that has been raised by several courts.[48] Considering the waste of time and marginal usefulness of such evidence, *Ridling* stated that it would not allow such a wide use of the polygraph:

> It is argued that polygraph use will result in the injection of many collateral issues in the trial. This could be the case if the Court were to permit its use on all witnesses as has been urged by the defendant in this case. This Court is not willing to go so far.[49]

The trial court in *A v. B*, also, would not have allowed such a broad application of the polygraph on the trial process; it held that polygraph use was limited to the parties to the proceeding who testified.[50] *Zeiger* did not even refer to this objection.

Since the reliability of the polygraph depends largely on the examiner who gives the test and interprets the physiological responses recorded,[51] the court in *Ridling* was especially concerned about the interpreter's qualifications.[52] Although *Zeiger*[53] and *A v. B*[54] both discussed the qualifications of the polygraph expert who had given the particular test in each case, neither court expressed the concern that *Ridling* did. This can be explained, at least in part, by the fact that, unlike *Ridling* in which the defendant had personally chosen his examiner,[55] the polygraph experts in *Zeiger* and *A v. B* were not chosen by the defendants and thus were not likely to be partial to them.[56]

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[47]350 F. Supp. at 691.

[48]*See, e.g.*, State v. Lowry, 163 Kan. 622, 627, 185 P.2d 147, 150 (1947); Henderson v. State, 94 Okla. Crim. 45, ___, 230 P.2d 495, 504, *cert. denied*, 342 U.S. 898 (1951).

[49]350 F. Supp. at 96.

[50]___ Misc. 2d at ___, 336 N.Y.S.2d at 844.

[51]*See, e.g.*, REID & INBAU 235; Skolnick, *supra* note 13, at 705; Comment, *The Polygraph Revisited: An Argument for Admissibility*, 4 SUFF. L. REV. 111, 119-20 (1969).

[52]350 F. Supp. at 96.

[53]350 F. Supp. at 690.

[54]___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[55]350 F. Supp. at 96-97.

[56]In *Zeiger* the examiner was a member of the police force at the time the test was given. 350

As *Ridling* pointed out, the problem of expert qualification was accentuated in that case because the polygraph profession has not as yet developed sufficient standards by which to police itself.[57] Consequently, *Ridling* concluded that "[b]ecause it may not be easy for the Court to determine the quality of the polygraph experts tendered by the defendant, it seems proper in such cases to cause polygraph experts of the Court's own choosing to be appointed who should be directed to test the defendant."[58] In addition, *Ridling* limited the admissibility of evidence of polygraph results, whether by the testimony of the court-appointed expert or by that of the defendant's expert, to those cases in which the court-appointed expert can definitely conclude that the subject is or is not telling the truth.[59] If the court-appointed expert can make such a conclusion, then the evidence is admissible, the trial court said, whether his interpretation agrees with that of the defendant's expert or not.[60]

No judicial procedures designed to minimize the importance of the objectionable features of polygraph evidence, short of exclusion, can altogether eliminate the risk of admitting unreliable results. Thus the court must ultimately balance the probative value of the polygraph evidence in the light of the particular circumstances in which it is sought to be introduced against the considerations that argue for exclusion. The courts in *Ridling* and *A v. B* stated that they favored limiting the admis-

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F. Supp. at 686. In *A v. B* the expert was the official polygraph examiner for the county. ___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[57]350 F. Supp. at 96. Because of the problem of a lack of standards among the polygraph profession, REID & INBAU at 257 suggested that:

> Before permitting the results [of a polygraph test] to be admitted as evidence in any case, however, the court should require the following: (1) That the examiner possess a college degree. (2) That he has received at least six months of internship training under an experienced, competent examiner or examiners with a sufficient volume of case work to afford frequent supervised testing in actual case situations. (3) That the witness have at least five years' experience as a specialist in the field of Polygraph examinations. (4) That the examiner's testimony must be based upon Polygraph records that he produces in court and which are available for cross examination purposes.

[58]350 F. Supp. at 96-97. Because of the particular danger of polygraph error caused by the examiner's inability in some cases to interpret the results correctly when the subject is psychologically abnormal, some commentators have suggested that obtaining a competent examiner is not enough. Instead, they recommend using a psychologist who can more readily observe the subject's behavior in addition to the examiner. Comment, 4 SUFF. L. REV., *supra* note 51, at 122 n.60.

[59]350 F. Supp. at 97.

[60]*Id.* Since truth was a substantive issue in the case, *Ridling* stated that the results of the test could be used by either party. *Id.* at 98. Furthermore, because a polygraph test requires the voluntary consent of the subject, the court felt that any privilege against self-incrimination could be waived if adequate warnings were given. *Id.* at 97.

sibility of polygraph evidence to those instances in which the question of truthfulness is of extraordinary importance.[61] As *Ridling* pointed out:

> A perjury case is based on "willfully" or "knowingly" giving false evidence. The experts all agree that the 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.[62]

The court in *A v. B* allowed polygraph testimony for the purpose of attacking the credibility of the mother who had testified.[63] The trial court opinion noted that on this issue the polygraph was far more reliable than many kinds of evidence, such as past conviction of crime or reputation for truthfulness, that courts have normally allowed on the question of credibility.[64] Thus, *Ridling* and *A v. B* both held that the usefulness of polygraph evidence outweighed the exclusionary considerations when a person's truthfulness is a direct issue in the case or has been put in issue by his own testimony. But both courts were careful to distinguish credibility issues from questions of mere accuracy in order to prevent the introduction of polygraph evidence under circumstances in which the jury might interpret favorable polygraph results as signifying the accuracy of a witness's recollection of facts.[65]

In contrast to *Ridling* and *A v. B*, *Zeiger* placed no limitation on the use of the polygraph; instead, the court stated it would allow the polygraph examiner "to assess the truthfulness of the defendant's answers to factual questions concerning the crime [of assault with intent to kill while armed] . . . ."[66] If this means that the polygraph results were admissible only to show the defendant's subjective intent, then the scope of admissibility is probably no wider in *Zeiger* than in *Ridling*.[67]

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[61]350 F. Supp. at 98; ___ Misc. 2d at ___, 336 N.Y.S.2d at 843.

[62]350 F. Supp. at 93.

[63]___ Misc. 2d at ___, 336 N.Y.S.2d at 842.

[64]*Id.* at ___, 336 N.Y.S.2d at 843-44.

[65]350 F. Supp. at 98; ___ Misc. 2d at ___, 336 N.Y.S.2d at 843.

[66]350 F. Supp. at 691.

[67]The element of intent in the crime charged against the defendant in *Zeiger* is the same as the knowledge requirement for a perjury conviction in *Ridling*. Both are subjective, as opposed to objective, elements of a crime. The ability of the polygraph to accurately detect the subject's veracity on each element is not conditioned on the subject's being able to recollect the actual facts. *See* text accompanying note 62 *supra*. At least one court, however, has excluded polygraph evidence which a defendant sought to introduce on the issue of criminal intent because the defendant was intoxicated at the time of the crime and because the defendant could have rationalized his intentions between the time of the crime and the time of the polygraph test five months later. State v. Hollywood, 138 Mont. 561, 575, 358 P.2d 437, 444 (1960).

However, the quoted language is just as capable of being interpteted to permit the polygraph evidence to show the defendant's belief as to how the crime occurred. Such a decision is disturbing on at least two counts. First, the polygraph only detects deception when there is a conscious conflict.[68] It is possible for the subject to be honestly mistaken in his memory of the events that occurred[69] or for the subject to have so rationalized the crime[70] that there is no conflict. In such a case the polygraph is incapable of detecting the mistaken recollection. Secondly, the polygraph examiner cannot be cross-examined as to any fine but crucial distinctions between the way the events actually occurred and the way the facts were posed to the subject during the polygraph examination.[71] Since the examiner's opinion is limited to his interpretation of the actual responses given to the test questions, any statement by him on the effect that such distinctions would have on the polygraph results is no more than an unsupportable opinion. Only the defendant can furnish the needed answer; however, since he has a constitutional privilege against self-incrimination, he can refuse to testify and leave the jury only to guess whether or not any crucial distinctions exist.[72]

The high reliability of the polygraph cannot be denied. Neither can it be gainsaid that the polygraph intrudes on the traditional function of the jury and is subject to the possibility of jury misuse. For too long, however, the courts have preempted a rational consideration of these countervailing points by the use of the nebulous "general acceptance" standard. *Ridling, Zeiger*, and *A v. B* have removed this obstacle to objective analysis. By so doing, these courts were able at least to begin to formulate guidelines under which polygraph evidence can be properly admitted. This is a welcome approach, regardless of what one may think of the courts' resolutions of the issues they have raised. *Ridling* and *A v. B* were careful in limiting the issues to which they thought polygraph testimony would be of more than marginal utility. *Zeiger*, on the other

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[68]*See* text accompanying note 16 *supra*.

[69]*See* text accompanying note 62 *supra*.

[70]This reason led the court in State v. Hollywood, 138 Mont. 561, 575, 358 P.2d 437, 444 (1960), to exclude the test results of an examination given over five months after the commission of the crime. *But see* REID & INBAU 179-80.

[71]*See* Boeche v. State, 151 Neb. 368, 377, 37 N.W.2d 593, 597 (1949).

[72]*See* State v. Bohner, 210 Wis. 651, 659, 246 N.W. 314, 318 (1933). However, since this issue has not actually been presented to the courts, it is possible that the introduction by a defendant of favorable polygraph results may be held to constitute a waiver, at least as to those matters raised directly by the polygraph evidence, of his fifth amendment privilege against self-incrimination.

hand, did not so limit the circumstances of admission. The usefulness of polygraph evidence on the *Zeiger* facts is not so apparent, and the evidence should have been excluded. However, the usefulness of the evidence in the narrow circumstances under which *Ridling* and *A v. B* allowed admissibility is apparent. The experience gained from such admissions may then be used to guide the courts in determining whether the admissions door should be opened wider.

L. JAMES BLACKWOOD

Evidence—Testimony of Government Informers in Narcotics Cases

The practice of using informers in an effort to apprehend narcotics peddlers and as a source of information is openly admitted by prosecutors and police officials.[1] This standard technique is considered "essential" in combating the drug traffic since there are no complaining witnesses or victims—only willing sellers and willing buyers—a fact that forces law enforcement officers to "initiate cases" to combat the drug trade.[2] It has been estimated that almost ninety-five percent of all federal narcotics convictions are obtained as the result of the work of informers[3] and that any government success in penetrating large selling organizations has been possible only through the use of informers and undercover agents.[4]

In order for the government to infiltrate the illicit drug traffic, it must use leverage to obtain the cooperation of reluctant participants in the traffic.[5] An informant usually is a person who is facing criminal charges and who is induced into cooperating with the government in order to receive a "break" in the criminal process.[6] If an informant is

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[1]A. LINDESMITH, THE ADDICT AND THE LAW 36 (1965) [hereinafter cited as LINDESMITH]; U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 8 (1967) [hereinafter cited as TASK FORCE REPORT].

[2]TASK FORCE REPORT 8.

[3]Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399, 403 (1959).

[4]*Id.*; LINDESMITH 43. The Bureau of Narcotics operates on the premise that the more "buys" set up and the more violators enlisted as informers, the deeper the government will penetrate into organized crime. Comment, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J.L. & SOC. PROB. 47 (1966).

[5]LINDESMITH 35.

[6]TASK FORCE REPORT 8. The "break" given informants is usually a reduction in charges.