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"THAT'S THE MAN": A SOBERING STUDY OF EYEWITNESS IDENTIFICATION AND THE POLYGRAPH†

FRANK O'CONNOR*

It is almost four o'clock in the morning, and, as he stands in the lighted doorway of the squad room at the 110th precinct, Manny Balestrero is tired — but, worse still, he is scared, more scared than he has ever been in his life. Things seem to be closing in around him. His interrogation since earlier that evening has not, by any standard, been brutal; no force has been used — just persistent, relentless, ceaseless questioning by two detectives who are so skeptically polite, so adamantly unbelieving![1]

The heavier-set detective now directs Manny to don his gray tweed overcoat, his maroon muffler, and his hat and to stand in the doorway. Manny is quickly aware that people are looking at him from the darkened doorway across the hall. He cannot see them but he senses they are there and his terror mounts. He was later to say, "When things like that happen and you're innocent, you want to shout and scream and you can't. I tried in many ways to tell them that I was innocent but they acted all the time as if I were guilty!"[2]

The drama moves swiftly to its bitter end. Manny again senses,

* Justice of the Supreme Court of New York, Queens County.

1 From the vantage point of ten years as District Attorney of Queens County (1956-66) and six years on the trial bench (1969 to present), the writer holds in high regard the professional competence and personal integrity of most policemen. Laudable instances of police efforts to clear a doubtful suspect are legion. Deliberate, willful efforts to frame or railroad an innocent man are totally unknown, at least to me. Yet, once the best-intentioned officer becomes honestly convinced that he has the right man, human nature being what it is, corners may be cut, some of the niceties forgotten, and serious error committed.

2 Brean, *A Case of Identity*, LIFE, June 29, 1953, at 98 [hereinafter cited as Brean]. For a follow-up story, *see id.*, Feb. 6, 1954, at 45. *See also* READER'S DIGEST, Oct. 1953, at 86.

The story was carried on Robert Montgomery's coast-to-coast television show. Under the title "The Wrong Man," it became a full-length motion picture, produced by Warner Brothers, under the direction of Alfred Hitchcock.

rather than sees, movement in the darkened room. Then come the whispered words: "That's the man!" Manny's whole world collapses.

Manny was arrested and spent the night in jail. Shortly thereafter, his wife, Rose, an intelligent and sensitive woman, beside herself with worry over the plight of her husband, suffered a complete collapse. The utter sorrow and injustice of it all seared my soul as few things have before or since. Thus, the groundwork was laid for one of the most dramatic and disturbing "wrong man" cases of modern times.

Not to hold you, gentle reader, in prolonged suspense, the trial of Balestrero terminated in a mistrial. Before the People's case was half presented, juror number four, in a voice loud and clear and audible to one and all, expressed his intense annoyance at the probing and searching cross-examination then being conducted by defense counsel, this writer. His prejudice was obvious, and the mistrial followed.[3]

A date was set for a new trial, but in the interim the real perpetrator was apprehended while committing another armed robbery. His name was Charles J. Daniell. He resembled Balestrero only remotely, and he quickly absolved him of any complicity in the crimes charged. On the night of his arrest and while handcuffed to a chair in the old 114th precinct, Daniell stated to this writer that had Balestrero been convicted he, Daniell, would have returned to the scene and reenacted in every minute detail the original robbery to prove to the police that poor Balestrero was the wrong man. Irony of ironies!

In the context of this article, it is interesting to note that shortly after his arrest and at the prompting of this writer, Balestrero, at his own expense, underwent a lie detector test. As the test was about to begin and the electrodes were being prepared, Balestrero began to shake like a reed in the wind. Knowing full well his innocence, grasping my hand like a little child, he piteously exclaimed, "What will happen if this machine says I'm lying?" He was not lying; the polygraph affirmed he was telling the truth, but all in vain. The results of the test would not be admissible at the trial.

Additional facts in the tragic tale of Balestrero will be subsequently recounted, but for the moment it is appropriate to reflect upon the observations of the Supreme Court in *United States v. Wade*:[4]

> The trial which might determine the accused's fate may well not be that in the courtroom but at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, . . . and

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[3] Brean, *supra* note 2, at 104.

[4] 388 U.S. 218 (1967).

with little or no effective appeal from the judgment there rendered by the witness — "that's the man."[5]

CONVICTING THE WRONG MAN

The stark horror of convicting the wrong man has always plagued bench and bar alike. Indeed, this problem prompted a provocative study over forty years ago entitled *Convicting the Innocent.*[6] Professor Borchard outlined 65 cases of criminal prosecutions and convictions where the defendants were totally innocent. In more than half of these cases the tragic error was occasioned by the wrongful identification by the victim of the crime. Professor Borchard's work lists some of the factors usually present in identification cases and offers impressive statistics indicating the almost total lack of probative value of such testimony. It says, in part:

> Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony. These cases illustrate the fact that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives, not necessarily stimulated originally by the accused personally — the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another. Thus doubts are resolved against the accused. How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in twelve other cases, the resemblance, while fair, was still not at all close. In only two cases can the resemblance be called striking.[7]

It is equally chilling to learn that in many instances the crimes of which the defendants were accused never even took place. One classic example is the trial of the Boorn brothers in Vermont in the year 1819. Although the conviction of the two brothers was partially due to their spurious confession to a totally shocking crime which, unbelievably, never took place, the case is worthy of note as an early American case

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[5] *Id.* at 235-36.

[6] E. BORCHARD, CONVICTING THE INNOCENT (1932) [hereinafter cited as BORCHARD].

[7] *Id.* at xiii (footnotes omitted). *See also* Williams & Hammelmann, *Identification Parades — II*, [1963] CRIM. L. REV. (Eng.) 479, 483, on the unconscious suggestive influences surrounding the lineup procedure.

involving mistaken identity. The Boorn brothers were convicted of the murder of their brother-in-law and were sentenced to be hanged. But for a curious concatenation of circumstances which brought about the discovery of the alleged victim, alive, hale and hearty, many miles from the site of his alleged demise, they would have been executed. As is so frequently true in these cases, the links in the chain which finally disclosed the truth were as accidental and fortuitous as those which led to the mistaken conviction.

The trial of Thomas Berdue, an early California case, would be totally ludicrous except for its tragic overtones. Drawn by the gold fever, many adventurers flocked to the Golden State in the middle of the nineteenth century. Murders and robberies were rampant, and were committed with apparent impunity. Law-abiding citizens became increasingly enraged at the uninterrupted wave of crime. A particularly vicious assault and robbery of a leading merchant took place, followed by a cold-blooded murder of another citizen. A totally innocent British subject, Thomas Berdue, was arrested, indicted, tried, and convicted of both crimes and sentenced to be hanged.

An extraordinarily detailed and impressive description of the suspect is to be found in the following summary of the eyewitnesses' testimony:

> Witnesses for the prosecution were generally bold and entirely positive; but the witnesses for the prisoner with the exception of Judge Stidger and B. F. Washington, appeared to feel uneasy, and often hesitated in their testimony. Some three or four witnesses testified that they had worked with Jim Stuart at Foster Bar, and had known him well before he went there. They had eaten with him at the same table often, and had played cards with him; and one or two testified they had slept with him. They testified that Jim Stuart was of the same height as the prisoner; that he had curly hair, like him; that he was slightly bald on the top of the head, like him; that his actions were like his — the court having made the prisoner stand up several times so that the witnesses could see him better than when sitting; that his voice and accent were the same, being English; that the color of the eyes and hair were the same; and that Jim Stuart had a stiff middle finger on the right hand, and a ring of Indian-ink round one of his fingers, and marks of Indian-ink between each thumb and forefinger; and further, that Jim Stuart had a rather long scar on his right cheek. The jury then examined the hands of the prisoner, and there was found a ring of Indian-ink on one of his fingers, several figures or spots of the same ink between the thumb and forefinger of each hand; and the right middle finger was not stiff, but had had a felon under the nail of the corresponding finger on the other hand, which had given it a short but stubby

> appearance, heavier at the end than elsewhere, the nail of the finger being broad and thick, and bending inward over the end of the finger. This was startling to the defence, indeed. It remained now to see if the prisoner had a scar on the right side of the face. His face could not be satisfactorily examined, as it was almost completely covered with a short growth of hair. The court ordered the prisoner to be shaved before being brought into court next morning, and on being examined a scar about the length of the one described by the witnesses was found, commencing on the edge of the jaw on the right side and running down the neck. The witnesses now seemed confident, and said that they had no doubt that the prisoner was Jim Stuart. On a cross-examination they said, in a positive and unhesitating manner, that it was not possible that they could be mistaken in their opinion that the prisoner was Jim Stuart. Colonel Prentiss swore positively that the prisoner was Jim Stuart and that he could not possibly be mistaken. Some four or five witnesses swore positively as to the identity of the prisoner, and that he was Jim Stuart beyond a question; each giving some one or more new reasons for his belief. No witness on the side of the prosecution would admit a probability that he could be mistaken in the prisoner; that he certainly was Jim Stuart![8]

This lengthy extract demonstrates the kind of detailed, particularized positive identification offered in absolute good faith by eyewitnesses who can so often be totally mistaken.

Needless to say, despite competent evidence of a perfectly sound and truthful alibi, Berdue was convicted on all counts at each of his three trials. As in the case of Boorn, through a purely fortuitous chain of circumstances, the real James Stuart was subsequently apprehended and, in a signed confession, completely exonerated the hapless Berdue.

The problem of mistaken eyewitness identification received further attention from a Royal Committee of Inquiry established in 1904 to investigate one of England's famous wrong man cases. It concluded:

> [E]vidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury.[9]

A similar word of caution had been expressed in one of America's most celebrated and controversial criminal trials, in which the identification procedures employed, and the identification testimony introduced, were excoriated by Felix Frankfurter, who exclaimed:

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8 BORCHARD, *supra* note 6, at 271-72.

9 E. WATSON, ADOLF BECK 250 (1924). The Royal Committee of Inquiry was appointed as a result of the trials involving one Adolf Beck, who was twice convicted in England for crimes he did not commit.

> What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent — not due to the brutalities of ancient criminal procedure.[10]

Back to Balestrero

Let us now return to the squad room at the 110th precinct. Earlier, prior to this "private showing," Manny had been directed by the police to write in block letters the identical message appearing on the hold-up note used in one of the robberies he is suspected of committing. That note read in part, "[G]ive me the money from the cash draw [*sic*]." Balestrero printed out five copies of the note with no visible reaction from the police, but when on the sixth try, he, too, misspelled the word "draw" the police "knew" they had the right man.[11]

A lineup is ordered, but it is well on to 5:00 A.M. and the police are hard-pressed to form one. Finally, the desk lieutenant and a police officer, their uniform trousers clearly visible below the hastily-donned civilian overcoats, stand beside the visibly crushed and totally demoralized Balestrero. On his other side is placed the husband of one of the identifying witnesses. Balestrero is positively identified by four young girls as the man who had robbed on two different occasions the insurance office where they worked.

The total inadequacy and the inherent unfairness of these entire proceedings involving Balestrero, Boorn, Berdue and legions of others strongly suggest the imperative need for objective safeguards in this all too long neglected area of the criminal law.[12]

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10 F. Frankfurter, The Case of Sacco and Vanzetti 30 (1927).

11 The holdup note read: "This is a gun I have pointing at you be quiet and you will not be hurt. Give me the money from the cash draw [*sic*]."

12 Indeed, the need was known in Canada 33 years ago. In *Rex v. Goldhar*, [1941] 2 D.L.R. 480, the Ontario Court of Appeals said:

> It would be well, however, if in the evidence at the trial the procedure followed on the occasion of the line-up were described in more detail than is usually done. At least two things should be made clearly to appear that are seldom even referred to in evidence.
>
> First, it should appear that there has been nothing whatever done to indicate to the witness the person in the line-up who is suspected by the police, either by showing a photograph or description, or an indication of the position in the line-up. In the second place it should appear that the selection of the other person [*sic*] to form the line-up has been made fairly, so that the suspect will not be conspicuously different from all the others in age or build, colour or complexion or custome or in any other particular. Where these precautions have been observed and it so appears by the evidence, identification by means of a line-up becomes much more convincing to a Judge or jury than the mere statement that on a line-up the witness picked out the accused.

Id. at 480-81.

CONSTITUTIONAL SAFEGUARDS AGAINST MISIDENTIFICATIONS

It was not until June 12, 1967, that the Supreme Court established constitutional safeguards and sanctions. In *Wade*[13] the Court gave explicit recognition to the deficiencies of the process of pretrial identification:

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[14]

To minimize the potential for injustice, the Court in *Wade, Gilbert v. California,*[15] and *Stovall v. Denno,*[16] mandated first, that in any pretrial confrontation the procedures must be fair in every respect.[17] Examples of unduly suggestive procedures include those in which (1) the suspect is the only person in the lineup unknown to the witness; (2) the suspect's appearance is grossly dissimilar from that of the other participants; (3) only the suspect wears distinctive clothing allegedly worn by the actual perpetrator; (4) the suspect is brought in for a one-on-one identification after the witness is told that the culprit has been caught; (5) the suspect is pointed out by the police before the lineup.[18] As an additional measure of protection, the Court extended the right to counsel to the lineup procedure.[19]

The Court then imposed a major sanction to enforce these protections — the exclusion from the trial of in-court identification testimony whenever the constitutional standards of *Wade-Gilbert-Stovall* are violated.[20] If, for example, a defendant lacks counsel at the lineup, the witness' in-court identification will be inadmissible unless the prosecution establishes by "clear and convincing" evidence that the in-court identification is based upon the witness' observations at the time of the crime and not upon the lineup procedure.[21] Factors relevant to this inquiry include the witness' opportunity and motivation to observe the criminal act, the time lapse between the commission of the crime

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13 388 U.S. 218 (1967).
14 *Id.* at 228.
15 388 U.S. 263 (1967).
16 388 U.S. 293 (1967).
17 United States v. Wade, 388 U.S. 218, 233-35 (1967); Gilbert v. California, 388 U.S. 263, 272-74 (1967); Stovall v. Denno, 388 U.S. 293, 297-99 (1967).
18 388 U.S. at 233.
19 *Id.* at 237.
20 *Id.* at 238.
21 *Id.* at 240.

and the identification procedure, the accuracy of the witness' description given immediately after the crime, and the degree of certainty demonstrated by the witness in selecting the defendant.[22] A year later, the Court held that whenever a pretrial photographic identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," the in-court identification is also to be excluded.[23]

In his excellent article entitled "Assailing the Impermissible Suggestion: Evolving Limitation on the Abuse of Pre-trial Criminal Identification Methods,"[24] Judge Sobel writes:

> From that perspective, the potential conviction of the innocent, the *Wade* trilogy represents the most important of the Court's criminal decisions of the past several decades. Although *Mapp* and *Miranda* are better known and more frequently encountered, neither has a direct bearing on guilt or innocence. The target of *Mapp* and *Miranda* is official misconduct; these decisions protect the integrity of the judicial process. Even high court judges fail to understand that in addition to assuring fairness in prosecution, these decisions add to the speed and efficiency of criminal prosecutions. *Wade, Gilbert* and *Stovall* perform all these functions as well as protecting the innocent from unjust conviction.[25]

While it is quite clear that these safeguards will help to reduce the number of wrong man convictions, Judge Sobel cautions that the extent of those beneficial results will depend, to a large degree, upon how realistically the courts enforce the mandated standards. He expresses a reservation shared by many of his confreres:

> [I]t is quite evident that there has existed a state of confusion among lawyers and trial judges concerning the implementation of the constitutional safeguards. This is due in measure to the fact that *Wade-Gilbert-Stovall* left many problems unsolved.[26]

Unfortunately, in recent years the Court has exhibited a diminished judicial concern in the area of suggestive pretrial identification procedures. *Wade*, itself, has been specifically limited to post-indictment procedures by the decision in *Kirby v. Illinois*.[27] More recently, the Court refused to extend the right to counsel to photographic identifica-

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22 *Id.* at 241. *See also* Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

23 Simmons v. United States, 390 U.S. 377, 384 (1968).

24 38 BROOKLYN L. REV. 261 (1971). Hon. Nathan R. Sobel, a former Justice of the New York State Supreme Court, is now Surrogate, Kings County.

25 *Id.* at 262.

26 *Id.*

27 406 U.S. 682 (1972).

tion procedures.[28] The Court has expressed its belief that the suspect is afforded substantial protection against impermissible suggestions through the integrity of the prosecutor:

> In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecution, who, as so often has been said, may "strike hard blows" but not "foul ones."[29]

Even if there were to develop a more favorable judicial attitude toward the *Wade* protections and the ethical probity of prosecutors could be assured, there still remains a grave danger of misidentification. According to one authority cited by the *Wade* Court, "[T]he influence of improper suggestion [intentional or unintentional] probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined."[30]

Suggestibility has been defined as "the readiness with which an individual will fill in the missing details that are absent from the suggestion."[31] Psychological experiments have established that most individuals are unconsciously susceptible to different forms of suggestions. The following cases are illustrative:

> A professor sprayed water around the classroom and asked the students to raise their hands when they detected an odor. 75% of the students raised their hands. Another professor played two identical phonograph recordings after having made the false statement that music critics had selected one of the two as the better. He asked the students to indicate which of the two was better. 96.6% of his listeners selected one or the other, although there was no difference.[32]

Some suggestive elements are by their nature incapable of being controlled.[33] A research study appearing in the December, 1974 Scientific American outlines a number of controlled experiments which

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28 United States v. Ash, 413 U.S. 300 (1973).

29 *Id.* at 320.

30 P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).

31 DOCKERY, PSYCHOLOGY 214-15 (1944). *See also The Case Against Personal Identification*, 13 FORTNIGHTLY L.J. 387, 387-88 (1943), wherein suggestion is defined as "the communication of any proposition from one person to another in such a way as to secure its acceptance."

32 FOURTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 233, 240 (1948) [hereinafter cited as NEW YORK REPORT].

33 *Id.* at 240-42. See Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079 (1973), for a summary of experimental research on perception and recall.

graphically demonstrate the inherent unreliability of eyewitness testimony.[34] The study isolates a number of factors contributing to this unreliability. Among them are the apparent insignificance of the original event, the length of period of the observation, the observer's overall physical condition, the stress of the situation, and the expectancy of the observer.[35] But even assuming ideal conditions for the original perception at the scene of the crime, the element of suggestion during the lineup can be the deciding factor in identification of the suspect. For example, the very fact that the witness has been called to the police station predisposes him to select someone as the culprit. Naturally, he will pick out the person who most nearly resembles the image he has in mind.[36] Thus, there remains a grave doubt that the safeguards afforded by *Wade* and its successors are an adequate protection against convicting persons who are totally innocent of any crime.[37]

POST-*Wade* CASES

Two recent post-*Wade* wrong man cases must be evaluated in the context of the protections now mandated. In the unreported case of *People v. Berson*, the defendant was arrested following a series of shocking rapes, robberies, and sodomies. He was promptly placed in a lineup and immediately and positively identified by four of the young women victims. Several weeks later two more victims came forward and, once again, Berson was positively identified as the assailant. Defendant's counsel,[38] experienced and knowledgeable, not only was present at the second lineup but also was permitted to assist the police in putting it together. He was satisfied that those in the lineup were comparable to his client in height, weight, coloring, and general appearance.

An extraordinary and highly suggestive factor unintentionally entered the picture. By sheer accident the suspect was placed directly under an overhead light, and a shadow was thrown directly across the mouth and chin area. Since childhood, the defendant had had a harelip, and corrective surgery had left an obvious scar. Perhaps in an effort to lessen its impact, the suspect had grown a rather straggly moustache, but no hair, of course, grew over the proud flesh of the scar. Yet, in

[34] Buckhout, *Eyewitness Testimony*, SCIENTIFIC AMERICAN, Dec., 1974, at 23.

[35] *Id.* at 25-26.

[36] New York REPORT, *supra* note 32, at 248.

[37] *See generally* Sobel, *Assailing the Impermissible Suggestion: Evolving Limitation on the Abuse of Pre-trial Criminal Identification Methods*, 38 BROOKLYN L. REV. 261 (1971); Comment, *No Panacea: Constitutional Supervision of Eyewitness Identification*, 62 J. CRIM. L.C. & P.S. 363 (1971); Note, *Pretrial Identification Procedures — Wade to Gilbert to Stovall: Lower Courts Bobble the Ball*, 55 MINN. L. REV. 779 (1971).

[38] Berson's lawyer was James Mulvaney, a former Assistant District Attorney, Queens County, who had served on the staff of the writer.

the shadow cast by the light, the entire upper lip appeared as if entirely covered with a moustache. It was later discovered that the real culprit had a full moustache.

It is both interesting and significant to note that the defendant, at his own expense and upon his attorney's advice, had a polygraph examination taken, which indicated that he was telling the truth.

It was not until some weeks later, prior to the defendant's trial, that another person was ascertained to be the true perpetrator of these crimes and was picked out of the lineup by all of the victims save one, who still persisted in her positive identification of the first defendant as her attacker.[39] The *Berson* case clearly establishes that even under *Wade* the possibilities of suggestive occurrences, conscious or unconscious, intentional or unintentional, remain virtually untouched.

Additional recognition of this suggestibility came in a report of the August 1973 Queens County Grand Jury, handed up in connection with another wrong man case. After completely exonerating the suspect by voting a no true bill, the report, at length and in detail, indicated that serious flaws still exist in the composition and mechanics of present-day lineups.

Briefly, the defendant William Schrager, an Assistant District Attorney on the staff of the Queens County Prosecutor's Office,[40] was arrested on serious morals charges after being identified by two young women in a lineup held at the 100th Precinct in Rockaway Beach. As noted by the grand jury, "The Schrager lineup provides a classic illustration of the shortcomings existing in lineup procedures." The report calls attention to the fact that the defendant, a caucasian male, five feet four inches tall with a receding hairline, a nonathletic build and possessed of an unusual voice, was placed in a lineup with five policemen and detectives, all of whom were over five feet eight inches in height. To further compound the situation, two of the participants were over five feet ten inches tall and weighed over two hundred pounds, and two others were drawn from the uniformed ranks and wore civilian shirts but retained their blue uniform trousers.

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39 It is noteworthy that after the conviction and sentencing of Carbone, the perpetrator, one Morales, was arrested and held by the New York County District Attorney's Office on the charge of attacking a young lady in Manhattan. When Carbone heard of this, he readily confessed to that attack and, upon request, took a polygraph examination. The results of that test proved that he was telling the truth concerning all of the attacks to which he had confessed.

40 Because of the defendant's connection with the district attorney's office, two special prosecutors were appointed. Howard D. Stave and Douglas H. Kreiger, both former assistant district attorneys on the staff of the writer. The grand jury report was prepared under their supervision.

The report describes the woefully inadequate physical facilities available in the ancient stationhouse of the 100th Precinct and then makes a series of recommendations, including the setting up of a central location adequately staffed and equipped for all future lineups throughout the city. It suggests the installation of modern audio equipment at the central lineup facility and that provision be made through computerization to call up on short notice from the ranks of the police and their auxiliary a sufficient number of look-alikes to conduct a proper lineup. It further recommends that stenographic, video tape, and audio recordings be made of the lineup and of all law enforcement personnel and viewing witnesses.

Both *Berson* and the Schrager case clearly indicate that despite the sanctions and procedures of *Wade*, and assuming all the foregoing suggested recommendations are carried out, something more is needed. The crying need for an objective standard is apparent. While the grand jury's proposals are a step in the right direction, nevertheless there remains a disturbing potential for error whenever a conviction rests solely upon the identification testimony of strangers to the defendant.

Prior Search For A Standard

In 1945, the sensitivities of New Yorkers, always alert to the cry of injustice, were deeply aroused by the sad story of Bertram M. Campbell, another wrong man.[41] The public was incensed at this incredible miscarriage of justice and, as a result, the Governor's counsel brought the entire problem to the attention of the New York State Judicial Council, which authorized a study of the problem of lessening the likelihood of erroneous identification. In the prelude to a truly excellent report the council stated in part:

> Were the Campbell case merely an isolated instance, it would still furnish cause for inquiry into the possibility of improving methods of identification. Our civilization is grounded upon the sanctity of individual rights. More than lip service should be paid to the adage

41 Campbell, a totally innocent man, was convicted of the crime of forgery even though he bore but a slight resemblance to the actual perpetrator. By the time the mistake had been discovered, he had served three years in state prison. The press revealed that three of the five identifying witnesses had been shown a photograph of Campbell by private detectives, apparently representing the banks involved. In the photo a moustache had been "dubbed in" to meet the description of the actual criminal and the witnesses had been informed that Campbell was a front for a big forgery ring. Worse still, Campbell was pointed out to the witnesses before the identification took place and no lineup at all was ever held. These three witnesses were later heard to say that if they had not studied the photograph in advance and had not been told that Campbell was part of a forgery ring, they would not have identified him as the criminal.

that it is better that a guilty person go free than that an innocent person should be punished.

Unfortunately, however, there have been more Campbell cases than is generally realized. The annals of criminal law contain a number of miscarriages of justice resulting from erroneous identification. The view has been expressed that there have been many more such cases which have never been verified.

The statement that there have been many such cases means that over a long period of time a relatively large number of such cases has been discovered. It is not intended to suggest that mistakes in identity are a regular occurrence or that they occur frequently in cases that go to trial. Nonetheless the gravity of such mistakes cannot be overemphasized.[42]

The purpose of the project was "to determine the feasibility of erecting safeguards against erroneous identification by legislation or court rule."[43] To this end four possible approaches to the problem were explored and the indicated conclusions were reached:

(1) The Council first studied but quickly rejected the advisability of admitting into evidence the results of psychological tests of a witness' capacity for recognition. Their research indicated that there is no consistency in the testimonial accuracy of individuals, that a witness may be very accurate in reporting one incident and very inaccurate in reporting the next.

(2) It then explored the possibility of mandating by statute the method of confronting the suspect with the witness. This, too, was promptly rejected as a matter not for legislative enactment but of police regulation.

(3) The Council then considered a statutory prohibition against convictions based solely on identification testimony. It was concluded that to ban such evidence — in many cases the only evidence — would be not only unscientific but would tend to encourage crime.

(4) Finally, the Council made an in-depth study of recognition of the lie detector test. Its conclusion was stated in the following words: "Investigation discloses, however, that the lie detector test has not yet reached that stage in its development where its results are sufficiently reliable to be made the subject of expert testimony. At present, this test is best suited for opening up avenues of investigation and for procuring confessions and admissions."[44]

The report noted that in the nineteenth century a student of the problem of identification posed the question of what remedy would

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42 N.Y. REPORT, *supra* note 32, at 235 (footnotes omitted).

43 *Id.* at 233.

44 *Id.* at 233-34.

prevent erroneous identification. The only reply he could make was: "It lies alone in caution and prudence. Observation and sad experience admonish courts and juries to the use of utmost care, caution and prudence."[45] The Council's report then inquires:

> Must the twentieth century render the same response? In view of the great advances made in the field of psychology it would seem that we should know more about psychological factors which affect identification. In the light of this knowledge, it might be possible to erect legislative safeguards which would prevent or minimize the recurrence of the tragic errors which have characterized the subject of identification testimony.[46]

Unfortunately, however, the Council was compelled to conclude, "On the basis of this study it is not believed that the problem of erroneous identification can be eased by statute or court rule."[47]

That was the best answer available thirty years ago to a question asked in the nineteenth century. Now, as we stand on the threshold of the twenty-first century, we must reexamine and reevaluate the conclusions of the 1948 report in the light of present-day knowledge and experience. It is the purpose of this study to suggest that a better answer may be found in the so-called lie detector or polygraph.

EVOLUTION OF JUDICIAL ACCEPTANCE OF THE POLYGRAPH

Although it had been in use since 1895, the polygraph[48] first came to the attention of an appellate court in 1923 when the accused in a

[45] *Id.* at 236, *quoting* HARRIS, A TREATISE ON THE LAW OF IDENTIFICATION 3 (1892).

[46] N.Y. REPORT, *supra* note 32, at 236-37.

[47] *Id.* at 234.

[48] The polygraph or so-called lie detector is premised on the theory that a person who consciously lies undergoes physiological reactions which can be measured. The instrument records various physiological responses, such as changes in pulse rate, blood pressure, respiration and electrodermal responses. The procedure entails comparing the individual's reactions upon being asked three types of questions: (1) simple unrelated questions that should cause no stress (*e.g.*, "Are you 21 years old?"); (2) control questions which are unrelated but will cause a certain amount of nervousness (*e.g.*, "Have you ever stolen anything?"); (3) questions related to the crime (*e.g.*, "Did you steal from X store on the 21st of January?"). A marked increase in the physical indicia between the second and third type of question would indicate that the person is consciously lying with respect to the relevant question. Of course, the accuracy of the conclusion depends greatly on the examiner's ability to interpret the charts and detect other factors which may affect the results, such as extreme dull-wittedness or psychosis. Reid, *A Revised Questioning Technique in Lie-Dectection Tests*, 37 J. CRIM. L. & CRIMINOLOGY 542 (1947).

For a discussion on the theory and operation of the polygraph, see R. FERGUSON & A. MILLER, THE POLYGRAPH IN COURT 143-321 (1973); R. FERGUSON & A. MILLER, THE POLYGRAPH FOR THE DEFENSE 88-89, 127-28, 161-62, 173, 182, 221-22, 253 (1974); J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH (LIE-DETECTOR) TECHNIQUE (1966) [hereinafter cited as REID & INBAU]; Burack, *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* 46 J. CRIM. L. & CRIMINOLOGY 414 (1955); Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 TENN. L. REV. 728 (1953); Skol-

murder trial offered as evidence the results of a Marston "systolic blood pressure" test. In *Frye v. United States*,[49] the court affirmed the exclusion of such evidence.

> 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.[50]

Though the *Frye* standard of general scientific acceptance has been criticized as applying a more rigorous test for the lie detector than for other types of scientific evidence, many jurisdictions still adhere to it.[51]

The New York Court of Appeals has consistently ruled against the admission of polygraph evidence on the logic of *Frye*.[52] In 1969, the Court reexamined its exclusionary rule in *People v. Leone*.[53] While Leone was in police custody as a murder suspect, he agreed to submit

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nick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961) [hereinafter cited as Skolnick].

49 293 F. 1013 (D.C. Cir. 1923).

50 *Id.* at 1014.

51 *See, e.g.*, United States v. Frogge, 476 F.2d 969 (5th Cir. 1973); United States v. Bando, 244 F.2d 833 (2d Cir. 1957); United States v. Wilson, 361 F. Supp. 510 (D. Md. 1973); United States v. Urquidez, 356 F. Supp. 1363 (C.D. Cal. 1973); People v. York, 174 Cal. App. 2d 305, 344 P.2d 811 (1959); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1941); Stone v. Earp (civil), 331 Mich. 606, 50 N.W.2d 172 (1951); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 343 U.S. 898 (1951); Romero v. State, 493 S.W.2d 206 (Tex. Crim. App. 1973).

52 Pereira v. Pereira, 35 N.Y.2d 301, 319 N.E.2d 413, 361 N.Y.S.2d 148 (1974); People v. Leone, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969); People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938). *See* Anonymous v. Anonymous, 75 Misc. 2d 823, 348 N.Y.S.2d 938 (Family Ct. Rockland County 1973); People v. Dodge, 72 Misc. 2d 345, 338 N.Y.S.2d 690 (Nassau County 1972); People v. Jacobson, 71 Misc. 2d 1040, 337 N.Y.S.2d 616 (Sup. Ct. Queens County 1972); Tree v. Ralston, 62 Misc. 2d 582, 309 N.Y.S.2d 229 (Family Ct. N.Y. County 1970); People v. Dobler, 29 Misc. 2d 481 (Suffolk County 1961).

But see In re Stenzel v. B., 71 Misc. 2d 719, 336 N.Y.S.2d 839 (Family Ct. Niagara County 1972), in which the court ordered a polygraph test to be given to the mother-petitioner in a paternity suit. The alleged father offered the polygraph results to impeach the credibility of the mother who had taken the stand. Walther v. O'Connell, 72 Misc. 2d 316, 339 N.Y.S.2d 386 (Queens County 1972), was an action for the balance due on a loan which the defendant contended he never received. To resolve the credibility issue, the court ordered a polygraph test to be administered, to which both parties consented.

53 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969).

to a polygraph test, the results of which the prosecution intended to submit in evidence. The trial court granted the defendant's motion to suppress the evidence. In affirming, the Court concluded that the prosecution had failed " 'to show a general scientific recognition that the polygraph possesses efficacy.' "[54] It was observed that

> [a]lthough perfection in test results is not a prerequisite to the admissibility of evidence obtainable by the use of scientific instruments, the rule has been to grant judicial recognition only after the instrument has been sufficiently established to have gained general acceptance in the particular field to which it belongs.
>
> Applying this standard, it is clear that the record before us does not adequately establish the reliability of the tests to be admissible in evidence. As previously indicated, the criterion for interpretation of the test chart has not as yet become sufficiently definite to be generally reliable so as to warrant judicial acceptance; nor can it be said that the examiner's opinion demonstrates reasonable certainty as to the accuracy of the polygraph test in most instances.[55]

The traditional arguments against admission of the polygraph center upon the alleged unreliability of the instrument, the nonavailability of experienced operators, and the adverse impact such evidence may have on the trial process. The merits of these arguments will now be considered.

One reason given for the polygraph's questionable accuracy is that its reliability is dependent upon the physical or mental state of the subject examined. The polygraph is designed to measure only conscious lying; therefore a psychopathic liar or an extremely feeble person who cannot distinguish between truth and falsehood are inappropriate subjects for the polygraph. The machine would fail to detect their lies since unconscious lying does not create a stressful situation with the attendant physical responses. Critics also fear that an examinee's extreme nervousness will be misinterpreted as an indication of lying. It will be recalled that the nervous Balestrero was afraid of the same possibility. Nevertheless, despite his inner anxiety, the polygraph results were consistent with the truth.

To guard against these dangers, a qualified examiner is indispensable. Both critics and proponents of the polygraph agree on the critical role of the examiner. It is the examiner who must screen out inappropriate subjects, prepare the proper questions and interpret the test results. Without standardization of qualifications, the court cannot be confident of the reliability of a particular test result.

[54] *Id.* at 517, 255 N.E.2d at 700, 307 N.Y.S.2d at 434-35, *quoting* People v. Forte, 279 N.Y. 204, 206, 18 N.E.2d 31, 32 (1938).

[55] *Id.*

The importance of the examiner's expertise was underscored in *Pereira v. Pereira*,[56] a recent decision by the New York Court of Appeals. Mrs. Pereira charged her husband with knowledge of the whereabouts of their daughter, over whom the court had given her custody. The husband vehemently denied any such knowledge. Counsel for the plaintiff and the defendant agreed that the defendant would submit to a polygraph examination. As in *Leone* the test was administered by a police detective with limited experience in the procedure. Over the defendant's objections, the trial court received the test results in evidence. Relying heavily on *Leone*, the Court of Appeals ruled the polygraph results inadmissible. As the Court noted, the examiner was "not sufficiently trained and expert to justify use of the tests in a court of law."[57] The examiner who administered the test was still in training, and this was the first time he had ever testified as to polygraph data. His inexperience represented a "vital deficiency."[58]

Notwithstanding the employment of unqualified examiners, as in the *Pereira* case, the polygraph has emerged from the "twilight zone" depicted in *Frye* and achieved a very substantial degree of reliability. The modern polygraph is a much more sophisticated, complex, and accurate recorder than the simple, crude device which was promptly and properly rejected in *Frye*. That machine registered only the systolic blood pressure, whereas today's polygraphs, in addition to recording the reactions in blood pressure, likewise graph the pulse, the respiration, and the skin resistance to electric current *i.e.*, galvanic skin response (G.S.R.).

In contexts other than the courtroom, it is common knowledge that there has been a widespread and general acceptance of the polygraph, particularly within the last two decades. Its use today is almost universal in governmental agencies, by prosecutors,[59] police, public and private investigators, commerce and industry, labor and management,[60] and in other recognized fields.

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56 35 N.Y.2d 301, 319 N.E.2d 413, 361 N.Y.S.2d 148 (1974).

57 *Id.* at 307, 319 N.E.2d at 417, 361 N.Y.S.2d at 153.

58 *Id.* at 308, 319 N.E.2d at 47, 361 N.Y.S.2d at 153.

59 A. WESTIN, PRIVACY AND FREEDOM 145-47 (1967), reports that more than half of the police departments in the United States employ polygraphs in investigation. To the knowledge of the writer, the polygraph is used extensively by many large district attorneys' offices in the country. Between 1956 and 1966 it was used in the Queens district attorney's office in almost every case involving pure identification. It is presently used in the district attorneys' offices in Manhattan and The Bronx and is used by the prosecutors in more than thirty counties throughout California, particularly in relation to paternity cases.

60 COGHILL, THE LIE DETECTOR IN EMPLOYMENT 2-3 (1968). *See* Dolan v. Kelly, 76 Misc. 2d 151, 348 N.Y.S.2d 478 (Sup. Ct. Suffolk County 1973), upholding the dismissal of a police officer for refusing to submit to a polygraph test pursuant to a departmental investigation of alleged misconduct of a fellow officer.

The polygraph's increased use is a direct result of its demonstrated reliability. Polygraphists claim an accuracy rate of as high as 95 percent.[61] In an experiment conducted by Horvath and Reid,[62] experienced and inexperienced examiners[63] were asked to determine guilt or innocence on the basis of chart readings alone. None of the examiners had the opportunity to observe the subjects' attitudes or behavior during the testing. Ninety-one percent of the experienced examiners and seventy-nine percent of the inexperienced were correct in their diagnoses. Interestingly, errors favored the guilty over the innocent. Of the mistakes in judgment, 6.4 percent designated an innocent person guilty and 10.8 percent exonerated those actually guilty. Furthermore, the accuracy rate for all the relevant questions asked, *i.e.*, those relating to the crime, was 89 percent.[64]

As the Horvath-Reid experiment indicates, the degree of the examiner's experience does affect the test's reliability. Some states have begun to set minimum standards for licensing purposes.[65] Reid and Inbau suggest that the following requirements be met before an examiner may testify: (1) he must have a college degree; (2) his experience must include at least a six-month training period with an experienced examiner; (3) he must have had at least five years experience as a specialist in the field.[66]

Legislative standards would undoubtedly assist the court in determining whether a proposed examiner is sufficiently qualified to testify. But the absence of such legislation should not preclude polygraph evidence if the court can identify a qualified examiner within an acceptable amount of the court's time. As the federal district court in *United States v. DeBetham*[67] observed,

> a qualified examiner can be adequately identified without consuming more court time than is presently necessary to qualify any

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61 REID & INBAU, *supra* note 48, at 234. Approximately 4.5% of the results were classified as unverified and .5% were in error.

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

63 The inexperienced examiners had from four to six months training.

64 This 89% figure is arrived at if inconclusive readings are not counted as errors.

65 *See, e.g.*, ARK. ANN. STAT. § 71-2207 (Supp. 1973); FLA. ANN. STAT. § 493.43 (Supp. 1974-75); GA. CODE ANN. § 84-5007 (Supp. 1973); ILL. ANN. STAT. ch. 38, § 202-11 (1973); KY. REV. STAT. ANN. ch. 329.030 (1970); N.M. ANN. STAT. ch. 67-31A-6 (Supp. 1973); N.D. CENTURY CODE ANN. tit. 43-31-07 (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 4413 (29cc), § 8 (Supp. 1974); VA. CODE ANN. § 54-729.03 (Supp. 1974).

66 REID & INBAU, *supra* note 48, at 257.

67 348 F. Supp. 1377 (S.D. Cal.), *aff'd per curiam*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973). Though the district court's reasoning supported the admission of unstipulated polygraph evidence, the court felt compelled to exclude such evidence on the basis of earlier appellate decisions.

> physician or psychiatrist, and an incompetent examiner can be discovered through the ordinary diligence expected of counsel in preparation for cross-examination.[68]

Proponents of the polygraph not only allude to the increased reliability and use of the polygraph since the *Frye* decision, but also challenge the standard of general scientific recognition. The standard is criticized for its imposition of a more rigorous test for the lie detector than for other types of scientific evidence.[69] As McCormick has stated,

> "General scientific acceptance" is a proper condition upon the court's 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.[70]

Furthermore, the more modern view would accord judicial recognition upon the general acceptance by specialists within a profession or field of science, even though the group as a whole may be completely unfamiliar with the instrument or technique.[71] This group may well be, for the most part, the polygraphists themselves.

Such a modified test is not new and certainly not unique, since it is constantly applied in many other areas involving scientific evidence. For example, it is an accepted standard within the medical profession for chemical tests for alcoholic intoxication. It is likewise readily approved in the field of radar with regard to the control of traffic.[72] It has also been generally accepted in cases involving the Nalline test for narcotics in the human body.[73]

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[68] *Id.* at 1386.

[69] *See* McCormick, *Deception-Tests and the Law of Evidence*, 15 CALIF. L. REV. 484, 500 (1927), where the author writes,

> [I]f the test results are shown by scientific experience to render the inferences of consciousness of falsity or truth substantially more probable, then the courts should accept the evidence, though the possibility of error in the inference be recognized. . . . Conclusiveness in the inference called for by the evidence is not a requirement for admissibility.

See generally Kaplan, *The Lie Detector: An Analysis of its Place in the Law of Evidence*, 10 WAYNE L. REV. 381, 392-401 (1964); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 412 (1952) [hereinafter cited as Trautman], both supporting the position that all logically relevant circumstantial evidence should be admitted subject to policy considerations. *But see* Koffler, *The Lie Detector—A Critical Appraisal of the Technique as a Potential Undermining Factor of the Judicial Process*, 3 N.Y.L.F. 123 (1957) [hereinafter cited as Koffler]; Radek, *The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo*, 3 LOYOLA L.J. 289 (1972), supporting a higher standard of admissibility for the polygraph than for other scientific evidence.

[70] C. MCCORMICK, EVIDENCE 491 (2d ed. 1972).

[71] People v. Williams, 164 Cal. App. 2d 858, 331 P.2d 251 (1958).

[72] State v. Graham, 322 S.W.2d 188 (Mo. Ct. App. 1959).

[73] People v. Williams, 164 Cal. App. 2d 858, 331 P.2d 251 (1958). In *Williams*, defendant challenged the admissibility of Nalline test results which indicated the presence of

Over the years the polygraph, in the hands of an experienced examiner, has demonstrated a substantial degree of accuracy and acceptance. But many of those who concede the test's probative value and reliability maintain that the polygraph should be excluded for policy reasons. Critics emphasize the undesirable impact polygraph testimony might have on the trial process. Among the policy considerations militating against admission are: (1) the test results will be viewed as determinative of guilt or innocence and thereby effectively replace the jury as the trier of facts; (2) the technical testimony will create confusion in the juror's minds; (3) an undue amount of time will be consumed.

The primary concern is that polygraph testimony will irreparably prejudice the jury against one of the parties. After an acquittal verdict in the one New York criminal case which admitted lie detector results,[74] a questionnaire was sent to the jurors to determine the weight such evidence was given. One question read: "Were you so impressed by the scientific value of the 'lie detector' that you accepted its testimony without question?" Five of the ten jurors answering the questionnaire responded in the affirmative. To the second question — "Did you base your vote upon such testimony alone?" — six said yes.[75]

Other considerations focus upon the possibility of jury confusion and the amount of time the introduction of polygraph evidence will entail. It is feared that the trial will be reduced to a protracted battle of experts beyond a juror's comprehension.[76] The court in *United States*

narcotics in his system. The state's witnesses admitted that the use of Nalline had not been generally accepted by the medical profession. Nevertheless, the court ruled that general acceptance by those dealing with the narcotic problem was sufficient to establish reliability.

74 People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (County Ct. Queens County 1938), *impliedly overruled by* People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938).

75 Koffler, *supra* note 69, at 137-38. Koffler also reports the results of an experiment conducted with 20 third-year law students. The students were presented with the following fact pattern: *A*, returning home one night, sees a burglar rushing out his front door. *A* was twenty-five feet from his house and a dim light illuminated the porch. Forty-eight hours later, *A* identifies *B* as the culprit. *C* testifies that *B* was with him the night of the burglary. On the basis of these facts all twenty students found *B* not guilty. The students were then given the same fact pattern, with one additional fact — lie detector results indicated that *B* was lying when he said he did not burglarize the house. They were also told that generally 85% of lie detector results were accurate, 14.5% were unverified, and .5% were inaccurate. Eight of the students changed their innocent vote to guilty. With the same facts, and upon being informed that the lie detector had a 95% accuracy rate, 17 of the twenty students voted guilty. *Id.* at 139-43. One of Koffler's concerns is that as the reliability of the polygraph increases so will the possibility of a miscarriage of justice for those few individuals who fall within the error range. *Id.* at 145-46.

76 For an interesting overview of the polygraph issue, see SUPREME COURT COMM. ON CRIMINAL PROCEDURE, REPORT TO THE STATE OF NEW JERSEY JUDICIAL COUNCIL, 96 N.J.L.J., May 10, 1973 (Index at 525) [hereinafter cited as NEW JERSEY REPORT]. While both the majority and minority reports adopted the substantial showing of reliability and acceptance standard (as opposed to the rigorous general acceptance standard of *Frye*), the ma-

v. Ridling[77] addressed itself to this line of criticism. After determining the reliability of the polygraph, Judge Joiner quickly put to rest the fear that the polygraph's aura of scientific respectability would lead the jury to give too much weight to test results. In fully sustaining the ability of a jury to properly weigh such evidence, the court stated that

> it is important to understand how different juries are today than they were when the restrictive rules of evidence were first developed. On the whole they read widely. Largely because of television they know generally what is going on in the world. Their educational background is extensive. They think. They reason. They are really very good at sorting out good evidence from bad, of separating the credible witness from the incredible, and of disregarding experts who attempt to inject their opinions into areas of which they have little knowledge. . . . A modern jury, that must deliberate, and must agree, is the ideal body to evaluate opinions of this kind.[78]

Similarly, the district court in *United States v. Zeiger*,[79] thought the probative value of the polygraph outweighed policy considerations against admission. In allowing polygraph testimony on defendant's motion, the court concluded that adequate safeguards, such as a thorough foundation and vigorous cross-examination, were available to prevent the evidence from having undue weight. Furthermore, the examiner would not be permitted to give an opinion on the issue of guilt or innocence, but only assess the truthfulness of specific answers and explain the basis of his opinion.[80]

Despite the presence of safeguards, many continue to insist that important elements of the trial should not be sacrificed to the probative value of the polygraph. In response to such legitimate concerns, courts have developed various approaches which permit the use of polygraph evidence within prescribed limits.

One significant breakthrough in this area has been admission upon stipulation of the parties as illustrated in *State v. Valdez*.[81] There, the

jority thought the evidence should be excluded for policy reasons absent a prior stipulation by the parties. The policy considerations which it listed were: (1) juries would give conclusive weight to polygraphs; (2) a jury would draw an unfavorable inference if the defendant failed to produce such evidence; (3) with the proliferation of polygraph evidence, conflicting expert testimony will result in confusion and an inordinate consumption of time. *Id.* at 21, col. 4. The minority, though, felt that the probative value of the polygraph outweighs the traditional policy considerations. It urged the admission of results of all voluntary examinations upon the laying of a proper foundation. *Id.* at 23, col. 2.

77 350 F. Supp. 90 (E.D. Mich. 1972).

78 *Id.* at 98.

79 350 F. Supp. 685 (D.D.C.), *rev'd per curiam*, 475 F.2d 1280 (D.C. Cir. 1972).

80 *Id.* at 691.

81 91 Ariz. 274, 371 P.2d 894 (1962).

defendant was charged with possession of narcotics. Before the trial, defendant, his counsel and the county attorney entered into a stipulation providing that the defendant submit to the test and that results of the examination would be admissible. At the trial the defendant objected to the submission of the results, which were unfavorable to him.

Although it rejected the contention that polygraph results should be generally admitted on motion of either party,[82] the Arizona court concluded that the technique had advanced sufficiently to warrant its admissibility upon stipulation.[83] It held results to be admissible either to corroborate other evidence of the defendant's participation in the crime, or to corroborate or impeach the defendant's credibility if he takes the stand.[84]

The conditions for admission were specified by the court as follows: (1) the prosecuting attorney, defendant, and his counsel must sign a written stipulation that the defendant voluntarily submits to the test and that the results may be introduced in evidence by either party; (2) notwithstanding such a stipulation, it is within the court's discretion to refuse to accept the evidence if it is not convinced of the examiner's qualifications or that the test was conducted under proper conditions; (3) if the evidence is admitted, the opposing party has the right to cross-examine the examiner on his qualifications, the testing conditions and the possibility for error; (4) the court should instruct the jury that the test results only tend to show whether the defendant was lying or not at the time of the examination — that they do not tend to prove or disprove any element of the crime.[85]

The *Valdez* approach does not assume that the stipulation makes the polygraph more reliable, but rather that it undercuts the policy objections against using polygraph testimony in court. Why should the trier of facts be deprived of probative evidence if the parties themselves agree that the feared hazards are nonexistent or inconsequential?[86] In addition, the specified conditions tend to promote a high degree of test reliability and guard against a jury's acceptance of the polygraph as the final word on guilt or innocence. The procedure enunciated by *Valdez* has been adopted by a number of jurisdictions.[87]

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82 *Id.* at 280, 371 P.2d at 898.

83 *Id.* at 283, 371 P.2d at 900.

84 *Id.*

85 *Id.* at 283-84, 371 P.2d at 900-01. *See generally* Hazlett, *Admissibility of the Results of a Lie-Detector Test*, 5 ARIZ. L. REV. 76 (1963).

86 Trautman, *supra* note 67, at 397.

87 State v. Brown, 177 So. 2d 532 (Fla. App. 1965) (oral agreement); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

The *Valdez* situation is easily distinguished from the limited stipulation contained in the New York case of *Pereira v. Pereira.*[88] In that case the issue before the Court centered on the defendant-husband's credibility, *i.e.*, whether he had knowledge of his child's whereabouts. If so, he was in contempt of court for not informing the wife, who had been given custody over the child. The stipulation entered into by the prosecution and defense merely provided that the defendant would submit to a polygraph examination; it contained no provision for the subsequent use of the results at the trial, as was done in *Valdez* and other stipulation cases in accord with *Valdez.* Thus, the *Pereira* fact pattern permitted the Court of Appeals to avoid confronting the stipulation issue squarely. It did not have to decide whether an all-inclusive stipulation would be sufficient to overcome the policy objections raised against the admission of polygraph evidence.

The facts in *Pereira* were more akin to those in *People v. Leone,*[89] wherein the prosecutor wanted to use damaging results of a test voluntarily taken by the accused. In both intances the Court justly refused to allow the evidence to be used against a defendant who did not expressly contemplate the judicial use of the polygraph. Voluntary submission is not the equivalent of a full stipulation and should not serve as its substitute.[90]

Of course, nothing would prevent a defendant from taking a private, informal polygraph examination prior to entering into a formal stipulation. "The Case of the Jamaican Accent," a dramatic wrong man prosecution which recently appeared in the *New York Times Magazine* indicates that this may be a wise procedure for defendants to take.[91] The charges against the defendant were dropped only after a face-to-face voice identification in which the victim positively concluded that the defendant was not her attacker since the real robber spoke with what

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See People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. Galloway, 167 N.W.2d 89 (Iowa 1969); State v. Fields, 434 S.W.2d 507 (Mo. 1968), recognizing that prior stipulation alone is sufficient for admission. *See also* State v. Pulakis, 476 P.2d 474 (Alaska 1970), upholding admission upon a showing of a clear intelligent waiver of the privilege to exclude the evidence. *See generally* 53 A.L.R.3d 1005 (1973) on the various procedures by which jurisdictions admit polygraph evidence.

88 Pereira v. Pereira, 35 N.Y.2d 301, 319 N.E.2d 413, 361 N.Y.S.2d 148 (1974).

89 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969).

90 *But see* State v. Alderete, 86 N.M. 176, 521 P.2d 138 (1974), holding that either side has the right to rely on the test voluntarily taken by the defendant. It holds that a court, in its discretion, may admit such evidence if: (1) the polygraphist is qualified; (2) the proposed test is accepted in his profession; (3) it is demonstrated that the test is reasonably precise in its measurements. *See also* the minority report in NEW JERSEY REPORT, *supra* note 76 at 22, col. 1.

91 Herman, *The Case of the Jamaican Accent,* N.Y. Times, Dec. 1, 1974, § 6 (Magazine), at 30.

she described as an "American Afro" while the defendant had a West Indian accent. The victim, who had spent fifteen minutes with her attacker, was also sure that the true perpetrator had a pierced ear while the defendant did not. Ironically, at his lawyer's suggestion, the defendant had eagerly submitted to a private polygraph test which indicated that he was lying.[92] Was the test administered properly? Was the examiner properly qualified? Or had the polygraph simply failed its mission? Since the test was administered "off the record," there would have been no danger of prejudice in a stipulation jurisdiction. Had the defendant entered into a stipulation without a preliminary examination, he would have had the benefit of judicial scrutiny of the examiner and the testing conditions prior to any in-court admission.

Admittedly, one limitation of the prior stipulation rule is that it requires both parties to be convinced of the polygraph's probative value. If the district attorney's office is not convinced of its reliability and, therefore, refuses to enter into a stipulation, the accused is prevented from submitting the evidence.[93] Other courts have gone so far as to admit unstipulated results on defendant's motion.[94] In *United States v. Ridling*,[95] the defendant, who was faced with a perjury charge, offered polygraph testimony of an expert of his own choosing. After hearing extensive expert testimony, the court concluded that the polygraph, in general, was reliable and went on to consider the policy considerations against admission. On balance, it decided that the advantages to be gained by admitting the evidence in a perjury case outweighed the traditional objections to the polygraph.

Although Judge Joiner agreed that many of the polygraph examiners and operators are deficient in training and experience, he surmounted that problem by exercising the court's inherent power to appoint its own qualified experts.[96] The court also set up stringent preconditions for admission of the evidence:

1. The parties will meet and will recommend to the Court

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92 *Id.* at 90.

93 *See* State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964), holding that the state cannot be required to enter into a stipulation or give the test.

94 United States v. Ridling, 350 F. Supp. (E.D. Mich. 1972) (mem.); United States v. Zeiger, 350 F. Supp. 685 (D.D.C.), *rev'd per curiam*, 475 F.2d 1280 (D.C. Cir. 1972); United States v. Dioguardi, 350 F. Supp. 1177 (E.D.N.Y. 1972); United States v. Hart, 344 F. Supp. 522 (E.D.N.Y. 1971). *But see* United States v. Frogge, 476 F.2d 969 (5th Cir. 1973), *rejecting Ridling*. *See generally* Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 (1973); Note, *Problems Remaining for the "Generally Accepted" Polygraph*, 53 B.U.L. REV. 75 (1973).

95 350 F. Supp. 90 (E.D. Mich. 1972) (mem.).

96 *Id.* at 97.

three competent polygraph experts other than those offered by the defendant.

2. The Court will appoint one or more of the experts to conduct a polygraph examination.

3. The defendant will submit himself for such examination at an appointed time.

4. The expert appointed by the Court will conduct the examination and report the results to the Court and to the counsel for both the defendant and the government.

5. If the results show, in the opinion of the expert, either that the defendant was telling the truth or that he was not telling the truth on the issues directly involved in this case, the testimony of the defendant's experts and the Court's experts will be admitted.

6. If the tests indicate that the examiner cannot determine whether the defendant is or is not telling the truth, none of the polygraph evidence will be admitted.[97]

Recently, Massachusetts has joined those states which, unlike New York, have modified their strict exclusion of polygraph evidence. In *Commonwealth v. A Juvenile*,[98] Massachusetts recognized the right of a defendant to submit polygraph testimony under carefully defined conditions. The case is particularly relevant to New York since both states continue to adhere to the stringent standard of general scientific recognition.[99] The defendant, who was charged with manslaughter, moved to admit test results of an examination conducted by experts of his own choosing. He further moved that the court order an additional examination by a court-appointed expert. Despite a showing of the polygraph's high degree of reliability, the trial court felt compelled to deny the motion absent a showing that the method's reliability had been generally accepted by the scientific community. The Massachusetts Supreme Court reversed. While noting that the polygraph had not yet met the *Frye* standard of gaining general admission on a par with other scientific evidence, it thought that the testing technique had

advanced to the point where it could prove to be of significant value to the criminal trial process if its admissibility is limited to carefully defined circumstances designed to protect the proper and effective administration of criminal justice . . . if a defendant agrees in advance to the admission of the results of a polygraph test regardless of their outcome, the trial judge, after a close and searching inquiry into the qualifications of the examiner, the fitness of the defendant for such examination, and the methods utilized in conducting the tests, may, in the proper exercise of his discretion, admit the results,

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97 *Id.* at 99.

98 313 N.E.2d 120 (Mass. 1974).

99 *See* Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

not as binding or conclusive evidence, but to be considered with all other evidence as to innocence or guilt.[100]

As illustrated by *Valdez*, *Ridling*, and *A Juvenile*, courts are presently searching for guidelines to minimize the risks attending the admission of polygraph evidence, including undue influence on a jury and the lack of standardized qualifications for examiners.

Admission of the Polygraph in Identification Cases

The conclusion is inescapable that a comprehensive reexamination and reevaluation of New York's prohibition on the admission of polygraph tests is long overdue. The entire thrust of modern thinking in all areas of the law — practice, procedure, pleadings, and evidence — indicates an abrupt departure from the straitjacket rules of the past. A clear trend is presently discernible, on both state and federal levels, towards admitting all relevant evidence that might legitimately aid the triers of the facts in their ceaseless search for the truth. This tendency toward broader acceptance of evidence, especially that of a scientific nature, strongly suggests that uniform and consistent standards for the admission of polygraph evidence under severe and strict court supervision should be adopted. If the polygraph cannot be used as a positive standard saying "that is the man," perhaps it can serve as a negative standard indicating that "that is not the man."

The need to modify New York's exclusionary rule is greatest in the area of pure identification cases. For a person in Balestrero's position, it might be the only means of exculpation available. Balestrero was faced with the testimony of four eyewitnesses who had positively identified him. As another court queried, are we "so confident of the reliability of the present system of resolving conflicts in testimony by impeachment, cross-examination and inferences from demeanor, that we can afford to reject scientific aid in the task?"[101]

Though it may be argued that the polygraph test has not achieved the same degree of general scientific recognition as fingerprinting and ballistics testing, clearly it has achieved substantial recognition. Granted, policy considerations may militate against the admissibility of the polygraph in all cases. But against these considerations, one must balance the possibility of a conviction based on evidence substantially less reliable than the polygraph, namely, eyewitness identification.

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100 Commonwealth v. A Juvenile, 313 N.E.2d 120, 124 (Mass. 1974).

101 United States v. DeBetham, 348 F. Supp. 1377, 1384 (S.D. Cal.), *aff'd per curiam*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973), *paraphrasing* C. McCormick, Evidence 369-70 (1954).

The question undoubtedly arises that if the reliability of the polygraph is acknowledged, why should its use be limited to identification cases? First, notwithstanding the arguments herein presented, there still remain a number of unanswered questions concerning impact and reliability. The most outspoken proponents of the polygraph admit that in a certain percentage of cases, howsoever small, the test results will be inaccurate. Furthermore, studies do tend to show that juries will at times ignore other good evidence in favor of the polygraph results.[102] It is the contention of this writer that in pure identification cases — prosecutions where the case against the defendant is based entirely on eyewitness testimony — the only effective means for the defendant to exculpate himself may be through the polygraph. As previously indicated, neither the *Wade* protections nor cross-examination of the identifying witnesses is a sufficient safeguard for the accused.[103] Thus, the risks presented by the polygraph are worth accepting when there exists the grave possibility of convicting a totally innocent man.

Moreover, due process may require that a state's rules of evidence give way where exculpatory evidence, which is at least substantially reliable and which may be the only effective means for the defendant to prove his innocence, is sought to be admitted. The United States Supreme Court in *Chambers v. Mississippi*[104] held the state's hearsay rules must yield to the defendant's due process rights under certain circumstances.

> Few rights are more fundamental than that of an accused to present witnesses. . . . In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. . . . The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and . . . was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.[105]

Much of what was said as to the exclusion of the hearsay evidence in

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102 *See* note 75 and accompanying text *supra.*

103 *See* text accompanying notes 38-40 *supra.*

104 410 U.S. 284 (1973) (8-1 decision).

105 *Id.* at 302 (citations omitted). However, the Court did note that:

> In reaching this judgment, we establish no new principle of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the State in the establishment and the implementation of their own criminal rules and procedures.

Id. at 302-03.

Chambers applies with equal force to polygraph evidence in an identification case.

Opponents might argue that formal, in-court admissibility is unnecessary in identification cases since no prosecutor would proceed with such a case in the face of an informal polygraph examination indicating the defendant's innocence. The hard reality of the situation is that at the present time a number of prosecutors' offices in the State of New York, and presumably elsewhere, will neither consider informal test results obtained by the defendant nor administer their own examination to a willing defendant. A rule admitting polygraph evidence would encourage its informal use and obviate the need for a trial in many cases.

Suggested Guidelines

The following guidelines are proposed as a possible solution to the polygraph problems facing appellate courts in New York, as well as the rest of the nation. By admitting polygraph results in the limited area of identification cases, the courts will be able to evaluate the impact of such evidence on the judicial process and establish further guidelines for its future use.

(1) The rule of *Frye* should be modified. In so doing, courts may adopt either of the following approaches:

(a) Polygraph evidence should be admitted in the discretion of the trial court on the basis of a balancing test. The degree of reliability and the risk of impact would be measured against those considerations in the particular case which call for admission. This would allow admission in possible "wrong man" cases as well as any other compelling factual circumstances which may arise. Furthermore, as the reliability increases, so, too, may the possible uses of the polygraph.

(b) As in *Commonwealth v. A Juvenile*,[106] courts may continue to adhere to the *Frye* rule but allow admission in "carefully defined circumstances designed to protect the proper and effective administration of criminal justice."[107] This would permit an appellate court to delineate and more closely supervise those instances where the polygraph will be admitted. Initially, admission should be limited to those cases involving pure identification.

(2) Admission should be further restricted to those cases where the defense has agreed and stipulated to the administration of the test, as well as its subsequent admission at trial, regardless of outcome. The

106 313 N.E.2d 120 (Mass. 1974). *See* text accompanying notes 98-100 *supra*.
107 313 N.E.2d at 124.

defendant should further acknowledge his understanding of the procedure. There appears no valid reason to require the consent and approval of the prosecution. Otherwise, a prosecutor who continues to reject the use of the polygraph could frustrate the very policy reasons militating in favor of its admission. Judicial supervision would insure that the polygraph is admitted only in proper cases.

(3) All possible methods of selecting and qualifying the expert should be explored. A licensing system for polygraph experts should be considered. Regardless of the methods of selection, the main thrust must be to insure that there be no repetition of the scandalous situation presently existing in many areas of expert testimony. In all too many cases, each side seeks to retain an expert who will give the most favorable testimony, not necessarily the correct or best opinion. The court must be completely satisfied as to the competency of the examiner. In the interim the following simple rules should be applied:

(a) Should the prosecution wish to join in the defendant's stipulation to the administering of the polygraph, then the parties may also agree as to the selection of the examiner. This stipulation, of course, would not alone be grounds for admission of the results. Absent such an agreement, the court should appoint the expert from a list of qualified operators.[108]
(b) After the administration of the test and prior to a court ruling on admissibility, the expert in a pretrial evidentiary hearing must be fully cross-examined as to his education, background, and experience. In this regard, it must be always remembered that the polygraph technique involves a diagnostic procedure and is not a mere mechanical operation. It cannot be too strongly stressed that the prime requisite to its effectiveness and reliability is the competence of the examiner.
(c) In addition, the court must closely scrutinize the circumstances and conditions surrounding the administration of the test and must carefully examine the underlying charts, data, and graphs upon which the opinion of the examiner is predicated.
(d) Where the court entertains doubts about the reliability of either the test or the examiner, it should refuse to admit the results.

(4) If the evidence is admitted by the court, the jury[109] must be carefully charged:

(a) The instructions must stress that the results of the test are not

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108 United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (mem.).

109 As to nonjury cases, assuming the reliability of the polygraph, the argument that the trier of the facts would tend to invest the testimony with scientific infallibility, falls of its own weight. In light of the full discretion granted a trial judge, as to both the weight of the evidence and the credibility of the witnesses, it would seem to be totally inconsistent to deny him any evidence which would assist him in finding the truth.

direct proof of guilt or innocence; that the test must at all times be regarded and considered for what it is — an aid to the court and the jury in the ceaseless search for the truth, and it is not a substitute for either court or jury; that the test is neither an absolute nor the ultimate determinant; finally, that the testtimony of the examiner is no more than opinion evidence, the weight and effect of which is a question of fact for the jury as it weighs *all* the evidence in the case.

(b) The full charge on the function of expert testimony must be given carefully and in detail. In substance, it must be made apparent that this evidence is admitted to aid the jury in reaching a decision in the context of *all* the evidence.

These guidelines should not prove burdensome. At a pretrial, prepolygraph hearing the trial court would determine whether, according to the established standards, the circumstances warrant administration of the test. The examiner would also be selected at this time. In a pretrial, *post*-polygraph hearing the court would scrutinize the testing conditions and results. It would also hear any additional arguments regarding the examiner's qualifications. At the trial the parties would examine the polygraphist in the same manner as any other expert witness. At the end of the trial, the jury would be charged in accordance with the above guidelines.

CONCLUSION

There remains unanswered the haunting inquiry of the nineteenth century student: "What would really prevent erroneous identification?"[110] In the most perfect of worlds and with all the suggested guidelines adopted, perfected, implemented and in full force and effect, inequities, inequalities and injustices will continue to exist—at least in this life. The tragedy of Balestrero will always be possible, but I suggest that our continued failure to embrace, within the concept of this paper, all proper scientific aids in this troubled area of the law, "will only serve to question the ability of the courts to efficiently administer justice."[111]

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110 *See* text accompanying notes 45-46 *supra.*

111 Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).