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## LICENSING OF DETECTION OF DECEPTION OPERATORS IN ILLINOIS

### NEED FOR A RE-EVALUATION OF THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN CIVIL AND CRIMINAL TRIALS

ON August 23, 1963, the Illinois legislature passed an act to provide for the licensing of detection of deception examiners—commonly known as polygraph or lie detector operators—and regulation of that profession.<sup>1</sup> In essence, the act sets forth the conditions under which persons may be admitted to practice detection of deception with a polygraph, the standards they must observe, and the types of polygraph devices that they may henceforth be used lawfully. The passing of this law may well force upon the Illinois courts a re-evaluation of the admissibility of polygraph evidence in civil and criminal trials.

Aside from such general qualifications as to age, citizenship, moral fitness and integrity, and absence of a criminal record, the act requires a prospective polygraph operator to pass an examination conducted by an examination committee to determine the applicant's competency in detecting deception with the polygraph. Furthermore, the act provides that an applicant must have had conferred upon him an academic degree, at least at the baccalaureate level, from a college or university accredited by the Department of Registration and Education of the State of Illinois, and must serve an internship training in polygraph testing of not less than six months under the personal supervision and control of a licensed examiner.<sup>2</sup>

As to the types of detection of deception instruments that will henceforth be acceptable, the act provides that only such instruments that record permanently and simultaneously a subject's cardio-vascular and respiratory patterns as minimum standards may be used, but the instrument may record additional physiological changes pertinent to the detection of deception.<sup>3</sup> The act further contains the usual sections designed to implement legis-

<sup>1</sup> Ill. Rev. Stat. Ch. 38, § 951 *et seq.* (1963).

<sup>2</sup> *Id.* at § 961.

<sup>3</sup> *Id.* at § 953.

lation of this type, and provides penalties for the violation of any or all provisions of the law. So far, only two other states, Kentucky<sup>4</sup> and New Mexico,<sup>5</sup> have similar licensing laws.

#### HISTORICAL DEVELOPMENT AND TECHNIQUES OF LIE DETECTION

The theory of the lie detector is based upon the discovery, made many years ago, that when there is an attempt to deceive, the blood pressure of the subject increases, his pulse rate changes, his breathing is apt to be shallow and suppressed, and fluctuations occur in his electrical resistance which are revealed by activity of the perspiration glands. The polygraph instruments used today under the popular name of "lie detector" contain at least the first two and often the third of the following devices: (1) a blood pressure-pulse rate test device; (2) a breathing test instrument; and (3) a galvanograph, which registers the galvanic skin response.

It is reported that as early as 300-250 B.C., Erasistratus, a Greek-born physician at the royal court of Syria, attempted to detect emotion by an observation of the pulse quickening process during emotional states.<sup>6</sup> In the 1890's the Swiss scientist Prof. Carl G. Jung worked on a deception test which measured the speed of a suspect's response, the theory being that liars hesitate before answering. About that time other psychologists came forward with a psycho-galvanometer test based on the idea that lying makes a man perspire.<sup>7</sup> This is the same test that Father Summers of Fordham University was later credited with "discovering" and which he used in the case that lead to the first reported United States decision where lie detector evidence was admitted.<sup>8</sup>

In this country, William M. Marston started working on the practicability of detecting deception with the systolic blood pressure test in 1915 with experimentation at the Harvard Psycho-

<sup>4</sup> Ky. Rev. Stat. Ch. 329, § 329.010 *et seq.* (1962).

<sup>5</sup> N. Mex. Stat. 67-30-17 *et seq.* (1963).

<sup>6</sup> Burack, *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* 46 J. Crim. L., C. & P.S. 414, 415 (1955).

<sup>7</sup> Marston, *The Lie Detector Test* 33 (1938).

<sup>8</sup> In *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Cty. Ct. 1938), discussed *infra* at n.22.

logical Laboratory.<sup>9</sup> Marston's techniques were later modified and applied to police procedure by Dr. John A. Larson at Berkeley, Calif., from 1921 to 1923. From 1923 to 1928, Dr. Larson conducted further investigation with the lie detector in the Evanston, Illinois Police Department and in the penitentiaries and courts of Illinois. During this period, Marston continued his work with the test in New York, on the West Coast, and in the Texas State Penitentiary. In short order a series of lie detector devices were placed on the market under such exotic names as: polygraph (by Larson and Keeler); psychograph (by Lee); deceptograph (by Stoelting); and many others.<sup>10</sup>

When in use, a lie detector records the various changes which occur in the physical state of the subject being questioned on a moving strip of paper. There is, of course, no such thing as a true "lie detector." The name is used to indicate an instrument which, when operated by a trained and experienced examiner, will help detect deception. The instrument serves as a diagnostic aid. "Its validity rests almost wholly upon the competency and integrity of the operator."<sup>11</sup> Throughout the years a growing concern has been felt for the fact that unscrupulous persons have established themselves as polygraph operators, using totally inadequate instruments, or sophisticated devices which they do not know how to use. Furthermore, many of these so-called lie detector operators lack the rudimentary knowledge of the art of interrogation, and display a total ignorance of the interpretation of polygraph records. These practices are largely responsible for the lack of good repute that is associated in the mind of lawyers and judges with the polygraph. Laws such as the one enacted in Illinois are designed to prevent incompetent persons from operating in this field.

In an effort to upgrade the quality of polygraph examiners,

<sup>9</sup> Marston, *Systolic Blood Pressure Symptoms of Deception*, 21 J. Experim. Psych. 117 (1917).

<sup>10</sup> For a detailed study on the history of the polygraph, and the technical aspects of mechanical detection of deception, see: Trovillo, *A History of Lie Detection*, 29 J. Crim. L. & C. 848 and 30 J. Crim. L. & C. 104 (1939); Reid, *Stimulated Blood Pressure Responses in Lie Detector Tests and a Method for their Detection*, 36 J. Crim. L. & C. 202 (1945); Larson, *Lying and Its Detection* (1932); Marston, *The Lie Detector Test* (1938); Inbau, *Lie Detection and Criminal Interrogation* (1942); Lee, *The Instrumental Detection of Deception* (1953).

<sup>11</sup> Dienstein, *The Rights of the Subject in Lie-Detector Interrogation*, 1 Police 41, 43 (Nov.-Dec. 1956).

a number of reputable and experienced operators founded an association called the American Academy of Polygraph Examiners. Rigorous standards for admission are set up and a code of professional ethics governs the conduct of all members. The group recognizes the potential sources of incalculable harm which exist when the instrument is used by untrained or unscrupulous persons, and at the fourth Annual Meeting of the group in Washington, D.C., in 1957, the Association published a statement of principles concerning the instrument to be used; the qualifications needed for an examiner; the conditions under which tests must be made; and the form of the examiner's report.<sup>12</sup>

Not every subject can be successfully interrogated with the use of a lie detector. Certain factors affect the validity of the readings obtained with the polygraph. Well trained examiners have learned how to spot these factors and will decline to test subjects whom they feel cannot produce accurate test readings with the instrument. This narrows the field of potential lie detector "subjects" considerably; in criminal cases it is not unusual to see an examiner refuse to test one subject out of five. A prominent author on the subject of polygraph interrogation enumerates the following factors which occasion difficulties in the diagnosis of detection of deception with the use of a polygraph:<sup>13</sup>

- (1) Emotional tension—"nervousness"—experienced by a subject who is innocent and telling the truth regarding the offense in question, but who is nevertheless affected by (a) fear induced by the mere fact that suspicion or accusation has been directed against him; and (b) a guilt complex involving another offense of which he is guilty.
- (2) Physiological abnormalities, such as (a) excessively high or low blood pressure; (b) diseases of the heart; (c) respiratory disorders, etc.
- (3) Mental abnormalities, such as (a) feeble-mindedness, as in idiots, imbeciles, and morons; (b) psychoses or insanities, as in manic depressives, paranoids, schizophrenics, paretics, etc; (c) psychoneuroses, and psychopathia, as among so-called "peculiar" or "emotionally unstable" persons—those who are neither psychotic nor normal, and who form the borderline between these two groups.
- (4) Unresponsiveness in a lying or guilty suspect, because of (a)

<sup>12</sup> The text of this "Statement of Principles" is reprinted in: Richardson, *Modern Scientific Evidence* (1961), at pp. 304-307.

<sup>13</sup> Inbau, *op. cit. supra* n.10, at pp. 19-25. The author has recently announced that a new edition of his book, dealing only with the lie detector, is forthcoming.

lack of fear of detection; (b) ability to consciously control responses by means of certain mental sets or attitudes; (c) a condition of "sub-shock" or "adrenal exhaustion" at the time of the test; (d) rationalization of the crime in advance of the test to such an extent that lying about the offense arouses little or no emotional disturbance.<sup>14</sup>

### THE COURTS' ATTITUDE TOWARD POLYGRAPH EVIDENCE

The courts have generally been extremely reluctant in admitting into evidence testimony as to the results of polygraph examinations. The first appellate decision involving lie detector evidence was rendered in 1923.<sup>15</sup> In that case, the defendant in a murder trial offered in evidence the results of a systolic blood pressure test to which he had voluntarily submitted in an effort to prove the truth of his defense. The trial court refused to permit the lie detector operator to testify as to the results of his examination.

On appeal, the Court of Appeals for the District of Columbia upheld the trial court's ruling and said that the lie detector was not sufficiently reliable and lacked as yet the general acceptance of scientists. In propounding the "general acceptance" rule, still adhered to today in most jurisdictions, Justice Van Orsdel, speaking for the court, 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.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition. . . .<sup>16</sup>

The *Frye* case has been followed in the great majority of jurisdictions. Trial courts have constantly refused to admit evidence of the results of lie detector tests, and their refusal has been

<sup>14</sup> In the following twenty pages of his book, Inbau proceeds to explore these factors in a detailed fashion.

<sup>15</sup> *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). Frye was convicted although Marston was going to testify that in his opinion Frye was innocent. Later it was established that Frye WAS innocent and was wrongly convicted of murder. 14th Annual Report of New York Judicial Council 265 (1948).

<sup>16</sup> *Id.* at 1014.

upheld on appeal. Almost all of the courts so holding indicated that the reason for the rejection of such testimony is that lie detection by means of a polygraph or similar device has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory.<sup>17</sup> Some courts have refused to admit the evidence without giving any reason for its exclusion.<sup>18</sup>

The reviewing tribunals have also uniformly reversed convictions in criminal proceedings when the trial court had admitted, over defendant's objection, testimony as to the result of lie detector tests given to the defendant,<sup>19</sup> or to witnesses for the state,<sup>20</sup> and held the admission of such testimony into evidence to be prejudicial error. It has also been held that the accused's refusal to take the lie test cannot be referred to at the trial to show the consciousness of guilt on his part. Testimony of such refusal was held to effectively deprive a defendant of a fair trial by precluding the jury from giving a fair consideration to his defense.<sup>21</sup>

In one of the few reported cases where a trial court admitted the testimony of a lie detector operator, the defendant offered the testimony in an attempt to show that he could not have committed the crime as charged. Over the state's objection, the trial judge

<sup>17</sup> *Marks v. United States*, 260 F.2d 377 (7th Cir. 1959), *cert. denied*, 358 U.S. 929. *Accord*, *State v. Anderson*, 261 Minn. 431, 113 N.W.2d 4 (1962); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957), *cert. denied*, 356 U.S. 933; *People v. Dobler*, 29 Misc. 2d 481, 215 N.Y.S.2d 313 (Cty. Ct. 1961); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951), *cert. denied*, 342 U.S. 898.

<sup>18</sup> See, e.g., *United States ex rel. Sadowy v. Fay*, 189 F. Supp. 150, *aff'd*, 284 F.2d 426 (2d Cir. 1960), *cert. denied*, 365 U.S. 850: lie detection tests not admissible, neither for the state nor the defendant, even though consent given; *Wilcutt v. State*, 123 So. 2d 193 (Ala. App. 1961), *cert. denied*, 271 Ala. 315, 123 So. 2d 203; *State v. McGee*, 91 Ariz. 101, 370 P.2d 261 (1962); *People v. Wochnick*, 98 Cal. App. 2d 124, 219 P.2d 70 (1950), *cert. denied*, 342 U.S. 888; *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950); *Marable v. State*, 203 Tenn. 400, 313 S.W.2d 451 (1958).

<sup>19</sup> *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961). See also *State v. Arnwine*, 67 N.J. Super. 483, 171 A.2d 124 (1961).

<sup>20</sup> See, e.g., *Mattox v. State*, 240 Miss. 544, 128 So. 2d 368 (1961); *Washburn v. State*, 167 Tex. Crim. 125, 318 S.W.2d 627 (1960), *cert. denied*, 359 U.S. 965.

<sup>21</sup> *State v. Emory*, 190 Kan. 406, 375 P.2d 585 (1962). *Accord*, *Mills v. People*, 139 Colo. 397, 339 P.2d 998 (1959); *State v. Driver*, 38 N.J. 255, 183 A.2d 655 (1962). In a somewhat surprising departure from well established principles, the highest court in Maine indicated, by way of dictum, in *State v. Mottram*, 158 Me. 325, 184 A.2d 225 (1962), that a person's refusal to take a lie detector test was admissible to show consciousness of guilt if it is shown that such person believed the test to be trustworthy or dependable. But in a recent Iowa decision, the court said that the refusal to take a lie detector test may not be shown as evidence of conscious guilt similar to evidence of flight: *State v. Green*, 121 N.W.2d 89 (Iowa 1963).

received the evidence and said that the time had come for the courts to recognize the efficacy of lie detector tests where the testimony of a qualified expert shows that the tests are in excess of 99 percent accurate.<sup>22</sup> Since the defendant was acquitted, the case was not carried to the New York Court of Appeals.

The principle of the *Kenny* case was repudiated in *People v. Forte*,<sup>23</sup> decided the same year, where the trial court refused to allow an accused murderer to be given a lie detector test by the same expert that testified in the *Kenny* case. On appeal the trial court's ruling was upheld, the high court noting that the record was devoid of any evidence tending to show a general recognition that the pathometer possessed efficacy as an instrument for detecting deception.<sup>24</sup>

There has been a slow trend, in a few jurisdictions, toward admitting evidence of lie detector examinations where both the prosecution and defense have agreed and stipulated in writing upon the admissibility of the test findings prior to the taking of the test. The first case where it was attempted to introduce evidence of a stipulated lie test was *Le Fevre v. State*.<sup>25</sup> The defendant agreed to take a lie detector test at the request of the prosecution and stipulated as to its admissibility in evidence. The test was favorable to the defendant but the prosecution was not satisfied and requested another test before a different expert, to which the

<sup>22</sup> *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (Cty. Ct. 1938). The expert witness, Prof. Walter Summers of Fordham University, used a psychogalvanometer (pathometer) and claimed that his findings of accuracy were based upon a study covering 6000 individual tests. His estimates are generally considered exaggerated. It also might be pointed out that the pathometer records only galvanic skin response and nothing else. Such a device does not qualify for use in Illinois under the present law.

<sup>23</sup> 167 Misc. 868, 4 N.Y.S.2d 913 (Cty. Ct. 1938).

<sup>24</sup> *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938). The expert proposed to use the pathometer, an instrument not presently used.

<sup>25</sup> 242 Wis. 416, 8 N.W.2d 288 (1943). The Illinois Supreme Court, in a decision rendered in 1963, but before the enactment of the act providing for licensing of polygraph operators, was faced with a similar problem in *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963). The defendant orally stipulated that he would take a lie detector test and that the results of the test would be admissible at the trial. He subsequently took the test but objected to the admission at trial of the reports of the operator, which were admitted, over his objection, without foundation. The Supreme Court subsequently reversed Zazzetta's conviction and remanded, holding that since the expertise of the operator and interpreter of test results has substantial bearing on the reliability of such tests, and since the operator was not available for cross-examination, the reports were improperly admitted. The court discussed the controversy of scientific reliability of the Polygraph, but expressly refused to take sides in that argument and rested its decision upon the narrow issue of the admissibility of the operator's report only.



defendant again stipulated. The result was the same; the prosecution went ahead nevertheless and tried the case. At the trial the defendant offered into evidence the results of the tests but the state's objection was sustained. It must be noted that the experts were not called to the stand; only their reports were offered in evidence.

In reversing the conviction, the Supreme Court of Wisconsin may well have been influenced by these test results, especially since the district attorney testified on trial that he had told the defendant if the tests were favorable to the latter that the prosecution would have to look elsewhere for the guilty party. The high court said that although the findings of the lie detector experts were properly excluded from the jury, it regarded the results as very significant.

This case was followed by *People v. Houser*,<sup>26</sup> in 1948, wherein the defendant and his counsel signed a written stipulation with the prosecuting attorney, agreeing that the defendant would take a lie detector test, and agreeing that the opinions and findings of the operator would be offered as evidence for the state or for the defendant. The defendant also stipulated that the operator was duly qualified and further waived his constitutional privilege against self-incrimination. The results indicated that he was not telling the truth. At the trial, defense counsel objected to the admission in evidence of the operator's testimony, but his objection was overruled.

On appeal, he argued that since lie detector evidence has not received evidentiary recognition, it was error to admit the results of the test. The Appellate Court dismissed defendant's argument summarily in stating:

It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that the operator . . . was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth.<sup>27</sup>

In *Boeche v. State*,<sup>28</sup> the defendant submitted to a lie detector

<sup>26</sup> 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

<sup>27</sup> *Id.* at 691, 193 P.2d at 942.

<sup>28</sup> 151 Neb. 368, 37 N.W.2d 593 (1949).

test after entering into an agreement with the prosecution that she would be released if the test demonstrated her innocence. The lie detector operator found that the defendant was telling the truth, but the state reneged on its agreement. The Nebraska Supreme Court held that the stipulation was not binding on the state since the lie detector had not achieved scientific acceptance. But the dissenting Justice Chappell thought that the time had come for a judicial acceptance of lie detector test results upon proof of the examiner's competence.<sup>29</sup>

In 1957, a defendant charged with robbery orally stipulated to be bound by the results of tests with a polygraph but objected to the introduction of the results at the trial. The court seemed to intimate that it would be inclined to admit such evidence if the parties had entered into a written stipulation, but held that the lack of formality in orally stipulating to an agreement of such importance precluded the admission of the test results.<sup>30</sup>

In *State v. McNamara*,<sup>31</sup> the defendant agreed in writing to submit to a polygraph test which turned out to be unfavorable to her. At the trial, she strenuously objected to the admission of the test results, but the trial court overruled the objection. On appeal the lie detector evidence was held properly admitted by reason of the agreement.

The following year, however, the New Mexico Supreme Court held that the admission of lie test results over objection of the defendant, even though the latter had signed a waiver agreeing to be bound by the test, was error, since the signing of a waiver did not alter the rule as to admissibility.<sup>32</sup> The court seems to have been unaware of any other decision which held such evidence admissible and makes no mention of the *Houser* and *McNamara* cases.

Finally, in 1962 the Arizona Supreme Court, in *State v. Valdez*,<sup>33</sup> at the request of the trial court, formulated the rule that

<sup>29</sup> *Id.* at 379, 37 N.W.2d at 600.

<sup>30</sup> *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. Ct. App. 1957). This decision was rendered prior to the enactment of the polygraph operators' licensing law.

<sup>31</sup> 252 Iowa 19, 104 N.W.2d 568 (1960).

<sup>32</sup> *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961).

<sup>33</sup> 91 Ariz. 274, 371 P.2d 894 (1962).

when parties in either a civil or criminal case stipulate to the admission of lie detector test results, such results might be admitted into evidence, providing: (1) the stipulation was in writing between both parties and their counsels (or between the city attorney, the defendant and his counsel); (2) an adequate foundation as to the examiner's qualifications and the conditions under which the test was given was laid; (3) that the admissibility of the evidence, notwithstanding the stipulation, is at the discretion of the trial judge who rules on the qualifications of the examiner; and (4) that the judge instruct the jury that the expert's testimony does not tend to prove or disprove any element of the case, but tends only to indicate that at the time of the examination the subject was or was not telling the truth.

In the absence of a written stipulation, no reviewing tribunal has, as yet, upheld the admissibility of evidence tending to show the results of lie detector examinations. The courts have given various reasons to justify their position. The most common argument is that lie detection has not yet gained general scientific acceptance, a reiteration of the *Frye* case principle.<sup>34</sup> Other courts excluded lie detector evidence because it was the most glaring type of hearsay,<sup>35</sup> or because no foundation was laid,<sup>36</sup> or because its admission would impair the vital function of cross-examination since the machine escapes all examination.<sup>37</sup> One court excluded the evidence because the test was not proved scientifically reliable and observed that there are "several valid" reasons for exclusion apart from lack of scientific acceptance, but did not state these reasons.<sup>38</sup>

### WHY IS JUDICIAL RECOGNITION WITHHELD?

In examining the decisions, many of the arguments and reasons given for the refusal to admit into evidence the results of lie

<sup>34</sup> *Frye v. United States*, *supra* n.15. See also *Commonwealth v. McKinley*, 181 Pa. Super. 610, 123 A.2d 735 (1956).

<sup>35</sup> *United States v. Stromberg*, 179 F. Supp. 278 (D.C.N.Y. 1960).

<sup>36</sup> *Colbert v. Commonwealth*, *supra* n.30. The court did not specify what would have been an adequate foundation. *Accord*, *State v. Walker*, 37 N.J. 208, 181 A.2d 1 (1962); *Looper v. State*, 381 P.2d 1018 (Okla. Crim. 1963).

<sup>37</sup> *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947). *Accord*, *Boeche v. State*, *supra* n.28.

<sup>38</sup> *Lee v. Commonwealth*, 200 Va. 233, 105 S.W.2d 152 (1959).

detector examinations seem unconvincing. The general acceptance of a test or experiment by the majority of scientists should be the criterion for taking judicial notice of scientific facts, not its basis for admissibility.<sup>39</sup> Many courts are in accord with this view, and have repeatedly stated that the fact that scientists differ on the validity of particular tests or experiments goes to the issue of weight and not to admissibility.<sup>40</sup> Furthermore, what "general scientific acceptance" are the courts talking about? Is it general scientific acceptance among medical men, psychiatrists, policemen, law professors, or polygraph operators? Many of the detractors of lie detection as a science or art—there seems to be no unanimity on this point—are outstanding men in their own field but have never actually studied the polygraph, the interrogation techniques and other problems connected with such tests. Their writings and opinions are of an ever greater "glaring type of hearsay" than the proffered evidence in the *Stromberg* case.<sup>41</sup>

A prominent medical man asserted that to establish the qualifications and standards for a polygraph operator is a most difficult and hazardous task. Medical training, like virtue, is always desirable, but on the other hand a degree of M.D. is in and of itself no more a qualification for a successful polygraph operator than the lack of a medical degree is a bar to it.<sup>42</sup> It is matter of common knowledge that the "scientific community" in practically every science, even in the exact sciences of physics, chemistry, etc., harbors a great deal of differences of opinion concerning procedures and techniques—by experts in that field. Needless to say, when they go into another person's field, they are no longer competent.

The argument of inaccuracy or chance of error is unsound today, because in the present state of development of lie detection a high degree of accuracy is achieved with the polygraph. Courts sometimes erroneously rely upon conservative estimates of accuracy made many years ago to justify their conclusion of unreliability.

<sup>39</sup> McCormick, Evidence § 170 (1954).

<sup>40</sup> E.g., *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E.2d 567 (1951) (drunkometer test); *State v. Olivas*, 77 Ariz. 118, 267 P.2d 893 (1954) (intoxication test).

<sup>41</sup> *United States v. Stromberg*, *supra* n.35.

<sup>42</sup> Inbau, *Lie Detection and Criminal Interrogation* 58 (1942).

Thus in *Commonwealth v. Fatalo*,<sup>43</sup> the court erroneously used a conservative estimate that the accuracy of lie detection tests must be fixed somewhere around seventy-five percent to eighty percent in support of its contention that the lie detector is too unreliable and the margin of error too great. This estimate was made by Professor Inbau in 1942.<sup>44</sup>

Dean William Wicker of the University of Tennessee College of Law, in discussing Inbau's book, stresses the point that Inbau does not assert that there is a margin of twenty-five percent positive error, but that Inbau's analysis indicates that findings are indefinite in twenty percent of those tested. The maximum probable error is less than five percent.<sup>45</sup> Also, let's not forget that Inbau made this statement more than twenty years ago. In weighing the issues, the same author furthermore writes:

Lie-detector tests, when conducted by competent and experienced operators, are of considerable practical utility. In the first place, with the aid of a lie-detector, it is possible to detect deception with much greater accuracy than is otherwise attainable.<sup>46</sup>

In the same *Fatalo* decision,<sup>47</sup> the Massachusetts Supreme Judicial Court also cited an article written by Professor Skolnick in support of its decision.<sup>48</sup> However, much of Skolnick's lengthy text is in the abstract, ignoring practical facts and recent statistics, while failing to conclusively document his position adverse to the lie detector.

A more enlightened study, with exhaustive statistics, was published in 1960 by Richard O. Arther, President of Scientific Lie Detection of New York City.<sup>49</sup> Arther studied 7400 actual cases over a period of seven years. He reports that the polygraph technique has a ninety-five percent accuracy, with less than a four percent margin of inconclusive determination, and a one percent margin of maximum possible error. Other statistical research

<sup>43</sup> 191 N.E.2d 479 (Mass. 1963).

<sup>44</sup> Inbau, *op. cit. supra* n.42, at pp. 54-55.

<sup>45</sup> Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 *Tenn. L. Rev.* 711, 713 (1953).

<sup>46</sup> Inbau, *op. cit. supra* n.42, at p. 54.

<sup>47</sup> *Commonwealth v. Fatalo*, *supra* n.43.

<sup>48</sup> Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 *Yale L.J.* 694 (1961).

<sup>49</sup> Arther, *The Lie Detector—Is It of Any Value?*, 24 *Fed. Probation* 36 (Dec. 1960).

indicates a high degree of accuracy in the results obtained by means of lie detector tests. As one writer observed, the machine used in polygraphic work is extremely accurate mechanically, and is probably almost as good as it will ever be.<sup>50</sup>

Why, then, are the courts so reluctant in extending judicial recognition to the polygraph? The reasons other than unreliability assigned by the courts as justifying their refusal to admit evidence of this type are equally "transparent." While undoubtedly justifiable in individual cases, the assigned reasons should not be regarded as formulating general rules.

The general acceptance rule does not require an absolute infallibility as a standard for admission of scientific evidence.<sup>51</sup> Courts have freely accepted in evidence testimony tending to show the results of dermal nitrate tests for gunpowder residues,<sup>52</sup> yet these tests are by no means considered infallible and have been discredited as totally unreliable by experts and other courts.<sup>53</sup> It seems also strange that the courts continue to refuse to accept in evidence the results of lie tests on the basis of a "lack of general scientific acceptance," while stating in the same breath that the lie detector is a useful instrument in criminal investigations and advocating its use in law enforcement.<sup>54</sup>

<sup>50</sup> Burack, *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* 46 J. Crim. L., C. & P.S. 414 (1956); the author indicates that an accuracy of over 99% may be expected if the tests are conducted by qualified operators.

<sup>51</sup> *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). However, the court added that a greater standardization of the instrument, technique and examiner's qualifications, as well as endorsement by a larger segment of the psychological and physiological branches of science must be obtained before it would permit the use of lie detector evidence in the courtroom in the absence of stipulation.

In *People v. Williams*, 164 Cal. App. 2d 858, 331 P.2d 251 (1958), it was said that scientific acceptance by a profession as a whole is not necessary; that in this day of specialization, it is sufficient foundation for the admissibility of scientific evidence to show that the particular scientific test involved has been accepted generally by a limited few who would be expected to be familiar with its use.

<sup>52</sup> *State v. Foster*, 44 Hawaii 403, 354 P.2d 960 (1960); *Commonwealth v. Westwood*, 342 Pa. 289, 188 Atl. 304 (1936); *Henson v. State*, 159 Tex. Crim. 647, 266 S.W.2d 864 (1953).

<sup>53</sup> *Brooks v. People*, 139 Colo. 388, 339 P.2d 993 (1959). See also: *Turkel & Lipman, Unreliability of Dermal Nitrate Test for Gunpowder*, 46 J. Crim. L., C. & P.S. 281 (1955).

At the first seminar on the scientific aspects of police work conducted by the International Criminal Police (Interpol) in 1963, the participating crime experts of the several countries, including the U.S.A., unanimously considered the traditional paraffin (dermal nitrate) test to be of no value whatsoever, neither as evidence to be put before the courts, nor even as a sure indication for the police officer. 19 Intern. Crim. Pol. Rev. 25, 28 (Jan. 1964).

<sup>54</sup> *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43, 189 S.W.2d 541 (1945). Similar observa-

The argument that the admission of lie detector evidence would tend to eliminate the function of the jury as a fact finding body can be met by a bench instruction to the jury that the expert testimony does not tend to prove or disprove any element of the crime, but tends only to indicate that at the time of the examination the subject was or was not telling the truth.<sup>55</sup> It would still remain for the jury to determine what corroborative weight and effect such testimony should be given.<sup>56</sup>

The right to an effective cross-examination is not impaired by the admission of lie detector evidence. The machine does not testify; the operator testifies as to conclusions he has drawn from the test, much like a doctor interprets for the jury the x-ray picture he has taken.

There is an almost absolute dearth of case material on the problem of laying a foundation for the admission of findings of lie detector tests for the simple reason that no appellate court has yet upheld the admissibility of such evidence in the absence of a stipulation. According to well established principles of evidence, before the results of a new technique or scientific test can be admitted into evidence, the party offering testimony as to the results of such tests must establish: (1) that the test has gained widespread scientific recognition; (2) that adequate test conditions were met in order to insure an accurate result; (3) that the operator or examiner was competent in his line of work.

Wigmore has said, "All that should be required as a condition [to admission in evidence] is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications."<sup>57</sup> Today the lie detector more than meets these requirements.

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tions were made in *State v. Lowry*, *supra* n.37; *Leeks v. State*, 95 Okla. Crim. 326, 245 P.2d 764 (1952). In *Davis v. State*, 106 Tex. Crim. 456, 308 S.W.2d 880 (1957), the court said that while the admission of lie detector test results is reversible error, this in no way condemns their use as a means of interrogation and investigation.

<sup>55</sup> *State v. Valdez*, *supra* n.33.

<sup>56</sup> This allegation also raises the question whether or not practically ALL findings of expert witnesses invade the province of the jury?

<sup>57</sup> 3 Wigmore, *Evidence* § 990 (3d ed. 1940).

## CONCLUSION

The time has come for our courts to reevaluate their attitude toward mechanical truth detection tests. Dean Wicker pointed out that all those connected with our courts know that today intentional perjury at the trial has become almost commonplace. In many instances it is very difficult, if not impossible, even for the experienced trial lawyer, to expose on cross-examination the many lies of perjuring witnesses. "The legal profession can no longer continue to assume a complacent attitude concerning our present methods of exposing mendacity."<sup>58</sup> The polygraph is widely used to check employee loyalty and honesty. Banks, insurance companies, industrial concerns use it daily for employee screening. Prudent lawyers even send their clients and witnesses to polygraph operators to avoid the embarrassing experience of hearing a totally different story on cross-examination.

For the past twenty-five years, lie detector test results have been admitted in evidence in criminal, quasi-criminal, and in civil cases by a group of liberal and progressive judges of the Municipal Court of Chicago in cases where there was no evidence other than contradictory testimony of parties willing to submit to polygraph testing.<sup>59</sup>

The researchers have proven, and tests have demonstrated, that the lie detector is a very accurate machine, when handled by a competent and experienced operator.<sup>60</sup> Under such circumstances, there is no scientific or legal reason why the results of an examination by means of a lie detector, administered with the consent of the subject and his counsel by a qualified operator, should not be admitted in evidence.

In the *Frye* case,<sup>61</sup> cited as a blanket "precedent" for the unreliability of the lie detector, a systolic blood pressure test method

<sup>58</sup> Wicker, *op cit. supra* n.45, at 712.

<sup>59</sup> Reid, *The Lie Detector in Court*, 4 DePaul L. Rev. 31, 39 (1954). The author is firmly convinced that lie detector results should be admitted as evidence upon an agreement and stipulation entered into beforehand with opposing counsel.

<sup>60</sup> Trovillo, *Scientific Proof of Credibility*, 22 Tenn. L. Rev. 743 (1953). At p. 765 the author said: "Here is a good method in qualified hands. . . . It is both scientific and democratic. While not usurping the places of other forms of scientific evidence, it must be given its rightful seat in the courtroom."

<sup>61</sup> *Frye v. United States*, *supra* n.15.



was used. This method has been found to be inadequate and would not have complied with the requirements of the new Illinois law.<sup>62</sup> Today's instruments record pulse rate, blood pressure, respiration and usually perspiration. The time has come to overturn the *Frye* holding as an anachronism, and to admit evidence as to the results of a polygraph test administered by a well qualified and experienced expert to a willing subject. It seems totally incongruous for our courts to keep hammering on the unreliability of lie detector tests, and at the same time admit into evidence the results of a test taken under a formal written stipulation. There is no judicial magic in such a stipulation. "If lie detector tests are as unpredictable and misleading as the courts are so certain they are, then their reliability and usefulness to the court and jury . . . remains the same, regardless if they are admitted by stipulation or not."<sup>63</sup>

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<sup>62</sup> Ill. Rev. Stat. Ch. 38, § 953 (1963).

<sup>63</sup> From the brief for the defense in *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963).