Polygraph

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UNFOUNDED RAPE COMPLAINTS AND THE POLYGRAPH

By

George N. Saxton, Detective Sergeant
Eugene J. Kanin, Ph.D.
Severine J. Brocki, Ph.D.

Abstract

There is a wide distribution of reports of rape which are classified as unfounded by law enforcement agencies. The distribution does not appear to be related to the male/female composition of the investigative teams, departmental policies, or the location of administrative decision making. There appears to be an inverse relationship for city size, with larger cities classifying fewer cases as unfounded. However, a plausible explanation for the variance lies in the relationship of the percent of unfounded reports of rape to whether or not a polygraph test is offered to the victim. A distribution of unfounded rape complaints shows that when no polygraph test is offered to the victim, the average rate is 14 percent. When a few victims are offered tests the rate is 16 percent. When some tests are offered to victims the rate rises to 22 percent. When most or all of the victims are offered polygraph tests the unfounded rape rate is 30 percent. The relationship is statistically significant. [Ed.]

Forcible rape has been repeatedly singled out as a crime in which the victim is liable to a unique confrontation with the criminal justice system. This paper is concerned with the aspect of this confrontation that involves the failure to officially acknowledge a rape, that is, to declare the complaint unfounded. Although declarations of unfounded are applied to all types of crimes, it is only in the case of rape that unfounded achieves celebrity status. Unfounded rape warrants attention since the concept has been uncritically invoked to serve a number of significant functions. It has been presented as an authoritative criminal justice statistic which is widely employed as an index of false reporting. It has also seen service as a lively political device since it is viewed as evidence of the criminal justice system's rejection of valid rape complaints. The justice system, therefore, has been charged with sexism and discrimination. Consequently, this concept has played a crucial role in bringing about modifications in police organization and procedures. Lastly, the concept has functioned to both reflect and reinforce certain conceptions of the nature of female sexuality, e.g., that women are commonly prone to imaginary or fantasy rape, a singular female affliction which, it is maintained, enables women to confuse fact with reality (See: Hibey 1973; Guttmacher and Weihofen 1952).

Detective Sergeant George N. Saxton is a member of the Lafayette, Indiana Police Department and an adjunct professor at Purdue University in the Sociology Department. Dr. Eugene J. Kanin is a member of the Department of Sociology & Anthropology at Purdue University. Dr. Severine J. Brocki is a Member of the American Medical Association.

In spite of its presumed utility, unfounded rape remains a confusing and provocative concept. It receives such divergent interpretations that it seems hardly possible that authors are addressing the same topic. Unfounded rape means different things to different people and, reasonably so, since we are seldom offered a standardized definition by those who actually discuss unfounded rape. LeGrand (1973) cautions us that unfounded does not imply that the woman's report of the crime was false. In fact, she points out that the concept may have "contributed to the myth that women make many false rape complaints." Hursch (1977), working with Denver, Colorado data also stresses that the concept can mean many things and concludes that she was able to locate but a few cases that had to do with false reports. Clark and Lewis (1977) follow in somewhat the same vein by specifying that "fully two-thirds of the unfounded classifications had arisen, at least partially, from pragmatic considerations of what the likely outcome would be if such cases proceeded to trial." In sum, these authors and others (Police Volume I 1977) have articulated an impressive array of factors that can lead to a rape complaint being classified unfounded, and have concluded that false reporting is but one of the minor factors involved. Brownmiller (1975:175), on the other hand, sees the concept quite differently: "... police say that 15 percent of all rape cases reported to them turn out on cursory (sic) investigation to be 'unfounded' - in other words, they didn't believe the complainant." Brownmiller's position is almost a literal interpretation of the UCR guidelines for unfounding a report of forcible rape, viz, only when "investigation shows that no offense occurred nor was attempted ..." (Uniform Crime Reports 1975). However, one survey of American police agencies found that only 20 percent of the police departments reported using any guidelines - let alone the F.B.I.'s - for unfounding a forcible rape complaint (Police Volume I 1977:16). An exhaustive review of the literature on rape enabled Katz and Mazur (1979) to conclude: "In practice, the term 'unfounded' has been used synonymously with 'false report'." There is considerable evidence that some legal experts and psychiatrists have enthusiastically accepted this practice. It is necessary to conclude that, on the basis of a few isolated studies, polar positions exist regarding the meaning of the concept.

The purpose of this paper is three fold: first, to examine the incidence of unfounded rape from information obtained from 216 police departments in the United States; second, to investigate the influence of select organizational and demographic variables that are commonly hypothesized as determinants of the incidence of unfounded rape; lastly, to bring evidence to bear on the question of whether unfounded rape does indeed reflect a myriad of common and unique evidentiary problems or whether it is essentially an indicator that police do not believe the complainant.

METHOD

Questionnaires were sent to 325 police departments across the United States (except Alaska and Hawaii) in cities with a population of 10,000 or greater. All cities with a population of 250,000 or larger were sent questionnaires and the remaining cities in our sample were randomly selected from the following categories: 10,000 to 24,999; 25,000 to 49,000; 50,000 to 99,999; 100,000 to 249,999. We experienced a return of 66.5 percent (n=216) usable questionnaires.

RESULTS

Incidence of Unfounded Rape

On a national level, the only available incidence figure for unfounded rape is the 19 percent value reported by the F.B.I. (Uniform Crime Reports 1977). Although a high of 64 percent is reported for Toronto (Clark and Lewis 1977), the range of unfounded for select American cities is 2 to 25 percent (Katz and Mazur 1977), and the 25 percent figure (McDonald 1971) has been clearly thrown into doubt by Hursch's critical reexamination of police records (1977). Consequently, the few existing reports from official records informs us that the range of unfounded from certain cities is 2 to 20 percent. With respect to our survey of 216 city police departments, the mean (Xwt) incidence of unfounded rape cases is 19.1 percent. Clearly, in terms of the various factors that may underlie unfounded rape, and the distinctive evidentiary obstacles confronting the successful processing of rape cases through the criminal justice system, this figure does not seem extraordinary.

What is surprising, however, is the extreme range of the incidence of unfounded, from 0 to 100 percent. Although fully three-fourths of the departments reported 0 to 25 percent of their rape cases unfounded, a reasonable figure in light of the UCR and other reports, 15 percent reported 26-49 percent, 6 percent reported 50-75 percent, and 4 percent indicate that 75-100 percent of their rape cases are unfounded. The higher incidence, 50 percent unfounded and over, are pretty much concentrated in the smaller cities which have far fewer cases of forcible rape. It is apparent, and only common sense, that the fewer cases handled the more thorough the investigation.

Organizational and Demographic Variables

A survey of the literature basically highlights four variables that could be hypothesized as viable in determining the incidence of unfounded rape:

1. The use of specialized police units;
2. The sex composition of the investigating units;
3. The use of the polygraph; and
4. Population size of the reporting city.

Law enforcement professionalism, as reflected in specialized sex crimes units or task forces, is an omnipresent variable that is assumed to have a profound influence on the incidence of unfounded reports. Regardless of the imputed causality of the unfounded rape declaration, whether from police disregarding rape complaints as genuine or from inept investigation, the degree of the unfounded status is expected to decrease with the rise of specialized units. These data, however, reveal that the presence of specialized units do not have a substantively meaningful effect on the incidence of unfounded reports. Departments that have "none" or "most" of their cases handled by such units report the largest incidence of unfounded at 26 percent and 22 percent, respectively; while those with "some" or "all" of their cases processed by specialized units report the smallest incidence of

unfounded, 12 percent and 14 percent, respectively. Since additional analysis was not able to account for this distribution, it is necessary to conclude from these data that the use of special units in rape investigation has no substantively meaningful effect on the declaration of unfounded rape.

Probably the most lively and cogently articulated criticism aimed at the presumably high incidence of unfounded rape involves police disbelief of the complainant. It is frequently charged that the sexism of male officers is responsible for rape complaints being assessed as fabrications or frivolous. The inclusion of female personnel to handle rape complaints, it is claimed, will bring greater understanding and acceptance of the victims' complaint. The most compelling evidence in support of this hypothesis comes from a verbal report that the creation of an all-female rape analysis unit of the New York City Police Department resulted in a 1 percent unfounded incidence, (This may also be 2 or 3 percent, depending on who cited the report.) (Brownmiller 1975; Csida and Csida 1974; Tong 1984. See note 3.)

Table 1 shows the distribution of unfounded by the sex composition of the officers handling rape complaints. In view of the expectation that female representation would have an effect on the incidence of unfounded, it is particularly interesting to see virtually no difference in the incidence of unfounded reported by investigative units that are totally male, largely male, and equally male-female. However, a rather dramatic decrease in unfounded appears where the investigative units are largely female. But the N's are small here, constituting only 8.8 percent of the sample, and the analysis of variance fails to show significance. It is also of some interest to note that the two departments that have exclusively female personnel handling rape complaints report the highest incidence of unfounded, 25.6 percent.

TABLE 1
Unfounded Rape and the Sex Composition of Investigating Officers (N=216)

Sex Composition	Unfounded %
All Male	23
Largely Male	19
Equally Male-Female	20
Largely Female	9
All Female	26

N.S.

Before completely discarding these two variables as irrelevant to the issue as unfounded, it is crucial to note that the existence of special units or the gender composition of the investigators does not mean they possess exclusive power - or even any power - for declaring a complaint unfounded. the presence of these personnel does not preclude that in many departments others, viz, uniformed officers, other detectives, people in the records division, commanders and supervisors, and representatives of the

prosecutor's office are authorized to make, and will make, declarations of unfounded. Departments contain from one to five of the foregoing, X=1.9, as authorized declarers of unfounded, and the number so empowered is not related to the presence of specialized units, the sex composition of the investigators, or to the size of the police agency. Who and how many in the police agency can make declarations of unfounded seems to be something of an idiosyncratic occurrence that is not meaningfully distributed among police departments. To illustrate the panorama of those authorized to make declarations of unfounded, it was found that uniformed officers can make such decisions in 25 percent of the departments surveyed; detectives, 84 percent; officer or civilian in charge of records, 7 percent; prosecutor's office, 28 percent; commanders and supervisors, 23 percent. The authorization of these personnel may reflect the existence of agency concern, or the complete lack of concern, with guidelines for the declaration of unfounded. In short, some departments have designated one person employed to declare a case unfounded and then only under certain conditions, e.g., the officer (or civilian) in charge of the records division and only when the complainant has admitted to the false charge. And others have virtually empowered all police personnel with this authority, regardless of the complainant's position regarding the veracity of the charge.

Another complicating factor is that the majority of police departments, 78 percent, can rule unfounded regardless of whether the complainant admitted to filing a false charge. Twenty-two percent of the reporting departments, however, rigorously pursue a policy that prohibits the declaration of unfounded unless the complainant admits to a false allegation, and these tend to be the smaller cities with populations under 50,000. In fact, these cities are more than twice as likely as the larger cities, 37 percent in contrast to 15 percent, to restrict a declaration of unfounded only to those cases where there is an admission to false charges.

One of the most provocative issues in rape investigation concerns the practice of victim polygraphing. It is charged that in no other major offense is there such an expenditure of effort to establish the veracity of the complainant. Indeed, in no other felony is it proposed that psychiatrists routinely examine the victim in order to detect false allegations (Guttmacher and Weihofen 1952). The polygraph in many police agencies functions as a more feasible way of negotiating this issue. The surveyed departments were asked: "To what extent are forcible rape complainants offered to be polygraphed?" This should not be construed as an evaluative measure of the actual use of the polygraph. However, it is probably true that a significant function of the polygraph resides in its potential use as well as in its actual application. In Table 2 the analysis of variance shows that the departments that extend the offer to polygraph "most/all" of the rape complainants show a significantly greater percent of unfounded cases. Indeed, this monotonic distribution rather convincingly portrays the use of the polygraph as having a positive effect on the frequency with which reports are declared unfounded. Although city size complicates this issue(Table 3), it is obvious that the larger the city the less likely that the polygraph will be used due to the large number of cases handled and the lack of time and trained polygraph examiners. There is evidence that departments swamped with serious crimes will tend to pursue the "best" cases. This usually means those cases that are most feasible for successful

prosecution. Hacker (1974), on the basis of his studies, concludes: "There seems reason to believe that in larger cities only murder cases are treated with a full investigation with a wide search for witnesses and rounding up of suspects."

TABLE 2
Unfounded Rape and Extent Complainants Offered to be Polygraphed (N=216)

Extent of polygraphing	Unfounded %
None	14
Few	16
Some	22
Most/All	30

F = 5.19; P < .001

TABLE 3
Unfounded Rape and City Size
(N=216)

City Size	Unfounded %
Below 25,000	32
25,000-49,999	30
50,000-99,999	19
100,000-249,999	16
250,000-499,999	13
500,000 & over	12

F = 5.27; P <.0001

CONCLUSIONS

Although statistical data is always suspect, especially from agencies as diverse as the law enforcement agencies are throughout the nation, some implications can be made from the data. It would seem that the use of specialized police units and the sex composition of those investigating units have little to do with the percentage of decisions to classify rape reports as unfounded. There is an indication, however, that the use of the polygraph and city size do have an effect and we would maintain, for reasons already stated, that these two are related. That is, the larger cities do not offer rape victims a polygraph test as often as small departments make the offer.

Perhaps the worst thing about the polygraph is the name it is most commonly known by - "lie detector." Most people fail to realize that it is also a "truth detector." Not only does the polygraph have the ability to detect a lie but it also has the ability to verify the truth. Most acts of

rape occur without additional eyewitnesses to the crime. Not only does the probability exist that innocent men have been sent to prison wrongfully (such as the recent Dotson/Webb case in Chicago) but guilty perpetrators of rape are walking the streets because the case was classified as unfounded due to lack of evidence. As for those innocent men found guilty of rape, their misfortune might have been avoided if the alleged victim had been offered a polygraph test.

F. Lee Bailey, one of the most prominent defense attorneys of our time, had this to say about the polygraph - "Nowhere in history has the law fouled up a useful tool more dismally than in the case of the polygraph. In some-ways the polygraph technique exercises a pervasive influence over legal matters, and in other respects it is branded a bastard child. Lawyers who are essentially ignorant of the true facts of the polygraph technique de-claim loudly in open court that the polygraph doesn't work (when it suits their purpose to do so) and judges equally uninformed render opinions which to the men and women of science make no sense. Prosecutors will announce one day that John Brown will not be prosecuted because he has 'passed a lie detector test with flying colors,' and appear in court the following day to fight tooth and nail to prevent Jim Green, an accused defendant, from even taking such a test. These, obviously, are not public officials sufficiently concerned with justice. Reporters who are too lazy to thoroughly and impar-tially investigate the merits of polygraph testing write articles debunking a scientific method they do not understand, and the hapless public is mis-led. The public would be better served if it read articles by writers who had at least taken a test and tried to demonstrate the many tricks and foibles they write about, but which do not exist" (Keeler 1984).

In spite of the fact that the use of the polygraph is very controver-sial, our research suggests that it still has a valuable place in law en-forcement, including rape investigations.

NOTES

1. The major factors typically responsible for unfounded declarations are: late reporting by the complainant, lack of corroboration, false allegation, lack of cooperation by the complainant and/or witnesses, reporting in the wrong jurisdiction, and inconsistency of the complainant's story. Addition-ally, Hursch (1977) shows how in one city unfounded is used as a "catch-all category for cases where no further action by the police is possible." Clark and Lewis (1977) demonstrate how characteristics of the criminal assault, the victim-offender relationship, and the victim are associated with unfounding. Pepinsky and Jesilow (1984) discuss the role of unfounded as a tactic for giving the impression of crime reduction.

2. Caution should be exercised in employing the 1977 figure since it is an unweighted mean representing reports only from the larger cities, probably 250,000 population and greater. The uncertainty is due to the fact that the original reports have been destroyed. Furthermore, to compare this figure with the 1975 15 percent report is unwarranted since it was based on a select summer months sample, whereas the 1977 figure was based on a 12 months sample. (Personal communication, Uniform Crime Reports Section, Federal Bureau of Investigation 1985).

3. There are several versions of this alleged report but Brownmiller's (1977:387) dominates the literature: "...when New York City instituted a special sex crimes analysis squad and put policewomen (instead of men) in charge of interviewing complainants, the number of false charges in New York dropped dramatically to 2 percent, a figure that corresponded exactly to the rate of false reports for other violent crimes." At best, this undocumented account of what occurred in New York City is suspect. Although the special unit started in 1972 to be an investigative unit, it soon lost that function since its 14 members could not possibly contend with more than a mere fraction of rape complainants in the city. And for this reason it would have been impossible for them to have had a meaningful impact on the incidence of unfounded, along with the fact that they did not possess the power to unfound. Our efforts to verify that the unfounded incidence dropped to 2 percent were unsuccessful after personal communication with several ranking members of the New York City Police Department who work in sex crimes investigation. In fact, all expressed doubt that such a figure existed. The most curious commentary on this situation is the fact that no one could produce the 1972 figure.

REFERENCES

Brownmiller, S. (1975) Against Our Will. New York: Simon and Schuster.

Clark, L.M.G., and D.J. Lewis (1977) Rape: The Price of Coercive Sexuality. Toronto: The Women's Press.

Comment (1973) "Complainant Credibility in Sexual Offense Cases: A Survey of Character Testimony and Psychiatric Experts." the Journal of Criminal Law and Criminology, 64: 67-75.

Csida, J.B. and J. Csida (1974) Rape. Books or Better Living. Chatsworth, California.

Federal Bureau of Investigation (1975, 1977) Uniform Crime Reports.

Guttmacher, M.S. and H. Weihofen (1952) Psychiatry and the Law. New York: W.W. Norton and Co.

Hacker, A. (1974) "Getting Used to Mugging," in Henry Etzkowitz, Is American Possible. St. Paul, MN: West, 79-86.

Hibey, R.A. (1973) "The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character." The American Criminal Law Review, 11: 309-334.

Hursch, C.J. (1977) The Trouble With Rape. Chicago: Nelson-Hall.

Katz, S. and M.A. Mazur (1979) Understanding the Rape Victim. New York: John Wiley and Sons.

Keeler, Eloise (1984) Lie Detector Man. Chicago: Telshare Publishing Co., Inc.

LeGrand, C.E. (1973) "Rape and Rape Law: Sexism in Society and Law." California Law Review, 61: 48-60.

MacDonald, J.M. (1971) Rape Offenders and Their Victims. Springfield, IL: Thomas.

Pepinsky, H.E. and P. Jesilow (1984) Myths That Cause Crime. Cabin John, MD: Seven Locks Press.

Police Volume I. Forcible Rape (1977). United States Department of Justice, Washington, D.C.

Russell, D.E.H. (1984) Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment. Beverly Hills: Sage.

Tong, R. (1984) Women, Sex and the Law. Totowa, N.J.: Rowman and Allanheld.

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THE ADMISSIBILITY OF POLYGRAPH EVIDENCE IN THE COMMONWEALTH OF MASSACHUSETTS

By

John A. Chistolini

GENERAL PRINCIPLES, STANDARDS OF ADMISSIBILITY OF SCIENTIFIC EVIDENCE

Scientific evidence is admissible to assist the trier of fact in resolving the issue(s) in controversy. The two basic ways for scientific evidence to be admissible are through the legislative process or judicial notice. Presently, neither Massachusetts nor any other state except California allows the introduction of polygraph results in a criminal trial through legislative authorization (Cal.Ev.Code 351.1, 1983). It is through judicial notice that polygraph is usually introduced to assist the trier of fact in determining the guilt or innocence of the defendant.

The issue of whether polygraph results should be judicially noticed in a court of law has generated much controversy both in federal and state courts. In 1923, the court in Frye v. United States, 293 F.1013 (D.C. cir. 1923) held the results of a polygraph test were inadmissible. In Frye, the court in rejecting this evidence stated:

> "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 ..." Id. at 1014

Not only was the Frye court the first to reject polygraph evidence, but more importantly it established the test for all emerging scientific evidence. The court in denying the admissibility of this evidence stated:

> "Just when a scientific principle discovery crosses the line between the experimental and demonstrable stages it 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 it belongs." Id. at 1014.

The question that confronts the courts in Massachusetts today is the same question that confronted the Frye court in 1923. That question is: Has polygraph passed beyond the developmental stage to general scientific acceptability, thus permitting its general admissibility? While the courts

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John A. Chistolini is a Member of the American Polygraph Association, former Chief of the Boston School Police, and current senior examiner for Truth Detection Laboratories, Inc. He holds a B.A., M.Ed. and is in final year in law school.

in Massachusetts have not held that polygraph has reached the standard of general scientific acceptability, case law does permit the introduction of polygraph evidence within very narrow parameters.

HISTORY OF DEVELOPMENT AND CASE REVIEW IN MASSACHUSETTS

The Massachusetts Supreme Court first considered the issue of the admissibility of polygraph tests in Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963). In its decision, the court stated that the polygraph could not be admitted because there were still "substantial doubts" which presently revolve about the polygraph test. Id. at 270. The Fatalo Court expressed concern that the admissibility of polygraph results would turn into a "battle of the experts" rather than assisting the trier of fact. Id. at 269. The court, citing the standard of Frye, stated that this standard for polygraph had still not been reached.

Eleven years following the court's holding in Fatalo, the Massachusetts Supreme Court in the landmark case of Commonwealth v. Juvenile, 365 Mass. 421, 313 N.E.2d 120 (1974), established limited admissibility of polygraph evidence. In Juvenile, the court, in assessing the developments in the polygraph field since Frye, stated it would take "... a cautious first step toward the acceptance of polygraph test." Id. at 432. The defendant, a juvenile was charged with the death of the victim and had submitted to two polygraph examinations which "... indicated that he was telling the truth when he denied having caused ... the death of the victim in the case." Id. at 423. While the court in Juvenile specifically stated that polygraph had still not advanced to the level of "general scientific acceptability", the court did add "we do however, think that polygraph testing has advanced to the point where it could prove to be of significant value to the criminal trial process if its admissibility initially is limited to carefully defined circumstances designed to protect the proper and effective administration of criminal justice." Id. at 424. The court in Juvenile held:

> "... if a defendant agrees in advance to the admission 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 an examination, and the methods utilized in conducting the test, may, in the proper exercise of his discretion, admit the results, not as a binding conclusive evidence, but to be considered with all other evidence as to innocence or guilt" Id. at 426.

The court in taking its "cautious first step" carefully reviewed the elements and theory of polygraph.

The Juvenile Court recognizing the critical role the examiner has not only in conducting a valid test but in interpreting the results of an examination, stated that "equal to the importance of the machine itself is the competence, experience and education of the test examiner" Id. at 427. Moreover, the court emphasized that "it is essential that the trial judge exercise a high degree of care in assessing an examiner's credentials" Id. at 430. In assessing the qualifications and credentials to qualify the examiner as an expert witness, the court stated "it is the combination of

training, experience and demonstrated ability that should be a determinative." Id. at 431.

A major Constitutional consideration involving polygraph testing is the Fifth Amendment right against self incrimination. In its holding, the Juvenile court stated that "as a prerequisite the judge would first make sure that the defendant's constitutional rights are fully protected." Id. at 426. While the Supreme Court has yet to rule on the admissibility of polygraph, in Schmerber v. California, 384 U.S. 757 (1966) the court in dicta remarked:

"There will be many cases in which the distinction between testimonial evidence and real or physical evidence is not readily drawn. Some tests seemingly directed to obtain physical evidence, for example, lie detector tests measuring changes in body functions ... may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the bases of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment" Id. at 764.

Citing this dicta, the Juvenile court stated that the "polygraph results are essentially testimonial in nature and therefore, a defendant could not be compelled to take such an examination on the Commonwealth's motion" Juvenile at 431.

The Juvenile Court in addressing the issue of self incrimination, premised any admissibility of polygraph results on "the court informing the defendant of his constitutional rights. Further, if the defendant wishes to waive this right, the court must assure that the waiver is made "voluntarily, knowledgeable and intelligently" Id. at 432.

The court reiterated the standard of Juvenile in Commonwealth v. Grenshaw, 356 N.E. 2nd 708 (1976). It noted that one facet of admissibility is that the defendant must agree in advance to the admissibility of the results regardless of its outcome. The defendant, who was charged with assault and battery with intent to commit murder, took a polygraph examination prior to any discussion with the court or prosecution. The results of the examination were favorable to the defendant. The court in Grenshaw denied admission stating that the defendant never agreed to be bound by the results of the polygraph examination. The court cited Juvenile in saying there was no abuse of discretion by the trial judge in denying the results of a polygraph examination which the defendant knew was favorable.

Again in Commonwealth v. Stewart, 377 N.E. 2nd 693 (1978), the court refused to admit the results of the polygraph examination favorable to the defendant because there was no prior agreement that the results would be admissible irrespective of the test outcome. Additionally in Stewart, the defendant moved that the chief prosecution witness be required to submit to a polygraph test. The court stated that there were serious 5th Amendment problems that arise from compelled polygraph examinations. The court stated that "a polygraph examination may never be compulsory." Id. at 384.

In 1978, two companion cases further refined the principles for limited admissibility of polygraph announciated in Juvenile. Under Juvenile, the results of a polygraph examination would be admissible whether favorable or unfavorable to the defendant's case. The first of these cases, Commonwealth v. Vitello, 376 Mass. 426, 382 N.E.2d 582 (1978), involved a defendant charged with an armed robbery. The defendant appealed the trial judge's admission of an unfavorable polygraph examination as part of the government's case in chief. The trial judge noted that the procedures in Juvenile were followed. Moreover, the defendant selected the examiners, whom the court approved.

The issue in Vitello was the trial judge's ruling that if he (judge) should "... find the examiner to be qualified, the polygraph evidence would be admissible as part of the Commonwealth's case in chief." Id. at 426. In overturning the trial court's ruling, the Massachusetts Supreme Court again stated that the Frye standard of "general scientific acceptance ... has not yet been achieved" Id. at 431. The court held that "... polygraph evidence may not be introduced during the Commonwealth's case in chief for the independent purpose of proving guilt." Id. at 426. However, while the Vitello court held that polygraph evidence cannot be admitted as independent evidence of guilt or innocence, it did hold that polygraph evidence may be introduced for the limited purpose of impeaching or corroborating the defendant's testimony. The court stated "while we have expressed our reservations regarding the distortions to the trial process ... we do not think it is wise to bar polygraph completely from the judicial arena." Id. at 453.

Allowing the examiner to testify to the issue of a defendant's credibility assists the trier of fact. A standard cross-examination technique for impeaching a witness' testimony is to attack his reputation for truth or veracity. The Vitello Court described "an examiner as a potential expert character witness." Id. at 454.

The court reasoned that "if polygraph evidence is favorable, a defendant with a criminal record may elect to testify where he otherwise would not on the theory that the impact of the polygraph evidence will offset the prejudicial impact of his criminal history" Id. at 455.

Recognizing the potential for examiner error, that a truthful defendant may be mistakenly evaluated by the examiner as lying, the court stated that the "defendant could protect himself ... by forfeiting his right to testify" Id. at 455. The court in reaching its holding balanced the "costs" of admission against the probative value of admissibility. In considering the "costs" of admissibility, the court cited three key areas.

First, is the potential confusion and prejudice to the jury. The court citing Commonwealth v. Lykus, 367 Mass. 191, (1975) which involved the admissibility of spectrographic analysis, was concerned that "the polygraph may assume a posture of mystic infallibility." Secondly, was the concern "that the use of polygraph evidence may usurp the jury's historic role of determining the credibility of witnesses and finding facts." Vitello at 445. The court went on to say that "this concern goes beyond the possibility that a jury will, in fact, be so influence by polygraph evidence that it effectively abnegates its responsibilities as independent fact finder." Id.

at 445. Thirdly, the court focused on the consumption of time and use of trial resources. The court believed that "the introduction of polygraph evidence through the testimony of an expert witness will consume a substantial amount of time." Id. at 446. This issue of time would be compounded, in the court's opinion, "because polygraph is a potentially critical element in every criminal case" Id. at 446. Further, the court was concerned with the potential burden on trial judges that may result from indiscriminate requests for admission of polygraph tests. These fears have proven to be unfounded in Massachusetts.

The court in addressing the other side of the equation, stated that while there is probative value to the use of polygraph, it "is diminished by the complexity of the interactions among subject, examiner and machine" Vitello at 451. On balance, the court found that the probative value of polygraph evidence was significantly outweighed by the potential dangers to allow general admissibility.

In the companion case of Commonwealth v. Moynihan, 376 Mass. 468 (1978), the court ruled that the trial judge did not err in not admitting polygraph as independent evidence of guilt or innocence, even though it was favorable to the defendant. The trial judge ruled that while the favorable polygraph results were not admissible as independent evidence of guilt, the results would be admissible for the limited purpose of corroborating the defendant's testimony in the event he took the stand. At the conclusion of the government's case, the defendant informed the trial judge that his first witness would be a polygraph examiner. The trial judge ruled that the examiner could not testify until the defendant took the stand. The Moynihan Court citing the reasoning in Commonwealth v. Vitello, held "That polygraph evidence favorable to the defendant cannot be introduced as independent evidence, but can be admitted to corroborate the defendant's testimony" Moynihan at 478. The trial judge also ruled that a voir dire hearing on the examiner's qualifications and testing procedures would not take place until the defendant had testified. The importance of the examiner's qualifications and testing procedures were one of the cornerstones for admissibility as established in A Juvenile. The court in Moynihan in reviewing this issue stated:

> "... although the judge should have granted the defendant's request that the voir dire of the polygraph examiner be conducted prior to his taking the stand. This error is harmless in view of the fact that the examiner was found to be qualified and his favorable testimony was received in evidence." Id. at 479.

It should be noted that notwithstanding the favorable polygraph results, the defendant was convicted by the jury. The concerns of possible usurpation of the jury role and the potential perception of "infallibility" of scientific evidence may not be as great as feared. Polygraph may be able to play an important part in the judicial process by assisting the trier of fact in assessing the credibility of the defendant.

INDIGENT DEFENDANT'S RIGHTS TO A POLYGRAPH EXAMINATION

In Vitello and Moynihan, both defendants, who were indigent, were permitted on pretrial motions to take a polygraph examination at the expense of the Commonwealth. The court in Commonwealth v. Lockley, 381 Mass. 156 (1980), ruled that the defendant was entitled to a new trial because the trial judge failed to conduct a sufficient hearing on the defendant's pretrial motion for a polygraph examination at the public expense. Under Massachusetts General Law Ch. 261, section 27A, if the court finds the defendant indigent, "...it shall not deny any request with respect to extra fees and costs ... reasonably necessary to assure the applicant as effective a prosecution or defense as he would have if he were financially able to pay." In Lockley, the trial judge failed to conduct a sufficient hearing on the defendant's motion for a polygraph test at the Commonwealth's expense. The trial judge ruled "as a matter of law, that the purpose for which polygraphic evidence could be used at trial were too limited ... ever to justify the expenditure of public funds for such a test ..." Id. at 161. The test that is to be applied:

> " ... is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires." Id. at 161.

The Lockley court stated that a sufficient hearing must be conducted on an indigent defendant's request for the expense of public funds for a polygraph examination. As a result of Lockley, a trial judge in determining whether polygraph would meet the definition of "reasonably necessary" to defense pursuant to General Law ch. 261, section 27C may consider:

> "... among other factors (1) the cost of the test; (2) whether the requirements of admissibility of polygraphic evidence set forth in Vitello have been satisfied; (3) the limited use to which polygraphic evidence may be put at trial; (4) whether the defendant has a criminal record which might deter him from testifying; and (5) the possibility that the test might work to the defendant's disadvantage in the event that it produces a result unfavorable to him, but he nonetheless wishes to testify on his behalf." Lockley at 162.

INTRODUCTION OF EVIDENCE

The introduction of polygraph evidence by the prosecution is not permitted. In Commonwealth v. Allen, 387 N.E. 2nd 553 (1979), the court again affirmed its limited admissibility standard as decided in Commonwealth v. Vitello. The defendant, Allen charged with murder, had taken a polygraph examination pursuant to the procedures set forth in A Juvenile. The trial court allowed, over objection of the defense, the prosecutor to include in her opening remarks that a polygraph examiner would testify that the defendant was not truthful when he denied involvement with the murder. The Allen Court granted a new trial stating that the limitations of admissibility under its Vitello decision only permitted polygraph results for "... the purpose of impeaching or corroborating the defendant's credibility if he testifies." Id. at 556. While more restrictive than A Juvenile, the

Vitello decision still assists the trier of fact in assessing the defendant's credibility if he testifies at his own trial.

NON PARTY WITNESS

The court further refined the limited admissibility of Commonwealth v. Walker, 392 Mass. 152, 466 N.E.2d 71 (1984), when it held that "the polygraph test results of a nonparty witness are not admissible in a criminal trial ... regardless of whether the witness, defendant, and Commonwealth have signed a stipulation agreeing to admissibility" Id. at 159. In Walker, the defendant was charged with a criminal complaint for nonsupport. The child in question, was conceived in late December 1980 or early January 1981. During this period of time, the defendant stated he only had "sexual relationships with the complainant once on January 2nd or 3rd, 1981." Id. at 153. On New Year's Eve, the complainant's escort was someone other than the defendant.

> "... the defendant and his counsel and the complainant and her counsel stipulated that the complainant would take a polygraph examination, the results of which would be admissible into evidence to support or impeach the testimony of the complainant and neither party shall object to the admission thereof in any criminal or civil litigation between the parties." Id. at 153.

The Commonwealth was not a party to the stipulation. The polygraph examination indicated that the complainant was not telling the truth when she stated she did not have sexual relations with her New Year's Eve companion. The court in Walker declined to extend Vitello, holding to include nonparty witness. [See also Commonwealth v. DiLego, 493 N.E.2d 807 (1982).]

JUDICIAL DISCRETION

Under the procedures for admissibility in Juvenile and Vitello, the judge has broad discretion in assessing the examiner's qualifications, the testee's amenability to testing, the test conditions, and the test questions. However, "if he finds the examiner qualified and the test properly conducted," the judge does not have broad discretion to exclude evidence of the test results offered to corroborate a defendant's testimony. Commonwealth v. Martin, 392 Mass. 161 (1984).

In Martin, the trial judge excluded favorable polygraph results based on the fact that he also excluded evidence of the defendant's prior convictions, which the prosecution attempted to introduce to impeach the defendant's credibility. The court cited Vitello in that the admissibility of favorable test results may aid the trier of fact by encouraging a defendant, with a similar prior conviction, to testify. However, the Walker court stressed "we have never said that polygraph test results favorable to a defendant are admissible to corroborate his testimony only when evidence of a prior conviction has been admitted to impeach his testimony. Such a rule would only benefit defendants who had been previously convicted of a crime." Id. at 163. Additionally, the court went on to say that favorable polygraph test results may not be excluded because in the judge's opinion, the defendant has corroborated alibi evidence to offer.

The holdings in Juvenile, Vitello, and Martin implicitly suggest that the Commonwealth has veto power over a defendant's request to take a polygraph examination. This specific issue was addressed in Commonwealth v. Wick, 399 Mass. 705, 506 N.E.2d 857 (1987). The defendant was charged with operating a motor vehicle while under the influence of liquor. The defendant maintained that he was not the operator of the vehicle, but rather a passenger. The defendant requested a polygraph examination concerning the issue of whether or not he was driving the vehicle. The trial court judge ruled that "he could not order a polygraph examination unless the prosecution and defendant agree" Id. at 705. The Wick court held that "although never expressed explicitly, it is inherent in ... our opinions that the Commonwealth does not have a veto over the use in evidence of the results of a defendant's polygraph examination" Id. at 706. The court's ruling precluded the Commonwealth from blocking a defendant's motion for a polygraph examination simply by objecting. The court in not requiring mutual agreement for a polygraph examination, did state in dicta that "it may be time for a careful study of the subject either as a basis for legislative action ... or for court rules concerning the use of polygraph examinations and their results in trial cases" Id. at 706.

In summary, the present admissibility of polygraph evidence in a Massachusetts' criminal trial, is limited to the extremely narrow purpose of impeaching or corroborating a defendant's testimony. This limited admissibility is predicated on the following:

1. That the defendant moves to submit to the examination.

2. That the trial judge finds the defendant suitable for testing.

3. That the defendant knowingly and intelligently waives his 5th Amendment Rights.

4. That the trial judge finds the examiner is qualified and the test procedures were properly conducted.

5. That the defendant actually testifies prior to the testimony of the examiner.

CONCLUSION

More than fourteen years have passed since the Commonwealth took "a cautious first step" towards the admissibility of polygraph results. While the Supreme Judicial Court of Massachusetts has yet to hold that polygraph has attained the level of "general scientific acceptability," the court has carefully crafted conditions for the limited admissibility of polygraph results. The court has insured that the defendant's constitutional rights are not infringed as a result of the use of polygraph evidence. Despite the fact that polygraph has failed to attain the level of the Frye standard, the Massachusetts Supreme Court recognizes the potential value this scientific device might have in assisting the trier of the fact in determining truth.

* * * * * *

WHY DON'T THEY LIKE US?

By

James R. Wygant

Whenever someone complains about polygraph testing, examiners are inclined to describe how effective it is. That response has not been persuasive. Beyond challenges to accuracy, there are other fundamental objections to the use of polygraph that those in the profession must address. It is not enough to assert that we accomplish good by raising the general level of honesty.

Critics increasingly ignore appeals to the "common good" and insist on limiting consideration to what they claim are abuses of individual rights. If we do not listen carefully to what the politicians and the courts are saying, we will never be able to satisfy them, and if they are not satisfied, they have the power to impose their own remedies.

When I became an examiner eleven years ago, the most common objection to polygraph was that it was inaccurate. In the past decade, credible research has repeatedly established very high levels of accuracy for polygraph. Today the argument of inaccuracy is seldom raised as vigorously as it once was.

Polygraph's opponents seem to have conceded that it is foolish to complain that 88 or 90 or 95 percent accuracy is inadequate. Anyone who has done the most rudimentary evaluation of investigative techniques recognizes that there are more mistakes made when polygraph is not used. As only one example, the 1979 book Eyewitness Testimony by Dr. Elizabeth Loftus severely shook the confidence that many people formerly had in eyewitness descriptions.

There is no perfect way to make a decision when facts are unresolved or in dispute, but research has clearly demonstrated that polygraph is better than most other commonly accepted methods.

Even the American Civil Liberties Union, a long standing opponent of polygraph, no longer makes accuracy their primary target. They now argue that polygraph testing is an affront to human dignity and to the inherent rights of privacy that we should all be allowed. Whether we agree with this argument or not is irrelevant. We must recognize that it can be persuasive.

The courts, as well, have taken a step back from the old argument that polygraph is not acceptable within the scientific community. They too now argue that the process of polygraph testing is itself antithetical to the justice system, regardless of effectiveness. What the courts are saying is, "We don't care if it works, we don't like it anyway."

James Wygant is a Member of the American Polygraph Association who has had six articles published previously in Polygraph.

Consider the recent opinion of the Canadian Supreme Court in Her Majesty the Queen v. Beland. Justice McIntyre, writing for the majority, said that the court's rejection of polygraph testimony "... is not based on a fear of the inaccuracies of the polygraph. ... It is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and [add] to numerous complications which will result in no greater degree of certainty in the process than that which already exists."

The Supreme Court of my own state, Oregon, rendered a similar opinion in State v. Lyon, 384 Or. 221, October 13, 1987, rejecting admissibility of polygraph results even when there was a written stipulation.

Justice Campbell wrote in that opinion, "Of greater concern even than the possibility of undue delay is the potential for misuse and over-valuation of the polygraph evidence by the jury." And, referring to a previous decision about polygraph admissibility, he reiterated that, "Our primary considerations in reaching our conclusion in Brown were the probable effect of polygraph evidence upon the integrity of the trial process and our respect for the traditional role of the jury."

That last statement probably strikes very clear to the heart of the judicial resistance to polygraph.

In a concurring opinion in State v. Lyon, Justice Linde observed perceptively that, "I doubt that the uneasiness about electrical lie detectors would disappear even if they were refined to place their accuracy beyond question. Indeed, I would not be surprised if such a development would only heighten the sense of unease and the search for plausible legal objections."

Rather than speaking prophetically, Justice Linde may have been describing what has already been happening. There seems to be a direct correlation between the increasing proof of polygraph accuracy and the rise in objections to its use. Over the past decade, with each new bit of research that has reaffirmed the accuracy or reliability of polygraph, there has also been an escalation in restraints imposed upon its use. It is as though politicians and courts had been more willing to accept polygraph when uncertain accuracy permitted them to ignore it.

Knowledge is power. Law makers are always sensitive to power being placed at the disposal of persons whom they regard as self-interested and venal. Many law makers include private polygraph examiners in that category. Examiners who have appeared eager to test anybody on anything have contributed to that view.

Courts, too, are uncomfortable with the traces of arrogance that they sometimes have observed in the course of polygraph testimony. Judges do not like witnesses who make absolute claims about being able to tell truth from lies. If all of the polygraph examiners who had ever testified had claimed only that they obtained results consistent with customary norms, perhaps polygraph would be more welcome in courtrooms today.

I have been limiting my observations to the resistance to polygraph that exists among politicians and courts. Surveys of persons who have taken pre-employment polygraph tests have repeatedly shown that the majority of them approved of the use of polygraph. I suspect that this represents a more common view within our society than the abhorrence of polygraph that troubles our courts and politicians.

So if the general public is supportive of the use of polygraph, even in the midst of a prevalent anti-polygraph attitude among the news media, why do courts and politicians fear it? Although some of their fear may be simple "protection of their turf", I believe that there are more significant underlying considerations. It is the nature of the work done by judges and politicians that compels them to think in more conceptual terms than the average citizen. They are more inclined to think of what could happen, rather than concentrating exclusively on what has been happening.

In the past decade the number of polygraph schools has at least doubled or tripled. Consequently, the number of examiners has increased dramatically. So, in turn, has the number of tests being administered in all private and public sectors. Using only the Department of Defense (DoD) as a reference, the number of polygraph tests administered by all branches of DoD nearly doubled in the six years from 1980 through 1985.

To a judge or law maker thinking of what "could" happen, such remarkable growth of the use of polygraph suggests that it might soon intrude into all phases of our culture. There is little doubt that we would all find that repugnant. We would all prefer to have our statements accepted at face value. None of us would condone a system in which polygraph or any other methodology was routinely employed to confirm our veracity.

It is useless to argue that there is absolutely nothing degrading about a polygraph examination. By its nature it is a challenge to the person being tested to offer proof that he or she is being truthful. That does steal something from the dignity that we would all ahve if we all told the truth and could expect to be believed.

Unfortunately, we do not live in such a perfect world. People do lie. And some people who are telling the truth are not believed. Because of that, those people who support, recommend, undergo, and administer polygraph tests have made a decision that they are willing to give up temporarily a little dignity for the sake of finding out the truth. It is not unlike the decisions we all make when we do anything unpleasant for the sake of a greater good (for example, supplying personal information when we apply for credit, or stripping naked for a medical examination).

The condition that must accompany the kind of decision I have just described is a voluntary concept. Whatever the circumstance, we generally conclude that it is not proper to compel someone to give up information. In matters of national security we usually stretch that to mean that a person can either choose to undergo a polygraph test or accept the alternative of being denied access to national secrets.

In the private employment sector, compulsion can become a clouded issue. When law makers think of the way things "could" be on the job, they invariably conclude that workers could be compelled to undergo polygraph testing because of a threat, even indirect, that their jobs would be at risk if they declined. As votes in Congress demonstrate, there are few law makers who are tolerant of any hint of compulsion, even the most indirect, when a polygraph is administered to an employee or applicant.

Any polygraph examiner who does not himself assure against such indirect compulsion contributes to that fear. He must accept some responsibility for legislation that limits or prohibits testing of employees or applicants. To repeat a point raised earlier, there is little value in making claims about the effectiveness of polygraph testing in commerce. Those who do that are attempting to answer an argument that opponents of polygraph are not making and do not care about.

Examiners must decide for themselves what examinations they will conduct, and must not simply accept every job that is shoved at them. Polygraph schools should be required to provide more hours on ethics. Any examiner who has never refused to do a test has probably conducted at least one examination that he should have turned down. Examiners must be prepared to make an ethical judgment before proceeding with any issue that is presented for testing. If we can think of no other reason for doing this, we must recognize that politicians and courts have already asserted the right to make those very judgments about the work that we do.

It is not surprising that restrictions have been clamped on the use of polygraph. I believe that we have succeeded admirably in convincing judges and law makers that it works. We must now convince them that we will use it in responsible ways that do not threaten the concepts of free choice and personal dignity that they believe they must guard. It is good that society at large apparently is not as fearful of polygraph as our courts and law makers. We must work harder now to convince those whom we have put in positions of power that we do not represent the threats that they imagine.

References

_____ (1988). Canadian Supreme Court Rules Against Polygraph Evidence. American Polygraph Association Newsletter, 21, 10-11.

Ash, P. (1973). Survey of attitudes on the polygraph. Polygraph, 2, 200-223.

Department of Defense (1987). Department of Defense Polygraph Program, Report to Congress for Fiscal Year 1976. Polygraph, 16, 53-72.

Horvath, F. (1987). Public attitudes on polygraph testing: a national survey. Polygraph, 16, 1-17.

Long, C. (1986). Lie detectors and the press. Polygraph, 15, 57-65.

Phannenstill, R. (1983). The polygraph passes the test. Security Management, 27, 58-60.

Silverberg, B. (1980). Attitudes of job applicants toward the Arther security clearance examination. the Journal of Polygraph Science, 14, 1-4.

GRAND JURY ADMISSIBILITY

There are few cases in which polygraph evidence has been admitted in grand jury hearings. In United States v. Dorfman, 532 F.Supp. 1118 (1981) a defendant claimed that withholding polygraph results from the Grand Jury was improper. The court held that the results of the test were not sufficiently probative to meet the standard of clearly negating guilt. In this case the defendant made no effort to establish a foundation for the validity of the polygraph test.

In United States v. Eden, 659 F.2d 1376 (9th Cir. 1981) the court noted that after indictment and prior to trial the defendant moved the trial court for an order requiring the results of a polygraph test taken by the defendant to be presented to the Grand Jury. The motion was denied. The appellate court said the trial court did not abuse its discretion in refusing to compel the government to present evidence to the Grand Jury which at a later hearing was determined to be inadmissible at trial.

In a case involving a test using sodium butathol rather than a polygraph, there is a note that the evidence was presented to the Grand Jury. Indicted, the defendant failed to obtain admissibility of the videotaped results into evidence at trial, and the Supreme Court of Florida agreed with the trial court. See State v. Zeigler, 402 So.2d 365 (Fla. 1981).

In Iowa, a grand jury changed a decision when polygraph evidence was presented. In Lukecart v. Swift & Co., 130 N.W.2d 716 (Iowa 1964), the plaintiffs were suing Swift for malicious prosecution and failed. Plaintiffs were alleged to have been involved in a theft from the company. A polygraph examination was given and the results were presented as additional evidence to the Grand Jury. Although the Grand Jury had already indicted for conspiracy and larceny, after hearing the additional evidence they recommended to the Court Attorney that he dismiss the charge. He recommended it to the Court, and the Court dismissed the charge because of reasonable doubt.

In State v. O'Blanc, 346 So.2d 686 (La. 1977) the defendant claimed that the trial judge erred in denying their motion to quash, claiming that results of polygraph examinations were improperly presented to the Grand Jury. The Supreme Court of Louisiana cited a state statute which said that "no indictment shall be quashed or conviction reversed on the ground that the indictment was based, in whole or in part, on illegal evidence." Therefore, the Court did not decide whether the submission of the results of the polygraph examinations to the Grand Jury was or was not proper.

However, a contrary result is found in People v. Dobler, 215 N.Y.S.2d 313 (N.Y. Suffolk County Ct. 1961). In that case the Court held that the indictment for perjury had to be dismissed because the grand jury received polygraph evidence which was not favorable to the accused. The Court said the Code of Criminal Procedure in New York states that a grand jury can receive none but legal evidence, and the court held that results of polygraph tests are not legal evidence in New York. Actually, there are a number of cases in which New York cases have admitted polygraph results into evidence, before and after Dobler. What distinguishes Dobler from O'Blanc

is state law. In People v. Ricigliano, 526 N.Y.S.2d 565 (A.D. 2 Dept. 1988) the New York Supreme Court, Appellate Division said the trial court correctly denied the defendant's motion to dismiss the indictment on the ground that the People should have submitted to the Grand Jury the results of a polygraph examination the complainant allegedly failed. Citing People v. Shedrick, 66 N.Y.S. 1015, 499 N.Y.S.2d 388, 489 N.E.2d 1290, the court said polygraph examinations are not considered competent evidence at trial. Ricigliano of 1988 is in keeping with the 1961 decision in Dobler, despite intervening cases of admissibility at trial, cases which are anomalies rather than precedential.

N. Ansley

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NEW STATUTE IN IOWA

AN ACT
RELATING TO THE PROHIBITION OF POLYGRAPH EXAMINATION AS A CONDITION OF EMPLOYMENT, AND PROVIDING A PENALTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 730.4, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

730.4 POLYGRAPH EXAMINATION PROHIBITED.

1. As used in this section, "polygraph examination" means any procedure which involves the use of instrumentation or a mechanical or electrical device to enable or assist the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding either of these, and includes a lie detector or similar test.

2. An employer shall not as a condition of employment, promotion, or change in status of employment, or as an express or implied condition of a benefit or privilege of employment, knowingly do any of the following:

a. Request or require that an employee or applicant for employment take or submit to a polygraph examination.

b. Administer, cause to be administered, threaten to administer, or attempt to administer a polygraph examination to an employee or applicant for employment.

c. Request or require that an employee or applicant for employment give an express or implied waiver of a practice prohibited by this section.

3. Subsection 2 does not apply to the state or a political subdivision of the state when in the process of selecting a candidate for employment as a peace officer or a corrections officer.

4. An employee who acted in good faith shall not be discharged, disciplined, or discriminated against in any manner for filing a complaint or testifying in any proceeding or action involving violations of this section. An employee discharged, disciplined, or otherwise discriminated against in violation of this section shall be compensated by the employer in the amount of any loss of wages and benefits arising out of the discrimination and shall be restored to the employee's previous position of employment.

5. This section may be enforced through a civil action.

a. A person who violates this section or who aids in the violation of this section is liable to an aggrieved employee or applicant for employment for affirmative relief including reinstatement or hiring, with or without back pay, or any other equitable relief as the court deems appropriate including attorney fees and court costs.

b. When a person commits, is committing, or proposes to commit, an act in violation of this section, an injunction may be granted through an action in district court to prohibit the person from continuing such acts. The action for injunctive relief may be brought by an aggrieved employee or applicant for employment, the county attorney, or the attorney general.

A person who in good faith brings an action under this subsection alleging that an employer has required or requested a polygraph examination in violation of this section shall establish that sufficient evidence exists upon which a reasonable person could find that a violation has occurred. Upon proof that sufficient evidence exists upon which a finding could be made that a violation has occurred as required under this paragraph, the employer has the burden or proving that the requirements of this section were met.

* * * * * *

VITTORIO BENUSSI AND RESEARCH

It is Vittorio Benussi who first used respiration as a measure to detect falsehood. His research, published in 1914, is known to all examiners as the basis for the selection of respiration as one of our current measures. Benussi's footnotes tell us that prior research had established a relationship between emotion and breathing.

All of the above is important. However, rereading of Benussi discloses that he deserves some additional plaudits for his observations and thinking. He observed that the "external symptoms of internal events can be suppressed by practice," or "at least attenuated to such an extent that they remain subliminal even for a highly experienced observer".

Second, Benussi speculated at length on the problem of translating laboratory results into the real world, then decided the results apply. We are still wrestling with this problem, and his thoughts remain relevant.

Third, Benussi was the first examiner in lie detection to analyze his results with statistics, possibly the best statistical tools of his day. The Inspiration/Expiration ratio was only part of the analysis.

Fourth, so far as I know, Benussi was the first to employ more than one physiological measure in detection of deception. He recorded respiration, heart rate, and a blood pressure curve. Unfortunately, the only paper we have does not discuss the sphygmograph results. Perhaps the results were inconclusive, perhaps the equipment did not function well, and it may be that he published the results in another paper.

Fifth, Benussi explored the results of controlled breathing as a means of appearing to be truthful when deceptive, and gave his opinion as to why it did not work. This is probably the first mention of countermeasures in our literature.

Sixth, Benussi was the first to compare his novel physiological method of detecting deception with the accepted method, a jury. However, his jury composition varied from 12 to 23 persons.

Seventh, Benussi reports that a truthful statement has characteristics of its own. We have largely ignored this, and it deserves more attention.

Eighth, Benussi wondered whether the response is from the intellectual conflict or the emotion of lying. He settled for the latter.

Despite all this, we are told that Benussi was held in low regard by some scientists of his time because his research was poorly designed and executed. It was also poorly written. Certainly there is some evidence of this in his work on respiration. However, it may be unfair to apply today's standards for psychological research to what was done in a period when psychology was a new field, more than 70 years ago.

Norman Ansley

See: Vittorio Benussi (1914). Die atmungsymptome der luge. Archiv, Fuer Die Gessampte Psychologie, 31, 244-273. Translated and reprinted in Polygraph, 4 (1)(March 1975), 52-76.

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BOOK REVIEWS

Joseph J. Grau, with Ben Jacobson. Criminal and Civil Investigation Handbook. New York: McGraw-Hill Book Company, 1981. Price $72.50, $78.55 postpaid by McGraw-Hill Book Company, P.O. Box 402, Hightstown, New Jersey 08520.

Reviewed by Norman Ansley

The book contains 63 chapters on individual topics, by 67 authors and co-authors. Two chapters are official publications, one by LEAA and one by the Rochester Police Department.

The polygraph chapter, of six pages, is by Fred Sanchez, a former polygraph examiner of the New York City Police Department, now in private practice. This is a "nuts and bolts" article prepared for the investigator or attorney. It tells him briefly how a test is administered, and what he must do to prepare his subject and case facts in order to effectively utilize polygraph services. In outline form, Sanchez lists the limitations of the polygraph test, which helps the investigator in knowing when subjects are unfit for testing, and what qualifications he should expect in an examiner. Sanchez gives an example of a subject waiver form, mentions legal restrictions, and has a brief paragraph on voice stress testing. While there is nothing new here for polygraph examiners, it is just what is needed for investigators who contemplate including polygraph tests in an investigative operation.

This approach, of reducing technical and management papers to a point of usefulness for the non-expert makes the book valuable as an advanced textbook and, as the publisher suggests, a reference book for police officers, security personnel, insurance and regulatory investigators, attorneys and others interested in the investigative process. Getting so many experts to write a chapter about their specialty is a considerable accomplishment. The Editor, in sticking to his principle of brevity, must have gone through agony with so many papers and writing styles to obtain a uniformly superior production. Unlike many books on investigation, the industrial and commercial security aspects are not an afterthought, but a significant aspect of the book. Altogether, an excellent work, albeit a bit expensive.

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Morton S. Freeman. A Treasury for Word Lovers. Philadelphia: iSi Press, 1983. Paperback, 333 pages, $14.95. Order from iSi Press, 3501 Market Street, Philadelphia, PA 19104, tel. 215/386-0100.

Reviewed by Norman Ansley

Every investigator and polygraph examiner writes reports, letters, and occasionally the results of research and professional papers for publication. A Treasury for Word Lovers is a useful text for all who write reports, as it is organized by the word you have in question, and the topic that may be of concern. This book is so good it was selected as an alternate selection by the Book-of-the-Month Club and the Quality Paperback Book Club. It is one of a series on professional writing published by iSi Press. For our profession, this one is the most useful, but there are books by iSi that tell you how to write and publish scientific papers, medical papers, engineering papers and reports, plus a book on the art of abstracting.

The Treasury is aptly titled, as it offers slants and solutions to the numerous problems of usage that beset people who communicate in writing. In our profession, where precision is essential, the Treasury is useful in answering questions on grammar, word selection and usage, punctuation, and a number of other problems that plague us all. This is not a textbook. It is a reference book that will soon be dog-eared from regular use.

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ABSTRACTS

Computer Analysis

John C. Kircher and David C. Raskin. "Human Versus Computerized Evaluations of Polygraph Data in a Laboratory Setting." Journal of Applied Psychology 73 (1988)(2), 291-302.

Computer methods were compared with human blind analysis of charts made during a mock crime experiment. There were 100 persons in the experiment, half guilty of a mock crime, half innocent. There were 48 subjects in another experiment, producing results used to cross validate the computer model. Computer classification of the first experiment's results were 93 percent correct, while blind numerical analysis of the same charts by a skilled examiner were 89 percent correct. On cross-validation, the computer results were correct in 94 percent of the cases and the examiner's numerical analyses were correct in 92 percent of the cases. These differences are not statistically significant, and the overall experiment suggests that computerized results may be useful in quality control.

Nonverbal Detection of Deception

Paul Ekman, Wallace V. Friesen and Maureen O'Sullivan. "Smiles When Lying." Journal of Personality and Social Psychology 54 (3)(1988): 414-420.

Subtle differences among forms of smiling distinguished when subjects were truthful and when they lied about experiencing pleasant feelings. Expression that included muscular activity around the eyes in addition to the smiling lips occurred more often when people were actually enjoying themselves as compared with when enjoyment was feigned to conceal negative emotions. Smiles that included traces of muscular actions associated with disgust, fear, contempt, or sadness occurred more often when subjects were trying to mask negative emotions with a happy mask. When these differences among types of smiling were ignored and smiling was treated as a unitary phenomenon, there was no difference between truthful and deceptive behavior. [author abstract] illustrated, references.

Reprint requests and correspondence concerning the article should be addressed to Paul Ekman, Human Interaction Laboratory, Department of Psychiatry, University of California, San Francisco, 401 Parnassus Avenue, San Francisco, California 94143.

Ronald E. Riggio, Joan Tucker & Barbara Throckmorton (1987). "Social Skills and Deception Ability." Personality and Social Psychology Bulletin 13 (4), 568-577.

The role of social or communication skills in the ability to deceive was investigated. Thirty-eight student volunteers were administered a number of standardized social skill instruments. Subjects were then videotaped while giving short, persuasive messages. Messages were of three types: attitude-consistent (truthful), counterattitudinal (deceptive), and neutral. The videotaped messages were viewed by groups of judges who made ratings of the subject's believability for each message. Expressive and socially tactful subjects were more successful deceivers, whereas socially anxious subjects were less successful at the deception task. These results were attributed to an honest demeanor bias in the socially skilled subjects and a deceptive demeanor bias in the socially anxious subjects.

For copies of reprints write to Ronald E. Riggio, Department of Psychology, California State University, Fullertin, CA 92634.

Validity of Sexual Arousal Measures for Pedophiles

Gordon C. Nagayama Hall, William C. Proctor, and George M. Nelson. "Validity of Physiological Measures of Pedophilic Sexual Arousal in a Sexual Population." Journal of Consulting and Clinical Psychology 56 (1)(1988): 118-122.

Sexual arousal, as measured by penile erection, in response nondeviant and pedophilic audiotapes was analyzed in a sample of 122 inpatient adult male sexual offenders. Eighty percent of the subjects were able to voluntarily and completely inhibit their sexual arousal.

Multivariate analyses suggested that nondeviant and deviant arousal were significantly associated and that sexual arousal as a male voice described consenting sexual intercourse with women or female minors was

significantly higher than sexual arousal to descriptions of physically forcible sexual and nonsexual activity with female minors. However, the correspondence of these physiological measures with several external offense criteria was weak.

Deviant sexual arousal among sexual offenders may often reflect general arousability rather than deviant sexual behavior. Caution is advised in the interpretation of physiological measures to assess sexual offenders.

Requests for reprints and correspondence concerning this article should be addressed to Gordon C. Nagayama Hall, Western State Hospital, Fort Steilacoom, Washington 98491.

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