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Lie Detection: The Supreme Court's Polygraph Decision

Bennett L. Gershman
Elisabeth Haub School of Law at Pace University

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Detecting deception by examining bodily changes is not a new phenomenon. More than 4,000 years ago the Chinese tried an accused in the presence of a physician who, listening to the heartbeat, would announce whether the accused was lying. The bedouins required suspected liars to lick a hot iron—a burned tongue was a sign of lying. In England the test was to swallow a "trial slice" of bread and cheese—inability to swallow revealed deception.[1]

Modern lie detection operates roughly on the same principle. Questions are put to the subject by a qualified examiner while a polygraph device monitors and records internal stresses from changes in blood pressure, pulse rate, respiration rate and perspiration. A comparison of responses to "control" questions ("Did you have breakfast?") with "relevant" questions ("Did you use drugs?") may reveal that the subject is lying.[2]

Although the rate of accuracy of polygraph testing is claimed to range from 70% to well over 90%,[3] American courts traditionally have been hostile to the admission of any evidence concerning the administration or results of a polygraph examination. For fifty years since *Frye v. United States*,[4] the seminal polygraph case, virtually all courts adhered to a rule of unconditional exclusion.[5] Inadmissibility was based on the unreliability of the test, the lack of standardized procedures, and the prejudicial impact on the jury. Principal concerns articulated by courts have been (1) the aura of infallibility of such evidence, (2) resistance to admitting an opinion on an ultimate issue, (3) infringement on the jury's role in determining credibility, and (4) undue consumption of judicial resources from such testimony.[6]

In *United States v. Scheffer*,[7] decided this past Term, the Supreme Court considered for the first time the admissibility of polygraph evidence.[8] The Court held that exclusion of such evidence on behalf of a criminal defendant was supported by valid justifications and offended no constitutional right to present a defense. The case produced three opinions. The principal opinion by Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Souter, reflected the traditional hostility to polygraph evidence and articulated the traditional justifications for categorical exclusion. A concurring opinion by Justice Kennedy, joined by Justices O'Connor, Ginsburg and Breyer, while agreeing with the result, criticized much of the reasoning in the principal opinion and adopted a more nuanced approach to the admissibility of polygraph evidence. Justice Stevens, in a powerful dissent, noted the incongruity between the government's extensive use of polygraphs to make vital security determinations and its argument in *Scheffer* stressing the inaccuracy of the tests.

Given the obvious tension between *Scheffer* and the Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[9] on the admissibility of scientific evidence generally, the discomfort by five Justices over a categorical rule of exclusion, and the modern trend of limited admissibility of polygraph evidence, it is likely that the Court will again revisit the admissibility of polygraph evidence in a different factual context, and the result next time might well be different.

Background

Scheffer, an airman, was tried by a court-martial on charges of knowingly using methamphetamine. A urinalysis indicated that he had ingested the substance, but his defense was that he was unaware of the ingestion. He so testified, and attempted to support his testimony by introducing the results of a lie detector test which was administered to him at the government's request, and which in the opinion of the government's polygraph examiner confirmed the truthfulness of Scheffer's testimony. Although the prosecution had selected the polygraph examiner, the equipment, the testing procedures, and the questions asked of the defendant, and argued throughout the trial that Scheffer "is a liar," it objected to the admissibility of the polygraph results, citing Military Rule of Evidence 707,[10] which categori-

[1] 1 *McCormick on Evidence* § 206, at 907 (J. Strong 4th ed. 1992).

[2] Moenssens, Inbau & Starrs, *Scientific Evidence in Criminal Cases*, § 14.07, at 704-07 (3d ed. 1986).

[3] *Id.* § 14.09, at 712. *See also United States v. Oliver*, 525 F. 2d 731, 737 (8th Cir. 1975) (expert polygrapher testifies to accuracy rate over 90%).

[4] 293 F. 1013 (D.C. Cir. 1923).

[5] New York is one of the jurisdictions adopting the *per se* rule of exclusion. *See People v. Leone*, 25 N.Y. 2d 511 (1969).

[6] *See United States v. Piccinonna*, 885 F. 2d 1529, 1532-33 (11th Cir. 1989); *Brown v. Darcy*, 783 F. 2d 1389, 1396-97 (9th Cir. 1986). Notwithstanding the general rule of exclusion, prosecutors have committed reversible misconduct by eliciting proof that the defendant failed the test, *United States v. Brevard*, 739 F. 2d 180 (4th Cir. 1984), that a key witness passed the test, *Commonwealth v. Kemp*, 410 A. 2d 870 (Pa. Super. 1979), or indirectly proving that the witness took the test, leaving the inescapable inference that the witness passed the test. *State v. Kilpatrick*, 578 P. 2d 1147 (Kan. 1978); *People v. Brocato*, 169 N.W. 2d 483 (Mich. 1969). Even proof of a witness' willingness or unwillingness to take a lie detector test is error. *United States v. Martino*, 648 F. 2d 367 (5th Cir. 1981).

[7] 118 S. Ct. 1261 (1998).

[8] In *Wood v. Bartholomew*, 116 S. Ct. 7 (1995), the Supreme Court ruled that a state prosecutor's failure to disclose to the defense that a key prosecution witness had failed a polygraph test did not deprive of exculpatory evidence. The Court noted that "disclosure of the polygraph results could have had no direct effect on the outcome of the trial, because [the defense] could have made no mention of them either during argument or while questioning witnesses." *Id.* at 10.

[9] 509 U.S. 579 (1993). *See United States v. Cordoba*, 104 F. 3d 225, 227 (9th Cir. 1997) ("a *per se* rule excluding polygraph evidence was overruled by *Daubert*"); *United States v. Posado*, 57 F. 3d 428, 431-34 (5th Cir. 1995) (*Daubert* "remove[d] the obstacle of the *per se* rule against admissibility").

[10] Rule 707 states: "(a) Notwithstanding any other provision of the law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." There is no counterpart to Military Rule of Evidence 707 in the Federal Rules of Evidence or the Federal Rules of Criminal Procedure.

cally excludes polygraph evidence. The military judge sustained the objection, and the Air Force Court of Criminal Appeals affirmed en banc.[11] However, the United States Court of Military Appeals reversed, holding that a *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility violates his Sixth Amendment right to present a defense.[12]

Supreme Court Opinions

The principal opinion by Justice Thomas began by noting the familiar principle that the right to present evidence is subject to reasonable restrictions, and that rules excluding evidence will be upheld so long as they are not "arbitrary" or "disproportionate" to the purposes they are designed to serve.[13] Rule 707's categorical ban on polygraph evidence serves several legitimate purposes, according to the principal opinion, including (1) ensuring that only reliable evidence is introduced at trial, (2) preserving the jury's role in determining credibility, and (3) avoiding litigation into collateral issues. Given the fact that "the scientific community remains extremely polarized about the reliability of polygraph techniques," the risk that juries will give excessive weight to the opinions of a polygrapher, and the time-consuming "collateral" litigation over the admissibility of polygraph evidence, exclusion of such evidence "is neither arbitrary nor disproportionate in promoting these ends."[14] The Court also held that Rule 707 does not implicate any "significant" or "sufficiently weighty" interest of the defendant, and therefore is distinguishable from the Court's precedents invalidating on constitutional grounds evidentiary rules that excluded a defendant's hypnotically refreshed testimony,[15] an accomplice's testimony,[16] and a third party's confession.[17] Here, Scheffer was neither prevented from testifying in his own behalf, nor precluded from introducing any factual evidence to prove his innocence. Scheffer "was barred merely from introducing expert opinion testimony to bolster his own credibility."[18]

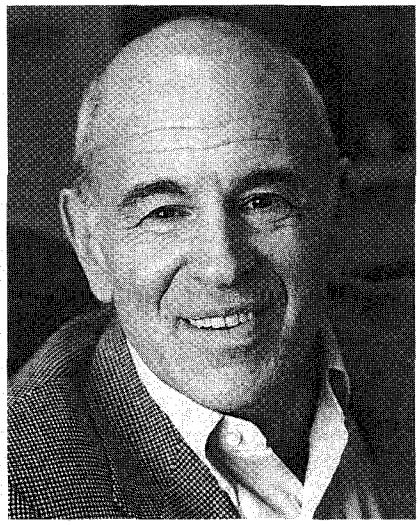
The concurring opinion of Justice Kennedy agreed that the ban on polygraph evidence served the legitimate interest of ensuring that only reliable evidence be presented to a fact-finder, and that given the disagreement in the legal and scientific community about the reliability of polygraph evidence, the exclusionary rule "is not so arbitrary or disproportionate that it is unconstitutional."[19] Nevertheless, the Kennedy opinion doubted the "wisdom" of a *per se* rule of exclusion, and argued that given the broad discretion of federal judges under *Daubert* in admitting or excluding scientific evidence, a "more compelling" case for the admissibility of polygraph evidence might be presented in the future.[20]

The Kennedy opinion emphatically disagreed with the principal opinion's assertion that a *per se* ban is appropriate in order to preserve the jury's role in making credibility determinations and in avoiding litigation into peripheral issues. The Kennedy opinion accused the principal opinion of "overreach[ing]" in arguing that the jury's role is "diminished" by the introduction of polygraph evidence.[21] Such claim is particularly inapt in the context of the military justice system given the extensive qualifications of military court members and the lessened risk that such members will be unduly influenced by opinion testimony from experts. The Kennedy opinion also rejected as "empty rhetoric" the "tired argument" against allowing juries to hear a conclusion about an ultimate issue.[22]

Justice Stevens' dissenting opinion made two arguments. First, he contended that Rule 707 violates Article 36(a) of the Uniform Code of Military Justice, which authorizes the President to prescribe rules for military proceedings relating to special areas of procedural or evidentiary concern.[23] However, according to Justice Stevens, "there is no identifiable military concern that justifies the President's promulgation of a special military rule that is more burdensome to defendants in military trials than the evidentiary rules applicable to the trial of civilians."[24]

Second, a blanket exclusion of potentially relevant evidence violates a defendant's firmly established constitutional right to present a complete defense with relevant and reliable proof. Justice Stevens referred to a host of studies placing the reliability of polygraph tests at between 85% to 90%, with critics placing polygraph accuracy at 70%.[25] Moreover, polygraph accuracy is probably greater than other types of admissible evidence, such as an expert's testimony on a defendant's "future dangerousness" in

[11] 41 M.J. 683 (1995) (en banc).
[12] 44 M.J. 442, 445 (1996).
[13] 118 S. Ct. at 1265.
[14] 118 S. Ct. at 1265.
[15] *Rock v. Arkansas*, 483 U.S. 44 (1987).
[16] *Washington v. Texas*, 388 U.S. 14 (1967).
[17] *Chambers v. Mississippi*, 410 U.S. 284 (1973).
[18] 118 S. Ct. at 1268-69.
[19] 118 S. Ct. at 1269.
[20] *Id.*
[21] *Id.* ("the argument demeans and mistakes the role and competence of jurors in deciding the factual question of guilt or innocence").
[22] 118 S. Ct. at 1269-70. The concurring opinion observed that Rule 704(a) of the Federal Rules of Evidence specifically allows opinions on ultimate issues. The concurring opinion also referred to the Advisory Committee's Notes to Rule 704, which observes that the stricture against allowing witnesses to express opinions upon ultimate issues was "unduly restrictive" and "served only to deprive the trier of fact of useful information."
[23] *See* 10 U.S.C. § 836(a), which authorizes the President to promulgate evidentiary rules "which shall, so far as practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."
[24] 118 S. Ct. 1272.
[25] 118 S. Ct. at 1276 n. 21.



BENNETT L. GERSHMAN is a professor at Pace University School of Law. His most recent book is *Trial Error and Misconduct* (Lexis Law Pub., 1997). He received the New York State Bar Association's award for outstanding contribution to criminal law education in 1991.

capital sentencing proceedings,[26] or the notoriously unreliable testimony of eyewitnesses.[27] Moreover, the belief that polygraph evidence will overpersuade a fact-finder "reflects a distressing lack of confidence in the intelligence of the average American."[28] Finally, no undue waste of judicial resources will be occasioned by polygraph evidence. Indeed, according to Justice Stevens, preliminary proceedings on the admissibility of evidence is a routine predicate for the admission of all sorts of expert testimony.[29] And there would have been no need for collateral proceedings in Scheffer's case since the government selected the examiner, the equipment and the questions asked of the defendant, and has used the identical procedures in hundreds of thousands of other cases.[30]

Modern Trend of Limited Admissibility

Scheffer arrives at a time when courts are increasingly departing from *Frye*'s restrictive approach in favor of a more flexible, balanced approach to the admissibility of polygraph evidence. *Scheffer* essentially maintains the status quo. After *Scheffer*, courts are not barred from continuing to experiment with increasing scientific advances in polygraph instrumentation and technique.[31] Moreover, *Frye* has been superseded in the federal courts by the landmark opinion in *Daubert v. Merrell Dow Pharmaceutical, Inc.*[32] which holds that the "rigid" *Frye* standard is incompatible with the "liberal thrust" of the Federal Rules of Evidence toward the admissibility of scientific evidence.[33] If *Scheffer* had invalidated the *per se* ban of Rule 707, the Court would have invalidated the restrictive approach of most state courts and sent a message to federal courts to exercise broader discretion in favor of polygraph admissibility.

Under current practice, polygraph evidence or the fact that a polygraph test was administered is admitted under several theories. First, references to a polygraph test are admissible when the evidence is introduced for a purpose other than proving the result of the test. Thus, statements made by a defendant prior to, during the course of, or after taking a polygraph are generally admissible.[34] Statements may also be admissible when an adverse expert has considered and discounted them in arriving at an opinion on a defendant's mental condition.[35] Finally, references to a polygraph test are allowed when the evidence is used to demonstrate an operative fact, such as proving the voluntariness of a confession,[36] explaining why the police failed to conduct a more thorough investigation,[37] or proving the existence of an alibi.[38]

Second, under the guidelines established in *Daubert*, federal courts have admitted the result of a polygraph test for substantive purposes. Examples include rebutting an attack on the defendant's credibility as a witness,[39] supporting the defendant's contention that he lacked the culpable mental state for the crime,[40] negating an element in the prosecution's case,[41] or impeaching the credibility of a key prosecution witness.[42] To these courts, the argument that juries will be overwhelmed by polygraph evidence is overstated and underestimates the effect of vigorous cross-examination and argument in exposing flaws in the testing process. Admission of polygraph evidence is also subject to safeguards such as requiring the party seeking to use the evidence to give notice to the adversary, allowing the opposing party to conduct his own examination covering the same questions, and using the proof only in conformity with appropriate rules of evidence governing impeachment and rehabilitation.[43]

Third, polygraph evidence is admitted in most federal circuits and many state courts by stipulation of the

[26] *See Barefoot v. Estelle*, 463 U.S. 880, 898-901 (1983) (expert testimony about future dangerousness to determine a defendant's eligibility for the death penalty is wrong "most of the time" but still admitted in evidence).

[27] *See* Huff, Rattner & Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinquency 518, 524 (1986) (study of wrongful convictions concludes that eyewitness misidentification is the single most important factor leading to conviction); Widacki & Horvath, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 23 J. Forensic Sciences 596, 596-600 (1978) (polygraph evidence compares favorably with fingerprint, handwriting, and eyewitness evidence).

[28] 118 S. Ct. at 1278 (research indicates that "jurors do not blindly accept polygraph evidence, but that they weigh polygraph evidence along with other evidence").

[29] 118 S. Ct. at 1278 ("If testimony that is critical to a fair determination of guilt or innocence could be excluded for that reason, the right to a meaningful opportunity to present a defense would be an illusion").

[30] *Id.* Between 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and criminal investigations. *See* Department of Defense Polygraph Program, Annual Polygraph Report to Congress. Moreover, as Justice Stevens argued, "the Government is in no position to argue that one who has successfully completed its carefully developed training program is unqualified." 118 S. Ct. at 1278.

[31] *See U.S. v. Gilliard*, 133 F. 3d 809 (11th Cir. 1998) (trial court properly excluded polygraph evidence because hybrid control question technique not shown to be reliable). It should be noted that if a defendant is allowed to introduce exculpatory polygraph evidence, a prosecutor may also be allowed to introduce inculpatory test results to prove consciousness of guilt. *See United States v. Scheffer*, 118 S. Ct. at 1279 n. 29 (Stevens, J., dissenting) ("I can see nothing fundamentally unfair about permitting the results of a test taken pursuant to stipulation being admitted into evidence to prove consciousness of guilt as well as consciousness of innocence").

[32] 509 U.S. 579 (1993).

[33] Applying a plain meaning approach to Rule 702 of the Federal Rules of Evidence, the Court in *Daubert* held that Rule 702 required district courts to determine that expert testimony relating to scientific evidence will assist the trier of fact to understand or determine a fact in issue. The first question to be determined is whether the testimony constitutes "scientific knowledge." The Court provided several criteria to guide judges in making that determination, including (1) whether the theory or technique has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence or maintenance of standards controlling the technique's operation, and (5) whether the technique is generally accepted within the relevant scientific community. 509 U.S. at 592-93. The second question under *Daubert* is whether the testimony will assist the trier of fact, that is, whether the testimony relates to an issue that is actually in dispute and whether such testimony provides a valid scientific connection to the pertinent inquiry. *Id.* at 591.

[34] *See State v. Hart*, 791 P. 2d 125 (Or. 1990); *People v. Ray*, 430 N.W. 2d 626 (Mich. 1988); *State v. Erickson*, 403 N.W. 2d 281 (Minn. App. 1987).

[35] *See United States v. A&S Council Oil Co.*, 947 F. 2d 1128 (4th Cir. 1991).

[36] *United States v. Miller*, 874 F. 2d 1255 (9th Cir. 1985); *United States v. Johnson*, 816 F. 2d 918 (3d Cir. 1987); *People v. Melock*, 599 N.E. 2d 941 (Ill. 1992).

[37] *United States v. Hall*, 805 F. 2d 1410 (10th Cir. 1986).

[38] *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995).

[39] *See United States v. Cordoba*, 104 F. 3d 225 (9th Cir. 1997); United States v. Crumby, 895 F. Supp. 13654 (D. Ariz. 1995).

[40] *See United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995).

[41] *See United States v. Posado*, 57 F. 3d 428 (5th Cir. 1995).

[42] *United States v. A&S Council Oil Co.*, 947 F. 2d 1128 (4th Cir. 1991).

[43] *See United States v. Piccinonna*, 885 F. 2d 1529, 1536 (11th Cir. 1989).

parties.[44] The parties must agree to material matters, such as the manner in which the test is conducted, the identity of the examiner, the nature of the questions asked, and the purpose for which the test will be introduced.[45] Courts typically require the stipulation to be written, signed, and a matter of record, afford the opposing side a broad opportunity to cross-examine the expert as to his qualifications and the limitations of polygraph testing, and give a limiting instruction to the jury as to the evidentiary purpose of the testimony.[46]

Fourth, polygraph evidence has been admitted under the evidentiary rule that allows a party to impeach or rehabilitate a witness through opinion or reputation evidence with respect to the witness' character for truthfulness or untruthfulness.[47] For example, if a defendant took the stand and denied having committed the crime, and the prosecutor impeached his credibility, the defendant would be permitted to rehabilitate his credibility by introducing polygraph evidence that demonstrated his character for truthfulness.[48] Moreover, a defendant could support his own credibility by stating that he passed a polygraph examination in connection with the case.[49]

Conclusion

In those jurisdictions that do not unconditionally foreclose the admission of polygraph evidence and allow the court to use discretion with respect to the introduction of scientific evidence, *Scheffer* will not stand in the way of the continued use of polygraph evidence. Moreover, to the extent that a majority of the Supreme Court apparently disapproves of a *per se* rule of polygraph exclusion, *Scheffer* supports a balanced and flexible approach to the use of polygraph evidence under rigorous standards and safeguards. Several federal and state courts have allowed the use of polygraph evidence in various contexts noted above, and probably will continue to do so. Although *per se* rules of exclusion presently do not offend constitutional principles, the emerging body of constitutional doctrine protecting a defendant's right to present relevant evidence to support a defense may one day include a limited right to present polygraph evidence.

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[44] *See United States v. Piccinonna*, 885 F. 2d at 1534 nn. 16, 17. By contrast, a privately commissioned polygraph test which is nknown to either until after its completion is of extremely dubious probative value. *See United States v. Sherlin*, 67 F. 3d 1208 (6th Cir. 1995); *Conti v. Commissioner*, 39 F. 3d 658 (6th Cir. 1994).

[45] *See United States v. Piccinonna*, 885 F. 2d at 1536.

[46] *See State v. Marti*, 290 N.W. 2d 570 (Iowa 1980); *Codie v. State*, 313 So. 2d 754 (Fla. 1975); *State v. Valdez*, 371 P. 2d 894 (Ariz. 1962). *But see State v. Boyd*, 673 N.E. 2d 607, 611 (Ohio App. 1996) (agreement by parties that polygraph examiner may not be examined concerning possibilities for error in testing process violates public policy as giving jury misimpression that examiner's opinion was sacrosanct).

[47] See Fed. R. Evid. 608(a).

[48] *See United States v. Piccinonna*, 885 F. 2d at 1536; *United States v. Crumby*, 895 F. Supp. at 1363. *But see United States v. Castillo*, 1997 WL 83746 n.1 (E.D. Pa. 1997) (rejecting view that polygraph expert opines as to witness' truthful character).

[49] *See United States v. Crumby*, 895 F. Supp. at 1364 (testimony admissible under "impeachment by contradiction" exception to Fed. R. Evid. 608(b)).