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The Polygraph in California: A Heartbeat Away From Admissibility

Listen, I don’t know anything about polygraphs and I don’t know how accurate they are, but I know they’ll scare the hell out of people.¹

Polygraphic evidence² has always been a sensitive topic in the halls of justice. The question of the admissibility of this evidence, seen by many to be worthwhile and reliable scientific evidence,³ and by others as some sort of “wizard of truth”,⁴ has engendered a lengthy debate.⁵ Polygraphic evidence, excluded from judicial consideration since 1923,⁶ has nevertheless been a source of continuing fascination for the American public and the legal profession.⁷ This interest has resulted in persistent efforts to convince the courts to change their opinions and permit the introduction of polygraphic evidence.⁸

The theory of polygraphy is simply stated. A person, when lying, will display subtle, yet measurable, physiological reactions which can be charted. To the trained eye, these reactions will reveal whether or not the subject under polygraphic interrogation is telling the truth.⁹ No one questions the validity of the polygraph as a measuring tool of physiological changes in the body.¹⁰ Many persons, however, hold strong and contradictory beliefs as to the reliability and validity of the polygraphic process, and its probative value as evidence in criminal matters.¹¹

The nation’s courts have, generally, heeded the opponents of poly-

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². See Lykken, supra note 1, at 37. The most basic definition of polygraphic evidence is that polygraphy is a means of instrumental interrogation intended to detect lying, used to determine whether the subject’s answers to certain relevant questions are deceptive or truthful. Id.
³. See generally Lykken, supra note 1, at 23-47.
⁴. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
⁵. See Lykken, supra note 1, at 29. A fascinating application of polygraphic techniques can be found on syndicated television. Attorney F. Lee Bailey, a long-standing advocate of polygraphy, has created a new television show pit ting celebrities and unknowns against a polygraph machine for a $25,000 prize for the person who manages to “beat the machine.” Sacramento Bee, Jan. 15, 1983, at 2, col. 1.
"See infra text accompanying notes 60-112.
9. See infra text accompanying notes 23-47.
11. See id. at 1381; see also text accompanying notes 48-112.
graphic evidence and have kept the results of polygraph examinations out of the courtroom. Following the exclusionary rule established in *Frye v. United States*, the seminal case in this area, judges have required polygraph proponents to show that the theory of polygraphy has received "general acceptance" by the scientific community. This requirement must have found impossible to meet, due in great measure to judicial hostility toward polygraphy. Yet a possible revolution in judicial thinking may be in the offing in California. This change is heralded by the recent California Court of Appeals decision of *Witherspoon v. Superior Court*, which indicated that California courts should reexamine their attitudes and, at the very least, give the proponents of polygraphic evidence their "day in court." 

Assuming that a change should occur, the courts will need to examine the standards by which the testimony of polygraph operators will be admitted. Currently, there are no established principles to guide judges in their examination of the qualifications of polygraph examiners who will be called on to testify as to the validity of the theory of polygraphy and the results of a polygraph test.

This comment will provide an overview of the theory and mechanics of the polygraph process. The reliability of polygraphic evidence, a critical factor in the admissibility of this evidence, will be discussed. The historic treatment of polygraphy will be traced, and the possible impact of *Witherspoon* upon judicial decision-making will be noted. *Witherspoon*, if it is followed, requires the courts to place the past to one side and examine, on a case-by-case basis, the admission of polygraphic evidence when the proponent has satisfactorily established its probativeness and reliability. This comment will also suggest a framework to aid the courts in determining whether a polygraph operator, the conduit through which the results of a polygraph test would pass into evidence, is sufficiently qualified to testify as an expert witness. Such a framework would require a judicial evaluation of the examiner's education, experience, ability, and competency.

12. See text accompanying notes 113-149.
13. See 293 F. 1013 at 1014.
14. See id.
17. Id. at 35, 183 Cal. Rptr. at 621. "It does not further the effective administration of justice for a court, on the basis of its own subjective reasons, to simply bar the use of otherwise valid relevant evidence." Id.
19. See id. at 33, 183 Cal. Rptr. at 620.
The search for truth through the use of external devices is hardly new.\(^1\) Controversy surrounding the methods used to discover the veracity of a person suspected of lying is also not unusual.\(^2\) To understand the often virulent debate surrounding the use of the polygraph, however, requires an examination of the history and the underlying theory of polygraphy. The sections which follow present, in an introductory form, the nature of the science of polygraphy, the procedures used in polygraphic examinations, and the treatment of the polygraph by the courts.

**Polygraphic Evidence: An Overview**

A. The Theory of Polygraphy

The basic assumption underlying the theory of polygraphy is that there are “voices” in the human body which, if properly elicited, can reveal to the trained observer the degree of truth in a person’s statement.\(^3\) The proponents of polygraphy believe that

> “Guilt carries Fear always about with it; there is a Tremor in the Blood of a Thief, that, if attended to, would effectually discover him . . . a fluttering Heart, an unequal Pulse, a sudden Palpitation shall evidently confess he is the Man, in spite of a bold Countenance or a false Tongue.”\(^4\)

These internal truth tellers are certain physiological reactions, the involuntary result of a conscious attempt at deception.\(^5\) These reactions are measured and displayed on a “polygraph”, or “machine of multiple graphs”\(^6\) as tracks, their patterns are interpreted by the polygraph operator, and a conclusion is drawn on the veracity of the subject’s verbal responses.\(^7\)

Polygraphic theory is founded on three basic assumptions. First, polygraphers believe that the extent of the recorded changes in the

\(^1\) See Lykken, supra note 1, at 25-26. As an example of the enlightened methods of truth detecting of the past, consider the method ascribed to the ancient Hindus. A person suspected of lying was invited to chew a mouthful of rice and then attempt to spit it out upon a leaf from the sacred Pipal tree. A man who successfully spat out the rice was deemed truthful, but if the rice stuck to the subject’s tongue or palate, he was adjudicated guilty. Id. at 26.

\(^2\) See id. at 25-27.

\(^3\) See id. at 25.

\(^4\) Daniel Defoe, An Effectual Scheme for the Immediate Prevention of Street Robberies and Suppressing All Other Disorders of the Night (1730), quoted in Lykken, supra note 1, at frontispiece.


\(^6\) 356 F. Supp. at 1365.

\(^7\) See Lykken, supra note 1, at 37.
physiological signals are governed by the subject's belief in the relevance and importance of the questions asked. Second, polygraphers assert that the telling of a lie will cause a greater deviation in the patterns being recorded than the telling of the truth. Finally, detection of a lie can be achieved by an examination of the responses to questions bearing the greatest relevance to the matter at issue, that is, the crime the subject is suspected of committing.

The most widely-used polygraphic format in criminal investigation, the "control question" test, was designed in recognition of these assumptions. The "control question" test is a combination of irrelevant, relevant, and so-called "lie control" questions. Irrelevant questions deal with matters such as the subject's age, name, or place of birth. The polygraphic responses to these questions should show a lack of stress, as the matters raised are usually of no importance to the investigation. The relevant questions relate directly to the issue at hand: "Did you kill X?" "Did you own the knife used to stab X?" These questions usually go directly to the subject's guilt or innocence of the crime charged. The "lie control" questions raise issues which,
while unrelated to the specific crime itself, may be associated with unsocial conduct. They are designed to evoke high responses in innocent persons: "During the first 18 years of your life, did you ever hurt someone?" "Before age 19, did you ever lie to get out of trouble?" 38

The interrelationship of the responses to these questions is the key to the perceived effectiveness of the polygraph test. 39 According to the theory of this examination, the subject will respond most violently to the questions that are perceived to be the most threatening. 40 Therefore, a guilty person will show stronger reactions to the relevant questions relating to the crime, and much less reactions to the control questions. 41 Innocent persons should produce larger reactions to the control questions than to the relevant questions. 42 If the polygraphic responses to the relevant questions are consistently larger than those responses to the control questions, the subject has "failed the test" and will be considered to have been deceptive. 43 If the number of responses to the control questions are the larger, then the subject has passed, and will be deemed truthful. 44 If there is minimal difference between the two sets of responses, the test is declared inconclusive. 45

The theoretical basis of polygraphy rests squarely on the assumption that a person’s involuntary reactions are more trustworthy than his observable, conscious acts. 46 Opinions on the reliability and validity of polygraphy divide at this stage at the practical application of the theory of polygraphy. 47

39. See Lykken, supra note 1, at 115; see also United States v. Urquidez, 356 F. Supp. at 1365.
40. See Raskin, supra note 3, at 2. Of course, "threat" is a relative term, and critics say that this generalization can be criticized on the grounds that the shaping of the "control" question, in terms of wording and appropriateness, have much to do with how the subject reacts. In United States v. Urquidez, 356 F. Supp. 1363, the results of a polygraph examination favorable to defendant were challenged on the grounds that the wording of the relevant question regarding the alleged sexual escapades of a suspected drug dealer was misleading (the question was, "Did you deliberately lie to me when you said you had "sex" with David (an undercover agent)?"), and that a principal control question dealing with lies made to her mother when young was inappropriate and confusing to the subject. Although the court raised the point, it did not give its conclusion on the subject, and instead refused to admit the evidence on the bases of the traditional view that polygraphic evidence was unreliable and would take up too much court time in considering expert testimony on the point. Id. at 1366-67.
41. See Raskin, supra note 3, at 2.
42. Id.
43. Lykken, supra note 1, at 111; Raskin, supra note 3, at 2. The scoring technique used by Raskin in his study was based on the strength or weakness of the three basic physiologic variables in their reaction following the questioning of the subject. If the total score was six points or larger, the subject was deemed truthful; if the score was negative six points or larger, the subject was deemed deceptive, and scores falling in between the two extremes were called inconclusive. Raskin, supra note 3, at 2.
44. Lykken, supra note 1, at 111.
45. Id.; see also 356 F. Supp. at 1365.
46. See Lykken, supra note 1, at 113-118.
47. See id.; see also Raskin, supra note 3, at 2.
B. The Reliability of Polygraphic Evidence

No one is quite sure how many polygraphic examinations are given in America every year. A conservative estimate would place the number at one million.\textsuperscript{48} Others would put the figure nearer to four million.\textsuperscript{49} A substantial portion of these figures represent the use of the polygraph in a criminal setting,\textsuperscript{50} where the innocence or guilt of a person is allegedly determined.\textsuperscript{51} The most common situation, however, in which the average person is subjected to polygraphic examination is in the employment setting.\textsuperscript{52} Approximately twenty percent of major American corporations, and fifty percent of retail sales organizations, use the polygraph in preemployment decisions or in periodic screenings for employee impropriety.\textsuperscript{53} To administer these tests, thirteen major polygraphic schools graduate hundreds of new examiners every year. In 1979, approximately 4,000 to 7,000 persons were practicing in the polygraphic field.\textsuperscript{54}

In the face of wide-spread use, many persons have come to believe in the infallibility of the polygraph.\textsuperscript{55} The polygraph has gained the reputation as a "truth teller",\textsuperscript{56} a "truth verifier", and a veritable Houdini which can always reveal truth. Others claim that polygraphy has become an American obsession, a pseudo-scientific game of cat and mouse with the rights of criminal suspects played for very high stakes.\textsuperscript{57}

Polygraphic evidence, to be admissible in a court of law, must be found valid.\textsuperscript{58} To find polygraphy reliable, judges must be convinced

\begin{itemize}
\item \textsuperscript{48} Lykken, supra note 1, at 1-2.
\item \textsuperscript{49} This figure was calculated by extrapolating figures cited by the president of the Florida Polygraph Association, which calculated the number of tests given in Florida annually to be in excess of 100,000, and multiplying it across the 50 states. Id. at 2.
\item \textsuperscript{50} Id. at 2.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. at 3. Both critics and supporters of polygraphic evidence are concerned at the rise of polygraph testing in the personnel offices and security investigations of America's businesses. Even David Raskin criticizes the results of the business polygraph test, saying that such tests are often conducted hastily and that the questions asked, usually very vague and general, are designed to elicit personal admissions that can be used against the subject when personnel decisions are made. On this point, see the brief discussion in Meyer, Do Lie Detectors Lie?, SCIENCE 82, June 1982, at 24, 27; see also Flaherty, Polygraphs: The Big Lie?, NAT'L L.J., Jan. 24, 1983, at 1, col. 1.
\item \textsuperscript{53} Lykken, supra note 1, at 3. Presently, there are no laws either banning the use of lie detectors in the business area, or establishing licensing requirements, in 15 states. Polygraph exams are permitted in 21 states which have polygraph licensing statutes. 16 states and the District of Columbia impose some type of prohibition on the use of the polygraph in the business setting. Two states enforce partial bans and require licenses. See Flaherty, supra note 52, at 28, col. 1; see also Belt & Holden, Polygraph Usage Among Major U.S. Corporations, PERSONNEL JOURNAL, 1978, at 80-86.
\item \textsuperscript{54} See Lykken, supra note 1, at 1.
\item \textsuperscript{55} See United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975).
\item \textsuperscript{56} See id.
\item \textsuperscript{57} See Meyer, Do Lie Detectors Lie?, SCIENCE 82, June 1982, at 24, 26.
\item \textsuperscript{58} See Lykken, supra note 1, at 70. "The lie test diagnosis may be unambiguous; the important question is whether it is correct." Id.
\end{itemize}
that the theory behind polygraphy, i.e., that certain physiological reactions can be interpreted by a capable polygrapher and be used to determine truth or falsity, can be proven to be accurate.59

Numerous studies have been conducted which claim to prove the accuracy of polygraphic testing.60 Most of these reports do not focus on the accuracy of the polygraph machine itself.61 There seems to be general agreement that the polygraph, as an instrument for measuring and recording the critical physiological signals, is an accurate and legitimate tool.62 Instead, criticism and praise are focused on the validity of the conclusions drawn from the polygraphic examination.63 Proponents of polygraphy have claimed accuracy figures ranging from 70% to 100%.64 John E. Reid, who is credited with creating the “lie control” polygraphic examination, and Professor Fred Inbau, a criminal law authority and director of the Chicago Crime Laboratory for many years, have conducted extensive studies of the accuracy of polygraphic tests.65 They assert that, based on their experiences with administering over 100,000 examinations, a properly conducted polygraph test will be correct 99% of the time.66

In a recent report for the National Institute of Law Enforcement and Criminal Justice,67 polygraph expert Professor David C. Raskin of the University of Utah examined the results of laboratory experiments and field studies of polygraphic examinations.68 Mr. Raskin's efforts were aimed at determining if the conclusions of truth or innocence reached through polygraphic examinations were valid generalizations useful in a defense of polygraphy against claims of inaccuracy.69 The report

59. See id.
61. See LYKKEN, supra note 1, at 112-26.
63. Id.
64. See LYKKEN, supra note 1, at 65. “Nearly every experienced polygraphic examiner who has recorded an opinion about the accuracy of tests he has himself administered has chosen an estimate in [the 100% range], where 95% is “conservative” and 99% is perhaps typical.” Id.; see also 361 F. Supp. 510, at 512.
66. Id. at 304.
67. RASKIN, supra note 3.
68. Id. at 1, 8-22.
69. Id.
stressed the advantages of laboratory experiments in assessing the accuracy of results. In the laboratory, "ground truth" can be established, and can be used as the standard by which to measure the results. Using ground truth, different test structures were evaluated for their relative truth-determining abilities, and the influence of characteristics held by the subject were examined.

The report analyzed the results of two separately conducted experiments using the "lie control" examination technique. In both experiments, test results were scored once by the examiner and again by an independent polygrapher. The examiners used an objective numerical system according point values to the results of each of the three physiological components measured by the machine. In the first experiment, an accuracy rate of 95% was achieved. The second experiment yielded an 89% accuracy figure, and the combined accuracy rates, as compared with established ground truth, exceeded 90%. The charts from the second experiment were examined by an independent examiner. This independent scoring revealed a 100% agreement between the polygraphers on the results of their conclusions. This is strong evidence supporting the report's position advocating the use of a numerical system of scoring which will ensure that any polygrapher can look at any set of responses and come up with the same result.

The report also undertook to meet common criticisms of polygraphy through the use of field studies in the criminal setting. A number of studies were conducted, each focusing on a particular area of critical

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70. Id. at 1.
71. Ground truth is factual truth that can be completely and certainly determined in the laboratory setting. Id. at 1.
72. Id.
73. Id.
74. Id. Raskin first examined the results of two experiments conducted separately at a provincial prison in British Columbia and at the University of Utah. Both experiments used a "mock crime" situation, where half of the subjects in each experiment were instructed to commit a "crime" while the other half were merely informed of the nature of the crime. The polygraph examinations were given by an examiner with no knowledge as to the guilt or innocence of the subjects. Id.
75. Id. at 1. For purposes of the experiment, all the subjects in both projects were instructed to deny having committed the theft, and were offered a cash bonus if they could produce truthful results on the test. Id.
76. Id. at 1.
77. Id. at 8.
78. Id. at 8. The other 10%, deemed inconclusive, were the result of errors in scoring, divided between "false positives" (an erratic response to a relevant question by an innocent person, indicating untruth) and "false negatives" (a lower response than expected to a relevant question by a guilty subject). Id.
79. Id. at 11.
80. Id. at 1. Dr. Raskin stated that questions concerning the everyday practice of polygraphy could be answered solely by the generalizations arrived at through laboratory experimentation. Raskin indicated his preference that these questions be answered through studies of field applications, as inferences drawn from the laboratory should be made cautiously and be fully tested in the field before considered accurate. Id.
These concerns, the methods used to meet them, and the test results are summarized below.

1. **Reliability and Validity of the “Lie Control” Examination with Criminal Suspects**

A concern of polygraph critics has been with the differences in results between claimed laboratory accuracy and actual field results. One study was designed to attempt to remove differences between laboratory and field practices by imposing strict controls on the subjects, examiners, and techniques used in the field examinations. Ninety-two criminal suspects were examined at the request of police, defense and prosecuting attorneys. Results were numerically scored by the examiner and by an independent polygrapher. Ground truth was determined by comparing the test results with a combination of criteria: an independent judgment of a five-member panel of experts, judicial outcomes, and full confessions of guilt. When the polygraphic results were compared with the decisions of the panel of experts as to guilt or innocence, they agreed in 86% of the cases. When compared with the judicial outcomes of the cases involving the subjects, there was 88% agreement between the polygraph results and the judicial outcomes. The relevance of this study is in the closeness of the results determined in the field with the accuracy figures determined in the laboratory experiments, showing that polygraphic examinations, if conducted properly, can have similar success rates whenever conducted.

2. **Accuracy of Chart Interpretation**

The first polygraph examinations gave great discretion to the examiner to add to the objective results certain subjective factors arising out of the examiner’s own opinion as to the guilt or innocence of the subject. These early examination techniques have been referred to as the

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81. See id. at 4-7.
82. Id. at 4.
83. Id. at 4. Raskin admits the impossibility of eliminating all the differences between laboratory and field exercises, but does conclude that a majority of the problems could be alleviated. These problems included the differences in subject motivation and population, availability of information about the case which might influence the examiner, differences in techniques used by the polygraphers, and the difference in training and experience between field practitioners and laboratory researchers. See id.
84. Id.
85. Id.
86. Id.
87. Id. at 8.
88. Id. at 10.
89. Id. at 11.
“clinical lie tests.” Criticism of these techniques led to the rise of the modern “lie control” test, which eliminates all potentially prejudicial factors, such as operator opinion, by requiring the test results to be scored in a numerical fashion. The report argues that the major benefit of the objective lie control test is that any polygrapher looking at the results and using the same scoring technique would arrive at the same result. To test this hypothesis, polygraph results from sixteen criminal suspects examined using the lie control test were evaluated by 25 experienced polygraphers from a variety of backgrounds. Eighteen of the polygraphers did not use the numerical scoring technique, seven did. Of the 400 judgments made by the polygraphers on the sixteen charts they scored, 79% were correct, 8% were errors, and 13% were inconclusive. Looking to the difference in accuracy rates between the scoring techniques, the average accuracy test of the 18 polygraphers who did not score numerically was 88%, while the rate for the seven who did was significantly higher, with an average of 99%, giving credence to the view that numerical scoring leads to higher accuracy and an increased reliability factor.

3. The “Friendly Polygrapher”

One objection often raised by critics and courts is the possibility that the polygraph results may be affected in cases where the examination is conducted at the request of defense attorneys. The motivation to deceive on the part of the subject, and the threat of serious consequences if such deceit were discovered, would be absent in the case of examination by a “friendly polygrapher.” Therefore, many critics assert that the results obtained in these situations would be invalid. Specifically, the critics fear that the subject’s concern with the use of the results of the test against him if found deceptive is missing in the friendly polygrapher situation. This absence of the motivation to lie, critics assert, will lead to results substantially different than results

90. For a discussion stating strong reasons to reject the results of the “clinical lie” test, see LYKKEN, supra note 1, at 87-101.
91. See id. at 85.
92. RASKIN, supra note 3, at 5.
93. Id. at 11.
94. Id. at 11. There was found no significant difference in accuracy of the decisions of examiners with at least one year of experience (92%) and the decisions of those with less than one year of experience (89%). Id.
95. Id.
97. See RASKIN, supra note 3, at 6; ORNE, supra note 96, at 114-16.
98. See 53 Cal. App. 3d at 117, 125 Cal. Rptr. at 522.
99. See id. at 116, 125 Cal. Rptr. at 522.

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which would arise from examinations conducted by neutral examiners or the police.° To test this hypothesis, three different groups of criminal suspects, evenly divided between subjects examined at the request of law enforcement officials and by private defense attorneys, were given polygraph examinations.° The results tended to disprove the "friendly polygrapher" theory, for the percentage of responses deemed truthful by the defense polygraphers, 78%, differed only slightly from truthful responses given to the prosecution examiners, 76%.°

To be admissible in court, polygraphy must be shown to be reliable. Experiments and field studies by polygraphers point to the conclusion that polygraphic examinations using the "lie control" format are highly accurate.° Numerical scoring of polygraph results produces a higher rate of accuracy and reliability than other methods.° Independent evaluations of test results to verify the accuracy of the polygrapher's conclusions are an important check on possible operator bias and guarantees objective results that can be relied upon by courts.°

The proponents of polygraphy believe that an examination by a well-trained and objective examiner, independently verified by a neutral polygrapher, will result in a highly accurate and reliable determination of guilt or innocence which should be given careful consideration in criminal investigations and judicial proceedings.° The modern polygraphic examination, it is urged, has a valuable potential not only for the discovery of truth but for the protection of the innocent.°

The polygraph does not speak absolute truth, but does supply at least some evidence of a greater indication of truth than would have been known without it.° While the results of a polygraph test should never be used by itself to support a criminal conviction, the reliability of polygraphic evidence supplies a compelling reason for its use in the adversary system of justice.°

The California courts, following the lead of the majority of Ameri-
can jurisdictions, have so far excluded the use of non-stipulated polygraph results in their courtrooms. The California view may soon be shifting, however, guided by the mandate expressed in the recently-approved “Victim's Bill of Rights,” which would allow the introduction of all relevant evidence in criminal proceedings. And the courts themselves, as shown by the Witherspoon decision, may be ready to enter into a period of serious reevaluation of the acceptability of polygraphic evidence. To better understand the possible change, an examination of the course of judicial treatment of polygraphy since its introduction as an evidentiary technique over fifty years ago is necessary.

**Judicial Treatment of Polygraphic Evidence in California**

The California approach to polygraphic evidence has been shaped to a great extent by the seminal case of Frye v. United States. In Frye, decided in 1923, the Court of Appeals for the District of Columbia upheld the rejection by the trial court of the results of a systolic blood pressure “lie detector” test. The Frye court fashioned a standard to govern the admissibility of scientific evidence, the “general acceptance” test. This test requires any scientific principle serving as the basis for evidence sought to be admitted to be so “sufficiently established (as) to have gained general acceptance in the particular field in which it belongs.” The principle must have “cross(e)d the line between the experimental and demonstrative stages”, and must be afforded some sort of scientific recognition by authorities in the relevant branch of science before its evidential force will be recognized by the courts. The Frye court concluded, in applying the “general acceptance” rule to polygraphic evidence, that the systolic blood pressure test had not yet gained the requisite general acceptance by physiological and psychological authorities, and the results of the test should not be admissible into evidence.

Under Frye, the proponent of polygraphic evidence must satisfy not only the traditional requirements of relevancy and helpfulness to the

110. *See infra* text accompanying notes 113-49.
111. *See infra* text accompanying notes 150-68.
112. *See infra* text accompanying notes 170-209.
113. 293 F. 1013 (D.C. Cir. 1923).
114. *See id.* at 1014.
115. *See id.*
116. Id.
trier of fact, but also must show that polygraphy has been generally accepted by the scientific community. This interpretation of Frye has been widely applied by American jurisdictions. The main use of the test has been in cases in which the admissibility of polygraph results was at issue. In most other areas of expert testimony based on scientific evaluation, the courts have not required the same degree of "general acceptance" as a prerequisite to admission as Frye requires of polygraphic evidence. The major reason for this difference in treatment seems to stem from judicial hostility to the polygraph. The result of the use of the Frye test to determine the admissibility of polygraphic evidence has been the exclusion of polygraphs from the courtroom.

A. Frye in California

The California courts have used the Frye "general acceptance" test as the basis for their decisions regarding the admissibility of polygraphic evidence, and have excluded the introduction of testimony regarding the results of polygraph examinations. In 1950, the California Supreme Court held in People v. Wochnick that the results of a polygraphic examination were not admissible as evidence, and there was prejudicial error for the trial judge to admit into evidence the results of a polygraph test indirectly through the form of a purported accusatory statement. The Wochnick court cited Frye and cases from other jurisdictions adopting the Frye standard. The court

118. See McCormick, supra note 117, at 881.
119. See Comment, supra note 117, at 337.
121. See Comment, supra note 117, at 339-40. Examples of types of expert testimony based on scientific evaluation which have been accepted by courts without a showing of the same degree of "general acceptance" required of polygraphy are fingerprints, People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911), ballistics, State v. Burney, 346 Mo. 859, 143 S.W.2d 273 (1940), and spectographs, United States v. Williams, 583 F.2d 1194 (2d Cir. 1978). The distinction between these types of scientific evidence and polygraphy is that in the former case, the court is examining the results of a "scientific" test, while at issue in polygraphy cases are scientific facts. Comment, supra note 117, at 339.
124. See Lister, supra note 123, at 41. California courts will, however, accept the introduction of polygraphic evidence into testimony by the stipulation of both parties. See People v. Houser, 85 Cal. App. 2d 686, 694-95, 193 P.2d 937, 942 (1948).
126. Id. at 127, 219 P.2d at 72.
declared California to be "in accord" with the view that the systolic blood pressure deception test had not yet "gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."127

The California courts have supported their use of the Frye standard in excluding polygraphic evidence with several policy arguments. In the California Supreme Court case of People v. Kelly,128 assessing the admissibility and validity of voiceprint evidence, the Court defended its continued use of the Frye test, pointing to the benefits of the "conservative nature" of the "general acceptance" test.129 Uniformity of decisions on the admissibility of scientific evidence "generally accepted" by the scientific community,130 and the avoidance of jury reliance on scientific proof such as polygraphic evidence which can assume a "posture of mystic infallibility",131 were benefits found by the Kelly court of continued adherence to the Frye test.132

Besides uniformity of decisions and the prevention of misplaced jury reliance on scientific evidence, the California courts have pointed to the nature of polygraphic evidence itself as a reason for continued exclusion. The judicial opinion that "lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results" has remained unchanged.133 While the Frye "general acceptance" requirement is the primary reason for refusing to admit polygraphic evidence, the reliability of the lie detector test has been deemed to be a far more important factor to consider in the admissibility of polygraphic evidence.134 In People v. Adams,135 the California Court of Appeals expressed its view that "general acceptance is not necessarily a proper test [of admissibility] since it does not invariably equate with reliability."136 Proponents must establish that polygraphic evidence has "a degree of reliability sufficient to warrant admissibility."137

127. Id. at 128, 219 P.2d at 72.
129. Id. at 31-32, 549 P.2d at 1244-45, 130 Cal. Rptr. at 148-49.
130. Id. at 31, 549 P.2d at 1245, 130 Cal. Rptr. at 149.
131. Id. at 31-32, 549 P.2d at 1245, 130 Cal. Rptr. at 149.
132. Id. at 31, 549 P.2d at 1245, 130 Cal. Rptr. at 149.
133. See People v. Carter, 48 Cal. 2d 737, 752, 312 P.2d 665, 674 (1951).
134. In People v. Jones, 52 Cal. 2d 636, 343 P.2d 577 (1959), the California Supreme Court held that a lack of scientific certainty as to the truth or falsity of the answers given during a polygraphic examination makes the results of a lie detector test inadmissible for or against a criminal defendant. Id. at 643, 343 P.2d at 588.
137. Id. at 115-119, 125 Cal. Rptr. at 522-25. The Adams court, in finding the polygraphic evidence "in accord" with the view that the systolic blood pressure deception test had not yet "gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made under such theory."127
Another judicial concern with the introduction of polygraphic evidence is the fear that the polygraph examination of an innocent person "may record as a lie what is in fact the truth." For this reason, evidence of the willingness or unwillingness of a criminal suspect to take a lie detector test is inadmissible. A final factor considered by the courts has been the absence of evidence regarding the methods or qualifications of the operator of the polygraph. In any case dealing with polygraphy, the extent of operator experience and proven competency are important factors showing the reliability of the polygraph itself.

The California courts, in their dealings with polygraphic evidence, have not only continued the use of a Frye-type "general acceptance" analysis, but have formulated various policy reasons which have been transmuted into further requirements to be met before polygraph examination results can be admitted. In the rare case in which the courts have gone beyond the holding of Frye to examine the rationale behind exclusion, polygraphic evidence has been found to be unworthy of judicial recognition because the proponents of the evidence have failed to show that polygraphy has gained that degree of reliability sufficient to warrant its admission. The continued viability of the traditional California treatment of polygraphy is now at issue in the courts and in the Legislature.

The Future of Polygraphic Evidence

A major reason for this reevaluation is the effect the recently-enacted "Victims' Bill of Rights" is having on California evidentiary juris-

evidence before it to be unreliable, cited the following reasons supporting its conclusion: (1) defendant took his examination from a "friendly polygrapher", (2) defendant had consumed alcohol and pills several hours before the accident in question in the case, casting doubts as to his ability to recall the incident and generate meaningful polygraphic response, (3) defendant had ingested a tranquilizing drug some hours before the polygraphic examination, thereby affecting the physiological responses he displayed at the time of the exam, and (4) defendant, a physician, may have been able to use his specialized knowledge of physiology to "beat the test". See People v. Carter, 48 Cal. 2d 737 at 752, 312 P.2d 665 at 674 (1951).


See id.

See Ashby, Legislature May Change Prop. 8's Evidentiary Rules, L.A. DAILY J., Feb. 7, 1983, at 1, col. 6. Two bills have been introduced in an attempt to restore non-controversial evidence provisions "wiped out" by the passage of Proposition 8. Senate Bill 242 restores the Evidence Code with the exception of section 788, which deals with the use of prior convictions, a subject proscribed elsewhere in Proposition 8. Senate Bill 243 restores the Financial Privacy Act, certain sections of the Penal Code, and other miscellaneous sections from other codes dealing with such things as speed traps and dependency child hearings. Id.

prudence. Judges and legislators alike are struggling with the ramifications of the "Truth in Evidence" clause of Proposition 8, which would seem to signal an expansion of admissible evidence into areas heretofore considered unreliable or misleading. Another factor signaling a possible change in attitude toward polygraphic evidence is the recent decision in Witherspoon v. Superior Court, which indicates a judicial willingness to reconsider the polygraph question.

A. Proposition 8: The Victims' Bill of Rights

Proposition 8, enacted into law by the voters of California in June, 1982, was one of the most wide-ranging and controversial ballot measures ever considered by the California electorate. The supporters of the measure hailed the "Bill of Rights" as a decisive action against violent crime, and an attempt to restore balance to the rules governing the use of evidence. The detractors of Proposition 8 were quick to label the initiative as an ill-conceived measure, a simplistic and short-sighted proposal which would needlessly reduce personal liberties by making radical changes in the state Constitution.

One provision in the "conglomeration of proposals" making up Proposition 8 was the so-called "truth-in-evidence" section. This provision states that, except for statutory exclusions created by a two-thirds vote of the California Legislature after the passage of the initiative, relevant evidence shall not be excluded in any criminal proceeding. This change, in effect, removes the judicially-created rules

146. See Ashby, supra note 144, at 1, col. 6.
147. See id.
149. See infra text accompanying notes 170-209.
150. See Ashby, supra note 144, at 1, col. 6. The proposition was approved by 57 percent of the California voters. Id.
151. See 32 Cal. 3d at 305-06, 651 P.2d at 318-19, 186 Cal. Rptr. at 74-75.
152. See 32 Cal. 3d at 305, 651 P.2d at 318, 186 Cal. Rptr. at 74 (quoting from ballot argument by then-Lieutenant Governor Mike Curb).
153. Id. at 305, 651 P.2d at 318, 186 Cal. Rptr. at 74 (quoting from ballot argument by then-Attorney General and present California Governor George Deukmejian).
154. Id. at 306, 651 P.2d at 319, 186 Cal. Rptr. at 75 (quoting from ballot argument by Richard Gilbert, Stanley Roden, and Terry Goggin).
156. See 32 Cal. 3d at 306, 651 P.2d at 319, 186 Cal. Rptr. at 75 (quoting ballot argument by Gilbert, Roden, and Goggin).
158. This rule is not to be applied to effect any existing statutory rule of evidence relating to privilege or hearsay, statutory or constitutional rights of the press, or certain Evidence Code sections relating to the discretionary exclusion powers of the trial judge and procedures relating to the admission of evidence of sexual conduct used to impeach a witness in certain criminal prosecutions. See id.; CAL. EVID. CODE §§352, 782, 1103. This rule is to be extended to include pretrial and post conviction hearings and motions, and any trial or hearing of
excluding certain types of evidence, including polygraphic evidence. The Office of the California Attorney General has suggested that the “truth-in-evidence” portion of Proposition 8 is in conflict with that portion of Evidence Code section 801 barring an expert from basing his opinion on matters “precluded by law.” Courts, under the provisions of “truth-in-evidence”, would be required to admit all relevant evidence supported by the testimony of a qualified expert witness, unless the probative value of the evidence is “overborne by the familiar dangers of prejudicing the jury, and undue consumption of time.” If prejudice is discovered, courts would keep the evidence out through the use of the court’s discretion under Evidence Code Section 352.

In the absence of legislation regulating or forbidding the admission of polygraphic evidence, the thrust of the “truth-in-evidence” provision would indicate that polygraphic evidence may serve as a valid basis on which an expert can base an opinion. There can be no doubt that an accurate, reliable polygraph examination can serve as the basis for relevant evidence in a judicial determination of guilt or innocence. If the relevance of the polygraph results outweigh any potential prejudice the presentation of the evidence would create in the minds of the trier of fact, there would be little preventing polygraphic evidence from being introduced into evidence. The “Victims’ Bill of Rights”, if it means nothing else, seems to require this result.

If polygraphic evidence is admissible under the evidentiary scheme outlined by Proposition 8’s “truth-in-evidence” clause, only stare decisis reliance on the California cases following Frye and the implicit judicial reticence to admit polygraph results would seem to stand in the way. Signals that the judicial edifice is weakening in the area of exclusion of polygraphic evidence have been sent out by the recent decision

a juvenile for a criminal offense, whether heard in juvenile or adult court. Federal restrictions on the admission of evidence are not affected. CAL. CONST. art. I, §28(d).


160. CALIFORNIA ATTORNEY GENERAL’S OFFICE, A GUIDE TO PROPOSITION 8, at 4-46 (1982) [hereinafter cited as GUIDE].

161. See id. at 4-15 (citing CAL. EVID. CODE §801(b)).

162. See id. at 4-47; see also C. McCormick, LAW OF EVIDENCE 491 (2nd ed. 1972).

163. See GUIDE, supra note 160, at 4-47.


165. See Ashby, supra note 144.

166. See 133 Cal. App. 3d at 33, 183 Cal. Rptr. at 620.

167. See id. at 33, 183 Cal. Rptr. at 620.

168. See Ashby, supra note 144. While the main intent of Proposition 8 was to eliminate the growing gap between state and federal courts over application of constitutional standards in search questions under the Fourth Amendment, a secondary purpose was to abolish restrictions on evidence heretofore kept out of the courtroom because of judicially-created exclusionary rules.

Id.
of the California Court of Appeals in Witherspoon v. Superior Court. 169 If this case is any indication of the future course of polygraphic evidence in the courtrooms of California, then the future is bright indeed for the proponents of polygraphy.

B. Witherspoon v. Superior Court

Until the decision of Witherspoon v. Superior Court, 170 California courts had followed an unbroken line of appellate decisions which created a blanket exclusion of polygraphic evidence. 171 The Witherspoon decision, however, reexamined this course of judicial treatment of polygraphy 172 and concluded that no legal reasons existed to justify the continuance of the exclusionary policy of the courts. 173

Defendant Gary Witherspoon was awaiting trial on eight counts of armed robbery. 174 Pursuant to procedures outlined in California Evidence Code section 402, Witherspoon requested a pretrial determination of the admissibility of a confession alleged to have been made by him. 175 He also sought an evidentiary hearing, at which he proposed to prove the validity of a polygraphic examination administered to him on the issues of the voluntariness of the confession and his innocence of the crimes with which he was charged, for future admission at trial. 176 The trial court denied the motion, refusing to hold the evidentiary hearing on the grounds that the polygraph examination results would be inadmissible regardless of what evidence the defendant might offer. 177 Witherspoon petitioned the Court of Appeals for a writ of mandate to require the trial court to hold the evidentiary hearing. 178 The appellate court directed the issuance of the writ of mandate, holding that polygraphic evidence meeting the requirements set forth in Evidence Code sections 402 through 406 (relating to judicial determination of existence of preliminary facts required before proffered evidence can

170. See id.
171. Id. at 26, 183 Cal. Rptr. at 616.
172. See supra text accompanying notes 113-149.
173. 133 Cal. App. 3d at 27, 183 Cal. Rptr. at 617.
174. Id. at 26, 183 Cal. Rptr. at 616.
175. California Evidence Code section 402 provides:
(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. (b) The court may hear and determine the question of the admissibility of evidence out of the presence of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests. (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.
176. 133 Cal. App. 3d at 26, 183 Cal. Rptr. at 616.
177. Id. at 26, 183 Cal. Rptr. at 616.
178. Id.
be presented to the trier of fact) should be admitted. The traditional
discretionary authority of the trial judge under Evidence Code section
352 to exclude prejudicial or overly time consuming evidence would be
preserved and could be used to prevent the admission of polygraphic
evidence falling within the purview of the section.

In analyzing the California cases dealing with the polygraph prob-
lem, Judge Compton, writing for the Witherspoon court, found that
many of the cases which applied the Frye test based their exclusion of
polygraphic evidence “on ipse dixit statements that the ‘reliability of
the results of a polygraph examination has not been established’ and
that ‘courts . . . have consistently denied their admission into evi-
dence.’” Judge Compton credited this to the futility of the attempt
to introduce evidence of polygraph reliability in the face of the widely
accepted exclusionary rule of Frye. A lack of understanding on the
part of judges of the theory and practical uses of polygraphy, accord-
ing to Judge Compton, led to a “knee jerk” subjective reaction among
judges which favored the foes of polygraphic evidence in an area in
which “there is a substantial and credible body of opinion on both sides
of the question.”

Judge Compton begins his opinion by removing the court from the
restraints of the Frye test. Citing the lack of judicial understanding
of polygraphy, Judge Compton points to the failure of the case law to
identify in “just what ‘scientific field’ the necessary ‘acceptance’ must
be achieved.” Were the Frye test to be applied in this case, however,
Judge Compton expresses no doubts that its “general acceptance” re-
quirement would be met, observing that the ability of the polygraph to
measure the physiological activities which serve as the basis for “lie
detecting” has not been disputed and is generally accepted in the scien-
tific community. Furthermore, the underlying theory of polygraphy
has its roots in the field of psychology, a discipline long accepted by the
courts as a recognized field of expertise.

The court next considered the arguments (1) that polygraphic evi-

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179. CAL. EVID. CODE §§402-406.
180. California Evidence Code section 352 provides:
The court in its discretion may exclude evidence if its probative value is substantially
outweighed by the probability that its admission will (a) necessitate undue consumption
of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of
misleading the jury.
181. 133 Cal. App. 3d at 28-29, 183 Cal. Rptr. at 617-18.
182. Id. at 28, 183 Cal. Rptr. at 617.
183. Id.
184. Id. at 29, 183 Cal. Rptr. at 618.
185. Id.
186. Id.
187. Id. at 32, 183 Cal. Rptr. at 620.
188. Id. at 33, 183 Cal. Rptr. at 621.
dence is unreliable, (2) that there is the chance that the machine or the
operator may make a mistake and read a person’s innocent reactions as
guilty responses, or (3) that a person may beat the polygraph through
the use of various physiological techniques, throwing the validity of the
polygraph results into question. The court declined to strike down
polygraphic evidence on these points, saying that the test is validated
by the common experiences of individuals within a normal range of
intellectual capacity and character. “Who but the most virtuous
among us,” writes Judge Compton, “can honestly say that they never
experienced the rapid breathing, sweating in the palms of the hands
and the feeling of ‘flushing’ in the face connected with an attempt to
deceive in even the most innocuous of situations?” As to the possi-

bility of error in the case of a “test beater”, the court states that “no one
has contended that the polygraph is fool proof under all circumstances
. . . but what scientific or technical process is?”

The court next discussed the relevance of polygraphic evidence in the
trial setting, citing California Evidence Code section 210, which de-
fines “relevant evidence” as evidence “having any tendency in reason
to prove or disprove any disputed fact that is of consequence to the
determination of the action.” The court found no specific reasons
which would support a finding of irrelevancy, noting that the trend in
the case law indicated that polygraphic evidence was excluded on pol-
icy grounds other than immateriality. Absent a positive rule of evi-
dence, a constitutional provision requiring exclusion, or legislatively-
created procedural schemes limiting the use of polygraphic evidence,
 Judge Compton concluded that the effective administration of justice
would not be furthered by simply barring the use of otherwise valid,
relevant evidence. Relevance, of course, would still need to be estab-
lished in each case by the party proffering the polygraphic evidence,
and the trial judge still has discretion to exclude evidence deemed to be
inordinately time consuming or overly prejudicial.

The question of the admissibility of polygraphic evidence presented
no difficulties for the Witherspoon court, which considered the argu-

189. Id. 190. Id. 191. Id. 192. Id. at 34, 183 Cal. Rptr. at 621. 193. CAL. EVID. CODE §210. 194. Id. 195. 133 Cal. App. 3d at 31, 183 Cal. Rptr. at 620. 196. Id. at 34, 183 Cal. Rptr. at 621. 197. Id. at 35, 183 Cal. Rptr. at 621. 198. Id. 199. See id. at 34, 183 Cal. Rptr. at 621. 200. See id. at 30, 183 Cal. Rptr. at 619.
ments for and against admissibility as "simply matters of proof to be developed by the opposing sides." The possibly prejudicial elements of the evidence, Judge Compton suggested, could be dealt with through the presentation of the conflicting evidence to the trier of fact under proper limiting instructions. As the novelty of the introduction wears off, the court suggested that any jury tendency to place undue emphasis on polygraph results will lessen as well. Polygraphic evidence will then be treated in the same manner by juries as other forms of scientific or medical evidence are dealt with at the present time.

The conclusion of the Witherspoon court that the blanket exclusion of polygraphic evidence should not be continued rests on two basic policies. First, the philosophy of the California Evidence Code is to encourage the greater admissibility of evidence. This is amplified by the "Victims' Bill of Rights" policy requiring the admissibility of all relevant evidence. Secondly, there is the compelling need for evidence to aid in an effective search for the truth, the most important of all judicial functions.

The Witherspoon case effectively interrupts that "unbroken chain" of precedents which has kept polygraphic evidence out of the courtrooms of California since the time of the Frye opinion. Witherspoon stands alone as a signpost indicating an alternate path courts may take in this "most important and vexed area" of the law. The reverberating effect of this decision must await the judgment of the future.

C. An Indication of the Future

Witherspoon indicates the potential for change in the California view of polygraphic evidence. There are, as yet, still many problems associated with the polygraph which remain judicially unresolved.
There are the opinions of judges to be changed. Judges fear that the admission of polygraphic evidence will mislead the jury. Judges worry that the jury will be forced to witness countless battles of the experts on the relative merits of polygraphy that will inevitably consume a great deal of time.

The rules of evidence dealing with relevancy, and the discretionary exclusionary powers of the judiciary should serve as adequate checks on the misuse and abuses some claim are inherent in the polygraph. Legislative action may establish appropriate rules and regulations on the introduction of polygraphic evidence, or may even explicitly ban the polygraph from the courts forever. Courts will continue to apply existing evidentiary rules to exclude opinion testimony of unqualified experts, the proffering of opinions lacking a proper basis or foundation, or evidence proffered without showing the existence of a

from its decision in Schmerber v. California, 384 U.S. 757 (1966), has indicated that requiring a defendant to submit to a polygraph examination would violate this right. Presumably, a defendant could not be forced by the state to take a polygraph test absent a waiver of the suspect's fifth amendment rights. See Comment, supra note 117, at 348-49. Another right affected by the introduction of polygraphic evidence may be the sixth amendment's provision for compulsory process. This right entitles defendants to call and present witnesses whose testimony is reliable and crucial to the defense. If polygraphic testimony is found to be reliable, and since the results of the test, if favorable to the defendant, would be crucial to their defense, the sixth amendment may require the admittance of such evidence. See Comment, supra note 117, at 351.

212. See Comment, Commonwealth v. Vitello: The Role of the Polygraph in Criminal Trials, 15 New Eng. L. Rev. 837, 850 (1980). This article supports the traditional non-admissibility stance of most courts on this point, stating that the strong possibility of prejudice which would arise from the introduction of the evidence can not be ameliorated by the "erroneous, or inadequate, or at the very best quite confusing" limiting instructions that supporters of polygraphic evidence say should suffice. See id. For an opposing viewpoint, see Comment, supra note 117, at 347. This comment suggests that the benefits of cross examination and the appropriate jury instructions can alleviate any problems raised by polygraphic evidence, and prevent it from usurping the jury's function as fact finder. See id.

213. Comment, supra note 117, at 346. This viewpoint can be questioned in the light of the nearly universal practice of admitting polygraphic evidence on the stipulation of both parties. Little difference in evidentiary effect can be found between juror examination of stipulated evidence and examination of the exact same evidence submitted to the jury after a lengthy discussion of its reliability and veracity in an adversary setting. See id.

214. See Witherspoon v. Superior Court, 133 Cal. App. 3d at 36, 183 Cal. Rptr. at 622-23. Judge Gates, in his concurring opinion, suggested that the Legislature "promptly move to establish what it perceives to be the truly appropriate rules, regulations, restrictions or out right bans" on polygraphic evidence to avoid this, and many other, problems. Id. at 37, 183 Cal. Rptr. at 623.

215. See comment, supra note 212, at 851-52. The main objections cited therein are that the necessary prerequisites for establishing the reliability of the particular examination—the subject was in a testable condition, the examination conditions were proper, the test was properly administered—will further burden an already clogged judicial system. Id. But see Comment, supra note 117, at 347-48, which says that the consumption of court time is not a sufficiently compelling state interest to outweigh the criminal defendant's due process rights to present his defense and challenge the prosecution's case against him. See id. at 347.

216. See 133 Cal. App. 3d at 29-30, 34, 183 Cal. Rptr. at 618-19.

217. See id. at 37, 183 Cal. Rptr. at 623 (Gates, J., concurring).


219. See id. §803.
sary preliminary fact. California Evidence Code section 352 will also be used by judges to prevent “esoteric ventures into the unknown” by excluding excessively prejudicial or time consuming evidence.

The impact of *Witherspoon* on the actual admission of polygraphic evidence is not yet known. The decision does open a long closed door for the proponents of polygraphic evidence, and the courts can no longer discard the offered polygraph results citing previous decisions as the only basis for their ruling. The California courts must make an examination of all relevant facts and determine admissibility on a case-by-case basis. The way to admissibility will be found in the qualifications of the expert through which the evidence will be offered.

**Requirements for Polygraph Operators to Qualify as Expert Witnesses**

An often overlooked aspect of opinions dealing with the admissibility of polygraphic evidence is the need for qualification of the polygraph operator as an expert witness. Assuming the admissibility of the polygraph results themselves, the question is whether the opinion of the polygraph operator as to the interpretation of those results is admissible.

The California courts forbid the testimony of polygraph operators to be introduced into evidence. In light of recent changes in the law regarding the relationship between relevant evidence and expert testimony, and the discussion of the court of the qualifications of a polygraphic operator as an expert witness in the *Witherspoon* case, a re-examination of this policy seems imminent. The following sections will review the applicable state statutory and judicial standards relating to expert testimony, and suggest a possible framework to aid judges in determining whether a particular polygraph operator is competent to testify as an expert witness.
A. Standards for Qualification of Expert Witnesses

Qualifications for expert witnesses are established in California by statute. California Evidence Code section 720\(^228\) proscribes the standards which expert witnesses must fulfill. Evidence Code section 801\(^229\) governs expert testimony.

Section 720 provides that a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.\(^230\) This expertise must be shown before the witness can testify,\(^231\) and can be proved through the introduction of any admissible evidence, including the witnesses' own testimony.\(^232\) The judge determines if the witness is qualified as an expert,\(^233\) and this determination will not be disturbed on appeal absent a manifest abuse of discretion.\(^234\)

Section 720 is founded on the notion that in the pursuit of relevant evidence,\(^235\) testimony by a witness claiming to be an expert is admissible only if the witness has a recognized basis for drawing the inference presented to the jury.\(^236\)

Evidence Code section 801\(^238\) provides that an expert witness may testify as to his opinion on matters related to a subject sufficiently beyond the common expertise of the trier of fact,\(^239\) and where the expert's opinion is proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue.\(^240\) The testimony of an expert is admissible because his professional pursuit or peculiar skill in some department of science not common to men in general, enables

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228. CAL. EVID. CODE §720.
229. Id. §801.
230. Id. §720(a).
231. Id.
232. Id. §720(b).
233. The trial judge's determination of the qualifications of a witness as an expert is given considerable latitude by appellate courts. See People v. Kelly, 17 Cal. 3d 24 at 39, 549 P.2d 1240 at 1250, 130 Cal. Rptr. 144 at 154 (1976).
234. Id. at 39, 549 P.2d at 1250, 130 Cal. Rptr. at 154.
235. "Relevant evidence means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." CAL. EVID. CODE §210.
236. "Except as otherwise provided by statute, all relevant evidence is admissible." CAL. EVID. CODE §351.
237. See GUIDE, supra note 160, at 4-15; see also CAL. EVID. CODE § 702 (makes testimony of witness inadmissible unless witness demonstrates personal knowledge of the matter). Rule 702 of the Federal Rules of Evidence, permits an expert qualified by "knowledge, skill, experience, training, or education" to testify "in the form of an opinion or otherwise" as to scientific, technical, or any other specialized knowledge that will assist the fact finders in understanding the evidence or determine a fact in issue. FED. R. EVID. 702. For the impact of the adoption of the Federal Rules of Evidence on the judicial reevaluation of the Frye standard, see MCCORMICK, supra note 117, at 886-888.
238. CAL. EVID. CODE §801.
239. Id. §801(a).

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him to draw an inference from phenomena that would leave men of common experience unenlightened.\textsuperscript{241} A properly qualified expert\textsuperscript{242} may offer an opinion based on facts presented in a hypothetical question,\textsuperscript{243} facts he has observed himself,\textsuperscript{244} or the experiences derived from his technical training.\textsuperscript{245} Once admitted, the testimony is to be given the weight to which it appears to be justly entitled in each case.\textsuperscript{246} The jurors are not bound by the opinion of the witness and are free to disregard it entirely if they find the evidence to be unreasonable.\textsuperscript{247}

In applying these rules to the polygraph situation, courts have not disagreed that a qualified polygraph operator may testify on the objective mechanical results of the polygraph test.\textsuperscript{248} There is not much dissent from the view that this testimony would be of great assistance to the trier of fact.\textsuperscript{249} The problem is when the expert testifies to the interpretation of the polygraph results.

Under Evidence Code 801, an expert witness may reasonably rely on matters personally known to him gained from his special experiences.\textsuperscript{250} This language is subject to the exception for matters which experts are legally precluded from using as a basis for an opinion.\textsuperscript{251} The function of this exception is to limit expert testimony to areas relevant to the determination of the dispute. Irrelevant or speculative matters, or evidence declared to be an improper basis for an opinion, are excluded by the operation of this section.\textsuperscript{252}

The exception for evidence that is an improper basis for expert opinion has served as a major stumbling block to the admission of polygraphic evidence in California.\textsuperscript{253} Proponents of polygraphic evidence have often found themselves in the interesting situation of attempting to prove the reliability of polygraphs through the use of an expert witness forbidden to express his opinion about polygraphy because of the

\begin{itemize}
\item \textsuperscript{241} \textit{Id.} at 674, 265 P.2d at 562.
\item \textsuperscript{242} See People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).
\item \textsuperscript{243} Kastner v. Los Angeles Metropolitan Transit Authority, 63 Cal. 2d 52, 57-58, 403 P.2d 385, 388, 45 Cal. Rptr. 129, 132 (1965).
\item \textsuperscript{244} \textit{Id.} at 57-58, 403 P.2d at 388, 45 Cal. Rptr. at 132.
\item \textsuperscript{245} 122 Cal. App. 2d at 674, 265 P.2d at 562.
\item \textsuperscript{246} Arais v. Kalensnikoff, 10 Cal. 2d 428, 432, 74 P.2d 1043, 1046 (1937).
\item \textsuperscript{247} People v. Cole, 47 Cal. 2d at 105, 301 P.2d at 857 (1956).
\item \textsuperscript{248} Witherspoon v. Superior Court, 133 Cal. App. 3d 24, 32, 183 Cal. Rptr. 615, 620.
\item \textsuperscript{249} People v. Marx, 54 Cal. App. 3d 100, 111, 126 Cal. Rptr. 350, 356 (1975).
\item \textsuperscript{250} CAL. EVID. CODE §801(b).
\item \textsuperscript{251} \textit{Id.} Rule 703 of the Federal Rules of Evidence states in part that “the facts or data in the particular case upon which an expert bases an opinion... if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject... need not be admissible in evidence.” \textit{Fed. R. Evid.} 702.
\item \textsuperscript{252} CAL. EVID. CODE §801 (Comment, Law Rev. Comm'n).
\item \textsuperscript{253} See \textit{GUIDE, supra} note 160, at 4-15, People v. Kelly, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148.
\end{itemize}
judicial determination that polygraphy was an improper basis for an opinion.\textsuperscript{254}

The "truth-in-evidence" portion of Proposition 8 is in conflict with that portion of Evidence Code section 801 barring an expert from basing his opinion on matters precluded by law.\textsuperscript{255} Courts, under the provisions of "truth-in-evidence", would be required to admit all relevant evidence supported by the testimony of a qualified expert witness, unless the probative value of the evidence is "overborne by the familiar dangers of prejudicing the jury, and undue consumption of time."\textsuperscript{256} The statutory obstacle to the admission of expert testimony on the technique and results of a polygraphic examination would seem to be removed by the operation of the "truth-in-evidence" provision.\textsuperscript{257}

The court in \textit{Witherspoon v. Superior Court}\textsuperscript{258} found no specific policy reasons which would require the exclusion of the opinion of the polygraph operator on the analysis of the results of a polygraph test,\textsuperscript{259} especially considering the vast numbers of fields in which persons with some technical or specialized training are permitted to express an opinion.\textsuperscript{260} Citing Evidence Code section 801, the \textit{Witherspoon} court noted that adequate machinery existed to permit the trial court to exclude the opinion testimony of unqualified polygraph operators,\textsuperscript{261} a matter within the sound discretion of the trial court.\textsuperscript{262}

Trial courts will have difficulty determining the required qualifications for expert certification of a polygraph operator because testimony relating to polygraphic evidence has been excluded for so long that no court has determined what the qualifications must be. As the general rule is that expert status is determined on a case-by-case basis, judges will rely on the facts of each case and the asserted qualifications of the witness for guidance in making the determination of expert witness status.\textsuperscript{263}

The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to give an opinion.\textsuperscript{264} In an

\begin{table}
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\hline
\textbf{Reference} & \\
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\textsuperscript{255} See GUIDE, supra note 160, at 4-15. & \\
\textsuperscript{256} See \textit{id.} at 4-47. & \\
\textsuperscript{258} 133 Cal. App. 3d 24, 183 Cal. Rptr. 615 (1982). & \\
\textsuperscript{259} \textit{Id.} at 31, 183 Cal. Rptr. at 619. & \\
\textsuperscript{260} \textit{Id.} at 32, 183 Cal. Rptr. at 620. & \\
\textsuperscript{261} \textit{Id.} at 34, 183 Cal. Rptr. at 621. & \\
\textsuperscript{262} \textit{Wells Truckways, Ltd. v. Cebrian}, 122 Cal. App. 2d at 677, 265 P.2d at 564. The defendant in \textit{Witherspoon} was given the chance to prove to the trial judge the expert qualifications of the polygraph examiner in his case by the court's granting of a writ of mandate to the trial court to hold an evidentiary hearing on the subject. 133 Cal. App. 3d at 35, 183 Cal. Rptr. at 622. & \\
\textsuperscript{263} See People v. Kelly, 17 Cal. 3d at 39, 549 P.2d at 1250, 130 Cal. Rptr. at 154. & \\
\textsuperscript{264} \textit{Id.} at 39, 549 P.2d at 1250, 130 Cal. Rptr. at 154. & \\
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unproven area with untested methods before the jury, the competency and experience of the expert would need to be convincing before his evidence would be admitted. The Frye court attempted to place polygraphy into the broad categories of physiology and psychology, impliedly requiring experts testifying on the polygraph to have a background in those fields. Courts are now beginning to recognize that polygraphy has become a specialized field in and of itself. Courts are now accepting expert testimony from qualified doctors, scientists, or operators with adequate experience in the theory or practicalities of polygraphy.

If polygraphic evidence is to be introduced through the testimony of the polygraph operator, the California courts will require a set of minimum criteria to help in their determination of the qualifications of a polygraph operator as an expert witness. A framework for analysis is necessary to ensure fair results and avoid undue consumption of time. A determination must be based on objectively discoverable factors which include: (1) training of the operator; (2) adequacy of experience; (3) demonstrated ability; and (4) reputation for competence of the operator.

A FRAMEWORK FOR JUDICIAL EXAMINATION OF POLYGRAPHER QUALIFICATIONS

Courts in other jurisdictions dealing with the problems of qualifying polygraph operators as expert witnesses have recognized the failure of state legislatures to supply adequate guidelines or establish training standards for polygraphers. In those states which do not have polygraph licensing laws, the courts have relied on qualifications defined by the polygraphers themselves.

The Ninth Circuit, relying on standards proposed by polygraphers, suggested in United States v. DeBetham that the correct focus in qualifying polygraph operators should be on their attainment of a sufficient degree of education and practical experience in the field of poly-

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265. People v. Marx, 54 Cal. App. 3d at 100, 126 Cal. Rptr. at 356.
266. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
267. See United States v. Zeiger, 350 F. Supp. 685, 689 (D.D.C. 1972). The court held there that any individual with experience in the specialized area of the polygraph, whether they are medical doctors, scientists, or polygraph operators can testify as to matters of acceptance, reliability, and experiences with the machine. Id. at 689.
268. Id. at 689.
269. See United States v. DeBetham, 348 F. Supp. 1377, 1386 (S.D. Calif. 1972). Only eleven states had enacted some legislation by the time of the DeBetham opinion. For the state of licensing requirements today, see supra note 53.
270. Id.
graph examinations. The particular examiner’s testing technique and reputation for competence and integrity should also be considered.

Some jurisdictions encourage close judicial scrutiny of the polygraph examiner’s qualifications. Courts pay particular attention to the examiner’s experience, formal training, and demonstrated ability. The combination of these three factors has been held to be determinative. The examiner’s expertise has been found to be the most critical factor in assessing the proficiency of the polygraph operator.

A. A Proposal for Qualifying Polygraph Operators

The necessary minimum factors to prove a polygraph operator’s competency as an expert witness can now be drawn together into a pattern that can be used as a basis for judicial determination of competency of individual polygraph operators on a case-by-case basis. The first important factor to consider is the examiner’s education.

I. Education

While a formal college degree is helpful in establishing an examiner’s general intellectual capacity, far greater attention should be directed at the amount of formal polygraphic training the examiner has received. Successful completion of a course of instruction embodying the minimum standards of training established for polygraph ex-

272. Id. at 1386 (quoting J. Reid & F. Inbau, Truth and Deception, The Polygraph (“Lie Detector”) Technique 257 (1st ed. 1966)). Reid and Inbau suggested four basic standards that a polygraph operator must achieve before being recognized as an expert witness: (1) the examiner possess a college degree, (2) the examiner have at least six months of internship training under an experienced, competent examiner, (3) the examiner have at least five years’ experience as a specialist in the field of polygraph examinations, and (4) the examiner’s testimony be based on polygraph records that are produced in court and available for cross-examination purposes. Id.

273. Id. at 1386-87.


275. Id. at 126.

276. Id. The Massachusetts Supreme Court, in the Juvenile case, suggested that their purpose was to guide the thinking of the lower courts, not to limit the discretion of trial judges by formulating strict minimum standards. Id.

277. Id. The expert found qualified to testify in the Juvenile case was trained in polygraphy while serving in the U.S. Army, and served as a polygraph examiner at the Military Police Crime Laboratory for 5 years. He was later an advisor for lie detection to the Headquarters, European Command for the U.S. Army, and in that capacity, conducted polygraph tests for the CIA, CIC, CID and Interpol. It was estimated that this examiner had given between 22,000 and 30,000 polygraph examinations. Id.; see also United States v. Zeiger, 350 F. Supp. 685 (D.D.C. 1972), in which the examiner who qualified as an expert received his training at the Polygraph Examiners School at Fort Gordon, Georgia. He had administered approximately 2,000 polygraph examinations for the D.C. Police Department and at the request of several courts in the District of Columbia, the U.S. Attorney’s Office, the FBI, and law enforcement agencies in Virginia and Maryland. Id. at 690.

278. See 348 F. Supp. at 1385, 1386.

279. See id.
aminers by the American Polygraph Association would be a substantial factor for judges to consider. A failure to have a sufficient educational background should not prevent an expert from offering evidence showing to the satisfaction of the court that he has an adequate grounding in the theory and procedures of polygraphy.

2. Experience

The second factor for the court to consider is the adequacy of the examiner’s experience. A minimum time of field practice should be required by the courts as a prerequisite for operator qualification as an expert witness. A five year figure of required field service would seem to be a reasonable requirement. A long period of field work by a polygrapher is strong evidence of the expert’s sincerity and dedication. A five year investment of time in the pursuit of expertise is an indication of the examiner’s familiarity with the polygraph process as applied in “real-life” situations, a valid factor to consider in judging a witness’ qualifications. This minimum requirement should not weigh against the operator when other considerations are present which show adequate compliance with the experience requirement.

3. Demonstrated Ability

The third factor to look at in considering whether a polygraph operator is a competent expert witness is the operator’s demonstrated ability in the administration and scoring of polygraph examinations. This can be shown by examining the number of polygraph tests an operator has conducted in his career. The operator’s employment history can be an important factor. Evidence of the number of times the individual operator has testified as an expert in other criminal or civil proceedings is helpful in showing an examiner’s standing in the polygraphic community. The trial court is not to be limited in its consideration of factors tending to show the operator’s qualifications.

281. 350 F. Supp. at 690.
282. See 348 F. Supp. at 1386.
285. Id. at 126.
286. See id. at 126, 350 F. Supp. 685, 690.
287. See 313 N.E.2d at 126, 350 F. Supp. at 690.
288. See 350 F. Supp. at 690.
289. See United States v. DeBetham, 348 F. Supp. at 1386. “[T]he absence of legislated standards need not preclude the use of polygraph evidence, as long as a qualified examiner can be identified without an undue consumption of time.” Id.
4. **Competence and Integrity**

A final consideration for courts to take into account in a proceeding to establish competency of a polygraph operator is the examiner's reputation.290 There would be a natural desire of any polygraph operator to preserve and encourage his reputation by the exercise of caution in giving polygraphic interpretations.291 An important basis for determining a particular operator's competence and integrity in this regard can be supplied by the examiner's willingness to produce the charts to be used as the foundation for his opinion for an independent interpretation.292

Judges, through a consideration of examiner competence, experience, training, ability, and integrity, can make an adequate determination of an individual operator's qualifications to be an expert witness. An examiner should be eminently qualified to offer a valid, probative, and convincing opinion on the evidentiary value of his interpretation of polygraphic evidence if he meets these four factors to the satisfaction of the trial judge sitting in a California courtroom.293

**CONCLUSION**

The time for recognition of polygraphic evidence as an important tool in the search for truth has come. The theory of polygraphy, that the unconscious reactions of the body are determinative of the truth of a person's statements, has been proven accurate and reliable by laboratory experiments and field applications. The results of polygraphic examinations have been excluded from the California courtrooms by the use of the *Frye* "general acceptance" test, but the change in the evidentiary rules brought about by the "Truth-In-Evidence" provision of Proposition 8 may require courts to admit the results if relevant. The indication that this change has already begun can be found in the *Witherspoon* case, which held that the blanket exclusion of polygraphic evidence can no longer be maintained. When polygraphic evidence is admitted, a competent and qualified polygraph examiner must be found to testify as to the objective results and the opinions to be reached from the polygraphic examination. A polygraph operator, to be qualified to testify as an expert witness, must meet judicially established standards, which must include an examination into the operator's competence, experience, training, and ability.

The polygraph examination can overcome the prejudice of years of

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290. See id. at 1386-87.
291. See id.
292. See id.
293. See Witherspoon v. Superior Court, 133 Cal. App. 3d at 33, 183 Cal. Rptr. at 620.
adverse judicial scrutiny and prove itself as a valuable addition in the arsenal of justice. Dean Wigmore, in the same year as the decision in *Frye v. United States*, declared that “if ever there is devised a psychological test for the evaluation of witnesses, the law will run to meet it.”294 The California courts have taken the first wavering and cautious steps toward judicial acceptance of the potential of the polygraph. Fifty years of judicial anxieties are difficult to overcome. But overcome they must be. Relevant polygraphic evidence has been kept out of the courtroom long enough.

*Thomas J. Moses*

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