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The Personhood Argument Against Polygraph Evidence, Or "Even If the Polygraph Really Works, Will Courts Admit the Results?"

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by
JAMES R. MCCALL*

Seventy five years ago Dean Wigmore wrote: "If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it." After sixty five years of reform and general liberalization of the law of evidence, Justice Hans Linde of the Oregon Supreme Court saw the matter somewhat differently: "I doubt the uneasiness about electrical lie detectors would disappear even if they were refined to place their accuracy beyond question. Indeed, I would not be surprised if such a development would only heighten the sense of unease and the search for plausible legal objections."[1] The passage is from the Justice's remarkable concurring opinion in *State v. Lyon.* Given Linde's deserved reputation as one of the nation's most scholarly judges, it is curious that the opinion has drawn no previous academic attention.[2] The opinion breaks new ground for honesty and lucidity in the literature documenting the reaction of American courts to the development of the purported science of polygraphy.

This judicial reaction has been one of resistance on an historic scale, marked by a general refusal to acknowledge or answer the cen-

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1. State v. Lyon, 744 P.2d 231, 238 (Or. 1987) (Linde, J., concurring).

2. Justice Linde was a well known law professor at the University of Oregon prior to his appointment. Following his retirement from the Oregon Supreme Court seven years ago, he has served as an adjunct professor at Willamette University Law School in Salem, Oregon. Linde's concurring opinion came to the author's attention because it was reproduced in D.H. KAYE, SCIENCE IN EVIDENCE 284-91 (1997). This article is the first academic comment that Linde's concurrence has received.

tral claim made by those litigants who have offered polygraph tests in evidence. Thus, with only a few recent exceptions, American courts have not addressed polygraph proponents' claim that polygraph testing constitutes an application of scientific principles that produces scientific evidence when reliably pursued. Instead, the judiciary has steadily refused to consider or respond to the "claim of science" made by proponents of forensic polygraph testing. Before Justice Linde's concurrence, there was no explanation offered in judicial opinions for this refusal to confront the claim of science. In *Lyon*, Justice Linde articulated the previously unexpressed and provided a basis for discussing the extreme judicial resistance to the polygraph claim of science. Although this author disagrees with Justice Linde's position, there can be no doubt that the Justice performed a great service by expressing what appears to be the core concern of the American judiciary on the subject of polygraph evidence.

It is well known that polygraph evidence has been treated as an "evidentiary pariah"[3] since the famous *Frye v. United States* opinion of 1923.[4] However, the surprising extent and vigor of the "search for plausible legal objections"[5] to avoid consideration of the claim to scientific status made by polygraph proponents is unappreciated. The 1993 opinion of the United States Supreme Court in *Daubert v. Merrell Dow* finally put an end to the indefensible misreading of the *Frye* holding on admissibility of polygraph evidence.[6] However, the irrational judicial attitude of seven decades that supported that misreading has persisted. In fact, one of the irrational, but traditional, "plausible legal objections" for refusing to consider the science claim of polygraph proponents appears in a slightly modified form in very recent polygraph admissibility opinions.[7]

The subject for consideration at this conference has been the place of truth among the possible goals of the law of evidence. The question of whether there is any legitimate rival for truth as the dominant objective of the law of evidence can be put aside for the purpose of appreciating the irrational quality of the judicial resistance to polygraphy. If truth is even a significant objective of the trial process, judges should have traditionally given the most serious and con-

3. The phrase was first used in *Whitherspoon v. Superior Court*, 184 Cal. Rptr. 615, 621 (Cal. Ct. App. 1982).

4. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

5. To use Linde's telling phrase. *Lyon*, 744 P.2d at 238 (Linde, J., concurring).

6. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). *See also infra* notes 9-10 and accompanying text.

7. *See infra* notes 17-26 and accompanying text.

certed attention to possible means of reliably determining if a witness has been consciously deceptive in answering relevant questions. Over a seventy-year period, however, courts have studiously avoided a careful review of polygraph proponents' claim of a scientific means of detecting conscious lying and, conversely, conscious truth telling.

If the hostility to rational consideration of the polygraph science claim continues at traditional levels, the answer to the question posed by the alternative title to this piece will be "No, courts will not admit polygraph results in evidence even if the polygraph really works." There are, however, enough signs of life in the collective judicial thinking on the subject to support a far more optimistic view. Before discussing that optimistic view, a number of topics need to be considered to provide support and context.

The first topic to be discussed is the history, very briefly stated, of the judicial search for "plausible legal objections" to keep the courts free of polygraph evidence. This history clearly shows that with few exceptions, American courts have not been able to approach polygraph evidence on the basis of what proponents claim that it is—a new form of scientific evidence. This was true before the *Daubert* opinion, and the post-*Daubert* treatment of polygraph evidence reveals that the reluctance to deal with the claim of scientific status for polygraphy remains strong. Whether polygraph testing produces "scientific knowledge" is a question apart from the matter of why American courts have steadfastly refused to consider the question of whether polygraph testing produces scientific knowledge, or, to state the question in pre-*Daubert* terms, whether polygraph testing "[has] gained general acceptance in the particular field in which it belongs."[8]

The historical review of polygraph treatment is followed by a brief consideration of the immediate future of polygraph law and the most obvious of the probable legal developments that will occur when and if courts eventually admit polygraph evidence, in anything like its present form, as scientific evidence. This paper then reviews the context for the argument of Justice Linde, which is principally the Oregon Supreme Court's decision in the *Lyon* case. Justice Linde's personhood argument is the next topic, followed by this author's response to that argument. The paper concludes with a statement of a "more optimistic view" of the future of polygraph evidence admissibility than would be supported by those who agree with the personhood objection.

8. *Frye*, 293 F. at 1014.

I. The History of Judicial Resistance to Consideration of Polygraph Evidence as a Form of Novel Scientific Evidence

A. "Plausible Legal Objections" Before *Daubert v. Merrell Dow*

Probably the most inexplicable objection to considering the science claim used by American courts during the first half century following *Frye v. United States* was the patently insupportable notion that the *Frye* opinion denied admissibility to polygraph evidence for all time.[9] This concept was supplemented and eventually succeeded by three other seemingly plausible legal objections to maintain the denial position.[10]

The three latter-day objections were, and to some degree continue to be, that polygraph evidence will be "unduly persuasive" to juries,[11] that admission of such evidence will lead to great confusion and needless consumption of trial time in the form of a "trial of the lie detector,"[12] and that polygraph evidence is just not accurate.[13] All three positions conflict with basic principles of American evidence law, and it is hard to imagine that these objections would have been generally honored in connection with any other type of evidence.[14]

9. *See, e.g.*, United States v. Frogge, 476 F.2d 969, 970 (5th Cir. 1973) ("[T]he rule is well established in federal criminal cases that the results of lie detector tests are inadmissible.") (citing United States v. Rodgers, 419 F.2d 1315, 1319 (10th Cir. 1969); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974) ("The leading case in this Circuit is *Frye v. United States* . . . which holds [polygraph] tests inadmissible. This case has been followed uniformly in this and other Circuits and there has never been any successful challenge to it in any federal court.").

10. For a fuller discussion and elaborate citations supplementing this brief discussion of the objections to polygraphs, see James R. McCall, *Misconceptions and Reevaluation—Polygraph Admissibility After* Rock *and* Daubert, 1996 U. ILL. L. REV. 363, 397-402.

11. Opinions reciting this reason abound. *See, e.g.*, United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) ("When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi.").

12. This reason has also appeared in numerous opinions. *See, e.g.*, Commonwealth v. Fatalo, 191 N.E.2d 479, 481 (Mass. 1963) ("[O]n the introduction of such evidence a trial could descend into a battle of experts on the probative value of the polygraph test rather than a determination of the guilt or innocence of a defendant. The end result, in all likelihood, would be confusion instead of enlightenment.").

13. *See, e.g.*, Fulton v. State, 541 P.2d 871, 872 (Okla. Crim. App. 1975) ("[I]n light of the potential unreliability of polygraph examinations . . . we feel that in all future cases the introduction into evidence of polygraph examination results for any purpose . . . will be error.").

14. As to the first, the degree of persuasiveness of otherwise admissible evidence is not a concern for the court in determining admissibility. In invoking the unduly persua-

Nonetheless, the 1992 executive order of the President of the United States that prohibited U.S. military courts from admitting polygraph evidence was based upon each and every one of the three latter-day objections.[15] This executive order will be the subject of the presently pending *United States v. Scheffer* decision of the United States Supreme Court.[16] The probable effect of the *Scheffer* opinion is discussed below.[17]

B. Indications of Judicial Resistance After *Daubert*

With some notable exceptions,[18] courts have continued to view polygraph evidence as something other than a novel form of what is purported to be scientific evidence. On the other hand, however, a review of the approach taken in recent opinions from the Fifth Circuit Court of Appeals toward polygraph evidence supports a guardedly optimistic view that the science claim of polygraph proponents will be seriously addressed in the near future. While the Fifth Circuit is clearly moving toward mandating the type of reliability assessment of polygraph evidence that *Daubert* appears to command, the most important opinion from the Fifth Circuit contains a troubling element that is contrary to the general approach requiring a wholehearted consideration of the science claim.

It should be noted that the Fifth Circuit had a pre-*Daubert* his-

sive ground, courts were responding to what is termed the "undue deference" concern under the Federal Rules of Evidence. Regarding the second ground, if polygraph results are credible they should be admitted in the same way that conflicting medical testimony is commonly heard by juries. Finally, the "lack of accuracy" ground appears to be persuasive but actually represents confusion on the part of trial courts that were reluctant to base their denial of admissibility solely on the general acceptance test. If a test was generally accepted in the relevant scientific community, a trial court's opinion of the accuracy of the test would be irrelevant.

15. Rule 707 of the Military Rules of Evidence was issued by Exec. Order No. 12, 767, 56 Fed. Reg. 30,284. The reasons given for the issuance of the Rule are found in Manual for Courts Martial, U.S. (1984), Change 5 (Nov. 15, 1991) at 11.

16. The United States Supreme Court heard oral argument in *Scheffer* on November 3, 1997.

17. *See infra* Part II.A.

18. Among federal trial courts, there have been several recent in-depth considerations of the science claim. *See* United States v. Crumby, 895 F. Supp. 1354, 1364 (D. Ariz. 1995) (same); United States v. Galbreth, 908 F. Supp. 877, 878 (D.N.M. 1995) (admitting polygraph evidence); Myers v. Arcudi, 947 F. Supp. 581 (D. Conn. 1996) (denying admission to polygraph evidence). Although there are almost no reported state court opinions addressing the science claim, the Connecticut Supreme Court recently reviewed a number of published studies in affirming a trial court's refusal to hold a reliability assessment hearing on an offer of polygraph evidence. State v. Porter, 698 A.2d 739, 759-68 (Conn. 1997).

tory of relatively enlightened consideration of polygraph admissibility. That Circuit recognized the usefulness of polygraph evidence in a non-jury trial context almost ten years ago,[19] and relatively early, abandoned the pretense that *Frye* permanently established the denial position for all federal courts.[20] Finally, the Fifth Circuit never adopted the illogical position that stipulated polygraph results should be admitted regardless of whether the results were a form of scientific evidence, a position taken by several other appellate courts.[21]

This history would have led observers to predict that the Fifth Circuit would be one of the first federal appellate courts to require lower trial courts to directly consider the polygraph science claim following *Daubert*. More technically, the prediction would have been that a consideration of the science claim would be compelled by an appellate opinion authorizing district courts to admit polygraph evidence if a *Daubert* reliability assessment proved that polygraph testing was based upon principles that constitute scientific knowledge and the proponent proved that the specific polygraph test at issue in the case was produced by a reliable application of those principles. The Fifth Circuit did just this in its opinion in *United States v. Posado*[22] in 1995, the first reported opinion from any trial or appellate court to correctly apply the holding in *Daubert* to an offer of polygraph evidence.[23] Unfortunately, the *Posado* opinion also contained an indication of continued resistance to the full acceptance of the terms of the

19. *See* Bennett v. City of Grand Prairie, 883 F.2d 400, 405-06 (5th Cir. 1989) (holding that magistrates could consider polygraph evidence in deciding whether to issue arrest warrants). The Fifth Circuit was also among the first to recognize the significance of polygraph testing under the *Brady* rule. *See* United States v. Lindell, 881 F.2d 1313, 1326 (5th Cir. 1989) (holding that polygraph results are impeachment evidence for purposes of the *Brady* rule).

20. *Compare* United States v. Clark, 622 F.2d 917, 917 (5th Cir. 1980) (en banc) (Gee, J., concurring) (arguing, in special concurrence joined by 11 other judges, that the status of polygraph evidence should be reconsidered if it could be demonstrated that the polygraph technique had improved in the years since *Frye*), *with* Dowd v. Calabrese, 585 F. Supp. 430 (D.D.C. 1984) (holding exculpatory polygraph results inadmissible under *Frye* and Federal Rule of Evidence 403).

21. Three circuits have authorized the admission of stipulated polygraph evidence. *See* United States v. Oliver, 525 F.2d 731, 736-37 (8th Cir. 1975); Brown v. Darcy, 783 F.2d 1389, 1391 (9th Cir. 1986); and United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989) (also authorizing admission of unstipulated polygraph evidence in limited circumstances).

22. 57 F.3d 428 (5th Cir. 1995) (decided June 20, 1995).

23. Shortly after *Posado*, two federal district courts followed the teaching of *Daubert* and admitted exculpatory polygraph results after extensive reliability assessment hearings. *See* United States v. Crumby, 895 F. Supp. 1354 (D. Ariz. 1995) (decided July 7, 1995); United States v. Galbreth, 908 F. Supp. 877 (D.N.M. 1995) (decided Oct. 4, 1995).

argument made by polygraph proponents—that polygraphy is a scientific endeavor.

At issue in *Posado* was the admission of the results of a polygraph test that showed that the defendants in a drug possession prosecution were not consciously lying when they denied giving consent to police officers to open suitcases belonging to the defendants.[24] The Fifth Circuit held that the trial court's denial of admission of the result in a suppression hearing was error, because the trial court did not conduct a *Daubert* hearing on the proponents' polygraph science claim.[25] However, the *Posado* court also announced its concern that the testimony of the defendants' polygraph examiner might "have an unusually prejudicial effect which is not justified by its probative value."[26] Further, the court stressed that the defendants' offer to collaborate with the prosecution in structuring a mutually acceptable polygraph examination before they submitted to testing was one of "several factors that may operate to counterbalance the potential prejudicial effect of [the polygraph examiner's] testimony."[27]

There is, of course, no logical connection between the fact that a polygraph proponent offered to have a "collaborative" test and the allegedly "unduly prejudicial effect" that evidence of the results of the test might have upon the jury. Furthermore, the evaluation of the probative force of otherwise admissible evidence is a task for the jury, not the trial judge. Thus, *if* evidence of a specific polygraph test result is admissible as a reliable application of principles that constitute scientific evidence it should be admitted without further standards imposed by courts.[28]

Considering the existence or absence of "collaboration" as an important factor to determine whether polygraph results are admissible is disturbingly similar to the position taken by many state courts and three federal circuit courts admitting stipulated polygraph test results regardless of the scientific validity of polygraph testing in gen-

24. *See Posado*, 57 F.3d at 430-31.
25. *See id.* at 431-32.
26. *Id.* at 435.
27. *Id.*
28. This is not to say that evidence of the degree of imprecision of polygraph testing should not be admitted when offered by the opponent of the evidence. Such evidence is obviously relevant and clearly admissible. It is also not to say that a trial court judge should not go to some pains to require that any proffered polygraph test results be based upon clearly relevant and unambiguous questions. Requiring that the polygraph test at issue have used only such questions *does* avoid jury confusion and possible unduly prejudicial effect. In *Posado*, however, the questions were unambiguous and the answers relevant. *See id.* at 428, 431.

eral or the reliability of the specific test at issue.[29] The collaboration factor injects a consideration that is irrelevant to the issue of the validity of the polygraph science claim, while the per se admissibility of stipulated test results completely negates any consideration of the science claim. Nonetheless, the motivation for adopting the stipulation and collaboration ideas is understandable. A primary reason for the concern of courts about the validity of polygraph testing is the generally unexpressed judicial perception that such testing depends to an uncomfortable degree upon the integrity and skill of the examiner. In stipulated or collaborative testing the parties presumably are mutually satisfied with the examiner. This mutual satisfaction is undoubtedly perceived by some judges as an acceptable surrogate for meaningful certification or some other method of insuring the reliability of the examiner performing the test at issue.

The Fifth Circuit has restated the collaboration factor as an item of importance in determining the admissibility of a particular test,[30] and district courts in that circuit have followed in this direction.[31] On the other hand, district court opinions in the Fifth Circuit show an increasing attention to factors bearing on the reliability and underlying scientific validity of the specific test results at issue.[32]

II. Future Legal Developments If Polygraph Testing Does Produce Scientific Evidence

A. The Immediate Future

If the assumption is made that polygraph testing in its present form or in a slightly altered form does produce scientific evidence, serious consideration of the science claim should result in admission of reliable specific test results within a reasonably short period. There

29. *See* cases cited *supra* note 20 (federal circuit courts). Nineteen state courts have followed the same rule of admissibility with regard to stipulated polygraphs. *See* McCall, *supra* note 10, at 370-73.

30. *See* United States v. Pettigrew, 77 F.3d 1500, 1515 (5th Cir. 1996).

31. *See* United States v. Dominguez, 902 F. Supp. 737, 739 (S.D. Tex. 1995); United States v. Zertouche-Tobias, 953 F. Supp. 803, 807 (S.D. Tex 1996). *But see* Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299, 303 (W.D. La. 1995) (holding that lack of collaboration was insignificant when examiner was a disinterested public official not selected by proponent).

32. *See Zertouche-Tobias*, 953 F. Supp. at 807 n.1 (inappropriate control question used by examiner); United States v. Ramirez, 1995 WL 918083, at *2-3 (S.D. Tex. 1995) (no activity monitor to detect countermeasures used in test).

are, to be sure, a number of topics that must receive much more sophisticated judicial attention than has been the case up to now. These include, at a minimum, the standardization of test formats, the elimination of subjective decisions by examiners, the efficacy of pre-test desensitizing by subjects, the efficacy of countermeasures, and the reliability of detection of countermeasures. These topics present difficult issues, but all appear to be amenable to scientific investigation and discovery. If courts can be led to address seriously the science claim of polygraph proponents, these topics can be addressed through adjudication, and the issues they present can be resolved by appellate courts or through legislative intervention in the judicial process.

At this writing, the United States Supreme Court is considering the arguments made in *United States v. Scheffer* and an opinion is expected within months if not weeks. At issue is whether an accused has a constitutional right under the Obtaining Witnesses Clause of the Sixth Amendment to present evidence of an exculpatory polygraph test. Based upon its reading of *Rock v. Arkansas*,[33] the Armed Forces Court of Appeals held that such a right exists.[34] Also based on its reading of the *Rock* opinion, the court held that this right was arbitrarily denied by the *per se* prohibition of the admission of polygraph evidence in military trials.[35]

It is possible to view the holding of *Rock* differently than did the majority of the members of the Armed Forces Court of Appeals,[36] and the Supreme Court may decide that the Obtaining Witnesses Clause does not apply to polygraph evidence. Nonetheless, the Court's opinion in *Scheffer* will stimulate professional interest in polygraph testing. The fact that the Court will be discussing, for the first time, this form of purported scientific evidence will in all likelihood tend to legitimize full consideration of this evidence and the science claim made by it proponents. This in turn will lead, over time, to

33. 483 U.S. 44 (1987).

34. *See* United States v. Scheffer, 44 M.J. 442, 443 (C.A.A.F. 1996), *cert. granted*, 117 S. Ct. 1817 (1997).

35. *See id.* at 445-46.

36. *Rock* involved a *per se* prohibition of admission of testimony about an event given by a witness who had, on a previous occasion, been hypnotized to assist in recalling the event. The accused had been so hypnotized and was precluded by the rule from testifying in her own behalf. *Rock* held that she had a constitutional right to present herself as a witness and testify, and that the right could not be arbitrarily denied. For a general discussion of the *Rock* opinion see McCall, *supra* note 10, at 392-94. Several courts have read *Rock* as limited to the testimony of the accused and have held that *Rock* has no application to the accused's rights to present any exculpatory evidence other than the accused's own testimony. *See* McCall, *supra* note 10, at 406-09 for a discussion of this specific issue.

the admission of polygraph evidence if, as is assumed for purposes of this discussion, polygraphy is based on principles that constitute scientific knowledge.

B. The Long Run Implications of Judicial Admission of Polygraph Evidence as Incontestably Reliable Scientific Evidence

The one complete certainty if polygraph evidence becomes admissible in American courts is that the United States Constitution will still be the law of the land and that basic evidence law concepts will continue to apply to all forms of proof in American courts. This means that polygraph testing will not be forced upon persons accused of crimes, although comment on their refusal to produce polygraph evidence if they choose to testify at trial should be permissible. While polygraph evidence presents no legitimate hearsay concerns,[37] the risk of confusion and time consumption will probably result in denial of admission of polygraph test results of non-testifying witnesses. However, the Sixth Amendment rights of an accused might lead to a different result in criminal prosecutions.[38]

III. The *State v. Lyon* Decision

A. The Majority Opinion

In *State v. Lyon*,[39] the Oregon Supreme Court considered the appeal of a murder conviction. The accused had entered into a pre-polygraph test stipulation that the results would be admissible in evidence in a future prosecution should such action be undertaken. The test result was inculpatory, and the State offered it in evidence at trial. The accused reneged on his stipulation and objected, but the trial court ruled the evidence admissible. This trial court ruling was one of three grounds of appeal raised by the accused, but it was almost the

37. *See* E. Imwinkelried & J. McCall, *Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations*, 32 WAKE FOREST L. REV. 1045, 1066-73 (1997).

38. The U.S. Supreme Court may announce the principle that *Rock v. Arkansas* applies to non-accused testimony in its forthcoming *United States v. Scheffer* opinion. (See *supra* text at notes 32-35. In the unlikely event the Court does so, a general reexamination of the application of FRE 403 to evidence offered by an accused will be required, and this could lead to admission of evidence offered by the accused that might otherwise be seen as capable of confusing the jury.

39. 744 P.2d 231, 231 (Or. 1987).

exclusive focus of the state supreme court's opinion in the case.[40]

The court had held unstipulated polygraph evidence to be inadmissible three years earlier on the ground that the evidence was unreliable.[41] Although the issue of the admissibility of stipulated polygraph evidence had produced a sharp split among state courts ruling on the issue,[42] the Oregon Supreme Court was unanimous in holding that the admission of this form of evidence was reversible error. Before the test at issue was conducted, the parties had stipulated that the test results be admitted in evidence. This stipulation, the court noted, did not affect the reliability of the polygraph test. The court had earlier concluded that polygraph tests without stipulation were too unreliable to produce results that could be admitted in evidence, and it now reasoned that the same must also be true of stipulated tests.

B. The Concurring Opinion

The first point in Justice Linde's concurrence was an acknowledgement of his full agreement with the majority opinion.[43] Linde then posed the question of "whether there perhaps are wider reasons for the result."[44] In essence, his answer was positive, and in explaining it he developed a position that is unprecedented, at least as an articulated concern, in American judicial reports. For the sake of making his point, the Justice was willing to grant the science claim of polygraph proponents. Even with that assumption, Justice Linde indicated that he would very likely refuse to admit *unquestionably reliable* polygraph test results in evidence.

The unarticulated concern that has resulted in the American judiciary's irrational resistance to serious consideration of the poly-

40. The accused also claimed that the trial court erred in admitting two other items of evidence: a record of prior testimony he allegedly had been compelled to give before the grand jury and hearsay testimony of statements made by the accused's father. The Oregon Supreme Court held that the grand jury testimony had not been compelled and was properly admitted, but that the admission of the hearsay testimony was reversible error. *See Lyon*, 744 P.2d at 232, 238.

41. *See* State v. Brown, 687 P.2d 751, 755 (Or. 1984). After a lengthy analysis of the probative value of polygraph test results (762-72), the court concluded "that under proper conditions polygraph evidence may possess some probative value and may, in some cases, be helpful to the trier of fact." *Id.* at 772. Nonetheless, the court held that all polygraph evidence should be denied admission in Oregon courts for the usual three latter-day objections. *See supra* notes 9-12 and accompanying text.

42. *See supra* note 28.

43. *See Lyon*, 744 P.2d at 238.

44. *Id.*

graph claim of science was captured in the *Lyon* concurring opinion. There, Justice Linde states his doubt that admitting polygraph evidence would be "consistent with the theory underlying our legal and social institutions"[45] and his belief that admitting accurate polygraph evidence in court proceedings could be at "the cost of diminishing [the] common humanity" of the American people.[46] These grave potential consequences follow logically from Linde's belief that polygraph testing may be inconsistent "with fundamental tenets about human personhood."[47]

Before considering Linde's personhood argument, his preliminary points deserve examination. In making them, the Justice first cites former Secretary of State George Schultz, who protested a 1985 presidential authorization for random polygraph testing of federal officials with access to confidential information.[48] The Secretary's statement to the effect that the polygraph program would be offensive as a sign of lack of trust to him and others, is cited to show that some objections to polygraph testing would be strong regardless of whether such testing was undeniably reliable.

While Schultz's and Linde's point is undoubtedly true, it seems irrelevant to a consideration of the use of reliable polygraph testing to prove or disprove the credibility of crucial points of courtroom testimony. The credibility of an important courtroom witness is almost always a contested issue, and no witness takes the stand without the expectation that an uncomfortable challenge of their trustworthiness is a real possibility. On the other hand, the credibility of leading officials in the State Department and other federal agencies is seldom, if ever, challenged by officials who appointed them.

Linde acknowledges the point that context and normal expectations are important to consider on the issue of the offensiveness of any form of lie detection procedure. Thus he lists such situations as applications for loans or responding to a police officer after a traffic stop for erratic driving as situations in which one can expect one's word not to be taken at face value. References or breathalyzer tests may be required in such situations and if the borrower or test subjects feels resentment, Linde believes it will be of a different order than the resentment occasioned by polygraph testing.

45. *Id.* at 239.
46. *Id.* at 240.
47. *Id.*
48. The White House was concerned about unauthorized disclosures ("leaks") of information, and proposed the polygraph program to stop such disclosures.

In his consideration of why polygraph testing is likely to produce more resentment than more common procedures for detecting falsehoods, Justice Linde acknowledges two important points. First, he believes "[t]here is no general right to lie."[49] Second, he states the common sense proposition: "Of course the polygraph is not torture, no more than an electrocardiogram, for instance." Both points should be borne in mind in view of the sources relied upon by the Justice in the remainder of his opinion.

The principal reason for the difference in the amount and nature of the resentment is, in Linde's opinion, that polygraph testing "turn(s) the human body against the personality that inhabits it in a way that other tests do not."[50] By this, the Justice means several things. First, while other tests "independently establish" facts, such as amount of alcohol in the subject's system, the polygraph only determines if a statement by the subject was deceptive. Second, the polygraph, in order to perform the valuable function of detecting a lie, "turns its subject into an object."[51] Finally, while the objectification of the subject is common to diagnostic tests of all sorts, Linde sees polygraph testing as different in kind because it "seems doubtful" that polygraph testing is "consistent with the theory underlying our legal and social institutions."[52]

The first and second reasons given by Justice Linde for what he seemingly views as the justified greater resentment felt by forensic polygraph test subjects lack substance.[53] The third reason he lists appears to be very substantial. For his third propostition, the Justice cites the work of three scholars who have written on the "[i]nconsistency of physiological lie detection with fundamental tenets about human personhood [that] has been important in European objections to the polygraph, reflecting Christian and Kantian philo-

49. *Lyon*, 744 P.2d at 239.

50. *Id.*

51. *Id.* Justice Linde notes that "the lie detector only purports to detect whether a person is uttering a lie" which "[b]eyond doubt . . . is often a useful thing to know." *Id.*

52. *Id.*

53. As to the first, polygraph tests can be said to "independently establish" facts (pulse rate, skin conductivity, etc.) in exactly the same way other tests do. These "independent facts" in turn reveal deception (according to polygraph proponents). The same relationship between independent facts and conclusions about larger scale determinations would seem to apply to DNA sequences that reveal parentage and breathalyzer readings that reveal legal drunkenness.

On the second, Justice Linde admits that objectification is a commonplace in "many diagnostic tests." *Id.*

sophical traditions as much as doubts of its accuracy."[54] Specific citations to the work of three scholars are marshalled in support of the proposition. While one of the scholars, Alfred F. Westin, is almost exclusively interested in the subject of American pre-employment polygraph testing,[55] the other two scholars do lend support to Justice Linde's precise concerns, and provide direct support for his personhood argument.

IV. Justice Linde's Personhood Argument Against Admission of Reliable Polygraph Evidence

A. The Scholarly Sources

The relevant scholarship noted by Justice Linde took the form of a 1956 article in the Harvard Law Review written by Ms. Helen Silving[56] and a 1956 article in the Northwestern University Law Review by Mr. Henry J. Kaganiec.[57] Both authors were comparativists, familiar with German law and the German legal system, and both articles discussed a then recent opinion of the West German Supreme Court, *B.G.H. St.*[58] The German opinion had held that the trial court had improperly considered evidence[59] of the inculpatory result of a polygraph test taken by the accused in an embezzlement prosecution that resulted in conviction.

Both Silving and Kaganiec approve of the opinion and their ex-

54. *Lyon*, 744 P.2d at 239-40.

55. In the cited work, ALAN F. WESTIN, PRIVACY AND FREEDOM 211-41 (1967), the author focuses upon the work of the Moss Committee in the mid 1960s, which primarily investigated the use of polygraph tests in employee screening in the federal government.

56. Ms. Silving was identified as a Research Assistant in Law, Harvard Law School in her article, Helen Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683 (1956).

57. Mr. Kaganiec was identified as a Member of the Illinois Bar in his article, Henry J. Kaganiec, *Lie Detector Tests and "Freedom of the Will" in Germany*, 51 NW. U. L. REV. 446 (1956).

58. Judgment of Bundesgerichtshof (I. Strafsenat), Feb. 16, 1954, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [hereinafter B.G.H. St.] 332 , cited in Silving, *supra* note 56, at 688-89 and Kaganiec, *supra* note 57, at 446.

59. *See* Kaganiec, *supra* note 57, at 446; Silving, *supra* note 56, at 688-89. German courts, which sit without juries, generally admit much evidence that would be denied in American courts. *See* N. FOSTER, GERMAN LAW & LEGAL SYSTEM 186-87 (1993). Only very limited types of evidence are prohibited. *See id.* at 187.

planations of its basic reasoning and support for it in German legal commentary of the time are quite similar.[60] The opinion is based upon the crucial German legal concept of "freedom of the will."[61] This freedom specifically includes the right of an accused to decide whether, and in what manner, he or she will answer the charges brought by the state. The taking of polygraph measurements of physiological reactions beyond voluntary control will, according to Kaganiec, "disclose the otherwise concealed psychic structure of the accused and . . . are an . . . attempt to discover what might be present only in the unconscious of the accused."[62] Seen in this light, the polygraph records the equivalent of an involuntary communication of the accused and "violates [the accused's] right to decide whether he wants to answer the criminal charge."[63]

On the issue of whether the accused should have the right to have courts consider an exculpatory polygraph test result, Silving and Kaganiec are of the same mind. The latter states:

> The state has an affirmative duty . . . to safeguard the human dignity and free will. Thus, these rights [to be free of "involuntary disclosure of the unconscious" through polygraph testing] are of *super-individual concern* and must be *protected against infringements by the individual himself* as well as against encroachments by the state authority.[64] (emphasis added).

Silving's recognition of the seriousness of the issue is also clear:

> Of all arguments in favor of admitting objective testing, that invoked in behalf of an accused demanding such a test to prove his innocence is the most challenging one. Rejection of this argument, in fact, involves sacrifice of an essential ethical tenet, that man is an ultimate value, not as a member of a species, but as an unique historical event.[65]

Her resolution of the issue requires that "consideration of such

60. Kaganiec's article is fourteen pages long and discusses only the German opinion and the commentary and philosophical traditions that support it. Silving's article is twenty two pages long and, besides a description of the German opinion and its support in German commentary, contains her argument that the German position on lie detector results should be maintained in the United States under her reading of the Due Process Clause. *See* Silving, *supra* note 56, at 690.

61. Silving discusses the concept and the points made in the remainder of the above text paragraph. *See id.* at 688-90. Kaganiec discusses the same topics at *supra* note 57, at 447-51.

62. Kaganiec, *supra* note 57, at 449.

63. *Id.* at 450.

64. *Id.* at 450-51.

65. Silving, *supra* note 56, at 693.

[individual] uniqueness is necessarily limited when it conflicts with the regard due to other individuals."[66] Thus:

> In cases of [such] conflicting claims, democratic law must give precedence to the general "dignity of man" over the individual dignity of a man. Human dignity in democratic law is not entirely a personal attribute of the individual as an unique event but rather a "virtue" accorded to the individual by law.[67]

Therefore, the "unavoidable conflict between the interest of the individual and imperative social interests" must be resolved in favor of the general dignity of man and the accused should have no option to have exculpatory polygraph test results considered.[68] Silving acknowledges that "[t]here is, to be sure, a touch of collectivism in this conception of 'civilization' being the source of individual right."[69]

She is also quite forthright in discussing the full extent of the accused's right to decide whether to answer the state's charge in both French and German law. Contrary to the Anglo-American common law on the matter, the continental concept of the accused's right to determine his or her defense specifically includes the right of the accused to lie in court in support of that defense.[70]

On a less important point, Silving is considerably less straightforward than Justice Linde. She discusses prohibitions against torture in a manner that appears to assume that there are meaningful similarities between torture and polygraphy.[71] Justice Linde specifically disavows any such suggestion.[72]

The preceding discussion of the authorities cited by Justice Linde indicate that some of the premises for the German position are not to be found in American law.[73] First, and most obviously, although the accused in an American prosecution enjoys many rights, he or she does not have carte blanche to decide how he or she will answer the state's charge of criminal conduct. The accused in America has no right to lie without penalty in presenting a defense. He or she must

66. *Id.*

67. *Id.*

68. *Id.* at 694. While not as unmistakably clear on the point as Kaganiec, Silving's language, which becomes oddly opaque at this point, permits of no other logical reading other than the one in the above text.

69. *Id.* at 693.

70. *See* Silving, *supra* note 56, at 696 n.54.

71. *See* Silving, *supra* note 56, at 701-02.

72. *See supra* note 49 and accompanying text.

73. While this would not be reason to disregard the German position, the lack of similar premises does indicate that the German position is not likely to fit smoothly into the fabric of American law.

take an oath and is subject to perjury prosecution for false testimony. This is evidence of a more intense commitment to truth in testimony in this country than in Germany. If there is a societal concept of human dignity in Germany, there is certainly a societal commitment to truth in American courtroom procedures.

Second, the basic concept of German criminal procedure, freedom of the will, is an almost boundless and undefinable concept when compared with the basic general American concepts of due process of law and equal protection of the laws. The German phrase evokes metaphysical speculations that have no counterpart in traditional American jurisprudence. This general observation leads to the specific point that it is almost impossible to conceive of the American Supreme Court adopting any notion of freedom of the will that would eliminate the ability of an accused to offer reliable crucial exculpatory evidence to obtain his or her freedom from incarceration. The type of logic involved in that exercise is generally foreign to American courts.

Third, the German concept, as explicated by the commentators, produces an extreme restraint on the freedom of the individual accused of a crime. American law, which reflects and helps to mold the thinking of American society, places a very high value on individual freedom in general and the specific freedom of those accused of a crime to present the best defense possible, as long as it is consistent with truth. It is unlikely that American courts would curtail those freedoms in favor of an abstraction on the order of freedom of the will.

B. Justice Linde's Personhood Argument

To Justice Linde it "seems doubtful" that polygraph testing is consistent with either "the theory underlying our legal and social institutions" or "fundamental tenets about human personhood."[74] By way of elaboration, he notes that "[t]he cherished courtroom drama of confrontation, oral testimony and cross examination is designed to let a jury pass judgment on [the] truthfulness [of witnesses] and on the accuracy of their testimony."[75] This leads to the observation that "it has long been argued" that the "cherished drama" "really serves

74. The three quoted phrases from three contiguous sentences at *Lyon*, 744 P.2d at 239-40.

75. *Id.* at 240.

symbolic values more important than reliable fact finding."[76] From this he concludes that:

> One of these implicit values surely is to see that parties and the witnesses are treated as persons to be believed or disbelieved by their peers rather than as electrochemical systems to be certified as truthful or mendacious by a machine.[77]

Thus, the admission of polygraph evidence would detract from the personhood of the parties to a trial as well as the jurors who decide crucial credibility issues, and, by extension, all members of society. The Justice further writes:

> A machine improved to detect uncertainty, faulty memory, or an overactive imagination would leave little need for live testimony and cross-examination before a human tribunal: an affidavit with the certificate of a polygraph operator attached would suffice .... Would a perfect detector enhance people's capacity to test for truth only at the cost of diminishing their common humanity?[78]

The chilling question concludes an argument well and strongly stated. No one else has voiced this underlying concern in anything resembling this form. If not convincing, at least to this author, Justice Linde's opinion deserves notice, appreciation and, most importantly, an answer.

V. A Response to the Personhood Argument

First, it may be the case that trials now seem to have other implicit values, but it is not at all established that trials should not be primarily concerned with establishing facts. The jury is, at least under our criminal procedure system, free to disregard these "facts" if they choose to do so. Second, polygraph evidence does not eliminate a jury's opportunity to take "demeanor evidence" and give it whatever weight they choose to. Unquestionably reliable polygraph evidence would merely make it more likely, but not totally so, that jurors would not rely upon their "take" on the credibility of a witness, when the polygraph evidence on the issue differed markedly from the opinion of the jurors. Third, polygraph evidence does not remove the "right to lie," if it is assumed, and Justice Linde specifically rejects the assumption, that "personhood" includes such a right. However, reliable polygraph evidence would certainly make it more difficult to lie

76. *Id.* Justice Linde cites, as an example of this view, ARNOLD, THE SYMBOLS OF GOVERNMENT 145 (1962).

77. *Id.*

78. *Id.*

successfully.

Considering the larger issues raised by Justice Linde, the following thoughts come to mind. If we assume that jurors know their own "personhood" and are more sensitive to their own personhood being diminished than would be any more distant observer, it follows that the jurors themselves should have the choice of accepting or rejecting the admitted polygraph evidence during jury deliberations. In fact, if we are to treat jurors as adult, mature persons capable of exercising judgment and discretion in important matters (which would certainly appear to be the type of treatment of a person that enlarges personhood) should not the jury receive *all* reliable evidence relevant to the issues they are to determine? Also on the subject of personhood, it would seem that the accused should have the right to put any *exculpatory,* undeniably reliable polygraph evidence in the record as one aspect of his or her personal right to take rational steps to prove his or her innocence and protect his or her person from incarceration.

Lastly, and returning to the idea that there are "implicit values" in the law of evidence other than truthfully establishing facts, is there any conceivable implicit value greater than requiring that all facts that exculpate an accused be established? Most persons would answer in the negative. The same logic would seemingly require that all facts that inculpate an accused be introduced, because the public is entitled to know who perpetrated a crime in order to protect innocent persons from being falsely accused. While some persons might not agree that the same primacy of truthful fact finding applies in civil litigation, it is certain that if a referendum vote were conducted on the proposition that undeniably reliable polygraph evidence should be admitted in such actions, the vote by society would be overwhelmingly in favor of the proposal.

Conclusion—An Optimistic View of Future Judicial Assessment of Polygraph Evidence

All that is necessary for the past irrational judicial attitude toward polygraph evidence to change is for courts to seriously confront the claim by its proponents that polygraph testing produces scientific knowledge. If this is done, it is by no means certain that present day polygraph testing will be held to produce admissible evidence. However, if courts approach the issue of polygraph evidence admissibility by requiring adequate proof of the scientific methodology underlying the relevant principles and the procedure used in polygraph testing, the history of the achievements of American science gives us reason

to believe that the seemingly significant problems concerning polygraph theory and practice will either be solved or proven to have been non-existent.

Due to Justice Linde's scrupulous intellectual self-awareness, analytical skill and power of expression, the personhood argument against serious consideration of polygraphy's science claim has been articulated. In this author's opinion the argument should serve merely to mandate a wholesome note of caution in judicial consideration of the science claim, not to serve as an unarticulated basis for resistance to undertaking such consideration.