Security-29

8 February 1957

MEMORANDUM FOR THE RECORD

SUBJECT: Background Material on the Polygraph

The citations listed below may be helpful relative to the Agency's use of the polygraph.

(a) "Critical analysis of the theory, method and limitations of the lie-detector"
46 Journal of Criminal Law, p. 414 (1955)

(b) "Scientific evaluation of the 'lie-detector'"
40 Iowa Law Review, pp. 440-58 (1955)

(c) "Polygraphic truth tests" -- symposium
22 Tennessee Law Review, pp. 711-74, 916-23 (1953)

(d) "Polygraph lie-detector: its psychological basis, reliability and admissability"
16 Alabama Law Review, pp. 209-24 (1953)

(e) "Lie-detector in court"
4 DePaul Law Review, pp. 31-42 (1954)

(f) "Lie-detector -- aid to fact finding"
2 New York Law Student Law Review, pp. 65-73 (1953)

(g) "Legal uses of the lie-detector"
1 St. Louis University Law Review, pp. 299-311 (1951)

(h) "The 'fourth degree': the lie-detector"
5 Vanderbilt Law Review, pp. 549-59 (1952)

(i) "Deception detection and the law"
11 University of Pittsburgh Law Review, pp. 210-27 (1950)

(j) "Lie-detector--evidence, discussion and proposals"
29 Cornell Law Quarterly, pp. 535-45 (1944)

(k) "Lies and their detection"
16 Tennessee Law Review, pp. 856-65 (1941)

(l) "Lie-detectors--extra judicial investigations and the courts"
48 West Virginia Law Quarterly, pp. 37-46 (1941)

STATINTL

Assistant General Counsel

OGC/RJB:bb
Distribution
1 - Subject
1 - Signer
1 - Chrono

Criminology
(West Germany)
Jan-Feb 1957
Security-3

LIE-DETECTOR TESTS AND "FREEDOM OF THE WILL" IN GERMANY

An accountant employed by a finance company in Germany was accused by his employer of having embezzled 5760 Deutsche Mark (about $1500) and of faking a burglary in an attempt to conceal the theft. The accused denied the accusations, and to prove his innocence he offered to take a lie-detector test if one could be arranged. A test was given by the American military at the request of the local public prosecutor, and the results apparently indicated that the accused was guilty of the offenses. Principally on the basis of those results, the employee was convicted of embezzlement and the "simulation of a criminal offense." Upon appeal, the conviction was reversed by the Bundesgerichtshof, the highest court of West Germany. According to the Supreme Court, basic principles of German criminal law prohibit the use of lie-detector tests because they encroach upon the freedom of the defendant to form a decision and to act according to his own will.

The Supreme Court, although admitting that the first duty of a court in a criminal proceeding is to determine the truth, held that the search for the truth must be conducted in accordance with established legal principles. The accused is a party to, rather than the object of, a criminal proceeding, and he cannot be subjected to any searches or other limitations which are not provided for by law. Moreover, law enforcement agencies have no greater liberty than the courts in examining an accused because he has an inviolable right at

every stage of the proceedings to make his own decision with respect to his answer to the criminal charge. The accused cannot be forced to cooperate with officials in their search for the truth. This freedom of an accused is based upon principles of constitutional law and criminal procedure, as well as upon the concept that an individual is a self-accountable moral personality. Infringements upon this freedom of the will are prohibited regardless of the accused's consent to the violation. It was this right of the accused to decide whether and how to answer every question that the Supreme Court held to be irreconcilable with the application of a lie-detector test.

The reasoning behind the decision is this: During the lie-detector test, the accused may voluntarily give answers to the questions presented; however, at the same time, his "true" answers---and thus the fact of his "guilt"---are actually obtained against his will. Such insight into the soul of the accused violates his freedom of decision and action. It must be prohibited in criminal proceedings because each individual has the right to retain an important and unrenounceable psychic sphere which is necessary for the maintenance and development of his personality.

THE BASIC CONCEPT

"Freedom of the will" is an important concept in German criminal law and procedure. It signifies the notion of human dignity and respect for human rights. The basic explanation of the individual's relation to society is that human rights are not regarded as a privilege granted by society; rather, the individual is an integral part of a social

order which is subservient to, and not the regulator of, the individual's rights, his position and his purpose in that society. German lawyers believe that an intimate understanding of the concepts of freedom of the will, freedom of the personality and the physical freedom of the individual is a pre-requisite to understanding the German judicial system itself. Although the law is regarded as an ever-growing body which changes to reflect the intellectual progress or stagnation of a particular generation, the concept of a free will is recognized as a permanent and basic principle of the criminal law.

Apart from the historical, philosophical and dogmatical aspects of the concept of freedom of the will, the primary sources of the protection afforded the human personality are the Constitution of the Federal Republic of Germany and the present Code of Criminal Procedure.

The Constitution guarantees the dignity of the individual, the right to free development of his personality and the physical safety of his person, and these rights can be limited only as provided by law. The broad constitutional safeguards reaffirm principles which governed the German legal system prior to 1933, but which were completely disregarded by the Nazi regime.

A more specific provision concerning the examination of an accused is set forth in Section 136 of the Code of Criminal Procedure which, literally translated, provides:

> 1. At the beginning of the examination the accused must be informed as to the nature of the punishable act of which he is accused. The accused must be asked whether he wants to answer anything with respect to the accusations.

As interpreted by the courts and most authorities on criminal procedure, this provision of the Code adequately expresses the broad scope of the protection which is to be given to the freedom of the will and personality of the accused. However, this once terror stricken nation preferred to leave no possible doubt with respect to limitations in examining detained persons; therefore, the legislature enacted Section 136a of the Code to prohibit specifically methods of interrogation which, under more general provisions of the Constitution and Code, were considered unlawful. Section 136a of the Code, literally translated, provides:

1. The freedom of the accused to form a decision and the freedom to act according to his own will shall not be impaired by ill-treatment, fatigue, bodily invasion, use of drugs, torture, deception, or hypnosis. Force can be used only to the extent permitted by the law of criminal procedure. The threat of measures not provided for by the law of criminal procedure, and the promise of a non-legally provided advantage are prohibited.

2. Measures which impair the memory and judgement of the accused are not allowed.

3. The prohibitions of paragraph 1 and paragraph 2 shall be in force without regard to the consent of the accused. Testimony received by offending against these prohibitions shall not be utilized even in the case where the accused consents to its use.

LIE-DETECTOR TESTS AS INFRINGEMENTS UPON "FREEDOM OF THE WILL"

The broad scope of the laws protecting the dignity and free will of the individual obviously raises many doubts as to the legality of the application of lie-detector tests. However, the problem was not discussed by German legal writers until "truth-serum tests" and lie-detector techniques were made available to the regular law enforcement agencies after World War II.

Both practices were discussed with reference to the questions of whether and to what extent the body of the accused could be utilized to elicit facts within his knowledge and thereby ascertain the truth and arrive at a just verdict regarding the case at hand. The conclusions reached concerning the legality of administering truth-serum tests were considered to be equally applicable with respect to the legality of lie-detector tests. Both means of interrogating an accused, in the opinion of most German authorities, represented illegal attempts to circumvent the right of the accused not to express himself with respect to the criminal charge.

The advocates of lie-detector testing, on the other hand, advanced the argument that such "silent communications" may lawfully be evaluated as evidence. Their reasoning was that lie-detector recordings are observations of the external appearances of the accused which are noticeable in a more exact form than when the accused is observed without an instrumental aid. Section 81a of the Code, which authorizes an examination of the body of the accused to establish facts which are relevant to the proceedings, was cited as the legal basis for lie-detector tests even when the accused objects to the test. Since the questioning during the test was thought not to impair the accused's freedom to act according to his own will, Sections 136 and 136a of the Code were not viewed as prohibitions against lie-detector tests.

The argument that lie-detector test recordings are only a new method of observing involuntary external expressions was met with the

argument that the recordings disclose the otherwise concealed psychic structure of the accused and that they are an actual attempt to discover what might be present only in the unconsciousness of the accused. Most authorities adopted this latter view and disapproved of any method of obtaining expressions which are not noticeable to the examiner himself. Under this view, the lie-detector disclosure of secret physiological reactions, followed by the examiner's evaluation, becomes the equivalent of an involuntary communication. And obtaining communications regardless of whether the accused is willing to make them violates his right to decide whether he wants to answer the criminal charge. The opponents of lie-detector testing have several grounds for refuting the argument that the tests are authorised under Section 81a of the Code as an "examination of the body of the accused." Thus, one group argued that the intent of the legislature in enacting section 81a was to allow only proof of the physical condition of the body of the accused. Another group argued that section 136a controls to prohibit the use of lie-detector tests inasmuch as the prohibitions of that section were meant to be illustrative of unlawful practices rather than an all inclusive listing. A third group opposing the use of lie-detector tests argued that even if sections 136 and 136a were not directly controlling, the application of lie-detector tests would be prohibited by the fundamental principles of criminal law which recognize the right of an accused to remain silent without fear of thereby incurring legal disadvantages.

The prevailing view which considers the use of lie-detector tests to be unlawful is in harmony with Article One of the Federal Constitu-

tion and the statutory provisions which protect the individual's free will. This regard for the dignity and freedom of decision of the human being as a moral person does not leave any room for the use of devices which explore his inner life.

Furthermore, most authorities agree with the decision of the Supreme Court that the constitutional prohibition of the use of lie-detector tests cannot be waived by the accused. The state has an affirmative duty under Article One of the Constitution to safeguard the human dignity and free will. Thus, these rights are of super-individual concern and must be protected against infringements by the individual himself as well as against encroachments by the state authority. The right of an accused to decide whether and how to answer a criminal charge must not be renounceable if the smallest degree of moral freedom is to be preserved in the criminal procedure.

Practical considerations, as well as general principles, support the exclusion of lie-detector tests regardless of the accused's consent. A refusal to submit to the test, or even a lack of a spontaneous offer to take it, may result in an unfavorable reflection on the accused. Furthermore, an option to take the test would appear to be a type of indirect coercion which is expressly prohibited by Section 136a (3) of the Code.

A separate aspect of the problem under consideration concerns the use of lie-detector tests in the interrogation of witnesses. The authorities who are opposed to the use of lie-detector tests have little, if any, difficulty in determining that such examinations are unlawful inasmuch as the safeguards provided by Section 136a of

the Code have been made applicable to the examination of witnesses by section 69 (3). They believe that this result is necessary to prevent circumvention of the direct prohibitions of sections 136 and 136a by such practices as first questioning a suspect as a witness to determine with the aid of lie-detector tests whether they have the right person to prosecute.

Some of the authorities who favor the use of lie-detector tests concede that they cannot be used in the examination of witnesses in view of the limited application of Section 81c of the Code which, literally translated, provides:

> Persons other than the accused, when they are witnesses, can be searched without their consent only when it is necessary for ascertainment of the truth whether on their body exist positive signs or effects of a criminal act.

However, others favoring the tests contend that their use results only in obtaining more objective impressions of the witness' reactions to particular questions and that this is a factor which normally is considered in determining the truthfulness of the witness. The argument that a witness should be subjected to a lie-detector test, even against his will if necessary, is supported by the fact that the witness, unlike the accused, is obliged to tell the truth.

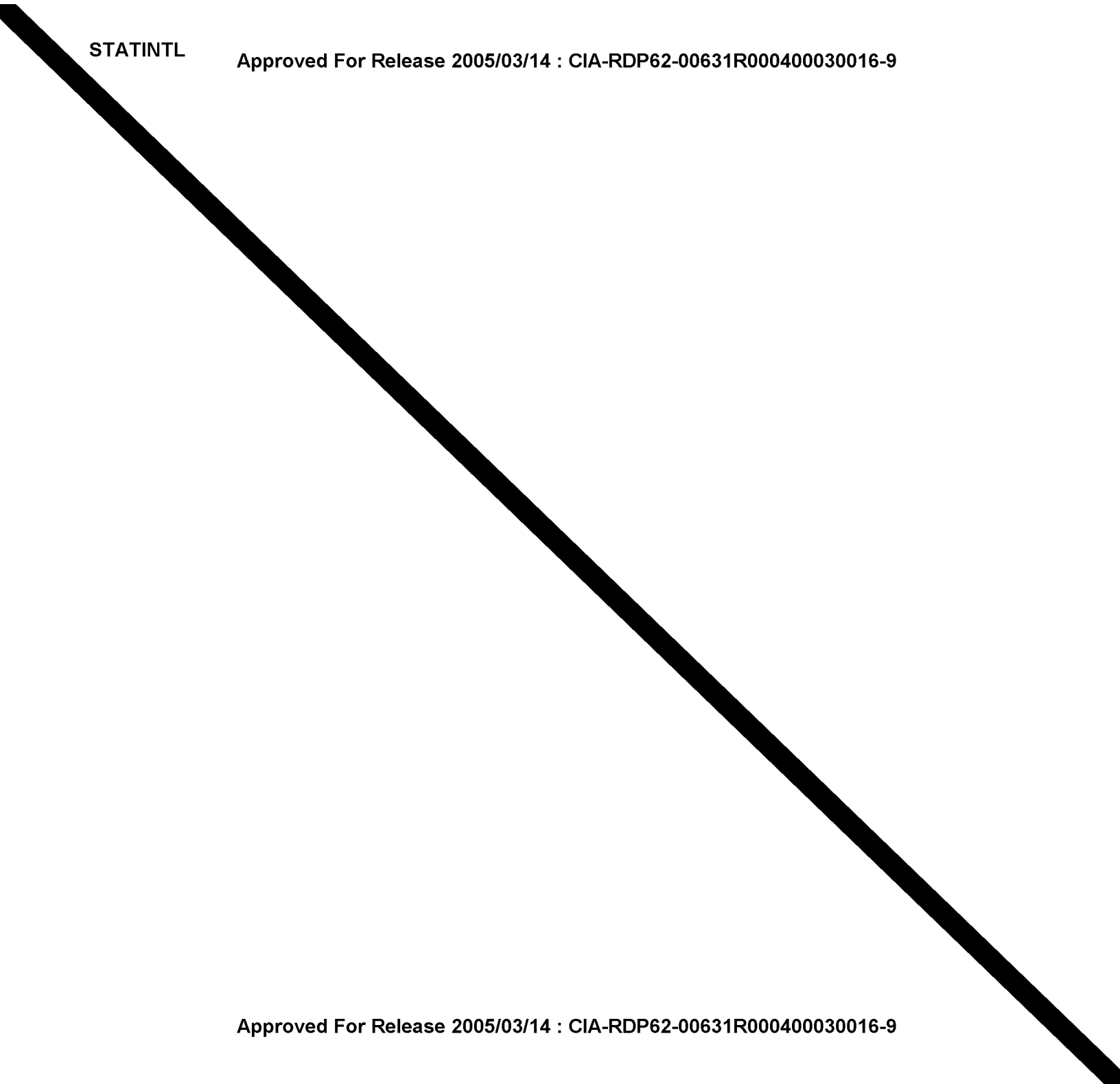
CONCLUSION

Of course, the decision of the Supreme Court is accepted as a legal reality; however, advocates of the sociological approach which considers the rights of the individual in relation to the well-being of society maintain that the decision is based upon

discredited liberal ideology and that it conflicts with the reality of actual necessity.

Authorities who support the constitutional state idea hail the Supreme Court as the guardian and preserver of the ideological concepts of a constitutional state--a guardian who in a clear and convincing manner prevented the penetration of the innate sphere of a free personality. On the other hand, the advocates of the methods of modern criminology reject the decision because it interferes with the search for truth; while it preserves the free will and personality of the accused, the price is a greater risk of unjust convictions as well as unjust acquittals. These authorities do not oppose the ideas of human dignity and democracy, because the issue is not one of their total rejection or complete acceptance. There are necessary limitations to any right, and some authorities believe that the public interest in efficient law enforcement justifies limiting the freedom of the individual to the extent of allowing the use of lie-detector tests.

The Supreme Court of West Germany, faced with the alternative of foregoing the right to punish some crimes or of opening the door to possible infringements upon personal freedom, obviously thought that it elected the lesser evil.



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public expense,[52] the Uniform Act appears to be constitutionally sound. It benefits from a device entitling witnesses to a hearing before the forwarding judge, which procedure seems adequate to prevent unreasonable and abusive application. The strength of the Uniform Act lies in its effective means of securing material evidence from unwilling and evasive witnesses who would otherwise be unavailable. The interests of justice are best served when the complete truth is before the court.

EDGAR H. DRUM

EVIDENCE — ADMISSIBILITY OF LIE DETECTOR EVIDENCE — At the trial in which defendant was convicted of second degree murder, the prosecution's witness, a police officer, testified that he had informed the defendant during pre-trial investigation that a lie detector test indicated he was lying. The trial court granted defendant's motion to strike the testimony and instructed the jury to disregard it. The District Court of Appeal *held* that insertion of lie detector evidence in a criminal proceeding is not prejudice constituting reversible error if the trial judge has given the jury proper instructions to disregard the evidence. *People v. Schiers*, 324 P.2d 981 (Cal. App. 1958). A petition to the California Supreme Court was denied per curiam with three dissents. *People v. Schiers*, 320 P.2d 1 (Cal. 1958).

Since the first reported case on the subject in 1923,[1] results of

[52]It has been held that defendants may avail themselves of the provisions of the Uniform Act and require witnesses to attend and testify. However, the Uniform Act being indefinite on the point, the same courts have held that the statute does not authorize courts to procure the attendance of witnesses for the defendant at the expense of the public. The defendant must apparently pay these expenses himself. Vore v. State, 158 Neb. 222, 63 N.W.2d 141 (1954); State v. Fouquette, 67 Nev. 505, 221 P.2d 404, *cert. denied*, 341 U.S. 932 (1950); State v. Blount, 200 Ore. 35, 264 P.2d 419, *cert. denied*, 341 U.S. 932 (1950).

[1]Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923). Ten years later Wisconsin followed the *Frye* case. State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). In 1938, however, New York admitted the results of a pathometer test conducted on behalf of the defendant. People v. Kenny, 3 N.Y.S.2d 348, 16 Chi.-Kent L. Rev. 269, 86 U. Pa. L. Rev. 903 (1938). See Summers, *Science Can Get the Confession*, 8 Ford. L. Rev. 334 (1939). In the same year another New York court held evidence obtained by lie detector inadmissible, without mentioning the *Kenny* case. People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938), 24 Cornell L.Q. 434 (1939), 37 Mich. L. Rev. 1141 (1939), 25 Va. L. Rev. 492 (1939), 27 Ill. B.J. 308 (1939). People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942), held lie detector tests showing that defendant killed deceased in self-defense inadmissible. In LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943), 1943 Wis. L. Rev. 430, lie detector tests were not admitted even though the district attorney and defendant had stipulated that the results could be used in evidence. *Contra*, People v. Houser, 85 Cal. App. 2d 682, 193 P.2d 937 (1948). For other cases excluding the tests see People v. Carter, 48 Cal.2d 737, 312 P.2d 665 (1957); Kaminski v. State, 63 So.2d 339 (Fla. 1953); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); People v. Welke, 342 Mich.

lie detector tests have generally been excluded from evidence. The exclusion, which applies to civil as well as criminal cases,[2] is based on the theory that the lie detector has not gained sufficient scientific recognition to warrant acceptance of the tests as competent legal evidence.[3] In civil cases admission of such evidence is improper, but usually does not constitute reversible error. In criminal cases, however, admission, whether urged by state or defendant,[4] constitutes reversible error which cannot be corrected by an admonition to the jury to disregard the testimony.[5] This rule obtains whether the evidence relates to results of,[6] or conversations about, lie detector tests which indicate that the accused was lying.[7] Although *People v. Houser*[8] made an exception to the general exclusionary rule by admitting such evidence if the parties have stipulated that test results should be admissible on behalf of either prosecution or defense, the exception is apparently recognized in only a minority of jurisdictions.[9] No other exceptions are made to admit lie detector evidence.[10]

164, 68 N.W.2d 759 (1955); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); Henderson v. State, 230 P.2d 495 (Okla. 1951); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1946); see Inbau & Reid, Lie Detection and Criminal Interrogation 127 (3d ed. 1953).

[2]For criminal cases see note 1 *supra*. The first reported appellate case on the admissibility of lie detector test results in a civil case was Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951) (admission of results improper but not reversible error); *accord*, Gideon v. Gideon, 153 Cal. App. 2d 541, 314 P.2d 1011 (1957), *cert. denied*, 356 U.S. 902 (1958); McCain v. Sheridan, 324 P.2d 923 (Cal. Dist. Ct. 1958) (dictum); Parker v. Friendt, 99 Ohio App. 329, 118 N.E.2d 216 (1954).

[3]Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923); People v. Carter, 48 Cal.2d 737, 312 P.2d 665 (1957); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); see Hardman, *Lie Detectors, Extra-Judicial Investigations and the Courts*, 48 W. Va. L. Rev. 37 (1941).

[4]The majority of cases arise when the defendant attempts to admit favorable results. See, *e.g.*, People v. Parrella, 158 Cal. App. 2d 140, 322 P.2d 83 (1958); People v. Spigno, 156 Cal. App. 2d 279, 319 P.2d 458 (1957); People v. Porter, 136 Cal. App. 2d 461, 288 P.2d 561 (1956); Parker v. State, 164 Neb. 614, 83 N.W.2d 347 (1957); LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943), 1943 Wis. L. Rev. 430.

[5]People v. Wochnick, 98 Cal. App. 2d 124, 219 P.2d 70 (1950) (admission of lie detector examiner's testimony regarding conversation with defendant about results of test constituted reversible error although trial judge instructed jury to disregard the testimony).

[6]State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947).

[7]People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (1957).

[8]85 Cal. App. 2d 682, 193 P.2d 937 (1948).

[9]LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943). See also State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947). Three unreported Wisconsin cases admitted results of lie detector tests upon stipulation of the parties. See 1943 Wis. L. Rev. 430, 435. For a full discussion of the examination involved in one of the cases see Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. Crim. L., C. & P.S. 262 (1935). For argument in favor of admitting the evidence on parties' stipulation see Spier, *It Helps Judge and Jury*, 30 Mich. St. B.J. 12 (1951).

[10]However, confessions made after lie detector tests are considered voluntary and are admitted in evidence if otherwise competent. Tyler v. United States, 193 F.2d 24 (1951); People v. Hills, 30 Cal. 2d 694, 185 P.2d 11 (1947); Pinter v. State, 203 Miss. 344, 34 So.2d 723 (1948); Commonwealth v. Jones,

Although the District Court of Appeal held that jurors are presumed to heed a strong admonition, which dissipates the harm done by admission of lie detector evidence,[11] the dissent by the three California Supreme Court justices points out that "This case breaks the uniformity of California decisions holding that an admonition to ignore the prosecution's evidence of lie detector tests is powerless."[12] The case is important because it departs from both California and predominant national precedent.[13]

Evidence admitted at trial is not regarded as completely reliable. It must be weighed by the trier of fact. Although the lie detector is not 100% accurate, there is authority to support the view that it is just as efficient and accurate as some presently accepted methods of determining facts.[14] The principal lie detector in use is the polygraph.[15] Some polygraph examiners claim that results obtained by diagnostic processes are almost 95% accurate.[16] Taking into consideration the inadequate examiner, however, some authorities have estimated that the percentage of error may be as high as 25%.[17] The presence of determinable inaccuracies has not,

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341 Pa. 541, 19 A.2d 389 (1941); Webb v. State, 291 S.W.2d 331 (Tex. Crim. App. 1956); State v. DeHart, 242 Wis. 562, 8 N.W.2d 360 (1943), 1943 Wis. L. Rev. 430. See 6 Stan. L. Rev. 172-74 (1953). Some writers have expressed the opinion that confessions obtained after subjecting defendant to lie detector tests are a violation of his right of privacy and of his constitutional privilege. See Note, 44 Harv. L. Rev. 842 (1931). *Contra*, 8 Wigmore, Evidence 379 n.1, 384 (3d ed. 1940).

[11]People v. Schiers, 324 P.2d 981, 986 (Cal. 1958).

[12]People v. Schiers, 329 P.2d 1, 3 (Cal.1958) (dissenting opinion).

[13]See note 1 *supra*. State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952) (where conviction rested on circumstantial evidence, admission of evidence that defendant refused to take lie detector test was prejudicial error). *Compare* Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951), where defendant's confession following the test and a statement which the examiner made to defendant that the lie detector indicated defendant was lying were both admitted. The trial court instructed the jury that the evidence was not admitted to show defendant was lying, but merely as bearing upon the question whether the confession was in fact voluntary. The appellate court affirmed the conviction: "With the court's clear and positive instruction to the jury, holding the evidence within proper bounds, and the presumption that the instruction was followed by the jury, we are not warranted in assuming that any prejudicial results followed from the incident." *Id.* at 31. It is contended, however, that limiting instructions in general have a negligible effect. See, *e.g.*, Frankfurter, Law and Politics 167 (1939); Comment, 8 Stan. L. Rev. 451, 456 (1956).

[14]See note 18 *infra*.

[15]For a detailed description of the Keeler polygraph see Keeler, *A Method for Detecting Deception*, 1 Am. J. Pol. Sci. 38 (1930); Hensley, *The Lie Detector in Action*, 3 Tex. B.J. 482 (1940).

[16]This estimate is from a five year study involving 4,280 criminal suspects. The examiners were unable to arrive at a definite opinion in four per cent of the cases. See Inbau & Reid, Lie Detection and Criminal Interrogation 111-12 (3d ed. 1953). A subsequent study of 8,450 subjects resulted in a similar percentage breakdown. See Harmon & Arthur, *The Utilization of the Reid Polygraph by Attorneys and the Courts*, 2 Crim. L. Rev. (N.Y.) 12, 26 (1955).

[17]See People v. Davis, 343 Mich. 348, 371, 72 N.W.2d 269, 282 (1955); Langley, *The Polygraph Lie Detector: Its Physiological Basis, Reliability and Admissibility*, 16 Ala. Law. 209, 223 (1955); Trovillo, *Scientific Proof of Credibility*, 22 Tenn. L. Rev. 743, 758-59 (1953).

however, prevented appeals to the courts for the admission of test results in evidence.[18] Although many legal writers continue to agree with the exclusion of such evidence because of possible inaccuracies,[19] some maintain that the force of the objection is lessened when it is pointed out that the evidence would not be conclusive proof when admitted. The fallacy in this contention is that as lie detectors become more accurate, the trier of fact is more likely to be influenced by what it may come to consider a mechanically infallible result.[20]

Previous cases have not considered objections other than lack of scientific recognition;[21] but that does not mean that other objections do not exist. The dissent in the principal case concluded that results of lie detector tests were within the privilege against self-incrimination granted by the California Constitution.[22] To bring the results within the privilege, such tests would have to be classed as testimonial because the privilege extends only to testimonial evidence.[23] Although experts have argued that lie detector recordations do not constitute testimonial utterances,[24] the dissent in the noted case disagreed. It might be argued that examinees who voluntarily consent to the test waive the constitutional privilege against self-incrimination.[25] Some even contend that a compulsory test would not violate the privilege.[26]

The dissent in the instant case also apparently presents the first judicial consideration of excluding such evidence for lack of

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[18]McCormick, Evidence § 174, at 372 (1954); see Inbau & Reid, Lie Detection and Criminal Interrogation 127 (3d ed. 1953); Streeter & Belli, *The "Fourth Degree": The Lie Detector*, 5 Vand. L. Rev. 549 (1952); Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711 (1953). Dean Wicker urges the courts to re-examine the statement originating in the *Frye* case that the lie detector has not gained such standing and scientific recognition as to justify the admission of its results, because that statement was made at a time when the lie detector was in its infancy.

[19]Gardner, Book Review, 10 Stan. L. Rev. 189, 194 (1957); Highleyman, *The Deceptive Certainty of the "Lie Detector,"* 40 Iowa L. Rev. 440 (1955). See also Silving, *Testing of the Unconscious in Criminal Cases*, 69 Harv. L. Rev. 683 (1956).

[20]Levitt, *Scientific Evaluation of the "Lie Detector,"* 40 Iowa L. Rev. 440, 457 (1955): "Considering the tremendous weight that testimony obtained with a lie detector would carry in the courtroom it is doubtless well that the courts have thus far been hypercautious about admitting it."

[21]See note 3 *supra*.

[22]People v. Shiers, 329 P.2d 1, 3, 4 (Cal. 1958).

[23]Holt v. United States, 218 U.S. 245 (1910).

[24]Hardman, *Lie Detectors: Extra-Judicial Investigation and the Courts*, 48 W. Va. L. Rev. 37, 39 (1941); "Such an objection, . . . seems untenable, for . . . the privilege applies only to compelled testimony as distinguished from non-testimonial evidence, and . . . recordations of the lie detector do not constitute a testimonial utterance within the meaning of the privilege. . . ." See also Inbau, Self-Incrimination 66 (1950); McCormick, *Deception-Tests and the Law of Evidence*, 15 Calif. L. Rev. 484 (1927); Note, 37 Harv. L. Rev. 1138 (1924).

[25]See People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

[26]See note 24 *supra*.

due process. It is possible that lack of due process could prohibit admissibility of lie detector evidence under both the fifth and fourteenth amendments. This objection has been suggested as the strongest ground for excluding results of such tests.[27]

The hearsay rule would perhaps have provided another ground for excluding the lie detector evidence in the instant case. The testimony by the prosecution's witness related to an out-of-court statement used to prove the fact asserted.[28] It would not come within the admissions exception because it was not a statement made by the defendant.[29] Furthermore, the prosecution should be estopped from arguing that the test results were admissions because admissions are definitely testimonial. Such an argument might lend efficacy to the self-incrimination objection.

DAVID L. CAMPBELL

EVIDENCE — ADVERSE SPOUSAL TESTIMONY IN FEDERAL COURTS — Defendant was convicted of a violation of the Mann Act for transporting a girl from Arkansas to Oklahoma for immoral purposes. Defendant's wife appeared voluntarily as a government witness and, over his objection, was permitted to testify. The conviction was upheld by the United States Court of Appeals and the United States Supreme Court granted certiorari. *Held*, that both common law precedent and the public interest in promoting domestic harmony preclude admission of testimony by one spouse against the other even when the witness spouse wishes to testify. *Hawkins v. United States*, 358 U.S. 74 (1958).[1]

At common law neither husband nor wife could appear as a witness for or against the other in any civil or criminal action.[2] On

[27]Silving, *supra* note 19.

[28]"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an asertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick, Evidence § 226 (1954).

[29]"Admissions are the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him." *Id.*, § 239.

[1]Justice Stewart concurred with the majority on the issues presented, but indicated that he might have dissented had different arguments been used. The government argued that the privilege against adverse spousal testimony should vest in the witness and not the defendant, and that the wife, though she could not be compelled to do so, could voluntarily testify against her husband. The record indicated, however, that her testimony was not wholly voluntary since she had been imprisoned and released on $3000 bond conditioned upon her appearance as a witness for the United States.

[2]Jones, Evidence § 798 (5th ed. 1958); 2 Underhill, Criminal Evidence § 342 (5th ed. 1956); 3 Wharton, Criminal Evidence § 764 (12th ed. 1955).