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Police, Plus Perjury, Equals Polygraphy

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POLICE, PLUS PERJURY, EQUALS POLYGRAPHY

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I. INTRODUCTION

Criminal procedure scholars devote themselves to debating the proper scope of the Constitution's limits on police methods. The application of constitutional rules, however, depends entirely on how facts are found on motions to suppress or at trials of civil rights actions. Police perjury, if accepted, can defeat any constitutional rule. Thus, the debates about stop-and-frisk, automobile searches, and police interrogation have a scholastic quality; no matter what rule appellate courts adopt, police may circumvent that rule by persuading trial courts to accept an incorrect account of the facts.

If police perjury were rare, academic discussion of it would lose little relevance. Unfortunately, criminal procedure scholars agree that police perjury is not exotic. Police perjury has been called "pervasive,"[1] "an integral feature of urban police work,"[2] and the "demon in the criminal process."[3] This essay suggests a new strategy for dealing with this problem.

My thesis holds that courts deciding suppression motions should admit expert testimony based on polygraph examinations, and draw an adverse inference from the failure to introduce such evidence, whenever the outcome of the dispute depends on the credibility of conflicting testimony given by the defendant and the police. To avoid confusion, I would like to set out at the beginning the precise approach I defend.

At the close of the testimony at a hearing on a suppression motion, upon motion by either party or *sua sponte*, the court should determine whether the outcome depends on resolving a conflict in the

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[1] Robert P. Burns, *Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843, 877 n.99 (1995).

[2] Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 70 (1994).

[3] H. RICHARD UVILLER, TEMPERED ZEAL 111 (1988).

testimony on the basis of credibility. If the court finds that the issue turns on credibility, the court should inquire whether either party is willing to supplement the record with a polygraph examination of the party's witness or witnesses. Each party could elect to supplement the record in this way, but the decision to do so would have to be made at that time. Neither side could wait for the outcome of the other's examination; and the results of any examination would be admissible regardless of the result.

Examinations would need to be administered by a qualified examiner, after notice to the opposing party that enabled the opposing party's representatives to attend the examination. The judge would not be bound by the results of the polygraph examinations, but could consider them along with all the evidence in the case. The results, however, would become part of the record, and in an appropriate case might be considered, along with all the circumstances of the case, by an appellate court in deciding whether the factual findings below were clearly erroneous.

My argument proceeds through four stages. First, I illustrate the corrosive effects of swearing contests involving the police by discussing the case of *Florida v. Bostick*.[4] Second, I demonstrate that the available evidence strongly indicates that police perjury is a widespread phenomenon. Third, I show that polygraph examinations can make a powerful contribution towards determining the truth, and that the usual reasons for excluding polygraph evidence from judicial proceedings do not apply in the context of swearing contests in which one of the witnesses is a police officer. As the Fifth Circuit recently recognized in *United States v. Posado*,[5] the Supreme Court's *Daubert* decision,[6] which liberalized the standard for admissibility of expert testimony, creates an opportunity for introducing polygraph evidence in the suppression context. Finally, I submit that even if polygraph evidence were of doubtful reliability, its admissibility to resolve swearing contests would give police departments a powerful incentive to minimize the number of swearing contests by making available reliable proof of what happened during an encounter between the police and a citizen.

II. The Perverse Dynamics of Swearing Contests Involving the Police

Those who follow criminal procedure developments in the

4 501 U.S. 429 (1991).

5 57 F.3d 428 (5th Cir. 1995).

6 Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993).

Supreme Court will remember *Florida v. Bostick*, where the Court upheld the constitutionality of so-called "bus sweeps." I focus on this decision because it provides a textbook example of how swearing contests at a suppression hearing can undermine the enforcement and distort the development of substantive rules. Indeed, the very fact that good lawyers only think of *Bostick* as a case about substantive Fourth Amendment law suggests that we now regard police control of the facts as the normal state of affairs. My concern here, however, is not with the merits of the *Bostick* decision, but with the Hobson's choice the judiciary faces when the police give an improbable account of the facts that led to an arrest.

Terrance Bostick was an Atlanta-bound passenger on a Greyhound bus that made a stop in Fort Lauderdale.[7] Two Broward County Sheriff's Department officers, Detective Nutt and Detective Rubino, boarded the bus.[8] The driver, who knew that the police had a drug-interdiction policy of boarding randomly selected busses, got off and closed the door.[9]

The officers found cocaine in a bag that belonged to Bostick.[10] He moved to suppress the cocaine on Fourth Amendment grounds. At the suppression hearing, the officers testified that they advised Bostick that they were police officers prior to the search, and that Bostick consented to the search that discovered the drugs.[11] However, Bostick testified that he never gave consent, although he also testified that he did not affirmatively protest or object to the search.[12]

There were two other witnesses to the search, both young men.[13] Both witnesses were summoned but neither appeared to testify at the suppression hearing.[14] Thus the case presented a common situation, in which the facts governing a claim of constitutional right depend on whether one believes the account of the police or the account of a criminal defendant.

On its face, the police account is highly improbable. Why would a cocaine smuggler consent to a search that could send him to prison for decades? We can suppose that criminals are not rocket scientists and that Freud's insights apply to criminals no less than to anyone else. But even if a self-destructive error of the sort posited by the po-

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7 Joint Appendix at 34-35, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717).

8 *Id.* at 9.

9 *Id.* at 12.

10 *Id.* at 53-54.

11 *Id.* at 8-10, 20.

12 *Id.* at 37.

13 *Id.* at 5-6.

14 *Id.* One was deposed; but the deposition is not included in the appendix the parties filed with the Supreme Court.

lice is possible, it is not probable.

Consider the words of Judge Seay, who ruled on the suppression motion:

> Yes. Well, whatever the issue, he [Judge Moe, who had ruled the bus-sweep tactic unconstitutional in a similar case] didn't like the whole picture, which I'm not crazy about, either, but when you've got sworn testimony from two police officers and they're testifying, sometimes you don't have much other than that and you have to go along with the sworn testimony but it does really stretch the imagination when they're standing there in an aisle and talking to someone and just checking all the bags. It's very intimidating even if there is consent.[15]

Judge Seay's remarks nicely capture the unpleasant situation facing trial judges faced with swearing contests at suppression hearings. The police story may be improbable, but police officers must be presumed honest, and the defendant's word is worthless.

In a swearing contest, the trial judge can discredit the police testimony only by branding the police as liars and accepting the word of an apparent felon. Typically the police, rather than the felon, will be telling the truth, but in a significant number of cases the police account is false.[16] Nonetheless judges decide cases one at a time, so the police almost always win the swearing contest.

The police are aware of this bias. The resulting incentives are exquisitely perverse. First, police officers indifferent to constitutional rights can violate them with impunity. I cannot prove that the Broward County officers deliberately planned to roust every black kid on those busses and then lie about consent whenever they found drugs. No one, however, can prove the opposite.

While the scope of Fourth and Fifth Amendment rights, and the purposes of the exclusionary rule, are much debated, the prevailing view is that the exclusionary rule is designed to deter unconstitutional behavior,[17] especially, if not exclusively, when the police act in bad faith.[18] But how can police acting in bad faith be deterred, if they know that their word will be accepted by the courts? Because almost any meritorious suppression motion can be defeated by incorrect factual findings, police knowledge that courts will usually believe police perjury takes a serious bite out of the rule's deterrent effect.

Second, and even more troubling, is that the acceptance of police perjury is known not just by individual officers, but by police depart-

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15 *Id.* at 49.

16 *See infra* notes 20-33 and accompanying text.

17 *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347 (1974) (purpose of excluding tainted evidence is to deter future unlawful police conduct).

18 *See* United States v. Leon, 468 U.S. 897, 911-13 (1984) (costs of excluding evidence outweigh deterrent benefits when police reasonably rely on defective search warrant).

ment policy-makers. They know that police testimony will typically be believed. Why, then, should they take measures that would enable courts to determine the facts independently of police testimony? Why should they require citizen observers or video cameras in patrol cars? Why should they—*almost thirty years* after *Miranda v. Arizona*[19]—finally decide to record interrogations? The police cannot win any cases with these procedures, they can only lose cases with them.

The mischief continues on appeal. An appellate court cannot second-guess trial court credibility rulings. So the appellate courts must make rules based on the false assumption that the facts will be accurately determined below (the usual approach these days, as evidenced by *Bostick*) or by extending constitutional rights so that the police will have difficulty denying the facts that set up the rights. The Fourth Amendment warrant requirement, and the *Miranda* decision, are examples of this latter approach.

Neither approach is very attractive. Ignoring police perjury with the bland assurance that trial courts can ferret it out is to mock the Constitution with hypocrisy. Trying to define rights that can be successfully asserted no matter what testimony is believed is both irrational and futile. It is irrational, because more and more cases of legitimate police work must be thrown out in order to nullify a few cases of illegitimate police work. It is futile because police perjury can migrate from one fact to another. Told they must record the facts in advance by obtaining a search warrant, unscrupulous police officers will simply lie in the warrant affidavit. Told that the test of a confession's admissibility is not voluntariness but a waiver made after warnings, unscrupulous police officers will simply lie about giving the warnings and getting the waiver.

I have focused here on the consequences of our systemic invitation to police perjury, reserving for last the rather simple and obvious point that police perjury is *wrong*. Barring some powerful countervailing moral obligation, it is wrong to break oaths; it is wrong to break the criminal law; and it is especially indefensible for public officials to do so in the name of law and order.

I have nothing against officers Nutt and Rubino. I expect that they are, on the whole, more honest than Terrance Bostick. I do not know that they lied that day in Judge Seay's courtroom. As things stand, however, no one who was not on the bus that day really knows whether they were lying or not. When it comes to police testimony, Judge Seay is an agnostic as an individual, but a true believer as a judge. One could say the same about most criminal court judges in

[19] 384 U.S. 436 (1966).

the country.

We are, as in many other contexts, asking too much of our police. How would you behave if you knew that you could count on having your story accepted in court? If called to testify in a case of interest to you, how would you testify, knowing that your testimony will be believed? Would you testify according to the truth, or according to justice? Wouldn't it be strange if we *didn't* have a police perjury problem?

The question is not whether we have a problem. The real question is the severity of the problem. I turn now to discuss some recent evidence suggesting that police perjury is a problem too large to ignore.

III. Police Perjury is Common

Experienced trial lawyers for many years have expressed the view that police officers frequently lie on the stand.[20] Some early empirical research following *Mapp v. Ohio*[21] showed that the police testified to the abandonment of narcotics (so-called "dropsy testimony") more than twice as often after the application of the exclusionary rule as before, indicating a widespread willingness among police to lie on the stand.[22] Nonetheless, because it is difficult to determine whether the police are lying in any given case, the dimensions of the problem have been speculative. Recent contributions to the legal literature, however, make it increasingly clear that the problem is serious indeed.

One such contribution is Richard Uviller's account of a sabbatical leave spent with police officers in New York city.[23] Another is Myron Orfield's interview study of prosecutors, defense lawyers, and trial judges involved in suppression motions in Chicago.[24] Yet a third is the NAACP's investigation of police practices in six cities, undertaken in the wake of the videotaped beating of Rodney King.[25]

Uviller was a New York City prosecutor for fourteen years. He

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[20] In a typically measured comment, Alan Dershowtiz declared that "[a]lmost all police lie about whether they violated the Constitution in order to convict guilty defendants." Alan Dershowtiz, The Best Defense xxi (1982). Fifteen years earlier, Irving Younger had called attention to the problem in a biting article in *The Nation*. *See* Irving Younger, *The Perjury Routine*, 204 Nation 596 (1967).

[21] 367 U.S. 643 (1961).

[22] Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 Crim. L. Bull. 549, 555-60, 570 (1968). *See also* Paul Chevigny, Police Power 187 (1969) (discussing research by Sarah Barlow).

[23] Uviller, *supra* note 3.

[24] Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75 (1992).

[25] Charles J. Ogletree, Jr., et al., Beyond the Rodney King Story (1995).

spent eight months observing the operations of a New York City police precinct. Uviller thought that the police were in general both natural and forthcoming in his presence, but "[o]ne subject on which I could not induce the cops [I was studying] to share any firsthand experience was perjury."[26] Nonetheless, he came away convinced that police perjury is not exotic.

His impression is worth quoting at some length. After describing a case in which the police, lacking a warrant, induced the suspect to leave his mother's apartment by simply ringing the bell and standing wordlessly at the doorway, he writes:

> I have no data to illustrate it, but my suspicion is that out of just such circumstances is born the most common form of police perjury: the *instrumental adjustment.* A slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result. How easy it would be to go into the flat, grab the suspect, and later say you busted him as he was leaving his mother's apartment to get a six-pack at the corner bodega. Same difference. Who will believe this stickup guy if he takes the stand and testifies, in his own interest, to the contrary? And ironically, the perjured version is, on its face, probably more credible than the actual events . . . .
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> By the same logic, cops may insert a little invention to fortify the probable cause upon which a fruitful search was based. Add a small but deft stroke to the facts—say, a visible bulge at the waistband of a person carrying a pistol. Just enough to put some flesh on the hunch that actually induced the officer to give the man a toss; it might make all the difference. Or a police officer, understandably eager to have the jury hear the bad guy's full and free confession, might advance slightly the moment at which the *Miranda* warnings were recited to satisfy the courts' insistence that they precede the very first question in a course of interrogation. That sort of thing. Although no one admitted it to me in so many words, I think most police officers regard such alterations of events as the natural and inevitable outgrowth of artificial and unrealistic *post facto* judgments that release criminals. The prevalence of this sort of perjury leads some cynics to suggest that the principal effect of the Supreme Court's carefully crafted interpretations of the Constitution on the behavior of those to whom their words are directed is to teach the police what they should say on the witness stand rather than what they should do in the streets.[27]

Uviller, then, concluded that "most police officers" view police perjury as "natural and inevitable," and he speaks casually of the "prevalence" of the phenomenon.[28]

Orfield interviewed judges, public defenders, and prosecutors as-

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26 UVILLER, *supra* note 3, at 111.

27 *Id.* at 115-16 (emphasis in original).

28 A recent official inquiry into police corruption in New York reached similar conclusions about the extent of police perjury. *See* Joe Sexton, *New York Police Often Lie Under Oath Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1.

signed to fourteen criminal courtrooms in Chicago.[29] His conclusions also deserve quotation:

> Significantly, the respondents outlined a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment. Dishonesty occurs in both the investigative process and the courtroom. The respondents report systematic fabrication in case reports and affidavits for search warrants, creating artificial probable cause which forms the basis of later testimony. Moreover, police keep dual sets of investigatory files; official files and "street files." Exculpatory material in the street files may be edited from the official record. Respondents, including prosecutors, estimate that police commit perjury between 20% and 50% of the time they testify on Fourth Amendment issues. This perjury may be tolerated, or even encouraged, by prosecutors at each step in the process in both direct and indirect ways.[30]

Orfield later notes:

> On average, the judges in the Courts Study estimate that judges disbelieve police testimony 18% of the time, compared with the public defenders estimate of 21% of the time, and the state's attorneys estimate of 19%. While these figures alone suggest a shocking level of police perjury, the majority of judges and public defenders, and almost half of the state's attorneys, believe that police lie more often than they are disbelieved.[31]

The fact that judges and even prosecutors believed perjury to be so common is a real eye-opener.

Orfield found, however, that judges only rarely rejected police testimony. "In a 'swearing contest' between an officer and a defendant, many respondents believe the defendant always loses. Some argued that before a judge disbelieves an officer, the defendant must 'prove beyond a reasonable doubt' that the officer is lying."[32] Orfield quotes one judge caught in the swearing-contest trap:

> Many times, I feel the police are lying, but I can't make a finding on a hunch. I've got to have some facts. If the defense can't show anything, that the police officer is telling a lie, then I have to find for the policeman . . . . You walk into a case and as a rule you believe the police officer—you've got to believe police more than defendant.[33]

Thus the judge might well believe that the police lie in a fifth of the cases, and yet never make a finding of police perjury in any single case.

The NAACP report is less a study of police perjury than a study of police brutality and abuse. Nonetheless brutality and abuse cannot

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29 Orfield, *supra* note 24, at 81-82.

30 Orfield, *supra* note 24, at 82-83.

31 *Id.* at 107 (footnotes omitted).

32 *Id.* at 118.

33 *Id.* at 119 (ellipses in original).

occur absent police control over the determination of facts in subsequent litigation. After holding hearings in six cities, the NAACP investigators concluded that what was unusual about the Rodney King case was the videotape, not the police behavior.[34]

This sort of behavior can survive only if it can be effectively covered-up. The report found that the police frequently file fabricated charges of assault or resisting arrest against victims of excessive force.[35] The investigators describe a "code of silence" that calls upon police officers to cover-up the misconduct of other police.[36]

One might, of course, disbelieve the witnesses who gave evidence to the NAACP team. But it is hard to see why they would make up their accounts. In the context of the study, they were not attempting to defeat criminal charges against themselves. Rather, they were coming forward (and risking police retaliation) to give what can only be supposed to be sincere accounts of police misconduct. Unless the police stand ready to perjure themselves, and unless police perjury is generally accepted by the courts, the state of affairs described by the report could not exist.

Last summer empirical evidence of police perjury moved from the law library to the living room. During the O.J. Simpson trial, Detective Mark Fuhrman, who declared on the stand that he had not used the word "nigger" in the last decade, was shown to have perjured himself when tapes of him uttering that word surfaced.[37] Meanwhile, the FBI—always thought of as America's model of professional, by-the-book law enforcement—was under investigation for destroying documents related to the Ruby Ridge shoot-out.[38]

What is to be done? In some ways, the problem is not only too large to ignore, it is too large to address. It would require judges, lawyers, and academics to admit that much of what they attempt to achieve by way of regulating the police is futile and naive. There is, moreover, a genuine impulse to sympathize with perjury that promotes justice in individual cases. Perjury can function as a shock-absorber, making sure that the exclusionary rule does not cost the

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34 *See* OGLETREE ET AL., *supra* note 25, at 29-39.

35 *Id.* at 42-44.

36 *Id.* at 74-76.

37 *See* William Claiborne, *Lawyers in Simpson Case Reach Compromise Allowing Judge Ito to Stay On*, WASH. POST, Aug. 17, 1995, at A10 ("[Defense] attorneys will submit written arguments on the admissibility of tapes containing 30 instances of Fuhrman's allegedly using the racial epithet 'nigger', and 17 instances in which he admits planting or manufacturing evidence and lying or covering up police misconduct.").

38 *See* Pierre Thomas, *For Prosecutors in Idaho Case, FBI was also an Adversary*, WASH. POST, Aug. 17, 1995, at A1, A15 (investigative task force "cited missing faxes, notes from headquarters and drafts of the operations plan for the siege").

convictions of especially heinous criminals. The temptation to acquiesce in hypocritical complacency is strong.

We must reject this temptation. If our settled judgments about constitutional rights cannot survive honest fact-finding, then let us change our judgments about constitutional rights. If we are serious in our claim that constitutional rights have priority over enforcing the criminal law, then let us find ways of enforcing constitutional rights.

Some commentators have shown the willingness to openly address the problem. Both Morgan Cloud[39] and William Stuntz[40] have recognized the relationship between the Fourth Amendment's warrant requirement and the police perjury problem. Professor Cloud argues that police perjury calls for both a more rigorous warrant requirement and for greater judicial reliance on the objective facts known to the officer.[41] On the other hand, Professor Stuntz argues that the court uses warrants to prevent after-the-fact bias from influencing judicial decisions, but not to prevent police perjury.[42] He suggests that any warrant requirement that would place meaningful obstacles in the way of police perjury would greatly limit searches based on informants, interfering with enforcement of organized criminal activity, especially drug distribution.[43]

Professor Stuntz's approach is the better of the two. Police willing to lie can lie not only about exigent circumstances but also about consent and abandonment. "Objective facts" depend on what testimony is believed at the suppression hearing. When the privacy interest to be invaded is less than that of arrest or home invasion, the burden of the requirement seems out of proportion to its contribution to protecting liberty[44]—unless warrants become so easy to obtain that they cease to protect liberty.[45]

So, in the end I am skeptical about letting the procedural tail wag the substantive dog. At the least we should artificially interpret the constitution to protect its true meanings from police perjury only as a last resort, with reluctance and regret. If there is a procedural ap-

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39 Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994).

40 William Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914-18 (1991).

41 Cloud, *supra* note 39, at 1346-48.

42 Stuntz, *supra* note 40, at 919.

43 *Id.* at 935-41.

44 *Id.* at 889-97. *See also* Craig Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 441-42 (1993).

45 *See* WAYNE R. LAFAVE, 2 SEARCH & SEIZURE sec. 4.1(a) at 120 (2d ed. 1987) ("it may well be that, as a practical matter, the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to prevent those police practices which would be most destructive of Fourth Amendment values").

proach that would greatly reduce the credibility, and thereby the temptation, of police perjury, that approach deserves a trial before we resign ourselves to doing our best to protect constitutional rights from police who can get away with lying. The obvious alternative is the polygraph.

IV. EXPERT TESTIMONY BASED ON POLYGRAPH EXAMINATIONS SHOULD BE ADMISSIBLE AT SUPPRESSION HEARINGS WHEN THE OUTCOME DEPENDS ON CREDIBILITY

The Supreme Court's recent decision in *Daubert v. Merrell Dow Pharmaceuticals*[46] makes clear that Federal Rules of Evidence permit expert testimony whenever the expert testimony is based on valid science, is relevant to the specific issues in dispute, and would be helpful to the jury. The Court explained:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determinate at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[47]

The Court took pains to add, however, that even when the proponent establishes the scientific validity of the testimony and the fit between the evidence and the issue, the judge must still determine whether the evidence would be helpful to the jury. Rule 403 always allows the judge to exclude evidence when its probative value is substantially outweighed by its potential for prejudice.[48]

The three-stage inquiry mandated by *Daubert*—evaluating validity according to an open-ended list of factors, checking the fit of the evidence with the dispute on trial, and finally weighing the probative value of the evidence against its potential to mislead, confuse, or carry away the trier of fact—is, to say the least, not self-executing.[49] I suggest that, under *Daubert*, polygraph evidence deserves to be received at suppression hearings, although I shall rely more on the unique procedural problem of the swearing contest between police and defendants than upon any change in the evidentiary standard *Daubert* followed. Thus, even in jurisdictions that do not follow the Federal Rules, there is a strong case for admissibility.

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46 113 S. Ct. 2786 (1993).

47 *Id.* at 2796 (footnotes omitted).

48 *See* 113 S. Ct. at 2797-98.

49 *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE sec. 7.8 (1995).

The first step in the *Daubert* inquiry is to determine whether the proffered expert testimony is based on valid science. The Supreme Court declared that the validity inquiry depended on an open-ended set of considerations. The Court specifically directed attention to whether the technique had been tested; whether it has been subjected to the peer review process in scientific publications; what the error rates for the technique are or might be; and whether the technique is generally accepted among experts.[50]

The polygraph has of course been tested a great deal. Several studies have been published in peer reviewed journals. These studies suggest an acceptable range of rates of error. The polygraph, moreover, is generally accepted by experts in the field of security and investigation.

For judicial purposes, the critical question is whether polygraph examination successfully detects deception and its absence. In the polygraph literature this is called the question of "validity." Validity is hard to study because the real truth is not always known, and when it is known that knowledge can influence the polygraph determination. The term "reliability" refers to the consistency with which different evaluators come to the same conclusions regarding the honesty of the same subject.

Nonetheless, there are by now many studies of polygraph validity in the context of criminal investigation, in which ground truth is determined by some generally accepted measure such as post-polygraph confession or discovery of physical evidence. There have been at least three major literature reviews of polygraph studies; each has surveyed these field studies. The first, conducted by the Office of Technology Assessment (OTA), concluded that "while polygraph examinations using [the Control Question Test method] in criminal investigations detect deceptiveness and nondeceptiveness better than chance, there is also what in some cases might be considered a high error rate, particularly for nondeceptive subjects."[51]

The second review was conducted by the Department of Defense (DOD). The DOD study noted that the high error rates that con-

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50 *See* 113 S. Ct. at 2797.

51 OTA, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING 52 (1983) [hereinafter OTA Report].

> Under the CQ format, a subject is asked an anxiety-provoking question unconnected with the incident under investigation as a control question. The question will produce a lying response, either because it is designed to produce a false answer or because the subject is directed to lie in answering. The control question is then followed by questions regarding the incident being investigated.

James R. McCall, *Misconceptions and Reevaluation-Polygraph Admissibility After* Rock *and* Daubert, 1996 ILL. L. REV. 363, 378 (footnote omitted).

cerned the OTA were found in the "blind" evaluations—opinions based on the paper records, not the opinions of evaluators who themselves administered the polygraph examination.[52] There is a good reason why blind evaluations are less valid than examiner evaluations, especially with respect to innocent subjects. All the machine records is stress; if an innocent individual is stressed during questioning by something other than the burden of deception—a noise in the street, concern for a sick relative, or what not—the machine will nonetheless record the stress. The examiner who witnesses the interview is in a better position to rule out—or in—alternative explanations for the tension detected by the machine.

The DOD report gives the following evaluation of the field test literature:

> Field studies of criterion validity are fairly consistent in their results for guilty subjects. When original examiner subjective decision is used to predict the criteria, 90% to 100% of the guilty subject have been correctly classified. Results are similar for studies using a criterion that is independent of examiner decision and studies using a criterion correlated with examiner decision. Numerical field scoring by the original examiner, chart scrutiny by a blind examiner, and numerical analysis by a blind examiner does not appear to alter the percentage of guilty subjects correctly classified when inconclusives are omitted.
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> The results for innocent subjects are much more variable. When original examiner's clinical judgment is used to predict the criterion, omitting inconclusives, from 14% to 100% of the innocent subjects are correctly classified. The Barland and Raskin (1976) study was the only one to show poor results; and problems with this study have been discussed. [The study determined ground truth by giving panels case files, sometimes with meager information; thus disagreement between the polygraph test and the panel conclusion does not establish that the polygraph result was erroneous]. Omitting the Barland and Raskin data, 85% to 100% of the innocent subjects were correctly classified. It is important to note that the study reporting a 85% correct classification figure used a criterion that was both independent of original examiner decision and accurate (Ginton et al., 1982).[53]

More recently, Norman Ansley, who edits *Polygraph,* the official journal of the American Polygraph Association, reviewed all studies of real cases since 1980.[54] In the studies in which the control question test approach was used, "examiners were correct in 301 of 316 NDI (No Deception Indicated) calls, for 95%. They were correct in 629 of

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[52] Department of Defense, The Accuracy and Utility of Polygraph Testing 59 (1984) [hereinafter DOD Report].

[53] *Id.* at 37-38.

[54] Norman Ansley, *The Validity and Reliability of Polygraph Decisions in Real Cases,* 19 POLYGRAPH 169 (1990).

634 DI (Deception Indicated) calls, for 99%."[55]

Each of these reviews had a mission. The OTA report was prepared at the request of a Congress preparing to strictly regulate polygraph screening in employment. In that context a ten percent rate of false positives is extremely troubling; it could mean unfairly excluding thousands of people from jobs. The DOD, however, has long relied on the polygraph both in investigations and in security screening. Ansley is a professional polygrapher and a dedicated proponent of the technique.

Nonetheless the underlying studies seem to point in the same direction. In criminal investigations, a competent polygraph examination has a very high probability of detecting deception, and a high probability of detecting the absence of deception. Thus, the testing, peer review, and error rate aspects relevant to the first stage of the *Daubert* analysis support admissibility.

Outside the courtroom, many sober individuals, caring only about the reliability of results, rely on the polygraph. The CIA, the Defense Department, and big business rely on the polygraph.[56] Most police departments rely on it, either to screen employment applicants[57] or to interview witnesses.[58]

The polygraph technique, then, has (1) been tested empirically, with generally strong results; (2) the supporting studies typically have survived the peer review process; (3) error rates are low, although incorrect findings of deception are more common than incorrect findings of no deception; (4) the technique is relied on by responsible people in many out-of-court contexts.[59] These conclusions are not

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55 *Id.* at 172.

56 *See* DOD Report, *supra* note 52, at 11 (CIA has used polygraph since 1950; DOD has used polygraph since 1951); Joseph P. Buckley, *The Use of Polygraph in the Workplace: The American Polygraph Association's View*, 17 POLYGRAPH 80 (1988) ("While exact figures are difficult to determine, several surveys indicate that approximately 20% of all major businesses in the United States use polygraph. In particular industries the figures are much higher: for example, approximately 50% of all commercial banks and over 60% of all retail operations use polygraph in some capacity.").

57 Robert T. Meesig & Frank Horvath, *Changes in Usage, Practices and Policies in Pre-Employment Polygraph Testing in Law Enforcement Agencies in the United States: 1964-1991*, 22 POLYGRAPH 1 (1993) (62% of the largest law enforcement agencies use the technique of pre-employment polygraph screening).

58 *See, e.g.*, UVILLER, *supra* note 3, at 173 ("The fact is that, notwithstanding its unsuitability for jurors, the polygraph is widely employed by both government and the private sector for questions of employee honesty and the like. And law enforcement agencies, including prosecutors' offices, occasionally use the polygraph to check the veracity of a questionable witness.").

59 This point should carry the day in jurisdictions that continue to adhere to the rule of Frye v. United States, 293 P.2d 1013 (D.C. Cir. 1923) (scientific evidence admissible when generally accepted among experts; primitive lie detector test inadmissible). The idea be-

terribly controversial, and collectively they make a persuasive case that polygraph evidence passes the validity threshold of the *Daubert* test.[60]

Why, then, have courts traditionally shown such hostility to the polygraph? There is no real paradox here. A cluster of powerful reasons, having little to do with scientific validity and much to do with the litigation process, counsels excluding polygraph evidence in ordinary litigation. Two initial observations deserve emphasis. First, in our system, polygraph evidence would be evaluated by a lay jury. Second, credibility is an issue in almost every case, civil or criminal.

Courts have expressly relied on the jury factor in ruling polygraph evidence generally inadmissible.[61] Even if the technique is reli-

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hind the *Frye* test is that courts can use consensus of expert opinion as a proxy for scientific reliability. If most experts in the security and law-enforcement field rely on the polygraph, including the federal government's intelligence services and the police themselves, *Frye* counsels deferring to their expert judgment.

In truth, the real fight about polygraph evidence in court has less to due with reliability than with concern about prejudice, a concern that applies regardless of whether the general test of admissibility is that of *Frye* or of *Daubert*. Hence, the arguments I develop about the unique context of the suppression hearing suggest a rule of admissibility in that context under *Frye* as well as *Daubert*.

60 *See* United States v. Crumby, 895 F. Supp. 1354 (D. Ariz. 1995) (detailed review of polygraph evidence under *Daubert* factors, supporting admissibility); United States v. Galbreth, 908 F. Supp. 877 (D.N.M. 1995) (same). In United States v. Black, 831 F. Supp. 120 (E.D.N.Y. 1993), the court adhered to pre-*Daubert* Second Circuit precedent holding polygraph evidence inadmissible. The *Black* court justified the exclusion of the evidence solely on the ground of unreliability. *See id.* at 122. *See also* United States v. Rea, 958 F.2d 1206 (2d Cir. 1992); United States v. Bortnovsky, 879 F.2d 30 (1989); United States v. Lech, 895 F. Supp. 582 (S.D.N.Y. 1995) (holding polygraph evidence inadmissible for fear of juror prejudice; intimating without holding that *per se* rule of inadmissibility survived *Daubert*).

If correct, this analysis would preclude admitting polygraph evidence at suppression hearings. But the *Black* court's conclusion, with respect, seems to ignore the weight of modern studies of the polygraph, and to ignore as well the widespread reliance on the polygraph outside the courtroom. Intelligence agencies, police departments, and big business don't need to worry about prejudicing juries, but they do need to worry about reliability. Either the *Black* court is wrong about polygraph reliability, or a great many hard-headed people in government and business are wasting time and money on pseudoscience.

61 *See, e.g.*, Brown v. Darcy, 783 F.2d 1389, 1394-95 (9th Cir. 1986):

> We have found no United States Court of Appeals decision which has affirmed the admission of unstipulated polygraph evidence under the Federal Rules of Evidence, or concluded that the refusal to admit polygraph evidence at trial was an abuse of discretion. At least five other Courts of Appeals have held that unstipulated polygraph evidence is per se inadmissible. Given the questionable reliability of polygraph evidence and the great potential for prejudice from inaccurate polygraph evidence, we conclude that unstipulated polygraph evidence is inadmissible as technical or scientific evidence under Fed. R. Evid. 702 because it does not 'assist the trier of fact to understand the evidence or to determine a fact in issue.'

(citations & footnotes omitted). *See also* United States v. Alexander, 526 F.2d 161, 169 (8th Cir. 1975) ("The extent to which the polygraph evidence may tend to pervade the factfinding process in a jury trial and the probable effect that such evidence may have upon jurors may be some of the reasons underlying judicial reluctance to admit the results of unstipulated polygraph tests.").

able, it is less reliable than it may appear to a jury. They may discount other evidence; and this is especially troubling given that when the polygraph examination is incorrect, it will be because the witness is found deceptive when in fact the truth was told.

The volume-of-litigation factor is one that courts have not much addressed, but it is an obvious obstacle to a general rule of admissibility. Examination reliability heavily depends on the quality of the examiner.[62] A general rule of admissibility would mean that polygraph services would be in universal demand. A litigant with a losing case has good reason to try anything, and anyone whose adversary hires a polygraph expert must do the same. The burgeoning demand would lead to rationing a potentially decisive litigation advantage according to means, or to a new army of fly-by-night "experts," and quite possibly to both of these unhappy results.

These considerations, however, come into play at the second and third stage of the *Daubert* inquiry. Suppose there is a relatively small class of cases in which polygraph evidence is really needed. In such a class of cases, in terms of *Daubert*'s second stage, there would be a very strong "fit" between the evidence and the case. Suppose further that in this class of cases, the issue would be determined by the court, and that situational prejudice typically means that the trier of fact is *now* prevented from judging the facts on an impartial basis.

Isn't a suppression motion governed by conflicting testimony precisely such a case? Judges, not juries, rule on suppression motions. Even judges are now unable to give due weight to the likely extent of police perjury, because the swearing contest pits a police officer against a criminal. Uniforms and badges can usurp the province of the fact-finder just as powerfully as any scientific technique.[63] Surely judges can be trusted to give polygraph evidence no undue weight; the more cogent objection is that they will not give it the weight it deserves.

In United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989) (en banc), the Eleventh Circuit broke with the prevailing judicial hostility to unstipulated polygraph evidence, but the departure was limited. The *Piccinonna* court held that polygraph evidence could be admitted to corroborate a witness's testimony, but not "unless or until the credibility of that witness were first attacked." *Id.* at 1536.

62 *See* OTA REPORT, *supra* note 51, at 83 ("It has long been recognized that the examiner's skill has an important effect on the validity of polygraph tests."); JOHN E. REID & FRED E. INBAU, TRUTH AND DECEPTION 304 (2d ed. 1977) ("Basic to all that has been said with regard to the utility and accuracy of the Polygraph technique is the matter of examiner qualifications."); JAMES ALLAN MATTE, THE ART AND SCIENCE OF THE POLYGRAPH TECHNIQUE 206 (1980) ("The defense attorney must remember that the strength and credibility of the polygraph results are based upon the qualifications and expertise of the polygraphist who administered the examination.").

63 *See* Cloud, *supra* note 39, at 1321-24 (five reasons why judges credit police perjury).

Moreover, although suppression motions presenting swearing contests are common, the class of suppression motions is vastly smaller than the class of all trials. In most cases, we should suppose, it is the defendant who is lying, not the officer. When counsel asks the defendant whether he would take a polygraph test to support the motion, the typical defendant with a false story will decline. Given the tendency of the polygraph exam to fail primarily by discrediting true testimony, rather than by crediting false testimony, counsel will make it clear to the client that this is the wiser course.

Moreover, I do not propose automatic admissibility in all suppression hearings. Only if the outcome turns on credibility should polygraph testimony be admitted. As I argue later, the police have ways to create credible records of many of their activities. Polygraph admissibility to break swearing contests would give them an incentive to take these steps. Thus, the ultimate point of admissibility is not to decide cases according to the polygraph, but to eliminate deciding them according to naked credibility judgments.

Thus suppression hearings provide an ideal opportunity for receiving polygraph evidence in a limited class of cases, in which the evidence could make a dramatic contribution to improving the administration of justice. One further point about the suppression context deserves discussion. Not only is the suppression context ideal from the standpoint of fit and prejudice; it is also a context in which the risk of unreliable polygraph evidence is reduced to a minimum.

Unlike broad screening examinations given to employees, or even interviews of a single suspect, in the swearing contest situation the polygraph can dictate a false outcome only if two examinations each produce an error of a different type. If both the defendant and the police fail the exam, or if both pass the exam, the judge is back to square one. But the police will know that failure to take the test will justify a strong inference of deception. If the defendant passes, it will be difficult for the government to prevail.

So typically the approach I defend will yield *two* polygraph examinations. Either or both may be inconclusive, but ordinarily they will produce a judgment of deception indicated or no deception indicated. When the examinations interlock, suggesting that one party is lying and the other is not, a decision based on the examinations is quite unlikely to be a miscarriage of justice.

The polygraph exams could suggest a false result only if one exam yielded a false negative, and the other exam yielded a false positive. Assume, conservatively, I believe, that the polygraph procedure detects deception in 90% of cases, and detects nondeception in 80%

of cases. Suppose further that the exams indicate deception by the officer and none by the defendant. The probability that the defendant is lying and the officer telling the truth, when the polygraph evidence indicates the opposite, would then be 10% (the probability of a false positive in the officer's exam) times 20% (the probability of a false negative in the defendant's exam), for a 2% chance of error.

Given police credibility, would a judge rule in favor of the defendant if the defendant passes his test and the officer refused to take one? I should hope that in most cases the judge would do so, but there is no way of knowing. The expert witness will make clear to the judge that the most common type of error is a false indication of deception. Thus, a "no deception indicated" result is quite probative of honesty.

One of the problems a judge faces in finding against the police is the need to call the officer a liar. The polygraph offers an opportunity for a slightly softer message: "I'm not saying you're lying, sir, but I am saying that on the basis of the evidence in the record, your story is uncorroborated and the defendant has passed a polygraph examination administered by a qualified expert."

Even if the pressure to admit evidence against a really nasty defendant is so strong that a judge will disregard a successful defense exam, good results would still follow from admitting the evidence. A record would be made that the officer's story is suspect, a record that could be important both to the police department and to the judge in future cases. If it turns out that judges routinely discredit defense testimony supported by favorable polygraph results, it would send a clear signal that stronger medicine was required, such as *requiring* the police to take examinations, or, in appropriate cases, reversing the judge's factual findings as clearly erroneous.

Knowledge that a polygraph examination is possible might well influence police behavior prior to the suppression hearing. Hopefully, those officers acting in bad faith will refrain from some unconstitutional behavior they now indulge. The police may tell straighter stories to prosecutors before the hearing if they know that the story might be tested by a safeguard more material than the oath.

Could the defendant, or the police, a' la Aldrich Ames, beat the polygraph? Countermeasures are possible,[64] but if they were easy we would expect the field studies to show less powerful results regarding the validity of the "deception indicated" calls. Successful countermeasures depend on artificially boosting the response to the control ques-

64 *See* DAVID THORESON LYKKEN, A TREMOR IN THE BLOOD 237-43 (1981); OTA REPORT, *supra* note 51, at 87-89.

tions, typically by muscular contraction or self-induced pain. In a screening situation, when the examiner has no reason to suspect such tactics, success is definitely possible. When these measures are not unexpected, however, as when the subject is an experienced law enforcement officer or a drug dealer, the chances of success decline.[65] Moreover, there are counter-countermeasures available to examiners.[66] If the examiner determines that the subject is deliberately attempting to defeat the examination, a conclusive inference of dishonesty can be drawn.

Finally, we return to the fact that in the suppression context there will be two examinations. If the officer's exam clearly suggests countermeasures, or is inconclusive because the control-question responses are peculiar, and the defendant passes *his* test, considerable light has been shed on the fact at issue.

A strong case, then, supports admitting polygraph evidence to illuminate swearing contests in the context of suppression motions. The Fifth Circuit Court of Appeals recently has taken a modest but important step toward accepting this case. In *United States v. Posado*,[67] the court reversed a conviction obtained after the district court refused to consider the defendants' polygraph evidence before denying their motion to suppress.

Posado involved a swearing contest of the familiar type.[68] The three defendants arrived at the Houston airport, where they aroused the suspicions of the police. The police retrieved their baggage and squeezed the luggage, causing one of the bags to emit the odor of fabric softener, which can be used to mask the scent of illegal drugs. The police then confronted the suspects, who spoke no English so that the ensuing conversations took place in Spanish, which was spoken by one of the officers. Two of the suspects had no identification; the one who did was identified by a name that did not match any of the names on any of the bags.

According to the police testimony, the police then advised the suspects that they were free to leave, but the defendants voluntarily agreed to accompany the police to the lower level of the airport where the police could search the defendants' luggage. Once downstairs,

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65 *See* LYKKEN, *supra* note 64, at 239-40 ("There is no doubt that it would be hard to beat a lie test when the examiner expects you to try and knows how you mean to do it."). *See also* Barry Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J., 917, 962-65 (1975).

66 *See* Stan Albrams & Michael Davidson, *Counter-Countermeasures in Polygraph Testing*, 17 POLYGRAPH 16 (1988) (recommending "activity sensor" for sophisticated subjects).

67 57 F.3d 428 (5th Cir. 1995).

68 The account of the facts is drawn from *Posado*, 57 F.3d at 429-30.

where the police were joined by a DEA agent who had taken custody of the defendants' checked luggage, the police asked for the keys to the padlocks securing the checked luggage. These the defendants did not have. The police then informed the defendants of their right to refuse to consent to the search, obtained consent both orally and in writing, and then opened the luggage by prying the padlocks open, discovering drugs.

According to the defendants' testimony, they believed themselves compelled to accompany the police even though it risked missing the flight. They further testified that the police did not inform them that they had a right to refuse consent; that the police began to pry open the locks without consent, but that during this process one of the officers ran back upstairs for a consent form. Only after the DEA agent opened the luggage with a penknife did the officer return with the form, which was executed by the defendants after the search. Defense counsel arranged for polygraph examinations of the defendants prior to the suppression hearing, and gave the prosecution an opportunity to participate in the tests. Two different polygraph examiners found no deception in the defendants' responses. The trial judge refused to consider the polygraph evidence:

> I am a great believer in polygraph, that polygraph technique, I think it's extremely effective as a law enforcement tool. I do not believe, however, that it belongs in the courtroom, either before the Court or before the jury, for several reasons, one of which is that it will lead to an impossible situation where we will have to hear polygraph experts on both sides, and we'll get into the same battle of experts that we get into in so many areas of law.
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> I am very concerned that it does have some valid use in determining whether people are likely to be truthful or likely not to be truthful, however, I think it opens up some policy questions that belong either to Congress or the appellate courts to resolve before we get into it here in the courtroom.[69]

The district court then denied the suppression motion, finding that the defendants had consented to the search.

The Fifth Circuit reversed. The court concluded that the "district court applied a per se rule against admitting polygraph evidence. Even the government concedes that that rule is no longer viable after *Daubert*. Therefore, the case must be remanded."[70]

The Court of Appeals did *not* hold that the polygraph evidence must be admitted. Rather, the district courts are to follow each step of the *Daubert* process—validity, fit, and the probity/prejudice balance—

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69 *Posado*, 57 F.3d at 431 (quoting Judge Black's ruling in the District Court).

70 *Id.* at 432.

on a case-by-case basis. The *Posado* court did suggest, however, that in the instant case the defendants had a strong case at the third step of the inquiry.

The court emphasized three factors. First, the prosecution knew about the examinations. "In such a case, both parties have a risk in the outcome of the polygraph examination, simultaneously reducing the possibility of unfair prejudice and increasing reliability."[71] "Second, the evidence was not offered at trial before a jury, but in a pretrial hearing before the district court judge. A district court judge is much less likely than a lay jury to be intimidated by claims of scientific validity into assigning an inappropriate evidentiary value to polygraph evidence."[72] Finally, the court pointed out that the particular facts in the record "substantially boost the probative value of this evidence."[73]

The ensuing discussion is highly relevant for our purposes:

> The evidence at the suppression hearing essentially required the district court to decide between the story told by the officers and that told by the defendants, not an unusual situation, *and perhaps not sufficient alone to justify admission of "tie-breaker" evidence carrying a high potential for prejudicial effect.* In this case, however, there was more. Because Officer Rodriguez was the only Spanish-speaking officer on the scene, he alone could testify as to what the defendants were told and as to their understanding of whether they were under arrest or whether they were consenting to a search of the baggage. Although Officer Rodriguez testified that he explained the consent form to the defendants, he was unable to read the consent form (printed in Spanish) to the court at both the probable cause hearing and the suppression hearing. There was also evidence calling the officers' recollection of events into question. For example, Officer Rodriguez testified incorrectly at the probable cause hearing that the defendants were travelling with one-way tickets, a fact which he said contributed to his reasonable suspicion that the defendants were carrying drugs. The defendants were in fact holding round-trip tickets. In addition, the defendants offered the testimony of a disinterested witness, an airline employee, who contradicted the officers' version of the events surrounding their retrieval of the defendants' bags from the airline prior to the search. Finally, the defendants introduced at the suppression hearing an order from a similar case in another district court in the Southern District involving Officer Rodriguez. In that case, the district court judge found that Officer Rodriguez' version of the events leading up to the search in that case was "untruthful" and therefore suppressed evidence obtained after the defendants allegedly consented to the search. Taken individually, each one of these inconsistencies can be explained and may seem inconsequential. Taken together, however, we believe that they can be said to enhance the need for evidence, and therefore its probative value, for clarifying which of the competing ver-

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71 *Id.* at 435.
72 *Id.*
73 *Id.*

sions of what happened that day is true.[74]

I applaud the Court's holding, and have only the highest respect for the court's reluctance to decide the case on any broader ground than necessary. With respect, however, I submit that the "plus factors" the Court invoked to emphasize the probative value of the polygraph evidence prove the necessity of a general rule of admissibility for polygraph evidence when a suppression motion turns on credibility.

How did the district judge conclude that the police were telling the truth *even in the absence of the polygraph evidence*? Sure, the defendants "voluntarily consented" to the police searching *padlocked* suitcases containing *in excess of five kilograms of cocaine.* Sure, the police are telling a straight story, even though only one of them, whose testimony was found untruthful in another case, who was demonstrably wrong under oath about other facts in the case, and who couldn't read the consent form himself, knew what the defendants said. And how can you trust an airline employee, anyway?

If police testimony is believed under these circumstances, isn't it obvious that police credibility and hostility to the exclusionary rule *already* have usurped the role of the court in finding the facts—that police testimony receives judicial deference that would make most administrative agencies drool with envy? Isn't it just as obvious that the case that most strongly calls for polygraph evidence is not the case in which the defendants *can* point to objectively demonstrable holes in the police testimony, but the case in which they cannot—the case in which the swearing contest is pristine, unmixed with any issue besides credibility? Isn't the temptation of police perjury heightened, rather than diminished, when the defense can call no independent witness and can point to no track record of untruthful testimony by the police?

Again, the *Posado* court quite properly decided the case on the narrowest possible ground. But the court's recognition of the probative value of the evidence applies, *a fortiori,* to the more common suppression hearing swearing contest in which police credibility is not diluted by the testimony of independent witnesses or serious holes in the police account. *Daubert* surely permits receiving polygraph evidence in such a case. The increasingly obvious role of police perjury in suppression hearings virtually compels it.

V. The Positive Dynamics of Admitting Polygraph Evidence at Suppression Hearings

I know that many readers will entertain some justifiable skepti-

[74] *Posado,* 57 F.3d at 435-36 (emphasis added).

cism about a techno-fix for a problem as intractable as police perjury. Surely it can't be that simple! I think there is a very good chance that the solution might be just that simple. But I invite the skeptical to consider my final, and most powerful argument: a rule of admissibility would create incentives for the police to actively prevent, rather than actively encourage, swearing contests. Police routinely record confessions, either stenographically, or on audio or videotape. They do not record interrogations. Why not? A complete taped record would eliminate uncertainty about *Miranda* waivers and about the facts that govern coercion claims.

That's why not.

Now imagine police interrogation when the police know that the suspect can take a polygraph exam that will be admissible in evidence. The court just might believe him—and it might believe even though the suspect is lying, rather than the police. After all, polygraphy isn't perfect. It is quite possible for the officer to fail the exam even though he is telling the truth. It is possible although highly unlikely for the suspect to pass a test even though the suspect is lying. Countermeasures are possible too, and so on down the list of skeptical reservations about the reliability of the polygraph procedure.

The police might start taping interrogations. Then it wouldn't matter what the polygraph exam showed; indeed, under the approach I advocate, polygraph evidence would be admissible only when the issue cannot be resolved with objective evidence. Rather than take the risk of a swearing contest they cannot count on dominating, the police would finally have a strong incentive to record the facts in a reliable way.

Unlike interrogation, which takes place in a carefully controlled environment, searches and arrests sometimes require instantaneous and violent action. Nonetheless, much search and seizure activity could be reliably recorded. Some departments already have equipped police cruisers with video cameras.[75] Experiments are underway with

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[75] *See, e.g.*, Holly Wagner, *Newport Beach Council to Consider Request to Put Video Cameras in 29 Police Cars*, L.A. TIMES, May 8, 1995, at B2; Jim McMahon, *Police Receive Pa. Grant for Video*, PITTSBURGH POST-GAZETTE, Aug. 3, 1995, at W1 ("'It will be up to each individual officer to determine when to use the equipment,' said [a police spokesman], who noted it could be quite beneficial in the courtroom and in deterring false charges filed against the arresting officer."). Outfitting a police car with a videotape recorder will cost almost $6,000 and should be completed within 60 days. A camera lens is typically mounted on the windshield with the recorder unit stored in the trunk. *Id.*

Activating the system can occur when the roof lights are turned on or by other manual operations. Some police departments that already use the equipment choose to run it at all times. Lan Nguyen, *Cameras Roll With Patrol Cars; Video Rides Shotgun on Arlington Streets*, WASH. POST, July 6, 1995, at V1 ("The department's newer hand-size video cameras attach to the windshield and are connected to a black-and-white monitor. Officers can replay or

miniature cameras officers can wear on their person.[76] Undercover police have worn concealed audio recorders for years. Citizen observers could be recruited to accompany police on patrol.

Expense would be no obstacle. The police frequently have the equipment even now, and although car mounted or miniaturized personal video-cameras are expensive, basic audio and portable video equipment is far cheaper. An 8 millimeter camcorder is no more expensive than a 9 millimeter automatic.

The police could turn the body-worn audio recorder on as soon as they approach a suspect. They could videotape a pre-search warning of the right to refuse consent to search and the voluntary consent of the suspect. They could do this now; but they have little reason to, for they control the swearing contest. Break the police hold on the swearing contest, and the swearing contest would become the exception rather than the rule.

VI. CONCLUSION

A growing body of evidence indicates what any shrewd observer of human behavior could predict: the blank check of the swearing contest tempts many police to accept the system's invitation to perjury. Permitting both sides to submit to admissible polygraph examinations when the issue at a suppression hearing turns on credibility offers an escape from the swearing contest trap. The polygraph is reliable enough for the police, the FBI, and the CIA. Trial court judges have the experience and toughness of mind to consider polygraph evidence for what it is worth. Polygraph evidence is worth a good deal, but the greatest benefit from receiving it would be to create incentives for the police to provide reliable records of their activities.

A truism among lawyers holds that in ordinary litigation the facts are more important than the law. George Orwell expressed this insight harshly but clearly in *1984*: He who controls the past controls the future. The swearing contest effectively delegates the court's fact-finding power to the police, giving them control of the past, and thus of the future. Admitting polygraph evidence at suppression hearings could enable the courts to reclaim that authority.

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advance tape but cannot erase recordings.").

76 *See* Jeff Collins, *New Technology Can Turn Officers into Walking Lenses, Recording Contacts for Their and the Public's Safety*, ORANGE COUNTY REGISTER, May 8, 1995, at B1.