continued

Fourth amendment limits on stop and frisk

Institutionalized discrimination and lawlessness was exposed. Police officers testified that superiors instructed them to "instill fear in black and Hispanics." Tape recordings of precinct meetings revealed officers told to just "make something up" to justify an arrest, and remember "we own the blacks." Police officers were told to use phrases like "furtive movements" in their reporting to justify reasonable suspicion. "Over stoppers" were praised, and under stoppers were pressured to increase their stops, under the sham theory more stops, less crime. Under this theory reasonable suspicion, which was already ambiguous, was given short shrift. Police received no formal stop and frisk training and were often encouraged to keep documentation of stops to an absolute minimum or to just not bother at all.

Scheindlin's final order focused on remedies that would stop this shocking un-American epidemic without diminishing police authority to protect against criminal activity. To that end, she instituted a multi-prong approach. First, a community based monitoring system would oversee and review all police-citizen encounters using clear written guidelines and protocols. Reports were mandated to describe each stop and any frisk with each citizen and officer identified, and the reasons and justifications for each clearly stated. New written policies banned racial profiling. Training about conscious and unconscious bias was mandated. Improved discipline processes were imposed along with a Civilian Review Board. Judge Scheindlin also imposed the incredibly helpful safeguard of required body cams to establish a visual record.

Despite the mud-slinging media, the fear-mongering politicians, and a slap-down from her own Circuit Court, Scheindlin's work — to her everlasting credit — was done. By 2016, stops had decreased 95%. Across the board, crime rates either stayed the same or decreased. And because of her order requiring transparent and detailed reporting, no one could argue these facts.

Looking back to the historic year of 1786, there was striking resistance by the states to acceptance of the Constitution as originally drafted. The people demanded a Bill of Rights. James Madison, a principal drafter, was taken by surprise by this even though most state constitutions, including Connecticut's, required a specific declaration of rights and protections. Madison first saw the Bill of Rights as a "mere parchment barrier," which gave no real protection in times of emergency; in any event it was not necessary since the government had no power to engage in activity not specifically mentioned in the Constitution. Eventually, he became a strong advocate for the Bill of Rights, not only for political reasons, but because he believed that each Amendment described important principals which the culture would internalize, thereby forming a safety net of shared constitutional values.

History has proven him to be right on.

Judging by the most recent political debates the Bill of Rights — in particular the Fourth Amendment — continues to play an essential role, not because of politicians, but because of hard working civil rights lawyers who have their cases decided by some judges of great courage and integrity who share Madison's values.

A long bow to the Fourth Amendment and a big tip of the hat to the Hon. Shira A. Scheindlin. The Bar yearns for judges big enough to fill your robes.

A. Paul Spinella is a Hartford based trial lawyer.

The Polygraph

A criminal defendant's friend or foe?

The idea of possessing a lie detection machine capable of determining false testimony has fascinated scientists, criminologists and lawyers for centuries. In 1921, the history of deception detection forever changed course when John Larson, a 29-year old Berkeley, California police patrolman, built the first lie detector machine. Larson's lie detector refined an earlier prototype developed by Harvard lawyer and psychologist, William Marston. Not your typical patrolman, Larson was also a serious scientist with a doctorate in physiology from the University of California. Called a "cardio-pneumo psychogram," his lie detecting machine measured changes in breathing rate and blood pressure.

It was Larson's protégé, Leonard Keeler, who dedicated his career to refining the machine into what we now know as the "polygraph." In 1925, Keeler built the analog polygraph, after years of research and development. In 1936 he added galvanic skin response (skin resistance to electric current), which is still used in modern polygraphs. Since Larson and Keeler, the polygraph has continually evolved in both complexity and range. But its' underlying theory has not: when we consciously lie, we undergo measurable physiological changes. And while there's no such thing as an infallible lie detecting machine, there is such a thing as measuring a physiological reaction that indicates deception.

Most polygraphists use the Comparison Questions Test (CQT) where a suspect is asked so-called " control" questions with indisputably true or false answers. Is your name Jeff Sessions? Are you Attorney General of the United States? Control question answers establish a physiological baseline against which answers about the alleged crime are compared. The greater the difference, the greater the lie.

As long as there has been a polygraph, there's been fierce debate about its' admissibility in the courtroom. Despite the critics and naysayers, there is a sizable and growing body of science that supports the validity and veracity of the polygraph.

This explains the extraordinary status it has recently enjoyed. As depicted in the Edward Snowden whistle-blowing docudrama, the polygraph is ubiquitous; used at every level of government,

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What's *Inside:*
Fourth amendment limits on stop and frisk
The Polygraph
A criminal defendant's friend or foe?

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Do the police have the right to "stop and frisk" any citizen they encounter?

Federal district judge Shira A. Scheindlin and the Fourth Amendment say no.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In the world of criminal justice, the Fourth Amendment to the United States Constitution is a 54 word marvel. Having, as Justice Felix Frankfurter wrote, "the virtue of brevity and the vice of ambiguity," the Fourth Amendment poses profound societal dilemmas about privacy, security and the police. And since the Amendment offers no clear definition of "unreasonable searches and seizures" or "probable cause," it has given rise to more litigation than any other Amendment in our great Bill of Rights.

The Founding Fathers, and its' principal author, James Madison, crafted the Fourth Amendment in response to the abhorred "general warrant" or "writs of assistance," which custom agents or their minions used to search homes and businesses without notice or cause. But the Colonial era from which it was born was nothing like modern America. There was no police force. There was no stop and frisk. And certainly, there was no large-scale, racially-driven policing that plagues our society today. Thus from its inception, the Fourth Amendment started, as Justice Frankfurter also noted, "a course of law pertaining to searches and seizures [that] has not run smooth."

This issue is dedicated to the Honorable Shira A. Scheindlin, former Federal District Judge for the Southern District of New York; 2017 Day Pitney visiting lecturer at the University of Connecticut Law School; and courageous guardian of the Fourth Amendment.

continued

Fourth amendment limits on stop and frisk

Last year's presidential debates are one example of the confusion, distortion and constitutional illiteracy that surrounds Fourth Amendment interpretation:

LESTER HOLT, MODERATOR: *Stop and frisk was ruled unconstitutional in New York, because it largely singled out black and Hispanic young men.*

CANDIDATE TRUMP: *"Whether or not in a place like Chicago you do stop and frisk which worked very well in New York, it brought the crime rate way down where you take away the guns away from criminals who shouldn't be having them. This issue was before a judge who was a very against police judge; it was taken away from her and our mayor refused to go forward with the case . . . They would have won an appeal; there are many places in the country where it is allowed."*

CANDIDATE CLINTON: *"Stop and frisk was found to be unconstitutional, in part because it was ineffective, it did not do what it needed to do. Now I believe in community policing, in fact violent crime was one-half of what it was in 1991; but there was some problems some unintended consequences; too many young African-Americans and Latino men ended up in jail for non-violent offenses . . .*

Turns out, they were both wrong in several ways.

The "against police judge" Trump referred to was the Honorable Shira A. Scheindlin, a brilliant, unbiased, stalwart defender of the Fourth Amendment. In 2008, she began work on a class action case, **David Floyd, et al v. The City of New York** , which challenged the NYPD's long-standing practice of non-probable cause citizen stops and searches, commonly referred to as stop and frisk. Five years of testimony later, Judge Scheindlin gave her final ruling in a 100+ page opinion. She did not find stop and frisk to be unconstitutional; only wrongfully applied under existing Fourth Amendment jurisprudence. And the mayor entered into a consent decree abiding by the Court's order since it was a righteous decision and would not have been overturned on appeal. Finally, the abusive practice of stop and frisk practiced by the New York Police Department has, in the aftermath of **Floyd**, proven to be an illusory method of crime control.

The United States Supreme Court sanctioned stop and frisk in the 1968 landmark case of **Terry v. Ohio**. In that case Martin McFodden, a veteran Cleveland Police Detective, stopped John Terry after observing him and an accomplice acting suspiciously near a department store. McFodden patted down Terry and found a pistol. Although the United States Supreme did not find probable cause to initially arrest Terry, it did uphold the long-standing police practice of stopping and interrogating suspicious looking or acting citizens. In the Court's view, so long as a policeman had "particularized articulable suspicion" of criminal activity, he has a constitutional right to stop a citizen and conduct a limited pat-down for weapons based on the additional suspicion that the citizen is armed and dangerous.

Forty-five years later, **Floyd** thrust the same questions of constitutionality and Fourth Amendment rights back into the limelight — this time with a staggering 4.4 million class of citizens, wrongfully profiled and stopped in New York City over eight years. Nineteen lead plaintiffs gave riveting testimony as law-abiding citizens simply going about their lives and suddenly seized, searched or both because of their race.

Multiple experts gave compelling statistical evidence based on written police records describing the racial-ethnic background of stopped and frisked citizens; comparison to other large cities; the legal outcome of each case; and comparison of stopped individuals with the greater population. The numbers showed that nearly all stops or frisks were made without grounds, and that racial profiling was happening on a massive scale.

The numbers were stunning.

Scheindlin's Court found that 52% of all stops involved blacks, compared to 23% of blacks in the general population. It also found that over 50% of all stops were followed by a frisk, yet only 5% produced weapons, and only 15% of those resulted in weapons prosecutions. Blacks and hispanics comprised the vast majority of cases where force was used, in addition to being 50% more likely to be arrested than non-blacks or non-Hispanics. Moreover, 88% of all stops were demonstrably without basis since no arrest or charges resulted. Of the remaining 12% of cases, the majority were dismissed. Perhaps most importantly, over one-third of all police officers who conducted arrests could not say why they did so.

continued

A criminal defendant's friend or foe?

as well as by private corporations, law enforcement, public and private investigators, and public and private attorneys. And in fact, the federal government, including its' untold law enforcement and intelligence agencies, is the greatest user of the polygraph in the world, something that is rarely acknowledged.

Despite its' established use, the judicial system has almost universally judged the polygraph with disfavor, and ruled examination results to be inadmissible at trial. Among the 50 states, there are exceptions. Approximately 15 states admit polygraph results at trial but only if all parties agree to its use prior to the test being taken. Only one state, New Mexico, allows routine admission of polygraph evidence. On the federal level, the polygraph is allowed only at the court's discretion, with the exception of the 11th Circuit, which prohibits the polygraph without condition.

The two main arguments against the courtroom polygraph orient around reliability and trust.

Questioning polygraph reliability

goes back to the 1922 murder case, **Frye v. United States**. Frye's murder defense was based on an alibi witness and a lie detector test. But the judge denied the defenses' request to put expert witness William Marston on the stand to explain Frye's test results, which supported his innocence.

Frye was found guilty on charges of second degree murder, carrying a sentence of life in prison. Interestingly, the decision to admit the lie detector test results was argued in front of the jury, suggesting that it could not ignore the fact that Marston's test corroborated Frye's innocence. One wonders, had the lie detector question not been raised, would the jury have found Frye guilty on charges of first degree murder, which carried the much harsher penalty of death?

The polygraph has become a much more sophisticated, complex, and accurate machine since **Frye**. But the Court's 1922 decision has stubbornly clung on despite significant polygraph advancements, such as blood pressure, heart rate and voice analysis, and even brain imaging.

Excluding the polygraph on grounds of reliability is an even weaker argument considering the broad spectrum of pattern-matching evidence the court routinely allows from so-called "experts" in such areas as ballistics, fingerprinting, handwriting comparison, bite mark matching, hair examination, blood tests, and carpet fiber analysis.

In modern courtrooms, these types of evidence often turn a case despite unknown error rates and lack of scientific scrutiny. Certainly, polygraph evidence, when viewed in this accepting light, is of no less scientific value.

Trust is the second and stronger argument against allowing polygraph evidence. For no matter how smart, should we trust a machine over human judgment? In **State v. Parker**, a widely respected Connecticut Supreme Court opinion, eyewitness credibility was found to be uniquely a jury function; allowing polygraph examinations as evidence would "cloud the issue with an aura of scientific conclusiveness...that could foreclose a true consideration of the issue." The machine engineered to soullessly outpace and outperform humans might be the stuff of thrilling sci-fi, but in the courtroom, treating lie detector results like the infallible 'Oracle of Delphi' has met with persistent resistance.

But along this line of reasoning, the routine admission of DNA and fingerprint evidence is just as questionable. In fact, a jury is more likely to be swayed by a dramatic "one in one billion" statistic and "expert" claims about the infallibility of fingerprint evidence, than they are a machine.

The conventional wisdom among defense lawyers is that a guilty client will be found guilty by the machine100% of the time, and an innocent client will be found guilty 50% of the time. Among legal commentators there has been a rising tide of opinion in favor of relaxing the rules of evidence to allow polygraph use in the courtroom whenever the exam is conducted by an experienced, reliable test giver.

The first rule of criminal defense is keep your client from being charged, which is why a favorable polygraph examination can be a defense lawyer's best friend. Assuming a client has the good sense to hire a defense lawyer before arrest, a confidential polygraph examination provides a singular opportunity to forestall prosecution. The polygraph is given great deference by prosecutors — a fact little known by the public, but widely recognized among defense lawyers. This is particularly true in "he said, she said" situations common in sex cases.

Examiner quality is key. The polygraph, like most pattern matching evidence, is not infallible. In the absence of standardized training and licensure, test quality depends on the skill of the examiner. The structure and content of the questions are the most important parts of the examination. It's up to the examiner to formulate "control" and "relevant" questions, which can be easily answered with a simple "yes" or "no," as well as logically distinct enough to elicit a physiological response that indicates deception.

Equally important is examiner confidentiality. As I can attest from experience, many polygraph examiners, if not most, have a background in law enforcement, increasing the likelihood that the results will be leaked to police or prosecutors. To a criminal defense lawyer, a prosecutor's invitation to use a police examiner is a red flag, as they are skilled interrogators trained to manipulate questions to show guilt.

A polygraph examination need not go in front of a jury to carry enormous weight in a case's official assessment. Trial judges have wide discretion at the time of sentencing to consider polygraphs along with virtually any other information they choose. The same applies in criminal forfeiture proceedings. Moreover, a good defense lawyer knows that when a favorable polygraph fails to persuade a prosecutor to dismiss a case, then taking it public by way of courtroom motion or media disclosure can dramatically change a case outcome.

Lie detector technology continues to develop in sophistication and accuracy. With the institution of national examiner standards and new state procedural rules designed to ensure reliability, supported by rapidly evolving brain-based technologies like electro encephalography (EEG) and functional magnetic resonance imaging (FMRI), it is becoming more and more difficult to ignore or discount the validity and veracity of the polygraph.

Given our government's institutionalized use of polygraphs, and judicial acceptance of other evidence that is less reliable than

the polygraph, the best approach might be to allow this machine into the courtroom on a case-by-case basis, subject to vigorous cross-examination and other tests of reliability. In cases where there are no exculpatory eyewitnesses or alibi evidence, and a polygraph is the only effective means to prove innocence, it should be allowed. Indeed, no one should be denied the constitutional right to present a defense.

A lawyer worth his salt will not turn his back on the polygraph. An intelligently handled polygraph can be the criminal defendant's best friend.

A. Paul Spinella is the author of Connecticut Criminal Procedure.