

Practicum

Advances are made by answering questions
Discoveries are made by questioning answers

Challenging “Blackstone’s Ratio”

Tuvya T. Amsel

In his best known publication “Commentaries on the Laws of England” (1769)¹, the prominent British jurist Sir William Blackstone laid out one penal code’s basics: A wrongful conviction is ten times worse than a wrongful acquittal, or to put the idea in his own words: “the law holds that it is better that ten guilty persons escape, than that one innocent suffer.”

(a.k.a “Blackstone’s ratio”). Although it seems that Blackstone portrayed the concept, the fact is that he only took credit for a concept that goes far back to ancient days. It can be found previously in the book of Genesis (18:23-32) in where Abraham is negotiating with God in order to spare the lives of the wicked Sodomites for the sake of saving the lives of fifty righteous man who

¹Blackstone, W., “Commentaries on the Laws of England” Clarendon Press, Oxford, 1765-1769.

The author is a private examiner in Israel, and a regular contributor to the publications of the American Polygraph Association. The views expressed in this column are solely those of the author, and do not necessarily represent those of the American Polygraph Association. Publishable comments and replies regarding this column can be sent to editor@polygraph.org.

lived there. The concept was repeated through history by many scholars and jurists, all whom shared the same idea with only one difference: the ratio of guilty that should be freed in exchange for one innocent person varied from 1 to 1000: namely, they put a different price tag for the exchange.

Although nowadays the maxim seems like a law of nature, there were others who disagreed, such as the German

chancellor Bismarck who is believed to have stated that “It is better that ten innocent men suffer than one guilty man escape.” The English jurist and philosopher Jeremy Bentham cynically took his point of view to the extreme when stating: “It is better that all guilty persons go free than that one innocent person is convicted.”²

The disagreement couldn't stop the concept from becoming one of criminal



Blackstone's Ratio

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²For a detailed count down go to Volokh, A., “n Guilty Men”, 146 *University of Pennsylvania Law Review* 173, 1997.that can be found at: <http://www2.law.ucla.edu/volokh/guilty.htm>

law's cornerstones as well as part of the Western philosophical thinking, to the point that nowadays it is a common belief that we all share regardless of the legal system practiced. Needless to say, we as polygraph examiners were educated upon this maxim, adopted the concept, and were taught to make decision in light of this rule. Or, to put it in polygraph language: "False negative (type 2 error) is better than a false positive (type 1 error)".

A hypothetical case study

A theft of petty cash located in the back storage room occurred in a convenience store, and all 11 employees who worked during the specific shift were polygraphed. The thief's charts were inconclusive with slight tendency to deception. Another employee who was not involved in the theft but was involved in another violation came out also inconclusive. The examiner loyal to the Blackstone concept clears both of them and reports the owner that all examinees were truthful and that the thief was probably an outsider, a client or a vendor.

What are the consequences of this reality? The owner who has no doubt that it is an inside job loses his faith in the polygraph as an effective tool and he stops using it. In addition to the cost of the tests, he is unable to retrieve the stolen money. But, the worst for him is to come: the thief not only went undetected and unpunished, he now believes that he is "polygraph immune" which in return gives him a "free pass" to continue stealing. The other employees, who probably suspect or know who the real thief is, realize that the "polygraph is not working" and they start to steal as well. All in all it has become a "Lose – Lose" situation to all parties involved, courtesy of Blackstone's Ratio.

Remedies

With all the difficulties arising from executing this concept, it is still a priceless human value. Yet, in order to reduce the sometimes devastating outcome of this concept, scholars suggested a few remedies that are applicable to polygraph examiners as well. The first one is to improve legal system practitioners (investigators,

prosecutors and judges). No doubt the more professionals there are involved, the chances of an error are lessened. The second “Play it safe” solution is to raise the threshold of evidentiary support for any conviction. Applying this solution to the polygraph setting will result in a higher number of inconclusive test results.

Discussion

On one hand there is no doubt in my mind that the Blackstone’s Ratio is needed in those instances where capital punishment is an option simply because a mistakened verdict is irreversible. On the other hand, the option of ten serial rapists or pedophiles going free, thanks to the generosity of Blackstone’s Ratio, and the pain and suffering inflicted upon the future victims (and their families), is equally disturbing, to say the least.

The answer to the question, whether the Blackstone’s Ratio should be practiced, is a concern of jurists and philosophers, but as an examiner my point of view is that we should ignore the Blackstone’s

Ratio in our daily practice for the following reasons:

The consequences to the examinee, following a wrongful decision, are minimal and reversible.

Test results are usually inadmissible in court, and in those instances where they are admissible, they will not be the only evidence presented to the court.

Test results are reversible in the sense that the examinee can always take another test.

Final words of conclusion

The use of Blackstone’s Ratio by a polygraph examiner as an excuse to avoid difficult decisions is wrong, and in order to avoid such situations the examiner should conduct a more thorough pretest, better his comparison questions, produce an extra chart if needed, call for a reexamination by a fellow examiner, have his charts reviewed by another examiner, and apply any known practice that exists in order to reach a final conclusive decision.