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Polygraphs in Employment: A State Survey

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Enid L. Zafran & Jeffrey R. Stickle, Polygraphs in Employment: A State Survey, 33 Clev. St. L. Rev. 751 (1984-1985)

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POLYGRAPHS IN EMPLOYMENT: A STATE SURVEY

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JEFFREY R. STICKLE**

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I. INTRODUCTION

Since 1981, more than one million Americans have been given lie detector tests each year¹ solely for employment purposes,² a dramatic increase from 1965 when the number was between 200,000 and 300,000.³ In the majority of states, these examinations are legal and can be required by employers.⁴ In New York, where thousands of polygraph examinations are given by employers annually, and where no statutes exist to govern polygraph use, their utilization constitutes the "most frequent employment-related complaint received by the NYCLU [New York Civil Liber-

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¹ D. LYKKE, *A TREMOR IN THE BLOOD, USES AND ABUSES OF THE LIE DETECTOR* (1981). In 1978 it was estimated that 7,000 examiners were actively engaged in business. Even if each examiner averaged only one test per day, the number of tests administered yearly would exceed one million.

² Rollins & Samuels, *Lie Detectors Lie*, N.Y. Times, Feb. 17, 1982, at A23, col. 1.

³ Burkey, *The Case Against the Polygraph*, 51 A.B.A. J. 855 (1965). In 1968, over 500,000 examinations were administered solely for pre-employment screening. *Hearings on the Use of Polygraphs and Similar Devices by Federal Agencies before the Subcommittee on Foreign Operations Information of the House Committee on Government Operations*, 93d Cong., 2d Sess. 181 (1984).

⁴ Only twenty-two states have statutes restricting the use of the polygraph in employment-related situations. See *infra* note 10.

ties Union]."⁵

The volume of polygraph tests and their attendant problems warrant a review of the current state laws that govern their use in employment situations. In addition, a growing number of large settlements have been awarded to employees discharged for reasons related to failure or refusal of polygraph examinations. In Florida, a former employee was awarded \$250,000 in damages.⁶ A Michigan attorney won a judgment of \$100,000 for his client who was discharged from a discount store.⁷ By far the largest polygraph employment-related damage award was levied against Rite-Aid Drugstores in a Maryland case, *Cook v. Moniodes*.⁸ In *Cook*, four discharged employees were awarded a jury verdict of \$5,000,000 in punitive and compensatory damages for wrongful discharge resulting from their refusal to submit to lie detector tests on the job.⁹

Two types of laws govern the use of polygraphs in the employment setting: those aimed at restricting employers' use of such tests¹⁰ and those delineating the qualifications and conduct of polygraph examiners.¹¹ Em-

⁵ Hayden, *Polygraph and Employment: The Myth of Lie Detection*, NYCLU Privacy Project 2 (1981) [hereinafter cited as NYCLU].

⁶ *Ivey v. Zayre Corp.*, No. G-78-586 (Polk Cty. Cir. Ct.). The plaintiff charged that the polygraph company upon which the employer relied had performed its job negligently. In addition to the negligence claim, the plaintiff raised the issue of defamation, asserting that the employee's firing under circumstances that strongly suggested theft was defamatory.

⁷ *Voikos v. S.S. Kresge Co.*, No. 74036068 (Wayne Cty. Cir. Ct., Mich. Nov. 21, 1979). The plaintiff alleged that her employer coerced her into taking a polygraph test and then accused her of embezzlement due to the test's results.

⁸ No. 1980-2249 (Baltimore Cir. Ct. Jan. 1984).

⁹ Bainbridge, *\$5M Won in Lie Test Refusal Suit*, Nat'l L.J., Feb. 13, 1984, at 3, col. 1.

¹⁰ Twenty-two states restrict the use of the polygraph in employment by statute. ALASKA STAT. § 23.10.037 (1984); CAL. LAB. CODE § 432.2 (West Supp. 1984); CONN. GEN. STAT. ANN. § 31-51g (West Supp. 1984); DEL. CODE ANN. tit. 19 § 704 (1979); HAWAII REV. STAT. § 378-21 (1976); IDAHO CODE § 44-903 (1977); IOWA CODE ANN. § 730.4 (West Supp. 1984-85); ME. REV. STAT. ANN. tit. 32 § 7166 (Supp. 1984); MD. ANN. CODE art. 100 § 95 (Supp. 1984); MASS. ANN. LAWS ch. 149, § 19B (Michie/Law. Co-op. 1976); MICH. COMP. LAWS ANN. § 37.208 (West Supp. 1984-85); MINN. STAT. § 181.75 (West Supp. 1984); MONT. CODE ANN. § 39-2-304 (1983); NEB. REV. STAT. §§ 81-1901-36 (1981); N.J. STAT. ANN. § 2C:40A-1 (West Supp. 1984-85); OR. REV. STAT. §§ 659.225 & 659.227 (1983); 18 PA. CONS. STAT. ANN. § 7321 (Purdon 1983); R.I. GEN. LAWS § 28-6.1-1 (1979); VA. CODE § 40.1-51.4:3 (1982); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1983); W. VA. CODE § 21-5-5b (Supp. 1983); and WIS. STAT. ANN. § 111.37 (West Supp. 1983).

¹¹ Polygraph examiners are subject to licensing statutes in twenty-eight states: ALA. CODE §§ 34-25-1-36 (1983 & Supp. 1984); ARIZ. REV. STAT. ANN. §§ 32-2701-15 (1976 & Supp. 1984); ARK. STAT. ANN. §§ 71-2201 & 71-2220 (1979); CAL. BUS. & PROF. CODE § 9300-21 (West Supp. 1984); FLA. STAT. §§ 493.561-.579 (1983); GA. CODE ANN. §§ 43-36-1 and 43-36-16 (1984); ILL. ANN. STAT. ch. 111, §§ 2401-31 (Smith-Hurd Supp. 1984-85); IND. CODE ANN. §§ 25-30-2-1-5 (West Supp. 1983-84); KY. REV. STAT. ANN. § 329.010-.990 (Baldwin 1981); LA. REV. STAT. ANN. § 37 2831 (West Supp. 1984); ME. REV. STAT. ANN. tit. 32, §§ 7154-69 (Supp. 1978-84); MICH. COMP. LAWS ANN. §§ 338.1701-.1729 (West 1976 & Supp. 1983); MISS. CODE ANN. §§ 73-29-1-73-29-49 (1972 & Supp. 1983); MONT. CODE ANN. §§ 37-62-101-311 (1983); NEB. REV. STAT. §§ 81-1901-1936 (1981); NEV. REV. STAT. §§ 648A.010-

ployment and/or licensing laws are in effect in all but six states,¹² but the scope of regulation differs from restrictive¹³ to permissive.¹⁴

This variance among the states is significant because it reflects the controversy surrounding the scientific validity of polygraph testing in the employment context. In Wisconsin, for instance, the legislature adopted a statute mandating a study of honesty testing and testing devices because their validity is so questionable at the present time.¹⁵ However, Wisconsin permits polygraph examinations under limited conditions.¹⁶ While other states have been less forthright in expressing their apprehension and demanding studies, their concern is nevertheless evident from the varying degrees of control which they seek to exercise over this problematic area.

This Article will survey and compare the present status of state laws relating to employer use of polygraph testing and the licensing of polygraph examiners. A brief background of the development of the polygraph is included, as well as a description of testing procedures, an assessment of test validity, and recommendations for a national uniform approach to polygraphs.

.290 (1983); N.M. STAT. ANN. §§ 61-26-1-13 (1984); N.C. GEN. STAT. §§ 74C-1-74C-33 (Supp. 1983); N.D. CENT. CODE §§ 43-31-01-43-41-17 (1977 & Supp. 1983); OKLA. STAT. ANN. tit. 59, §§ 1451-1476 (West. Supp. 1983); OR. REV. STAT. §§ 703.010-.990 (1983); S.C. CODE ANN. §§ 40-53-10-250 (Law. Co-op. 1977 & Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 36-30-1-3 (Interim Supp. 1984); TENN. CODE ANN. § 62-27-101-124 (Michie Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413 (29cc)(West 1976); UTAH CODE ANN. §§ 34-37-1-16 (1974 & Supp. 1983); VT. STAT. ANN. tit. 26, §§ 2901-2910 (Supp. 1984); and W. VA. CODE §§ 21-5-5c and 21-5-5d (Supp. 1983).

¹² Only six states (Colorado, Kansas, New Hampshire, New York, Ohio and Wyoming) have no polygraph-related laws. Ohio and New York considered legislation to establish such laws in 1984. In Ohio, the legislation (H.B. 106) never progressed beyond the Economic Development and Small Business Committee. The New York legislature considered nine bills in 1984 (S.B. 1106, S.B. 1403, S.B. 4122, S.B. 6481, S.B. 7629, Assembly Bill 1311, Assembly Bill 405, Assembly Bill 1187, and Assembly Bill 9243). Only one, Assembly Bill 1311, succeeded in passing beyond the committee of the proposing house, although it never left the Senate Labor Committee before the end of the session. The legislatures in Montana, New Hampshire and Wyoming did not meet in 1984, and therefore did not have any polygraph bills under consideration. Kansas has previously considered bills regulating polygraph examiners (1983 H.B. 2203, 1980 S.B. 589, and 1977 H.B. 2393) but has not enacted any into law. No bills dealing with polygraphs were proposed in Colorado in 1984.

¹³ *E.g.*, Massachusetts and Alaska. New Jersey was long considered to have the most comprehensive ban on polygraph use, but it has recently amended its statute to allow an exemption. See *infra* note 119 and accompanying text.

¹⁴ *E.g.*, Montana, where an employer cannot require a polygraph test but may be able to suggest a test, or an employee may "volunteer" to take one. MONT. CODE ANN. § 39-2-304 (1983). Moreover, the penalties for violations by employers are minimal (\$500 fine or up to six months imprisonment)(MONT. CODE ANN. § 46-18-212 (1983)).

¹⁵ WIS. STAT. ANN. § 111.381 (West Supp. 1984).

¹⁶ WIS. STAT. ANN. § 111.37 (West Supp. 1984).

II. HISTORY OF THE POLYGRAPH¹⁷

Over 85 years ago, the "hydrosphygmograph" was introduced to the world by Cesare Lombroso, an Italian criminologist. This device, the precursor of the modern polygraph, evaluated the truth of statements made by criminal suspects.¹⁸

William M. Marston is regarded as the inventor of modern lie detection. He created the phrase "lie detector" to describe his discovery of a specific lie response. But Marston was more concerned with exploiting the commercial possibilities of his invention than with continuing to research and develop the polygraph.¹⁹

Between 1915 and 1950, John A. Larson, a forensic psychologist, was "the only investigator to report an objective study of the accuracy of the diagnosis of deception."²⁰ He published a 400-page book thoroughly analyzing lying and its detection. The chief method of examination at this time consisted of a mixture of relevant and irrelevant questions. This procedure, which has been named "the R/I procedure," continues to be used today primarily by older examiners.²¹

A new technique was developed by John E. Reid, who recognized the concept of the "control" question and the appraisal of comparative responses. Realizing that accusatory questions elicit emotional reactions even from innocent suspects, Reid added questions that were unrelated to the subject of the investigation but were still calculated to provoke an emotional response. The reactions to these "control" questions can be used as standards against which to measure the responses to relevant questions.²² This approach is presently used by the majority of examiners.²³

The use of polygraph examinations began in business settings in the 1950's.²⁴ At first it was limited to the testing of individuals already employed.²⁵ Labor unions successfully opposed discharges based solely on

¹⁷ For a more complete early history, see Trovillo, *A History of Lie Detection*, 29 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 848-81 (1939).

¹⁸ J.E. REID & F.E. INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* (3d ed. 1953). The hydrosphygmograph measured changes in water level which occurred when a suspect's fist was immersed in water. According to Lombroso's theory, the water level changed to reflect changes in the suspect's pulse and blood pressure.

¹⁹ LYKKEN, *supra* note 1, at 27-28.

²⁰ *Id.* at 29.

²¹ *Id.* at 30.

²² *Id.* at 31. Reid authored a textbook, *TRUTH AND DECEPTION, THE POLYGRAPH ("LIE-DETECTOR") TECHNIQUE* (2d ed. 1977), with F.E. Inbau, in which he described the methodology of this technique. This work has been accepted as a standard in the field. Reid also founded the Reid College of Detection which is accredited by the state of Illinois and grants a master's degree upon completion of a six-month course of instruction.

²³ LYKKEN, *supra* note 1, at 33.

²⁴ Burkey, *Privacy, Property and the Polygraph*, 18 LAB. L.J. 79 (1967).

²⁵ *Id.*

failure to pass a test in a series of cases that found reliance on such tests an unfair labor practice.²⁶ Thus, one class of employees achieved protection while its nonunionized counterpart has remained subject to employer testing. A more recent development in polygraph use has been the examination of job applicants.²⁷ This Article will focus on these latter two groups.

III. ADMINISTRATION OF THE POLYGRAPH TEST

Polygraph examinations are used purportedly to detect deception in an individual's statements by means of an examiner's analysis of charts based on physiological responses recorded during questioning. The polygraph records physiological changes such as fluctuations in blood pressure (cardiovascular), respiration, and perspiration (galvanic skin or electrodermal response). Theoretically, these changes occur in response to stress which is caused by the fear and guilt produced by lying.²⁸

Five different formats are currently used by examiners: Reid Control Question Technique, zone of comparison, positive control test, relevant control test, and peak of tension. The Reid Control Question Technique is "widely regarded among polygraphers as their most refined technique."²⁹ Its use is favored when an examinee is suspected of having committed a certain crime. For example, in the employment context it is used when theft, vandalism, or sabotage has already occurred. It cannot be used in pre-employment screening because no specific criminal act is under investigation. The preferred test in pre-employment is the relevant control test.³⁰ This Article focuses on the Reid Control Question Technique and the relevant control test, which are the most prevalent in employment context examinations.

In a standard Reid Control Question Technique the subject first undergoes a pre-test interview which lasts approximately twenty minutes. During the interview the examiner explains the purpose of the test and the testing device. The actual test questions are reviewed with the examinee while the examiner objectively notes "the subject's behavior symptoms such as how he acts, looks, and talks and attempts to make an evaluation of these observations in terms of truth or deception."³¹

The polygraph testing which is administered in a series of separate tests, consists of relevant, irrelevant, and control questions. Relevant

²⁶ See *St. Anthony's Center*, N.L.R.B. 258 (1977); *Solo Serve Co.*, 219 N.L.R.B. 395 (1975); *Glazer's Wholesale Drug Co.*, 152 N.L.R.B. 467, *enforced*, 368 F.2d 1005 (5th Cir. 1966); *Aladdin Indus., Inc.*, 147 N.L.R.B. 1392 (1964).

²⁷ *Burkey*, *supra* note 24.

²⁸ *NYCLU*, *supra* note 5, at 7.

²⁹ *Id.* at 126.

³⁰ *Id.* at 139-40.

³¹ *Horvath & Reid, The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, 62 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 276, 277 (1971).

questions relating to the matter under investigation are in the 3, 5, 8, 9, and 10 position. In position 1, 2, 4, and 7, questions irrelevant to the investigation are posed for the purpose of establishing the examinee's normal pattern of responsiveness. The remaining two questions in positions 6 and 11 are control questions.³² While these questions are unrelated to the matter under investigation, they are chosen because the subject will "in all probability, lie; or at least his answer[s] will give him some concern with respect to either [their] truthfulness or [their] accuracy."³³ Usually the control questions probe for past misdeeds of the same kind as the crime under investigation. To create an even more dubious environment, the questions are designed to encompass a long period of time. "The examiner stresses that the subject must be able to answer the questions completely with a simple 'yes' or 'no' answer."³⁴ In actual practice though, control questions are intentionally ambiguous and difficult to answer with a truthful, unqualified "no."

The procedure of a pre-test interview is also followed in the relevant control test, the technique preferred for pre-employment screening. "The subject is made to understand that he is supposed to be able to answer each of the relevant questions truthfully in the negative."³⁵ Three question lists are used, each covering the same topics but in a different order and with different language. A typical list consisting of sixteen questions has three irrelevant and thirteen relevant questions without any control questions.³⁶ The main purpose of this test is to elicit admissions about past behavior that might disqualify the subject from a job.³⁷

During the test, polygraph measuring devices are attached to the body of the examinee. These devices (sphygmomanometer for cardiovascular, pneumographs for respiration, and electrodes for perspiration) feed into a machine that records responses on a moving chart.³⁸ It is the examiner's analysis of these recordings that purportedly determines whether or not deception exists.

The examiner will evaluate the responses on a comparative scale. "Generally, the truthful person will respond more to the control questions than to the relevant questions" while the "deceptive person will respond more to the relevant questions than to the control questions."³⁹ The responses

³² *Id.*

³³ *Id.*

³⁴ U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION, A TECHNICAL MEMORANDUM 20 (1983)[hereinafter cited as OTA]. —

³⁵ LYKKEN, *supra* note 1, at 141.

³⁶ *Id.* at 140.

³⁷ *Id.* at 141.

³⁸ This three-channel measurement is considered optimal, but is not required in all states. See *infra* notes 146-51 and accompanying text.

³⁹ Giannelli, *Polygraph and Deception Tests*, 8 PUB. DEFENDER REP. 2 (Jan.-Feb. 1985).

are based on how the subject perceives the questions. To the truthful individual the control question presents the greater threat because of its intentional ambiguity. In evaluating the test results, an examiner may consider other factors in addition to the chart results, such as his assessment of the subject during the pre-test interview.⁴⁰

The polygraph instrument, it should be noted, is not a "lie detector" per se; i.e., it does not indicate directly when a subject is being deceptive or truthful. There is no known physiological response that is consistently unique to deception. Instead, a polygraph examiner obtains a subject's responses to a carefully structured set of questions, and based on the pattern of arousal responses, infers the subject's veracity. This assessment has been called the "diagnosis" of truthfulness or deception.⁴¹

IV. ASSESSMENT OF TEST VALIDITY

Polygraph charts presumably provide examiners with data from which they can judge truthfulness and deception. However, the validity of the test results depends upon the experience and training of the examiner, the setting in which the test is given, and the characteristics or personality of the subject. In addition, subjects can use countermeasures to deliberately avoid detection.⁴²

"It has long been recognized . . . that the examiner's skill has an important effect on the validity of polygraph tests."⁴³ Practical experience has been determined to significantly improve the accuracy of diagnosing truth and deception.⁴⁴ Training is equally important since the results will only be informative if the examinee has been asked the right questions in the right order and has been properly prepared.⁴⁵ Nevertheless, many polygraph examiners have "little training even in the skills of their own craft, and virtually no education in the broad fields of human physiology and behavior."⁴⁶ Of the twenty-eight states regulating polygraphers' licensing, only seventeen require a baccalaureate degree.⁴⁷ But fourteen of

⁴⁰ LYKKEN, *supra* note 1, at 89-92.

⁴¹ OTA, *supra* note 34, at 11.

⁴² *Id.* at 83.

⁴³ *Id.*

⁴⁴ Horvath and Reid studied ten polygraph examiners, seven of whom had more than one year of experience and three who were still participating in internship programs. The more experienced examiners were successful in 91.4 percent of their diagnoses while the interns achieved only 79.19 percent accuracy. Horvath & Reid, *supra* note 31, at 279.

⁴⁵ The U.S. Army Military Police School, for instance, instructs trainees by providing them with both classroom and hands-on training. OTA, *supra* note 34, at 84.

⁴⁶ NYCLU, *supra* note 5, at 14.

⁴⁷ ALA. CODE § 34-25-21 (1975 & Supp. 1984); ARIZ. REV. STAT. ANN. § 32-2703 (1976 & Supp. 1977-84); ARK. STAT. ANN. § 71-2207 (1979); FLA. STAT. ANN. § 566 (West 1983); GA. CODE ANN. § 43-36-6 (1984); ILL. ANN. STAT. ch. 111 § 2412 (Smith-Hurd 1978 & Supp.

the seventeen states allow four or five years of experience in investigative work or in administering polygraph examinations to be substituted for a college education.⁴⁸ Only Michigan specifically requires a baccalaureate with a "suitable" major.⁴⁹ Internships are mandatory in just eighteen of the twenty-eight states and are usually of six-month's duration.⁵⁰ Thus, many examiners lack any post-high school education or supervised training in their own profession.

In all probability the setting of the examination can likewise influence the validity of the test. No research has yet been reported on the effect of the testing environment, which can range from motel rooms to specially designed facilities.⁵¹ "Serious polygraph proponents consider prerequisite to a valid test . . . sufficient time [and] a calm atmosphere."⁵² In order for the test to unmask lies, it is important that the subject believe that the machine cannot be fooled. To sustain a subject's awe of the machine, examiners "must . . . be sufficiently intimidating . . . [but many] . . . go considerably beyond this and become openly hostile and threatening."⁵³ Under these circumstances, the calm and scientific environment required for trustworthiness is frequently lacking.

Subjects may have inherent traits that affect the soundness of test results. "Guilty psychopaths may escape detection because they are not

1984-85); LA. REV. STAT. ANN. § 37 2838 (West Supp. 1984); MICH. COMP. LAWS ANN. § 338-1710 (West 1976); MISS. CODE ANN. 73-29-13 (1972); NEB. REV. STAT. § 81-1916 (1981); NEV. REV. STAT. § 648A.130 (1983); OKLA. STAT. ANN. tit. 59, § 1458 (West Supp. 1984); OR. REV. STAT. § 703.090 (1983); S.C. CODE ANN. § 40-53-70 (Law. Co-op. 1976 & Supp. 1984); TENN. CODE ANN. § 62-27-107 (Michie 1982 & Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413 (29cc)(Vernon 1976 & Supp. 1984) and UTAH CODE ANN. § 34-37-5 (1953 & Supp. 1983).

⁴⁸ ALA. CODE § 34-25-2 (1975 & Supp. 1984); ARIZ. REV. STAT. ANN. § 32-2703 (1976 & Supp. 1977-84); ARK. STAT. ANN. § 71-2207 (1979); GA. CODE ANN. § 43-36-6 (1984); MICH. COMP. LAWS ANN. § 338.1710 (West 1976); MISS. CODE ANN. § 73-29-13 (1972); NEB. REV. STAT. § 81-1916 (1981); NEV. REV. STAT. § 648A.130 (1983); OKLA. STAT. ANN. tit. 59, § 1458 (West Supp. 1984); OR. REV. STAT. § 703.090 (1983); S.C. CODE ANN. § 40-53-70 (Law. Co-op. 1976 & Supp. 1984); TENN. CODE ANN. § 62-27-107 (Michie 1982 & Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413(29cc) (Vernon 1976 & Supp. 1984) and UTAH CODE ANN. § 34-37-5 (1953 & Supp. 1983).

⁴⁹ MICH. COMP. LAWS ANN. § 338.1710 (West 1976).

⁵⁰ ALA. CODE § 84-25-21 (1975 & Supp. 1984); ARK. STAT. ANN. § 71-2207 (1979); FLA. STAT. § 566 (West 1983); GA. CODE ANN. § 43-36-6 (1984); ILL. ANN. STAT. ch. 111 § 2412 (Smith-Hurd 1978 & Supp. 1984-85); LA. REV. STAT. ANN. § 37 2838 (West Supp. 1984); ME. REV. STAT. ANN. tit. 32, § 7155 (Supp. 1978-84); MISS. CODE ANN. § 73-29-13 (1972); NEB. REV. STAT. § 81-1916 (1981); NEV. REV. STAT. § 648A.130 (1983); OKLA. STAT. ANN. tit. 59, § 1458 (West Supp. 1984); OR. REV. STAT. § 703.090 (1983); S.C. CODE ANN. § 40-53-70 (Law. Co-op. 1976 & Supp. 1984); TENN. CODE ANN. § 62-27-107 (Michie 1982 & Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 4413 (29cc)(Vernon 1976 & Supp. 1984); UTAH CODE ANN. § 34-37-5 (1953 & Supp. 1983); VT. STAT. ANN. tit. 26, § 2904 (Supp. 1984); and W. VA. CODE § 21-5-5c (Supp. 1984).

⁵¹ OTA, *supra* note 34, at 87.

⁵² NYCLU, *supra* note 5, at 3.

⁵³ *Id.* at 16.

concerned enough about a misdeed to create interpretable physiological responses."⁵⁴ Innocent neurotics and psychotics, on the other hand, are likely to be labelled deceptive.⁵⁵ In addition, cross-cultural research has shown that ethnic groups react differently to stress.⁵⁶

Deceptive subjects can further skew test results by utilizing either physical or mental countermeasures. In Reid control question tests, the examinee can "beat" the lie detector by augmenting his reaction to the control questions.⁵⁷ Drug use by examinees may make deception more difficult to detect.⁵⁸ Three types of mental countermeasures have been identified: thought control or mental dissociation, knowledge of results (particularly for individuals who have been tested repeatedly), and lack of belief in the machine and test.⁵⁹

In terms of the acceptance of polygraph results as valid evidence, the determination of *Frye v. United States*⁶⁰ in 1923 still applies today in most jurisdictions.

While courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.⁶¹

In short, the standard for acceptability of scientific evidence in a court of

⁵⁴ OTA, *supra* note 34, at 85.

⁵⁵ In a study reported in 1962, validity of detecting deception was found to decrease as emotional disturbance increased. It was concluded that "testing for the presence or absence of guilt in an emotionally disturbed individual" might lead to erroneous conclusions. Heckel, *Polygraph Variations in Reactivity between Delusional, Nondelusional, and Control Groups in a Crime Situation*, 53 J. CRIM. L., CRIMINOLOGY AND POLICE SCI. 380, 383 (1962).

⁵⁶ Kugelmas & Lieblich, *Relations between Ethnic Origin and GSR Reactivity in Psychophysiological Detection*, 52 J. OF APPLIED PSYCH. 158, 160-62 (1968). This study found that under stress conditions there were GSR reactivity differences between Bedouin tribesmen and Israeli Jews.

⁵⁷ Lykken describes such diverse techniques as varying breathing patterns, tightening muscles, and a thumbtack in the subject's sock. The successful use of these tactics depends, however, on the subject's ability to identify the control questions during the pre-test interview. LYKKEN, *supra* note 1, at 238-41.

⁵⁸ Studies conducted on the use of tranquilizers have yielded varying results. OTA, *supra* note 34, at 88.

⁵⁹ *Id.* at 89-90

⁶⁰ 293 F. 1013 (D.C. Cir. 1923). In this case a murder suspect sought to introduce results of a polygraph test to establish his innocence. The court held the evidence inadmissible.

⁶¹ *Id.* at 1014.

law is general scientific community acceptance of the principle behind the test. Such acceptability has eluded the polygraph.⁶²

The validity of the polygraph as a means to detect deception is therefore suspect. Nevertheless, survey results indicate that "one-fifth of major corporations" and about 50% of retail companies use polygraph testing of employees and job applicants.⁶³ In a recent government study,⁶⁴ it was concluded that "no acceptable scientific evidence" exists to support the polygraph's use in pre-employment and employment situations.⁶⁵ The study declared:

Because there is no physiological response unique to lying, the polygraph cannot distinguish between people who are lying and those who are merely afraid or nervous. Therefore, the policy of forcing employees to submit to polygraphs by the threat of adverse consequences is dangerous and may result in high rates of misidentification.⁶⁶

This report, conducted under the auspices of the government and involving many reputable scientists, concluded that the polygraph as an employment tool is supported by little, if any, scientific evidence. Thus, the question that arises is: Why do employers place any reliance on the test?

"Many employers use the polygraph because they think it is faster and less expensive than other methods of investigation."⁶⁷ Employee theft in the United States exceeds \$9 billion a year and three out of five small business bankruptcies have been attributed to losses due to employee theft, although this estimate is probably inflated by "the reluctance of the failed to acknowledge poor management. . . ."⁶⁸ In businesses where employees have direct access to either cash or commodities that are easy and profitable to steal, employers desire a simple means to evaluate honesty. The polygraph test purports to provide such a simplistic solution. Despite doubts about test validity, employers perceive the polygraph as a security precaution in pre-employment practice and as a deterrent during

⁶² For a discussion reviewing court rejection of polygraph evidence in criminal cases and exceptions to this general rule, see Giannelli, *Polygraph and Deception Tests*, 8 PUBLIC DEFENDER REPORTER 3-5 (Jan.-Feb. 1985) and 1-3 (Mar.-Apr. 1985).

⁶³ Belt & Holden, *Polygraph Usage among Major U.S. Corporations*, 57 PERSONNEL J. 80, 86 (Feb. 1978).

⁶⁴ THE ADMINISTRATION'S INITIATIVES TO EXPAND POLYGRAPH USE AND IMPOSE LIFELONG CENSORSHIP ON THOUSANDS OF GOVERNMENT EMPLOYEES, Twenty-fifth Report by the Committee on Government Operations together with Additional and Dissenting Views, U.S. Government Printing Office, Washington (1983). [hereinafter cited as THE ADMINISTRATION'S INITIATIVES].

⁶⁵ *Id.* at 20.

⁶⁶ *Id.*

⁶⁷ NYCLU, *supra* note 5, at 5. In 1979, a typical examination cost between \$25 and \$50. See Belt & Holden, *supra* note 63.

⁶⁸ Lykken, *supra* note 1, at 185.

employment.

Moreover, the polygraph has been responsible for finding criminals, primarily through polygraphically induced confessions. As Dr. John Beary, Associate Dean at the Georgetown University School of Medicine and former Principal Assistant Secretary of Defense for Health Affairs, stated in testimony before the Committee on Government Operations:

[It is] the *placebo response*. Because most citizens are scientifically naive, some confess to things when hooked up to the polygraph because they believe it can really detect lies. However, you don't get something for nothing. The innocent people whose careers are damaged by the machine are the price paid for these placebo-induced confessions.⁶⁹

While the question of the polygraph's validity remains open to debate, most state legislatures are allowing their citizens to undergo testing with only minimal protections, if any, of their rights.

V. STATE LAW ANALYSIS

A. Restrictions on Polygraph Use in Employment

In 1984, the polygraph was mentioned in relation to employment in the statutes of twenty-two states.⁷⁰ A typical statute prohibits the employer from requiring employees or prospective employees to take a polygraph test in order to keep or gain employment. These states have recognized that employees need protection from employer use of the polygraph as a means of terminating or refusing employment.

The most restrictive language in a statute is typified by New Jersey's pre-1983 law which stated: "Any person who as an employer shall influence, request or require an employee or prospective employee to take or submit to a lie detector test as a condition of employment or continued employment, commits a disorderly person offense."⁷¹ As New Jersey courts have noted,⁷² this statute was purposefully aimed at "sweepingly" including more than just an employer requiring a test.⁷³ It also encompassed circumstances in which the employee was influenced to take a test or requested to do so. Statutes such as New Jersey's former law have

⁶⁹ THE ADMINISTRATION'S INITIATIVES, *supra* note 64, at 12.

⁷⁰ See *supra* note 10.

⁷¹ N.J. STAT. ANN. § 2C:40A-1 (West Supp. 1984-85). This statute was amended in 1983 to allow an exemption for employees who deal with controlled substances. This exception weakened the effectiveness of the law which had been so broadly construed. For a discussion of the exception, see *infra* notes 114-20 and accompanying text.

⁷² *State v. Community Distributors, Inc.*, 64 N.J. 479, 317 A.2d 697 (1974); *State v. Vornado, Inc.*, 155 N.J. Super. 354, 382 A.2d 945 (1978).

⁷³ *Community Distributors*, 64 N.J. at 486, 317 A.2d at 700.

withstood challenges alleging overbreadth, vagueness, and due process violations and have been found constitutional.⁷⁴ Statutes similar to New Jersey's law afford employees the greatest protection, but they are rare.⁷⁵

The majority of states which have legislated in this area, however, have less extensive bans. They focus strictly on the employer's requirement of a polygraph examination.⁷⁶ Under these statutes an employer may still request, suggest, or influence an employee or prospective employee to submit to a test. Various means of protecting employees' rights have been attempted by state legislation in connection with these statutes.

In order to insure voluntary employee participation in tests, some states that prohibit compulsory polygraph testing have attempted to establish safeguards. Wisconsin's statute stipulates that the employer must obtain the written and informed consent of the employee,⁷⁷ and California's statute states that the employer must inform the employee in writing of his right to refuse.⁷⁸ Other states which ban employer-required polygraphs nevertheless allow the employee to take a lie detector test at his own request.⁷⁹ While the taking of polygraph examinations appears less pressured under these circumstances, it still places the employee in the uncomfortable position of either refusing or undergoing a demeaning and anxiety-ridden experience. The voluntariness of such statutes is superficial and does little to protect the employee.

In two New Jersey cases,⁸⁰ the court found that the election to take a polygraph test by the employee was not truly voluntary and amounted to an employer requirement. Since such testing violated the statutory ban on an employer who would "influence, request or require an employee take or submit to a lie detector test as a condition of employment or continued employment,"⁸¹ the employer was subject to a fine. In *State v. Vornado, Inc.*,⁸² the court focused on the use of the word "influence" in

⁷⁴ *Spannaus v. Century Camera, Inc.*, 309 N.W.2d 735 (Minn. 1981); *State v. Community Distributors, Inc.*, 64 N.J. 479, 317 A.2d 697 (1974).

⁷⁵ Alaska and Massachusetts have statutes that can be construed as broadly as New Jersey's former ban. In Alaska, an employer cannot "suggest" that the employee submit to a polygraph test (ALASKA STAT. § 23.10.037 (1981)), and in Massachusetts he cannot "indirectly" require such a test (MASS. ANN. LAWS ch. 149, § 19B (Michie/Law. Co-op. 1976)).

⁷⁶ *E.g.*, MONT. CODE ANN. § 46-18-212 (1983); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1983).

⁷⁷ WIS. STAT. ANN. § 942.06 (West Supp. 1982).

⁷⁸ CAL. LAB. CODE § 432.2 (West Supp. 1984).

⁷⁹ MICH. COMP. LAWS ANN. § 37.208 (West 1983); MINN. STAT. § 181.75 (West Supp. 1984).

⁸⁰ *State v. Berkey Photo, Inc.*, 150 N.J. Super. 56, 374 A.2d 1226 (1977); *State v. Vornado, Inc.*, 155 N.J. Super. 354, 382 A.2d 945 (1978).

⁸¹ N.J. STAT. ANN. § 2C:40 A-1 (West Supp. 1984-85).

⁸² 155 N.J. Super. 354, 382 A.2d 945 (1978). In *Vornado*, the employee had never actually taken the polygraph test, but the New Jersey courts still found the employer guilty. "There is no statutory requirement that a polygraph test actually be administered before a violation occurs. [T]he Legislature meant to prevent direct or indirect psychological pres-

the statute and concluded that the employer because of his superior bargaining position did exert "influence" on the employee's decision to voluntarily submit to the test. An employee's failure to volunteer for a polygraph examination would inevitably appear to his employer as an admission of guilt. Voluntariness is thus a hollow concept in the use of polygraphs in employment.

Another approach to safeguard employees from mistreatment during examinations by polygraphers permits the employee to have a witness of his choice present during the examination.⁸³ In New Jersey, the employee is entitled to have his attorney present during the examination.⁸⁴ The attendance of a third party during the testing does not necessarily serve the employee's best interests, and can affect the validity of test results. It is possible that an examinee may purposefully alter his answers rather than reveal embarrassing events or secrets in front of a witness who may be a close friend or relative. Unless the witness has knowledge of or prior experience with polygraphs, he cannot assess the administration of the test. While his presence may deter gross abuses by examiners it would not prevent the examiner from asking invasive questions or from using coercive methods of interrogation. The witness's main purpose would be to provide corroboration to the responses transcribed by the examiner. Although an attorney may afford the employee a true assurance against harassment and questions prohibited by statute, the employee must pay for such protection. Since many of the occupations in which employers require testing are not high paying,⁸⁵ the employee is placed at a severe disadvantage. In a pre-employment testing situation the prospective employee may fail to secure the position after incurring the expense. Furthermore, the employer may view the prospective employee's insistence on a witness as indicative of a troublemaker who should not be hired in the first place.

In the state of Nevada, which heavily regulates polygraph testing of employees, a statutory provision requires the employee to sign a release before his examination results can be disclosed.⁸⁶ On the surface, such a statute appears to give some protection to employees who may wish to challenge test results, but in the eyes of an employer a refusal to release results may equal an admission of some misdeed. Once the employee has consented to and taken the test, he has virtually given up his right of

sure to submit to testing . . . The employee does not have to succumb before the statute is violated." *Id.* at 356, 382 A.2d at 946.

⁸³ ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1978-84).

⁸⁴ N.J. STAT. ANN. § 2C:40A-1 (West Supp. 1984-85). New Jersey is presently the only state that statutorily allows an employee the right to counsel during polygraph training.

⁸⁵ The types of businesses that traditionally test applicants include lumber companies, banks, supply warehouses, jewelry stores, pharmacies, and stereo equipment stores. NYCLU, *supra* note 5, at 35-36.

⁸⁶ NEV. REV. STAT. § 648A.260 (1983).

privacy in the results. As a protection for the employee, such statutes fail to accomplish their goal.

A few states⁸⁷ restrict the types of questions asked in polygraph tests in an effort to eliminate discrimination by employers. No questions may be asked concerning sexual practices, labor unions,⁸⁸ political, or religious affiliations, or marital relationships. In Wisconsin, the statute contains the further restriction that questions be related specifically to the examinee's performance or conduct in past and present employment.⁸⁹ Usually, however, the restrictions on questioning are not found in the employment statutes, but rather in statutes which regulate the licensing of examiners.⁹⁰ In this instance, however, it is not the employer who suffers for asking the prohibited questions, but the examiner, who may lose his license. For true protection of employee rights, states must attach the penalties directly to the employers, not their "henchmen," the examiners.

If an employer violates the statute and dismisses employees due either to their refusal to take an examination or to their failure on such an examination, a criminal penalty can be levied against the employer. Most of the penalties, however, are mild in form. They are all misdemeanors with usual fines of \$1,000 or less.⁹¹ Jail sentences are also possible, with typical terms spanning 30 days⁹² to one year.⁹³

Only in Maryland, Michigan, Minnesota, and West Virginia is the employer subject by statute to civil as well as criminal penalties. Of these four states, Michigan has one of the most complex and lengthy laws governing the use of polygraphs in the employment context.⁹⁴ In Michigan, an examination can be given to an employee only upon his voluntary request and must be administered by a licensed polygraph examiner. Ques-

⁸⁷ NEB. REV. STAT. § 81-1932 (1981); VA. CODE §§ 40.1-51.4:3 (1982); WIS. STAT. ANN. § 111.37 (West Supp. 1983).

⁸⁸ "The use of a lie detector by an employer to discover union sympathies or protected activities of employees clearly constitutes an unfair labor practice." Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 32 (1977). This article examines the use of polygraph tests under the National Labor Relations Act and their admissibility at arbitration proceedings.

⁸⁹ WIS. STAT. ANN. § 111.37(3)(c) (West Supp. 1983).

⁹⁰ ARIZ. REV. STAT. ANN. § 32-2713 (1977); ILL. ANN. STAT. ch. 111, § 2415.1 (Smith-Hurd Supp. 1984-85); ME. REV. STAT. ANN. tit. 32, § 7154 (Supp. 1983-84); MICH. COMP. LAWS ANN. § 338.1719 (West 1983); NEB. REV. STAT. § 81-1928(3) (1981); NEV. REV. STAT. § 648A.220 (1983); N.M. STAT. ANN. § 61-26-9G (1983); TENN. CODE ANN. § 62-27-117(14) (1982); VA. CODE §§ 40.1-51.4:3 (1982); WIS. STAT. ANN. § 111.37 (West Supp. 1983).

⁹¹ Maryland has the lowest fine, \$100 (MD. ANN. CODE art. 100, § 95 (1979)), while Washington has the exceptionally high amount of \$5,000 (WASH. REV. CODE ANN. § 9.92.020 (Supp. 1982)). States levying fines are Alaska, California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oregon, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin.

⁹² IOWA CODE ANN. § 903.1 (West Supp. 1984-85).

⁹³ VA. CODE § 18.2-11 (1982).

⁹⁴ MICH. COMP. LAW ANN. § 37.208 (West 1983).

tions that can be posed during the examination are limited by statute, and the employee must receive a copy of the statute prior to the test. Moreover, the results of the examination are considered confidential information which the employer is restricted from communicating to any other person. The criminal penalty for violation of any of these provisions can reach \$1,000 and/or 90 days imprisonment. While both penalties fall within the norm of other states' provisions, Michigan then adds a unique civil penalty: the employee can sue for civil damages, attorney fees, and double lost wages. This costly civil penalty, coupled with a criminal sentence, operates as a stronger deterrent than any of the criminal penalties operating alone.⁹⁶ Other states have considered adding laws similar to Michigan's in efforts to protect employee rights.⁹⁶

Without such civil penalties, employees who have become "victims" of polygraph abuses also have little incentive to seek prosecution of employers. Not only are criminal penalties minimal, but they do not recompense the employee or gain employment for the applicant wrongly denied a job. Recent successful cases have also found grounds such as defamation and negligence to provide damages directly to the employee.⁹⁷ As employers realize the potential for monetary loss, illegal use of the polygraph should begin to decline.

Most of these statutory restrictions on employer use of polygraphs are intended to overcome the most common objections to lie detector tests. They attempt to provide guarantees of voluntariness, to limit questions related to employment, and to seek to punish employers who violate their mandates. Too few of the states have even legislated these weak safeguards and consequently the majority of workers in the United States are subject to lie detector tests without clear legal recourse. Employees can bring actions based on invasion of privacy or under the fourteenth amendment, alleging "state inaction in failing to alleviate the tremendous imbalance of powers between corporate employers and prospective employees."⁹⁸ For employees who are discharged from jobs under suspicious circumstances, and because of the nature of the discharge cannot obtain new employment, defamation actions are providing the most effective means for redress.⁹⁹ However, in an action for defamation the plaintiff must show actual financial loss, so such suits are not possible or success-

⁹⁶ Robert Ellis Smith, the publisher of *Privacy Journal*, stated in the National Law Journal article, *\$5M Won in Lie Test Refusal Suit* (Feb. 1984), that "many employers have not been deterred by low statutory fines." Bainbridge, *supra* note 9, at 36, col. 4.

⁹⁶ Florida, Georgia, Hawaii, Illinois, New York, and Ohio all considered such legislation in 1984. The legislation did not pass in Florida, Georgia, Illinois, New York, and Ohio. H.B. 1748-84 passed in Hawaii, thus allowing civil actions and the award of attorney's fees.

⁹⁷ See *supra* notes 6-9 and accompanying text.

⁹⁸ Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 148-49 (1971).

⁹⁹ See *supra* notes 6-9 and accompanying text.

ful for all employees terminated due to polygraph results.¹⁰⁰

Although only a few states place the anti-polygraph provisions among their equal employment opportunity statutes,¹⁰¹ it is clear that discrimination can result from the use of questions dealing with religious, racial, or sexual views. Such questions can also be viewed as an invasion of privacy and abusive of employees.¹⁰² Moreover, a person should not be deprived of his livelihood by a test the results of which are of questionable scientific validity. States should recognize that an employee's rights preempt the results of a debatably pseudo-scientific investigation. Until the validity of polygraph examinations is scientifically established, it is necessary for states to protect employees who could suffer drastically from the consequences of such tests.

B. *Exempt Classifications of Employees*

Certain classes or types of employees are not protected by the restrictions on polygraph tests discussed above. Fifteen states which restrict polygraph testing in employment also provide a class exemption.¹⁰³ Only three of the twenty-two states with employment restrictive laws have no class exemptions.¹⁰⁴

The classification of employers most commonly held exempt is that of law enforcement.¹⁰⁵ To single out law enforcement employees for poly-

¹⁰⁰ See, *Montgomery v. Big B, Inc.*, No. 83-954 (Ala. November 30, 1984) (the court concluded it was not defamation for an employer to supply information regarding circumstances of missing money to polygraph operator).

¹⁰¹ See e.g., Wisconsin's statute (WIS. STAT. ANN. § 111.37 (West Supp. 1983)) which is part of a subchapter on fair employment.

¹⁰² See generally, Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35 (1976).

¹⁰³ ALASKA STAT. § 23.10.037 (1981); CAL. PENAL CODE § 637.3(b) (West 1985); CONN. GEN. STAT. ANN. § 31-51g (West Supp. 1984); DEL. CODE ANN. tit. 19, § 704 (1979); IDAHO CODE § 44-904 (1977); IOWA CODE ANN. § 730.4 (West Supp. 1984-85); ME. REV. STAT. ANN. tit. 32 § 7166 (Supp. 1978-84); NEB. REV. STAT. § 81-1932 (1981); N.J. STAT. ANN. § 2C:40A-1 (West Supp. 1984-85); OR. REV. STAT. § 659.227 (1983); 18 PA. CONS. STAT. ANN. § 7321 (Purdon 1983); R.I. GEN. LAWS § 28-6.1-2 (1979); VA. CODE § 40.1-51-4.3 (1982); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1983); and W. VA. CODE § 21-5-5b (Supp. 1983).

¹⁰⁴ Hawaii, Massachusetts, and Wisconsin. None of these states proposed exemptions in 1984.

¹⁰⁵ The following ten states have restrictive polygraph employment laws with exemptions for law enforcement personnel: ALASKA STAT. § 23.10.037 (1981); CAL. PENAL CODE § 637.3 (West 1985); CONN. GEN. STAT. ANN. § 31-51g (West Supp. 1984); IDAHO CODE § 44-904 (1977); IOWA CODE ANN. § 730.4 (West Supp. 1984-85); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1978-84); MD. ANN. CODE art. 100, § 95 (1979); VA. CODE § 40.1-51-4.3 (1982); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1983); and W. VA. CODE § 21-5-5b (Supp. 1983). California and Idaho also include federal law enforcement personnel in their exemptions. Other states (Delaware, Oregon, and Rhode Island) have statutes prohibiting or limiting employment-related polygraph tests with an exemption for tests conducted in regard to official police business.

graph tests that are prohibited for other classes of employees appears to violate the equal protection clause of the fourteenth amendment. While the state may argue that it has a rational basis for assuring that law officials meet the highest levels of honesty and that it is justified in using any means at its disposal to determine the honesty of these individuals, it is debatable whether this argument outweighs the discriminatory classification of law enforcement personnel and the use of such unproven testing on them. States do have an interest in protecting their citizens from dishonest police practices, but the means used to determine whether a police officer either has a deceitful personality or has committed deceitful and/or illegal acts must be valid and justifiable. Reliance on polygraph examinations lacks the validity to satisfy a fourteenth amendment test. Other constitutional challenges alleging fifth amendment violations of self-incrimination have been raised concerning the compulsory use of lie detectors during investigations of public employees.¹⁰⁶

Nevertheless, several states have ruled that police officers may be disciplined or discharged for refusal to submit to a polygraph examination. In *Fichera v. State Personnel Board*,¹⁰⁷ a California Court of Appeals held that the refusal of policemen to take a lie detector test constituted insubordination and provided justifiable grounds for their discharge. Similar decisions were reached in the states of Illinois,¹⁰⁸ Louisiana,¹⁰⁹ and Texas.¹¹⁰ Cases in which discharge or disciplinary action for refusal to submit to polygraph testing were held not justified have previously been distinguishable on the facts surrounding the specific inquiry.¹¹¹

In 1983, the Florida Supreme Court handed down a significant decision concerning the wrongful discharge of a police officer for refusing to take a

¹⁰⁶ Toomey, *Compelled Lie Detector Tests and Public Employees: What Happened to the Fifth Amendment*, 21 S. Tex. L.J. 375 (1981).

¹⁰⁷ 217 Cal. App. 2d 613, 21 Cal. Rptr. 159 (1963).

¹⁰⁸ *Coursey v. Board of Fire and Police Commissioners*, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967)(police officer was properly found insubordinate for refusing to obey reasonable order to submit to a polygraph test).

¹⁰⁹ *Roux v. New Orleans Police Department*, 223 So. 2d 905 (La. App. 1969), cert. denied, 397 U.S. 1008 (1970)(police officer's dismissal was affirmed on grounds that he failed to follow a direct order to take a polygraph test and that such an order was within the reasonable exercise of the police power and therefore did not violate due process).

¹¹⁰ *Richardson v. Pasadena*, 500 S.W.2d 175 (Tex. Civ. App. 1973), rev'd on other grounds, 513 S.W.2d 1 (Tex. 1974)(where an order to submit to a polygraph examination is not unreasonable or unconstitutional and where the examination relates to a matter of police department efficiency and credibility, an officer's refusal to obey is insubordination which cannot be upheld).

¹¹¹ See *Toomey*, supra note 106. The order to take the test and the subsequent questions asked must be reasonable. *Monino v. Board of Public Safety*, 154 Conn. 368, 225 A.2d 805 (1966)(It was unreasonable to discharge police for refusing a polygraph examination when the inquiry did not involve criminal activity); *Talent v. Abilene*, 508 S.W.2d 595 (Tex. 1974)(fire chief cannot order lie detector inquiry when crime charged does not relate to fireman's official duties).

polygraph test.¹¹² The Court made three important findings:

1. [W]e hold that the same unreliability which prevents the polygraph's admissibility in court should preclude the dismissal of a police officer for failure to take a test.
2. [T]he polygraph is not a sufficiently reliable or valid instrument to warrant its use in judicial proceedings.
3. [W]hile an individual does not have a constitutional right to be hired by the government, he does have, once employed and attaining seniority, an employment status entitling him to protection against unjust and unlawful job deprivation.¹¹³

The *Farmer* decision directly conflicts with the holdings of cases like *Fichera*. The Florida Supreme Court has moved to protect law enforcement officers from unjust discharge, and to include within the parameters of its definition mandatory polygraph testing. The polygraph should not be considered part of normal questioning or interrogation procedure for investigation of police misconduct. The precedent of *Farmer* should be followed in other states because it protects law officers from wrongful discharge due solely to a scientifically unreliable device.

Four states provide exemptions from restrictions on employment polygraph testing for employees involved in the manufacture or distribution of controlled substances.¹¹⁴ New Jersey has already been discussed as a state which has enacted a general prohibition against polygraph tests.¹¹⁵ Nevertheless, New Jersey does allow polygraphs to be given to individuals involved in the manufacture, dispensation, and distribution of controlled substances. This exemption was added to the New Jersey statutes in 1983.¹¹⁶ The use of polygraph examinations in this type of employment had previously been litigated in 1974 in *State v. Community Distributors, Inc.*¹¹⁷ In that case, the employer had presented evidence of heavy losses due to theft as the basis for his request that employees submit to lie detector tests. He raised the issues of the constitutionality of the statutory

¹¹² *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla. 1983), arose from a bank robbery. All bank employees were ordered to be given polygraph tests, but *Farmer*, a police officer, refused to comply. He was then dismissed for "willful violation of a lawful and reasonable regulation, order or direction . . . given by a superior officer where such violation has amounted to insubordination or serious breach of proper discipline or has resulted in loss or injury to the public." *Id.* at 188. The Florida Supreme Court found this termination to constitute "unjust and unlawful job deprivation." *Id.* at 191. (Florida is a state without any employment-related restrictions on polygraph examinations).

¹¹³ *Id.* at 190-91

¹¹⁴ N.J. Stat. Ann. § 2C:40A-1 (West Supp. 1984-85); 18 PA. CONS. STAT. ANN. § 7321 (Purdon 1983); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1983); and W. VA. CODE § 21-5-5b (Supp. 1983).

¹¹⁵ See *supra* notes 71-75 and accompanying text.

¹¹⁶ N.J. STAT. ANN. § 2C:40A-1 (West Supp. 1984-85).

¹¹⁷ 64 N.J. 479, 317 A.2d 697 (1974).

prohibition on polygraph testing as it impinged upon his ability to protect his property (a due process violation) and he suggested an exemption from the statute for the business of dispensing narcotics and dangerous drugs. The court found the statute constitutional and declined to create an exemption which the legislature had chosen not to enact. Having failed in the court to gain such an exemption, members of the drug industry turned to the legislature for their desired solution. Here they succeeded in obtaining statutory permission to administer polygraph tests.

In an attempt to protect employees' rights as much as possible, New Jersey included in the statute extra safeguards for the examinees: During the examination the individual has the right to have an attorney present and can have a second independently-administered lie detector examination prior to any decision by the employer.¹¹⁸ Such safeguards recognize the true adversarial nature of a polygraph examination. Its implications are so serious that it demands treatment similar to that accorded criminal proceedings, i.e., the right to counsel. Moreover, the employee is given the opportunity to have more control by introducing test results from an independent examiner, rather than being forced to accept results from an examiner who could potentially be biased due to his employment agreement with the employer. These safeguards, however, are at the employee's own expense and may impose an undue burden. In its general "ban" statute, New Jersey recognized the inherent inequality between the positions of employer and the employee and carefully guarded the rights of the less powerful employee. By creating this exception for the drug industry, however, New Jersey has yielded to the pressure of one business group and provided a dangerous precedent.¹¹⁹ If one industry can qualify for such an exemption either due to its significant financial loss or the intrinsic danger of its product, then surely other private employers may equally qualify. The New Jersey prohibition on polygraphs has been compromised and no longer provides a clear assurance of employees' rights in that state.

Three states, Massachusetts, Hawaii, and Wisconsin, do not allow any class of employees to be singled out as eligible for testing. In 1984, Alaska was the only state to consider elimination of an existing exemption;¹²⁰ however, the amendment failed to gain passage. Rather than creating exemptions for certain classes of employees, states should be moving to pro-

¹¹⁸ See *supra* note 84.

¹¹⁹ The exemption for the manufacture or sale of controlled substances does not, however, appear to be rapidly gaining following. Georgia was the only state to consider it in 1984 as part of comprehensive legislation on polygraphs in employment. Ga. S. B. 439 (1984). The Georgia Senate Committee on Judiciary and Constitutional Law decided that the bill needed more exploration and by Senate Resolution 382 assigned it to a study committee.

¹²⁰ ALASKA STAT. § 23.10.037(b) (1984) allows polygraph testing of policemen or applicants for employment as policemen. H.B. 200 and S.B. 115 proposed the elimination of this subsection of the statute in 1983.

tect all citizens from the unreasonable probing of polygraph examinations.

C. Licensing of Polygraph Examiners

The majority of states presently license polygraph examiners.¹²¹ Because, even to proponents of the polygraph, "the most important factor involved in the use of [the polygraph] is the ability, experience, education, and integrity of the examiner himself,"¹²² this licensing requirement provides a necessary safeguard. States without licensing provisions fail to protect their citizens even in this simple way from the known danger of unqualified polygraphers.

The validity of licensing statutes has been challenged on several occasions. In a Texas case the court upheld a statute requiring operators of polygraph equipment to be licensed and to pass an examination to qualify for licensing.¹²³ In *Illinois Polygraph Society v. Pellicano*,¹²⁴ the Illinois Supreme Court considered a constitutional challenge alleging that the statute providing for licensing and regulating of deception examiners was in violation of the Illinois Constitution because it granted a "monopolistic special privilege" to polygraph examiners to the exclusion of other types of detection of deception examiners.¹²⁵ The court concluded that the regulations imposed by the Illinois General Assembly were reasonable, did not confer a monopoly upon licensed examiners, and reasonably related to the public health, safety, and welfare. The legislature had established minimal equipment standards to be used in detecting deception, and these standards stipulated that recordings of cardiovascular and respiratory patterns, at the least, were needed. The defendant who did not use this equipment was not discriminated against in favor of a select group. "There is still enough doubt about the reliability of detection-of-deception instruments, and the varying expertise of those who use them, to justify the General Assembly's decision to set minimum standards which prefer one instrument over another."¹²⁶

Vermont's licensing statutes were challenged in federal district court in

¹²¹ Twenty-eight states have licensing statutes. See *supra* note 11.

¹²² REID & INBAU, *TRUTH AND DECEPTION* 5 (2d ed. 1977).

¹²³ *Dovalina v. Albert*, 409 S.W.2d 616 (Tex. Civ. App. 1966).

¹²⁴ Ill. 2d 130, 414 N.E.2d 458 (1980).

¹²⁵ *Id.* at 135, 414 N.E.2d at 461. The defendant in *Pellicano* used a psychological stress evaluator to conduct detection of deception examinations. The defendant did not possess a license or internship license as required by the statute for detection of deception examiners, and plaintiff sought to enjoin him from holding himself out as an examiner. Defendant moved to dismiss the complaint on the ground that the statute was unconstitutional. Although the plaintiff prevailed at trial, the Illinois appellate court then reversed. 78 Ill. App. 3d 340, 396 N.E.2d 1354 (1979). The Illinois Supreme Court then reversed the court of appeals, thus holding the statute constitutional.

¹²⁶ *Id.* at 139, 414 N.E.2d at 463.

1980.¹²⁷ The plaintiff in this case, like Pellicano in Illinois, was a PSE operator. Because the Vermont law restricted licensing to persons using polygraph machines,¹²⁸ plaintiff alleged that it violated the Fourteenth Amendment by discriminating against those who use other devices to test for deception. The court reasoned that no fourteenth amendment violation existed since the state has a valid interest in regulating professions, particularly one which "has serious implications for the privacy rights of those who may be subjected to it."¹²⁹

The requirements for licensing and revocation or denial of a license are very similar in most states. Generally, the requirements for obtaining a polygraph examiner's license fall into the following categories:

1. Age and citizenship. Minimum age requirements range from 18 to 21 years. Citizenship is usually restricted to U.S. citizens. In two states, Michigan¹³⁰ and Utah,¹³¹ the examiner must also reside in the state;
2. Good moral character;
3. No convictions for felonies or crimes involving moral turpitude;
4. Payment of a licensing fee;
5. If a veteran, honorable discharge from the armed services is required in Kentucky,¹³² North Dakota,¹³³ Utah,¹³⁴ and West Virginia;¹³⁵
6. Educational requirements which vary from a high school diploma to a four-year college degree and special polygraph examiner training;¹³⁶
7. Posting of a bond in Arizona,¹³⁷ Arkansas,¹³⁸ Mississippi,¹³⁹ and South Carolina,¹⁴⁰ and securing insurance in North Carolina;¹⁴¹
8. Passing an oral or written test on polygraph examinations;¹⁴² and
9. Experience and/or internship in polygraph testing.¹⁴³

¹²⁷ *Heisse v. Vermont*, 519 F. Supp. 36 (D. Vermont 1980).

¹²⁸ VT. STAT. ANN. tit. 26, §§ 2901 *et seq.* (Supp. 1984).

¹²⁹ 519 F. Supp. at 45.

¹³⁰ MICH. COMP. LAWS ANN. § 338.1710(j) (West 1976).

¹³¹ UTAH CODE ANN. § 34-37-5 (1953 & Supp. 1983).

¹³² KY. REV. STAT. ANN. § 329.030(2)(e) (Baldwin 1981).

¹³³ N.D. CENT. CODE § 43-31-07 (1960 & Supp. 1983).

¹³⁴ UTAH CODE ANN. § 34-37-5 (1953 & Supp. 1983).

¹³⁵ W. VA. CODE § 21-5-5c (Supp. 1984).

¹³⁶ See *supra* notes 47-48 and accompanying text.

¹³⁷ ARIZ. REV. STAT. ANN. § 32-2706 (1977).

¹³⁸ ARK. STAT. ANN. § 71-2207 (1979).

¹³⁹ MISS. CODE ANN. § 73-29-13 (1972 & Supp. 1984).

¹⁴⁰ S.C. CODE ANN. § 40-53-70 (Law. Co-op. & Supp. 1984).

¹⁴¹ N.C. GEN. STAT. § 74C-8 (1981 & Supp. 1983).

¹⁴² *E.g.*, ILL. ANN. STAT. ch. 111, § 2412 (1978 & Supp. 1983).

¹⁴³ See *supra* note 50 and accompanying text.

Some of the reasons for revocation or denial of a license include the following:

1. Violation of the examiner licensing statute provisions;
2. Conviction of a felony or crime involving moral turpitude;
3. Adjudgment of incompetency as an examiner;
4. Demonstration of incompetency as an examiner;
5. Material misstatement on an application; or
6. Failing to inform the examinee about the nature of the test, that the test is voluntary, or that he or she may refuse the test.

Some states, in addition, specify types of testing procedures and minimal machine standards. Of the twenty-eight licensing states, only three have not established machine requirements.¹⁴⁴ The other states either require a two-factor test (cardiovascular and respiratory)¹⁴⁵ or a three-factor test (cardiovascular, respiratory, and electrodermal).¹⁴⁶ The statutes do not prohibit the recording of other physiological responses,¹⁴⁷ but specify only a minimal level of testing. The value of the third factor, the electrodermal or galvanic skin response (GSR), has been questioned by even major users of the polygraph.¹⁴⁸ States that do not regulate licensing and the three states without machine and testing requirements have failed to protect their citizens from techniques that are considered invalid by the lie detection industry itself. Such methods of testing may involve less than two-pattern recording,¹⁴⁹ or the use of voice stress analysis without the corroboration of a two- or three-factor polygraph.¹⁵⁰ If a state allows polygraph testing, it should prescribe standards for testing and machinery to insure

¹⁴⁴ Maine, North Carolina, and Michigan.

¹⁴⁵ *E.g.*, VT. STAT. ANN. tit. 26, § 2902 (Supp. 1984).

¹⁴⁶ *E.g.*, IND. CODE § 25-30-2-1 (Supp. 1984).

¹⁴⁷ Vermont's statute even states that "[p]atterns of other physiological changes . . . may also be recorded." VT. STAT. ANN. tit. 26, § 2902(b) (Supp. 1984).

¹⁴⁸ Kugelmass, *Experimental Evaluation of Galvanic Skin Response and Blood Pressure Change Indices during Criminal Interrogation*, 59 J. CRIM. L., CRIMINOLOGY, AND POLICE SCI. 632 (1968). This article concludes that the GSR is as valid as a cardiovascular response but recognizes that "the professional opinion of leading police authorities" considers "the GSR to be of limited value in lie detection." *Id.* at 632.

¹⁴⁹ Variables taken independently have been found significantly less reliable. Researchers favor "larger quantities of simultaneous data" for effective results. Cutrow, *The Objective Use of Multiple Physiological Indices in the Detection of Deception*, 9 PSYCHOPHYSIOLOGY 578, 586 (1972).

¹⁵⁰ Voice stress analysis is assessed by psychological stress evaluators (PSE). In *Heisse v. Vermont*, 519 F. Supp. 36 (D. Vermont 1980), the court commented that "within the scientific community there continues to be some discord as to [its] validity." *Id.* at 46. But more importantly, the court noted that the PSE can be administered without the subject's knowledge or consent. "With the use of the polygraph machine the subject cannot be examined unknowingly." *Id.* The Vermont legislature had considered broadening the statute to allow licensing of the PSE but had rejected the proposed amendment because of the potential for abuse that exists when tests can be administered to unknowing suspects. *Id.* at 42, 46.

uniform test results. Until the question of polygraph validity is settled, or until all states have prohibited lie detection, the states must at least set standards so that all employees are assured testing by consistent procedures and interpretation. An employee who could suffer the loss of his job due to a lie detection test should be protected from the inventions and innovations of unqualified examiners.

Licensing standards are important. First, the standards supply some assurance that the examiner will have proper education and training and have shown himself to be a responsible person. Convicted perpetrators of felonious acts cannot be licensed. The profession has also established certain ethical criteria. Second, for the employee subjected to a polygraph test, the statutes form a base for examiner qualifications. If the employee is ultimately damaged by the examination, then these standards may provide a basis for a cause of action. Penalties are provided and may serve to keep the examiner from asking the employee harmful, discriminatory, or intrusive questions. And third, the state receives the direct financial benefit of collecting licensing fees.

Florida's licensing statutes must be reviewed by the legislature on a regular basis since the laws are scheduled for repeal unless reenacted.¹⁶¹ In January, 1980, the Florida Senate Judiciary-Criminal Committee issued a study advising the continued regulation of licensing deception detectors (polygraph examiners) by the state. The committee staff considered certification of examiners as an alternative to licensing and concluded that "the potential harm to the individual who is the subject of the polygraph examination is too great to allow a person without any background qualifications to conduct the exam."¹⁶²

Unfortunately, the licensing standards provide a deceiving aura of validity to the polygraph test. A prerequisite to registering professionals should be the basic soundness of their profession. However, that supposition is not legitimate in the case of the polygraph. It is a device whose scientific credibility has yet to be established. Nevertheless, studies indicate that in states with legally prescribed licensing and training requirements there is a greater tendency for businesses to require the test as a condition of employment.¹⁶³

D. Proposed Model Statute

Legislation is needed on the state level since Congress has failed to take a stand on the issue. Studies have been conducted by various congressional offices¹⁶⁴ and by executive agencies.¹⁶⁵ Despite the conclusions of

¹⁶¹ FLA. STAT. § 11.61 (1976).

¹⁶² Florida Senate Judiciary-Criminal Committee, *A Review of Chapter 493, Florida Statutes Investigative Agencies; Deception Detectors* 65 (Jan. 1980).

¹⁶³ Wise, *Trial by Machine*, 12 HUM. RTS. 30, 32 (1984).

¹⁶⁴ See OTA, *supra* note 34, at 33, 130-31.

¹⁶⁵ E.g., THE ADMINISTRATION'S INITIATIVES, *supra* note 64. For a listing, see OTA, *supra* note 34, at 131, which cites sixteen federal agency documents dealing with polygraph testing. See also OTA, *supra* note 34, at 33.

these studies that polygraph results are unreliable, the federal government has not enacted any legislation in this area.¹⁶⁶ Moreover, the Pentagon has recently expanded the polygraph testing of employees under certain circumstances.¹⁶⁷ With the use of polygraph testing rapidly increasing and proliferating the potential for abuses, employees cannot afford to wait for the federal government to protect them.

The states must regulate the use of polygraphs by employers. A model statute would follow that of the original New Jersey prohibition, but would add a civil as well as a criminal penalty. The protection would then be as broad as possible, and the penalty would likewise be a strong deterrent. Such a model statute would read as follows:

(A) Any person who as an employer shall influence, request, or require an employee or prospective employee to take or submit to a lie detector test as a condition of employment or continued employment is guilty of a misdemeanor punishable by a fine of \$1,000 or one-year imprisonment, or both.

(B) In addition to the remedies otherwise provided by law, the aggrieved party may bring a civil action to recover any and all damages recoverable at law, including but not limited to double lost and anticipated wages, together with costs and disbursements, including costs of investigation and reasonable attorney fees.

VI. CONCLUSION

This review of the laws concerning the polygraph in the employment relationship has revealed that there is wide variation in the laws of the states. The spectrum ranges from states like New Jersey that ban testing, to states like Florida that allow testing but require examiners to be licensed, to states like Ohio without any laws affecting polygraph use or examiners. Almost all of the states have adopted or have considered legislation on the subject. Yet too many employees remain unprotected from unjust job deprivation based on the results of polygraph testing.

After over 85 years of use, lie detectors have not been scientifically established as providing reliable information on a person's trustworthiness or innocence. No evidence exists to show that they clearly do or do not

¹⁶⁶ H 2403 was introduced in the 98th Congress and never left committee.

¹⁶⁷ As reported in the *Washington Post*, Jan. 4, 1985, at 1, col. 4, *Pentagon Begins Wider Use of the Detector Examination*. The Defense Department authorized the testing of non-intelligence employees to determine their trustworthiness, patriotism, and integrity. Under this policy approximately 3,500 employees will be tested. Based solely on the results of the examinations, promotions may be granted or denied to these individuals.

work. This continuing debate raises too many questions casting doubt on the accuracy of polygraph results. Factors such as testing environment, race, psychological character, and drug usage, among others, can all influence an individual's responses. Moreover, the interpretation of the chart results depends upon the subjective judgment of one person, the examiner, who frequently has no training or education and who may, in fact, rely more heavily on impressions formed during the pre-test interview than on the chart. A person's ability to gain or keep employment should not be determined by an unsubstantiated process that infringes on the fundamental right to privacy. States must acknowledge the problems created by polygraph use and must effectively deal with them.

Only through the enactment of such statutes as the proposed model will workers be assured of their basic rights of human dignity and privacy. Polygraph testing destroys the trust relationship that should exist between employer and employee, and creates an adversarial and inquisitorial environment. It also has the power to deprive a citizen of his right to a livelihood. With so many unknowns and with the stakes so high, states should legislate to prohibit employer reliance on polygraphs.

