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Labor Law—POLICE OFFICER MAY NOT PROPERLY BE DISMISSED FOR REFUSAL TO SUBMIT TO A POLYGRAPH EXAMINATION—*Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla. 1983)

“The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

Oliver Wendell Holmes¹

“We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.”

William O. Douglas²

I. INTRODUCTION

As indicated by the above quotations, police officers, as well as other public employees, have come a long way towards attaining first-class citizenship in the courts. In a recent decision, the Florida Supreme Court has taken a strong position that demonstrates this progress. In *Farmer v. City of Fort Lauderdale*,³ the court, in a five-two decision, held that police officers could not properly be discharged for refusing to submit to a polygraph test.⁴ The decision relied primarily on the inherent unreliability of the polygraph instrument and its lack of judicial acceptance. The holding is particularly significant because it drastically alters the current state of the law in Florida and places Florida among only a handful of jurisdictions that have adopted this position.⁵

Although the *Farmer* decision represents progressive judicial reasoning, the limited issues presented to the court prevent this holding from providing a panacea on the issue of polygraphs in the employment scenario. The many issues left unresolved by *Farmer* and, in fact, the *Farmer* holding itself, are conducive to legislative study culminating in a comprehensive statute. Often sparked by judicial decisions, the legislatures in twenty-one states and the District of Columbia have seen the need for such legislation.⁶

1. *McAuliffe v. New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

2. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

3. 427 So. 2d 187 (Fla. 1983).

4. *Id.* at 190.

5. The minority rule is also followed by California, Hawaii, Michigan, Minnesota, New Jersey, Oregon and Washington. Each of these states adopted the rule by statutory provision. The majority rule is that police officers may be required to take polygraph examinations. Alaska, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, Massachusetts, Montana, Nebraska, Pennsylvania and Rhode Island have adopted this rule by statute, and Arizona, Illinois, Iowa, Louisiana, New York and Texas have done so by case decision.

6. ALASKA STAT. § 23.10.037 (1964); CAL. LAB. CODE § 432.2 (West 1971 & Supp. 1982) and CAL. GOV'T. CODE § 3307 (West 1980); CONN. GEN. STAT. ANN. § 31-51(g) (West 1958 & Supp. 1982); DEL. CODE ANN. tit. 19, § 704 (1979); D.C. CODE ANN. §§ 36-801 to -803 (1973);

This note will discuss the *Farmer* decision and its impact on Florida law. Further, it will explore issues beyond the scope of the *Farmer* holding that are sure to arise later. Since most of these issues can be resolved by comprehensive legislation, they will be discussed with that goal in mind. This discussion will include an analysis of judicial decisions and statutes from other jurisdictions in an attempt to provide an objective overview of the issues that should be considered in formulating remedial legislation.

II. *Farmer v. City of Fort Lauderdale*

Arthur Farmer was employed as a police sergeant for the City of Fort Lauderdale Police Department. On April 28, 1977, Farmer was working a special duty at the Southeast Bank of Broward. During the day's activities, he was asked by a teller to assist her by moving a heavy "bus vault" from the main vault to the teller's window.⁷ Later that day the teller reported that \$10,000 was missing from the vault that Farmer had previously moved.⁸

The Federal Bureau of Investigation conducted an investigation into the disappearance. All bank employees who had access to the vault were subjected to polygraph examinations and, purportedly, were eliminated as suspects. Farmer, however, refused to submit to a polygraph at the initial stage of the investigation.⁹

By March of 1978, the FBI had exhausted all investigatory avenues in the case. The matter was subsequently turned over to the Fort Lauderdale Police Department,¹⁰ and the investigation was continued by the internal affairs unit of that Department.¹¹ In order to facilitate Farmer's cooperation, members of the offices of the State Attorney and the United States Attorney gave their written

HAWAII REV. STAT. §§ 378-21 to -22 (1968); IDAHO CODE §§ 44-903 to -904 (1973); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1982-83); MD. ANN. CODE art. 100, § 95 (1979); MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1973 & Supp. 1982); MICH. COMP. LAWS ANN. §§ 37.201-.209 (West Supp. 1983); MINN. STAT. ANN. §§ 181.75-.77 (West 1980); MONT. CODE ANN. § 41-119 to -120 (Supp. 1977); NEB. REV. STAT. § 23-1737 (1943); N.J. STAT. ANN. § 2C:40A-1 (West 1981); N.Y. LAB. LAW §§ 733-35 (McKinney 1978) (prohibits voice stress tests but not polygraphs); OR. REV. STAT. § 659.225 (1981); PA. STAT. ANN. tit. 18, § 7321 (Purdon 1973); R.I. GEN. LAWS § 28-6.1-1 (1956); UTAH CODE ANN. § 34-37-16 (Supp. 1981); WASH. REV. CODE ANN. § 49.44.120 (West 1981 & Supp. 1982); WIS. STAT. ANN. § 111.37 (West 1981 & Supp. 1982).

7. Brief for Petitioner at 4.

8. *Id.*

9. *Id.*

10. *Id.*

11. Unlike a criminal investigation unit, the internal affairs unit investigates employees to determine whether discipline is warranted.

agreement not to use any statements made by Farmer to the internal investigators against him in any subsequent criminal proceeding.¹²

On June 6, 1978, Farmer, with counsel present, was presented with the letters of immunity and was ordered by police superiors to answer questions. After he answered all of the questions, he was next ordered to submit to a polygraph test. On advice of counsel, Farmer responded: "not at this time." He gave a similar response to a subsequent demand by another superior.¹³ Prior to this demand, Farmer had been advised that a refusal to comply might "subject [him] to disciplinary action up to and including dismissal."¹⁴

On June 29, 1978, Farmer was suspended and subsequently dismissed for insubordination.¹⁵ The order of dismissal was affirmed by the Civil Service Board of the City of Fort Lauderdale and the Circuit Court, Seventeenth Judicial Circuit.¹⁶ The Fourth District Court of Appeals, finding no distinction between the instant case and its previous decision in *State Department of Highway Safety & Motor Vehicles v. Zimmer*,¹⁷ denied certiorari, with Judge Hurley in dissent.¹⁸

The Florida Supreme Court obtained jurisdiction under article V, section 3(b)(4) of the Florida Constitution to answer three ques-

12. Brief for Petitioner at 5.

The letter from the office of the U.S. Attorney dated May 16, 1978, stated:

In order to secure his cooperation in taking a polygraph examination, please be advised that anything said by Officer Farmer during that examination . . . will not be used by this office against him in any criminal prosecution.

Id. at 13-14.

The letter dated May 19, 1978 from the Chief Assistant State Attorney said:

To assist your department in your internal investigation concerning this matter, [sic] this office agrees and by this letter binds itself to this agreement, that anything Sgt. Farmer may say to any officer of the Fort Lauderdale Police Department, [sic] will be considered confidential and not admissible as evidence, should any criminal prosecution, [sic] be instituted in the future.

Id. at 13-14.

13. *Id.* at 5.

14. Brief for Respondent at 3 (quoting Record at 36).

15. The written order stated the reason for dismissal as follows: "Willful violation of a lawful and reasonable regulation, order or direction, made or given by a superior officer where such violation has amounted to insubordinate or serious breach of proper discipline or has resulted in loss or injury to the public." Brief for Petitioner at 5-6.

16. *Farmer*, 427 So. 2d at 188.

17. 398 So. 2d 463 (Fla. 4th DCA 1981).

18. *Farmer v. City of Fort Lauderdale*, 400 So. 2d 99 (Fla. 4th DCA 1981).

tions certified by the Fourth District as being of great public importance:

1) Does Section 914.04 of the Florida Statutes and the Supreme Court's decision in *Lurie v. Florida State Board of Dentistry* . . . prohibit the use of immunized testimony to discharge a city employee?

2) Should a city employee's right under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 9 of the Constitution of the State of Florida require protection by immunization from all penal sanctions as opposed to only criminal?

3) Can a police officer be compelled to submit to a polygraph test when he is a suspect in a criminal investigation without granting him immunity from all penalties or forfeiture?¹⁹

Although the questions, as drafted, were not relevant to the crucial issues in the case,²⁰ the court, in a pervasive opinion by Justice Adkins, reversed the decision of the lower court.²¹

The supreme court began its analysis by discussing the United States Supreme Court decisions dealing with the issue of questioning public employees. In *Garrity v. New Jersey*,²² the appellants, who were police officers, were under investigation for "fixing" traffic tickets. The Attorney General advised the officers, before questioning them, that they were entitled to refuse to answer the questions by invoking their fifth amendment privilege against self-

19. *Farmer*, 427 So. 2d at 187.

20. The certified questions all pertained to the previous Florida immunity statute. That statute required persons who had been subpoenaed to testify before any court with felony trial jurisdiction, grand juries, or state attorneys. However, it immunized the person from any "penalty or forfeiture" on "account of any transaction, matter, or thing" which concerned the testimony. FLA. STAT. § 914.04 (1981). The Florida Supreme Court, in *Lurie v. Florida State Bd. of Dentistry*, 288 So. 2d 223 (Fla. 1973), interpreted the "penalty or forfeiture" language as contemplating "loss of property, position or some other personal right." *Id.* at 226. Hence, as interpreted, the immunity statute prevented the state from administratively punishing *Lurie* for the matter about which he had been subpoenaed to testify.

As the *Farmer* court pointed out, however, since *Farmer* had not been subpoenaed to testify before one of the entities enumerated in the statute, he could not avail himself of the immunity statute's broad judicial gloss.

Under the amended version of FLA. STAT. § 914.04 (Supp. 1982), the immunized testimony may not be used against the testifying individual in any subsequent "criminal investigation or proceeding." Hence, the immunity statute, as amended, is much narrower in scope than its predecessor, and it appears that such immunized testimony could now be used in an administrative hearing as evidence to support a dismissal from employment.

21. *Farmer*, 427 So. 2d at 192.

22. 385 U.S. 493 (1967).

incrimination. The officers were told, however, that the penalty for so doing was the forfeiture of their jobs under a New Jersey statute.²³ Faced with this Hobson's Choice, the officers answered the questions, and the resulting answers were used as evidence against them in a subsequent criminal prosecution.²⁴

The Court held that the threat of job forfeiture was "coercion" within the contemplation of the fifth and fourteenth amendments and, therefore, the answers could not be used as evidence against the officers in a subsequent criminal proceeding.²⁵ However, the Court did not address the issue of whether a police officer may be discharged for refusing to answer questions, when the answers are intended to be used for the limited purpose of assessing his suitability to continue in his employment.

In *Spevack v. Klein*,²⁶ a companion case to *Garrity*, the Supreme Court held that an attorney could not be disbarred merely for asserting his fifth amendment privilege. The Court stated that the lawyer there, like the police officers in *Garrity*, enjoyed "first-class citizenship."²⁷ In a concurring opinion, Justice Fortas was careful to expressly limit the *Spevack* holding to lawyers and did not extend it to public employees who are asked questions "specifically, directly, and narrowly relating to the performance of [their] official duties."²⁸

In *Gardner v. Broderick*,²⁹ a New York City police officer was discharged for refusing to waive statutory immunity while testifying before a grand jury that was investigating corruption. The officer purportedly was required to waive immunity under a provi-

23. The statute required public employees or office holders to testify before any official body or, if the employee refused to testify, invoked his fifth amendment privilege, or refused to waive immunity, he would be removed from office. *Id.* at 494 n.1 (quoting N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965)).

24. *Garrity*, 385 U.S. at 495.

25. *Id.* at 500.

26. 385 U.S. 511 (1967).

27. *Id.* at 516.

28. *Id.* at 519 (Fortas, J., concurring).

Justice Fortas' basis for this distinction was as follows:

[A] lawyer is not an employee of the State. He does not have the responsibility of an employee to account to the State for his actions because he does not perform them as agent of the State. His responsibility to the State is to obey its laws and the rules of conduct that it has generally laid down as part of its licensing procedures. The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights.

Id. at 520.

29. 392 U.S. 273 (1968).

sion of the State Constitution and City Charter. In an opinion by Justice Fortas, the Court held that the police officer could not be discharged for refusing to waive his fifth amendment right against self-incrimination.³⁰ In *dicta*, the Court recognized the lawyer/public employee distinction made by Justice Fortas in his *Spevack* concurrence.³¹ The Court articulated that a police officer's right to remain silent, unlike that of a lawyer, is not absolute:

If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-incrimination would not have been a bar to his dismissal.³²

The Court would, therefore, require police officers to answer questions when the answers are to be used "solely for the purpose of securing an accounting of his performance of his public trust."³³ In *Uniformed Sanitation Men Association v. Commissioner of Sanitation*,³⁴ the Court made clear that its holding in *Gardner* was also applicable to other public employees.

The Florida Supreme Court in *Farmer* held that the petitioner fully complied with the *Gardner* requirement by answering questions, and he was not required to go beyond that by submitting to a polygraph.³⁵ The court acknowledged that it was adopting the minority position on this issue, but it reasoned that the unreliability of the polygraph justified that view.³⁶ The city argued that al-

30. *Id.* at 278-79.

31. *Id.* See *supra* note 28.

32. 392 U.S. at 278 (footnote omitted).

33. *Id.* at 279.

34. 392 U.S. 280, 284-85 (1968).

35. *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187, 191 (Fla. 1983).

36. *Id.* at 189-90.

The court cited several Florida decisions in which the courts have consistently refused to allow polygraph results to be admitted into court. See, e.g., *Sullivan v. State*, 303 So. 2d 632 (Fla. 1974), *reh'g denied*, 429 U.S. 873 (1976) (state is admonished against asking questions which are intended to elicit a response making reference to a polygraph test); *Kaminski v. State*, 63 So. 2d 339 (Fla. 1952) (state may not ask its witness if he had taken a polygraph test in order to rehabilitate him after his credibility had been impeached); *Crawford v. State*, 321 So. 2d 559 (Fla. 4th DCA 1975) (*per curiam*, *aff'd*, 339 So. 2d 214 (Fla. 1976) (impermissible inference of witness' credibility raised by mention that witness was asked to submit to a polygraph); *City of Miami v. Jervis*, 139 So. 2d 513 (Fla. 3d DCA 1962) (no adverse presumption can be drawn from individual's refusal to submit to a polygraph test). Cf. *Codie v. State*, 313 So. 2d 754 (Fla. 1975) (polygraph results are admissible if both parties stipulate to that effect, even if the stipulation is not in writing or made before the

though polygraphs are inherently unreliable, the tests would assist the city by providing leads to new information, which could be used as a basis for discipline.³⁷ However, the court determined "that the possible investigative benefit of building a case upon the foundation of the results of a polygraph examination is too thin a reed to support a denial of a police officer's right to be subjected only to lawful and reasonable orders."³⁸

In conclusion, the court held that the order to take the polygraph examination was not a "lawful and reasonable" order and, therefore, Farmer's refusal to submit to it did not constitute a basis for termination of employment.³⁹ A contrary holding, said the court, would "open the door" to the use of other deception detection methods such as "hypnosis, sodium pentothal or whatever other technique any given municipality believes would be of any assistance in an investigation."⁴⁰

Chief Justice Alderman, in dissent, would have affirmed the Fourth District Court of Appeal on the reasoning articulated in *State Department of Highway Safety and Motor Vehicles v. Zimmer*.⁴¹ In that case, Zimmer, a highway patrol trooper, was under investigation for stealing property from an accident victim. After interviews disclosed discrepancies in Zimmer's story, the Director of the Department of Highway Safety and Motor Vehicles ordered him to submit to a polygraph. He refused and his employment was subsequently terminated.⁴² On appeal, Zimmer was ordered to be reinstated by the State Career Service Commission. The Commission relied upon a 1975 opinion of the Attorney General of Florida, which opined that a State Division of Corrections employee could not be discharged for refusing to take a polygraph absent a statute or administrative rule expressly conferring upon the Department

court).

The court took judicial notice of the principles under which the polygraph functions: "A polygraph operates based on certain assumptions, to wit, that an individual will undergo physiological changes in blood pressure, breathing rate and galvanic skin responses when he knowingly makes an untrue statement." The court acknowledged further that variables such as operator skill, the emotional state of the examinee, the fallibility of the machine and the inability to quantify the relationship between physiological and emotional states all influence the machine's validity. *Id.* at 191-92.

37. *Id.* at 190.

38. *Id.*

39. *Id.* at 191.

40. *Id.*

41. 398 So. 2d 463 (Fla. 4th DCA 1981).

42. *Id.* at 463-64.

the authority to order such a test.⁴³ In response to this opinion, the *Zimmer* court held that the authority to conduct internal investigations by interrogating personnel is implicit in the statute creating the Highway Patrol. Further, the court said that authorization to require employees to submit to a polygraph examination follows from this implicit authority to conduct internal investigations.⁴⁴ The *Zimmer* court also articulated a distinction between public employees and private employees which Chief Justice Alderman endorsed in his *Farmer* dissent:⁴⁵ "The personal integrity of the employees of a private employer has little, if any, direct impact on the members of the public; however, the personal integrity of public employees has enormous impact on the public and is of serious concern to the public."⁴⁶

Although not expressly overruling *Zimmer*, the Florida Supreme Court's decision in *Farmer* appears certain to have overturned the premise that supports the *Zimmer* holding—that the authority to interrogate employees includes the authority to subject them to a polygraph examination. The strong position taken by the court in *Farmer*, however, is not alone sufficient to settle the law in Florida on the issue of employment-related polygraph use. The need for a thorough study based on empirical data makes the subject ripe for a comprehensive legislative enactment on the subject of polygraph use in the employment context. The remainder of this note will discuss the need for such legislation and analyze the policy issues and drafting considerations that must be taken into account before the enactment of such a statute.

III. USE OF POLYGRAPHS

A. Practical Utility

The *Farmer* court was adamant that the results of a polygraph test could not be used in a subsequent *judicial proceeding* relating to any job dismissal.⁴⁷ Assuming for the moment that this precludes any disciplinary action predicated upon the polygraph results, the question arises: Are there other uses for the instrument? In *Farmer*, the city argued that there were other ways in which the

43. 1975 FLA. ATT'Y GEN. ANN. REP. 94.

44. *Zimmer*, 398 So. 2d at 464.

45. *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187, 192 (Fla. 1983) (Alderman, C.J., dissenting).

46. *Zimmer*, 398 So. 2d at 466.

47. *Id.* at 191.

polygraph could be utilized. These purported uses included "identifying co-conspirators or locating the proceeds of the alleged crime."⁴⁸ The court rejected this argument as insufficient to overcome the police officer's right to be subjected only to reasonable orders.⁴⁹

Other courts, however, have accepted arguments pertaining to the utility of the polygraph device. Such arguments reason that: (1) the test may assist investigators in narrowing the scope of suspects, thus allowing them to concentrate their investigative efforts, saving time and resources; (2) the test may be used as an exculpatory device to clear an officer's good name and restore public confidence in the police department;⁵⁰ (3) an officer's willingness to submit to a test is a factor that may be weighed in considering his fitness;⁵¹ and (4) results may be considered in determining whether discipline is warranted when there is other evidence of wrongdoing.⁵²

With regard to private employers, additional justifications become relevant. Employee theft is a major concern of the employers who have considerable pecuniary interests in their merchandise; and, therefore, the polygraph may provide a means of isolating internal security problems and locating stolen goods. In addition to these purported attributes, a perusal of the polygraph cases demonstrates the effectiveness of the device in persuading a suspected employee to confess his involvement in the suspected wrongdoing.⁵³ In fact, the leverage gained by the ability to force an employee to take the polygraph may be the real reason it is so widely used.⁵⁴ Similarly, the polygraph may provide a form of deterrent, as evidenced by the following quotation attributed to Richard M. Nixon: "Polygraph them all. I don't know anything about polygraphs and I don't know how accurate they are, but I know

48. *Id.* at 190.

49. *Id.*

50. *Grabinger v. Conlisk*, 320 F. Supp. 1213, 1221 (N.D. Ill. 1970); *Fichera v. State Personnel Bd.*, 32 Cal. Rptr. 159 (Dist. Ct. App. 1963); *Frazee v. Civil Serv. Bd.*, 338 P.2d 943 (Cal. Dist. Ct. App. 1959); *Coursey v. Board of Fire & Police Comm'rs*, 234 N.E.2d 339 (Ill. App. Ct. 1967); *Roux v. New Orleans Police Dep't*, 223 So. 2d 905 (La. Ct. App. 1969), *cert. denied*, 397 U.S. 1008 (1970).

51. *Coursey v. Board of Fire & Police Comm'rs*, 234 N.E.2d 339, 344 (Ill. App. Ct. 1967).

52. *Id.* *Dolan v. Kelly*, 348 N.Y.S.2d 478 (Sup. Ct. 1973).

53. *See, e.g., Estes v. City of Grover City*, 147 Cal. Rptr. 131 (Dist. Ct. App. 1978) (police officer admitted violating policy under threat of polygraph examination).

54. Comment, *The Polygraph and Pre-Employment Screening*, 13 Hous. L. Rev. 551, 552-53 (1976).

they'll scare the hell out of people."⁵⁵

Because none of the aforementioned justifications for polygraph use involve using the results to establish culpability, it would seem that the reliability of the machine is irrelevant. The only policy concern would be whether the purported justifications are sufficient to overcome any interests the employee might have against submitting to such an examination.⁵⁶

B. Probative Value

When polygraph results are relied on to establish the truthfulness of an examinee's answers, however, reliability becomes very relevant. Even courts that have held that a police officer must submit to the polygraph test are reluctant to allow adverse results to be used as evidence to support a discharge.⁵⁷ However, one court has held that polygraph results may be considered as evidence in an administrative hearing, when the polygraphist appears at the hearing and is subject to direct and cross examination concerning his qualifications and the procedure used to conduct the test.⁵⁸

In the private sector, arbitrators have generally followed suit by not allowing the polygraph results to be admitted into evidence.⁵⁹ The Fifth Circuit Court of Appeals has even upheld an arbitrator's decision to exclude polygraph results notwithstanding a collective bargaining agreement that reserved the right of management to require the employee to submit to the test.⁶⁰

Although most courts, including the Florida Supreme Court in *Farmer*, have indicated an unwillingness to admit the results of polygraph examinations into evidence in support of employee discharges, any subsequent statutory authorization on the use of

55. Comment, *Lie Detectors in the Employment Context*, 35 LA. L. REV. 694, 694 (1975) (citing *Hearings Before the House Judiciary Committee on the Impeachment of the President*, 93d Cong., 2d Sess., Statement of Information, bk. VII, pt. 2 at 881 (1974)).

56. See *infra* notes 96-103 and accompanying text.

57. See, e.g., *Grabinger v. Conlisk*, 320 F. Supp. 1213 (N.D. Ill. 1970); *Fichera v. State Personnel Bd.*, 32 Cal. Rptr. 159 (Dist. Ct. App. 1963); *City of Sioux City v. Fairbanks*, 287 N.W.2d 579 (Iowa 1980); *Roux v. New Orleans Police Dep't*, 223 So. 2d 905 (La. Ct. App. 1969), cert. denied, 397 U.S. 1008 (1970); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485 (Wash. 1972).

58. *Chambliss v. Board of Fire & Police Commr's*, 312 N.E.2d 842 (Ill. App. Ct. 1974). For a criticism of this decision, see *Bart v. Department of Law Enforcement*, 367 N.E.2d 773 (Ill. App. Ct. 1977).

59. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 34 (1977).

60. *Amalgamated Meat Cutters & Butcher Workmen Local 540 v. Neuhoff Bros. Packers*, 481 F.2d 817 (5th Cir. 1973).

polygraphs should expressly preclude the admission of test results into evidence. Absent such an express limitation, at least one court has interpreted a statute that authorizes the administration of these tests as implicitly authorizing the admission of the test results into evidence.⁶¹

Of course, if adverse polygraph results were admissible, notions of symmetry would seem to enable the employee to secure an independent examination and admit the favorable results into evidence in mitigation. He may even be permitted to build an affirmative case based upon favorable polygraph results, even when adverse results have not been previously introduced.⁶² This could result in a futile battle of the polygraphists.

Even if the legislature is in agreement with the *Farmer* holding and finds the aforementioned purported justifications insufficient to allow employers to use the polygraph, the need for a comprehensive statute to govern the use of polygraphs by employers is still present.

IV. THE NEED FOR COMPREHENSIVE LEGISLATION

One concern is that the *Farmer* holding only prohibits employers from discharging employees for refusing to take the polygraph. This would not seem to prohibit the employer from merely requesting that a current employee consent to a polygraph.⁶³ Further, an employer would be able to circumvent the holding by including a consent form as part of the job application.⁶⁴ It strains

61. Appeal of McMullin, 401 A.2d 572 (Pa. Commw. Ct. 1979).

The court addressed the issue of whether a law enforcement employee may be properly discharged based on the polygraph results but found it unnecessary to resolve the issue because the polygraph results were found, as a factual matter, not to have formulated the basis for the dismissal. *Id.* at 574 n.1. The court did point out, however, in *dicta*, that a holding that prohibited the use of these results as a basis for termination would seem to contradict the statutory authorization to administer these exams to police personnel. *Id.* However, this is not necessarily correct. As pointed out in other decisions, one purported use for the polygraph is the elimination of innocent persons from a field of suspects. See also *supra* notes 57-59 and accompanying text.

62. See *Bart v. Dep't of Law Enforcement*, 367 N.E.2d 773 (Ill. App. Ct. 1977).

63. See Comment, *Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence*, 15 U.C.D. L. REV. 113 (1981) (statutes which prohibit employers from "demanding" employees to take a polygraph test are easily circumvented by this procedure).

64. *State v. Community Distributions*, 304 A.2d 213, 218 (N.J. Monmouth County Ct. 1973), *aff'd*, 317 A.2d 695 (1974) (describing the psychological factors which compel an employee or prospective employee to submit to a polygraph, even when only "requested" by management). See also *Swope v. Florida Indus. Comm'n Unemp. Comp. Bd. of Rev.*, 159 So. 2d 653 (Fla. 3d DCA 1963) (holding that a discharged employee could not be denied unemployment

credulity to fathom a prospective employee not feeling compelled to sign the waiver for fear that, if he does not sign, he will not be offered employment.⁶⁵ The compulsion to comply with the employer's "request" would also seem to hold true for current employees, although not as strongly as with job applicants. In fact, the employer may aggravate the employee's psychological desires to comply with the "request" by subtle coercion, which is just short of a formal "demand."⁶⁶ Absent a statute that prevents this behavior, the *Farmer* decision, and its resulting protection, may be reduced to a nullity within a short period of time.⁶⁷

To combat this problem, many states have enacted legislation that not only prohibits an employer from demanding that an employee take the polygraph, but also prohibits the less imperative "requests." The language used in these statutes is varied. Some states prohibit an employer from requiring, requesting, or suggesting that an employee take a polygraph.⁶⁸ The District of Columbia provides an equally pervasive prohibition by preventing the employer from administering or having administered, or accepting, or using the results of the test.⁶⁹ Maine provides perhaps the most pervasive statutory prohibition. That state's statute prohibits employers from requiring, suggesting or requesting, administering, causing to be administered, or using or referring to the results of any test. Further, even if the employee requests that the test be given to him, the test must be administered in the presence of a witness chosen by the employee, the test must be recorded, and the results may not be used by the employer against the employee.⁷⁰ An equally comprehensive statute has recently been enacted by the Michigan legislature. It prohibits employers from re-

benefits when the discharge was for refusing to take a polygraph, but reserving judgment on the effect of a pre-employment waiver).

65. See *State v. Community Distributions*, 304 A.2d 213, 218 (N.J. Monmouth County Ct. 1973).

66. See, e.g., *Polsky v. Radio Shack*, 666 F.2d 824 (3d Cir. 1981).

67. In two recent cases, police officers had agreed as part of the application process that they would submit to a polygraph exam at a later time if requested. Their later discharges for refusal to submit to the test were sustained on appeal. *Kersey v. Shipley*, 673 F.2d 730 (4th Cir. 1982), cert. denied, 103 S. Ct. 80 (1982); *Migliore v. City of Lauderhill*, 415 So. 2d 62 (Fla. 4th DCA 1982).

68. Alaska, Connecticut (request or require); Delaware, Maine, New York (prohibits only regarding voice stress test). See *supra* note 6 for citations to statutes.

69. D.C. CODE ANN. § 36-802(a) (1973). See also Massachusetts (subjects or request, directly or indirectly); Oregon (subject to, directly or indirectly); Rhode Island (require, subject or cause, directly or indirectly to take); Washington (require or subject to test), cited *supra* note 6.

70. ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1982-83).

questing, requiring, administering, threatening to administer or attempting to administer a polygraph to employees or applicants.⁷¹

Two states allow the employer to request the employee to submit to the polygraph test if the employee is advised of his right to refuse.⁷² One state requires that the right to refuse be communicated in writing,⁷³ and the other state merely requires that the employer advise the employee that the test is voluntary.⁷⁴ The particular language used in these statutes is immaterial as long as it prohibits the employer from circumventing the prohibition against polygraph use by coercive means.

Another concern, which militates in favor of a statute on this subject, is the disparate treatment among various classes of employees under the current law. Although the *Farmer* decision clearly protects the tenured employee, other classes of employees appear to be less well guarded. The present state of the law is ambiguous. Can a polygraph be given to an employee in the private sector? Can a polygraph be required of a deputy sheriff? How about a job applicant, as opposed to a tenured employee?

In *Swope v. Florida Industrial Commission Unemployment Compensation Board of Review*,⁷⁵ the court held that an employee who had been discharged from a department store for refusing to take a polygraph had not committed "misconduct" within the meaning of the unemployment compensation statute and, therefore, could not be denied unemployment benefits.⁷⁶ The *Zimmer* court apparently read the *Swope* decision as a prohibition against discharging private sector employees based upon a refusal to submit to a polygraph, because it thought it necessary to distinguish private sector employees from their public sector counterparts.⁷⁷ Not only was this distinction tenuous,⁷⁸ but it was also unnecessary. *Swope* does not preclude an employer from discharging a private sector employee for refusing to take a polygraph, but merely

71. MICH. COMP. LAWS ANN. § 37.203 (Supp. 1983).

72. California and Minnesota.

73. California.

74. Minnesota.

75. 159 So. 2d 653 (Fla. 3d DCA 1963).

76. *Id.* at 653-54.

77. *State Dep't of Highway Safety & Motor Vehicles v. Zimmer*, 398 So. 2d 466, 468 (Fla. 4th DCA 1981) (Anstead, J., dissenting). See *supra* text accompanying note 46.

78. The distinction made by the court may be valid when the public employee is a police officer and the private employee is a floor sweeper, but it would seem ludicrous when the public employee is a street sweeper and the private employee is a lawyer, doctor, druggist, architect or brake assemblyman in a GM factory.

holds that, absent a pre-employment condition requiring him to submit, the employee is entitled to unemployment benefits.⁷⁹ In fact, before the *Farmer* decision, the *Swope* holding was probably equally applicable to public employees who were discharged for refusing to submit to a polygraph.⁸⁰

The *Swope* decision expressly leaves unanswered the question of whether acceptance of a job by an employee with notice of the test requirement would yield the same result. Further, *Swope* does not impede the employer's right to predicate discharge upon the refusal to submit to a polygraph. The *Farmer* decision sheds little or no light on either of these situations. Hence, the result in Florida could be that public sector employees receive far greater protection than private sector employees. This result is not necessarily unfavorable, but does represent an anomaly when contrasted with the policies of the legislatures of the twenty states that have enacted legislation limiting the polygraph's use in the employment context.⁸¹ This is another area that the legislature should consider in formulating a statute, for there seems to be no cogent reason for excluding private sector employees.

Another question in need of legislative attention is whether deputy sheriffs can be required to take a polygraph. The present state of the law in Florida is that deputy sheriffs can be so compelled.⁸² This is partially premised upon the fact that sheriffs in Florida are constitutional officers who have the right to appoint deputies and, likewise, to withdraw the appointment without a specific reason.⁸³ While the constitutional authority of sheriffs may be pervasive enough to justify this holding, it seems intuitively unfair to condone the disparate treatment of law enforcement officers who perform similar functions within the same state.⁸⁴ This is especially so after considering that a deputy sheriff who is discharged for refus-

79. *Valley Vendors v. Jamieson*, 630 P.2d 61 (Ariz. Ct. App. 1981) (on facts similar to *Swope*, the court expressly limited its decision to only preclude the denial of benefits, thereby having no effect on the right to discharge an employee).

80. *City of Dallas v. Texas Employment Comm'n*, 626 S.W.2d 549 (Tex. Ct. App. 1981) (although the city properly discharged an employee for refusing to submit to a polygraph, it was not "misconduct" within contemplation of the unemployment statute). *See also* decisions cited in *Valley Vendors v. Jamieson*, 630 P.2d 61, 66 n.2 (Ariz. Ct. App. 1981).

81. *See supra* notes 5 & 6.

82. *Fraternal Order of Police v. Freeman*, 372 So. 2d 945 (Fla. 3d DCA 1979).

83. *Id.* at 947.

84. Only one state treats deputy sheriffs differently from other police officers with regard to the polygraph requirement. Nebraska requires by statute that deputy sheriffs submit to a polygraph upon commencement of their employment and thereafter whenever requested. NEB. REV. STAT. § 23-1737 (1943).

ing to submit to a polygraph may seek and be denied employment as a municipal police officer on the grounds that he was involuntarily discharged for exercising a right that is inherent in the position that he seeks.⁸⁵

Another category of employee that is particularly vulnerable, even after the *Farmer* decision, is that of the prospective employee. Since the use of polygraph examinations by employers is a mandatory subject for collective bargaining, employers of organized labor are prohibited, in most circumstances, from unilaterally imposing the exam as a condition of continued employment.⁸⁶ Therefore, unionized private sector employees are able to protect themselves by bargaining with management.⁸⁷

These protections are not available to the prospective employee in either the public or private sector. The situation is particularly acute in the private sector. Since private employment does not involve state action, remedies for constitutional violations are unavailable under section 1983 of title 42, United States Code. Absent a statute protecting this class of employee, a wrongfully denied applicant in the private sector may have no legal redress.⁸⁸

The situation is not much better for the public sector employee. Although a section 1983 action is available, considerable hurdles must be overcome before a successful prosecution may be pursued under this theory.⁸⁹ That this is true is demonstrated by a recent

85. The Michigan Legislature had enacted a statute which, as construed, prohibited a sheriff from discharging a deputy based upon a refusal to submit to a polygraph. MICH. COMP. LAWS ANN. § 338.1726 (1976) (current version in MICH. COMP. LAWS ANN. §§ 37-201 to -209 (1983)); see also *Cyrus v. Calhoun County Sheriff*, 271 N.W.2d 249 (Mich. Ct. App. 1978). The statute withstood constitutional challenge based upon the fact that sheriffs in Michigan are constitutional officers. The court stated: "The power of the Legislature is also constitutionally created . . . and through that power the [l]egislature has passed both statutes at issue in this case. The constitutional underpinning of one is not greater than that of the other." 271 N.W.2d at 251.

86. *Miller, Worker Privacy and Collective Bargaining*, 33 LAB. L.J. 154, 160 (1982). See also *Craver, supra* note 59, at 32-33.

87. Prior to the *Farmer* decision, many police officers also protected themselves through collective bargaining agreements. In a recent study of 58 police collective bargaining agreements in Florida, 21 contracts addressed the issue of whether a police officer could be required to take a polygraph when he is the subject of an internal investigation. Of the 21 contracts, 18 provided that an officer could not be so compelled. *Stewart, Police and Firefighter Collective Bargaining in Florida*, Center for Employee Relations and the Law, Monograph No. 2, at 77 (1979). The *Farmer* decision may, therefore, have some impact on collective bargaining because police bargaining units will no longer have to bargain for a favorable provision on polygraphs.

88. *Toomey, Compelled Lie Detector Tests and Public Employees: What Happened to the Fifth Amendment?*, 21 S. TEX. L.J. 375, 386 (1981).

89. *Webb v. Village of Streamwood*, No. 79-C-4021, slip op. (N.D. Ill. Jan. 23, 1981).

decision of an Illinois federal district court. In that case the plaintiff, a police officer applicant, had successfully completed a battery of exams, including physical agility, medical, written, and oral tests, and was placed on an eligibility list. He was subsequently offered a position, contingent upon his successful completion of a polygraph. The plaintiff submitted to the exam; however, in the opinion of the polygraphist, the plaintiff had been deceptive. This opinion was founded upon the fact that the plaintiff had purposely controlled his breathing.⁹⁰ This conclusion was based upon the fact that the plaintiff's respiration cycles were eight to ten per minute while the normal rate, according to the examiner, is eighteen to twenty-one. Based on this information, the city removed the plaintiff's name from the list of eligible job applicants.

However, after offering additional information to establish his integrity and character, the plaintiff convinced the city to allow him to take another test. The second test was inconclusive, although the same examiner indicated that the plaintiff's breathing rate was still, in his opinion, "far below normal."⁹¹ The plaintiff submitted an affidavit from a medical doctor who stated that the plaintiff's breathing rate of eight to ten was "normal" and indicative of a "calm disposition and excellent respiratory function." Despite this evidence, the plaintiff was denied employment.⁹²

The plaintiff overcame the first hurdle when the court held that his position on the eligibility list constituted a protected property interest under Illinois law. Nevertheless, the court held that the defendant's actions were not arbitrary and capricious and denied plaintiff's claim for relief.⁹³

In a leading law review article, Professor Hermann, in arguing for a federal statute to protect the prospective employee from polygraph testing, made the following observations:

The prospective employee increasingly finds himself subject to unilaterally established personnel selection requirements which, for a great many jobs, include polygraph and personality testing. The reliability of the polygraph and the validity of personality testing are highly questionable, but the most serious threat posed by the use of the instrument is the invasion of the personal liberty of the worker subjected to interrogation. Polygraph testing is

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

an attempt to overbear the will of the person subjected to testing by measuring uncontrolled physiological responses, while personality testing poses much the same problem by attempting to reach beyond the conscious, articulated response of the person being examined. It is the character of the interrogation itself—focusing on past acts and associations, ferreting out attitudes, opinions, and beliefs about sex, politics, and religion—which presents the critical threat to individual integrity by the invasion of personal privacy.⁹⁴

Although no federal legislation has been enacted to date, the legislatures of twenty states have enacted statutes to protect this class of citizens.⁹⁵

V. INVASION OF PRIVACY

The most frequently stated constitutional objection to polygraph tests is that they are an invasion of the right to privacy as recognized in the landmark Supreme Court case of *Griswold v. Connecticut*.⁹⁶ Additionally, in Florida, the constitutional right of privacy under article I, section 23 of the Florida Constitution may prohibit “granting public employers carte blanche authority to force employees to submit to unlimited questioning during a lie detector test.”⁹⁷ One commentator has isolated four aspects of polygraph testing that are particularly intrusive and, arguably, constitute an invasion of personal privacy. The first aspect is the technical procedure used.

A blood pressure device similar to those used by physicians measures the subject's heart rate and blood pressure. A pneumograph, a tube fastened around the examinee's chest and abdomen, measures the examinee's rate of breathing by monitoring expansion of the chest and abdomen. Finally, electrodes fastened to the examinee's index and ring fingers monitor the variations in flow of electrical current through the subject's body.⁹⁸

94. Hermann, *Privacy, The Prospective Employee, and Employment Testing: The Need To Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 153-54 (1973). See also Craver, *supra* note 59, at 42 (recommending total abolition of pre-employment polygraph tests).

95. See *supra* note 6.

96. 381 U.S. 479, 484 (1965). See also *United States v. Perkins*, 383 F. Supp. 922, 926 n.1 (N.D. Ohio 1974).

97. *State Dep't of Highway Safety & Motor Vehicles v. Zimmer*, 398 So. 2d 463, 468 (Fla. 4th DCA 1981) (Anstead, J., dissenting).

98. Comment, *supra* note 63, at 117 n.17.

The second aspect is the broad scope of inquiry used by polygraphists covering areas not pertinent to the ultimate information sought, for example, opinions on sex, politics and religion.⁹⁹ Third, transcripts of the test may become part of the employee's file. Finally, the machine continuously monitors the subject's bodily functions, eliciting responses from the subject even when he chooses not to answer.¹⁰⁰

In *Fraternal Order of Police v. Freeman*, the court suggested that while administration of the polygraph is not an invasion of privacy, publishing the results or exceeding the proper scope of an examination may constitute a violation.¹⁰¹

Although this section is not intended as a full exposition on the subject of privacy in polygraph testing,¹⁰² it is offered as an introduction to the topic for two reasons: 1) as further argument in support of the need for a statute that will govern this area, and 2) in the event that such a statute is enacted, to demonstrate the need for procedures and safeguards that will protect the valued constitutional right of privacy.¹⁰³

VI. OTHER DRAFTING CONSIDERATIONS

A. Protected Class

One important issue in considering a polygraph statute is the question of whom to include in the protected class. This note has already discussed those employees excluded under present law and the need for remedial legislation to include them.¹⁰⁴ However, what

99. See *supra* note 94 and accompanying text.

100. Comment, *supra* note 63, at 117-18. Compare the *Fichera* decision. In response to an argument that the mandatory imposition of polygraph exams upon police officers is an invasion of privacy, the *Fichera* court said:

The polygraph is an extension of the age-old process of assessing the veracity of a witness, by scrutinizing his facial expression, rubescence, tremors, evasion of meeting the eye, and the like. It works through externals and is quite distinct from drug induced revelation, hypnosis, or any other form of narcoanalysis. In the limited field of cases such as this one, and those of the prior cases cited above, we find no deprivation of constitutional or legal rights.

Fichera v. State Personnel Bd., 32 Cal. Rptr. 159, 164 (Dist. Ct. App. 1963).

101. 372 So. 2d 945, 948 (Fla. 3d DCA 1979).

102. For a more detailed analysis of these considerations, see Hermann, *supra* note 94, at 126-36. See also Castagnera-Cain, *Defamation, Invasion of Privacy, and Use of Lie Detectors in Employee Relations-An Overview*, 4 GLENDALE L. REV. 189, 195-207 (1981).

103. See *Perkins*, 383 F. Supp. at 926 n.1. See also *State v. Community Distribs.*, 304 A.2d 213, 216 (N.J. Monmouth County Ct. 1973), *aff'd*, 317 A.2d 697 (N.J. 1974).

104. See *infra* notes 63-95 and accompanying text.

has not been explored is the classes of employees who have been specifically excluded in other jurisdictions and the purported justifications for these discrepancies in treatment.

As previously noted, the dichotomy between public and private sector employees has been recognized by the United States Supreme Court insofar as the privilege against self-incrimination is concerned.¹⁰⁵ Because a public sector employee is responsible only to his employer, the Court has held that the privilege does not bar compelling employees to answer questions that constitute an accounting for the public trust.¹⁰⁶ The Court made clear in *Uniformed Sanitation Men* that these considerations extend to all public employees, not only to police officers.¹⁰⁷

It would seem that the same rationale used by the Court in justifying the disparate treatment in the compelled questioning context would also be applicable in the case of questioning through the medium of polygraphs.¹⁰⁸ Most states, however, have not drawn the line here. Instead, they have chosen to give protection to all public employees except police officers.¹⁰⁹ One state statute excepts from its protection police applicants and police employees who are seeking promotion to the rank of captain or higher.¹¹⁰ Ironically, in California, the courts of which were the first to condone the administration of polygraph exams to police officers,¹¹¹ two statutes have been enacted, the net effect of which allows employers to administer polygraphs to all public employees except police

105. See *supra* note 28 and accompanying text.

106. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).

107. *Uniformed Sanitation Men v. Comm'r of Sanitation*, 392 U.S. 280, 284-85 (1968).

The *Zimmer* court justified the public/private dichotomy as follows: "The personal integrity of the employees of a private employer has little, if any, direct impact on the members of the public; however, the personal integrity of public employees has enormous impact on the public and is of serious concern to the public." *State Dep't of Highway Safety & Motor Vehicles v. Zimmer* 398 So. 2d 463, 466 (Fla. 4th DCA 1981). This distinction is also endorsed by Chief Justice Alderman in his *Farmer* dissent. *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187, 192 (Fla. 1983) (Alderman, C.J. dissenting). As previously argued, however, this distinction is unconvincing. See *supra* note 78. Rather than make the division at the public/private line, it would seem more logical to exempt certain categories of employee from a general prohibition against the polygraph based on the sensitive nature of the employee's position.

108. See, e.g., *Rivera v. City of Douglas*, 644 P.2d 271 (Ariz. Ct. App. 1982) (public works employees could be required under *Garrity* and its progeny to submit to a polygraph).

109. See, e.g., statutes of Alaska, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, Massachusetts, Montana, Pennsylvania, and Rhode Island. These statutes are cited *supra* at note 6.

110. WASH. REV. CODE ANN. § 49.44.120 (West 1981 & Supp. 1982).

111. See *McCain v. Sheridan*, 324 P.2d 923 (Cal. Dist. Ct. App. 1958).

officers.¹¹²

The justification for these different approaches is unclear. The Iowa Supreme Court, in holding that a city mechanic could not be compelled to submit to a polygraph, distinguished cases involving police officers and firefighters by reasoning that those cases focused on the "unique law-oriented position such officers hold in our society . . . as well as the paramilitary character of those departments."¹¹³ Another state supreme court, however, included policemen, but specifically excluded firemen from the requirement where the investigated activity involved a crime committed outside the performance of the fireman's official duties.¹¹⁴

Another purported justification for the disparate treatment of police officers concerns the constitutional right of privacy. One court has stated that the right of privacy confers upon the private citizen a right to refuse to submit to a polygraph.¹¹⁵ In contrast, the court said that a police officer has "subordinated his right of privacy as a private citizen to the superior right of the public to an efficient and credible police department."¹¹⁶ While the invasion of privacy may be a legitimate concern in drafting a polygraph statute,¹¹⁷ it would not seem to be a valid reason for the aforementioned double standard.¹¹⁸

Probably the most widely cited justification for requiring police officers to submit to the polygraph was articulated by an early California court: "[T]he basis was the need for confidence of the public in officers who have sworn to uphold and enforce the laws, which require officers, under certain circumstances, to risk self-incrimination, not in defense against accusation of criminal conduct, but in the course of maintaining their positions."¹¹⁹ This seems to be the most logical distinction between police officers and other public employees. A police officer is sworn to uphold the law. He

112. CAL. LAB. CODE § 432.2 (West 1971 & Supp. 1982); CAL. GOV'T CODE § 3307 (West 1980); see also *Estes v. City of Grover City*, 147 Cal. Rptr. 131 (Ct. App. 1978) (interpreted statute which creates a privilege against compelling an officer to submit to a polygraph test as a bar to admission of statement made by officer under threat of polygraph, even when the statement was made prior to enactment of statute).

113. *In re Fairbanks*, 287 N.W.2d 579, 581 (Iowa 1980).

114. *Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974).

115. *Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex. Ct. App. 1973), *rev'd on other grounds*, 513 S.W.2d 1 (Tex. 1974).

116. *Id.*

117. See *supra* text accompanying notes 96-103.

118. Cf. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (police officer not relegated to watered-down version of constitutional rights).

119. *Fichera v. State Personnel Bd.*, 32 Cal. Rptr. 159, 163 (Dist. Ct. App. 1963).

has a high degree of power, and an abuse of this power can have a devastating impact on the citizens he has sworn to protect. Further, if a police department is to be effective, the public must have confidence in it, which means that the department must be able to free itself of bad employees. Hence, there may exist limited circumstances where a polygraph exam is necessary to guard the public trust. Any such statute should be carefully written, however, so as to authorize the administration of these exams only when absolutely necessary.

Several states have exempted other classes of employees from the blanket protection of an anti-polygraph statute. As previously discussed, California exempts all public employees except police officers.¹²⁰ New Jersey, Pennsylvania, and Washington exempt employees who have access to dangerous drugs.¹²¹ New Jersey evidently enacted the statutory exemption after a court refused to judicially create it and held that a drug store owner was criminally liable for requiring an employee to take a polygraph test.¹²² The argument advanced to justify this exemption is one that combines the property interests of the employer with the public interest in preventing dangerous drugs from entering the illicit market.¹²³ Other exceptions include persons who hold positions of national security,¹²⁴ and fire department and corrections personnel.¹²⁵

In addition to the aforementioned exemptions, which target certain classes of individuals, one state provides an exception for tests administered by law enforcement agencies conducting criminal investigations.¹²⁶ Two states exempt tests administered by law enforcement agencies in the performance of official duties.¹²⁷ Reading these exceptions in the context of the statutes, it appears that they were intended to insure that the prohibition against polygraphs would only extend to employer/employee scenarios, leaving law enforcement officials free to request individuals to take polygraph examinations.

The Massachusetts Supreme Court, however, has interpreted the language of the Massachusetts statute differently. In *Baker v. City*

120. CAL. LAB. CODE § 432.2 (West 1971 & Supp. 1982).

121. See *supra* note 6.

122. *State v. Community Distributions*, 304 A.2d 213 (N.J. Monmouth County Ct. 1973), *aff'd*, 317 A.2d 697 (N.J. 1974).

123. *Id.*

124. WASH. REV. CODE ANN. § 49.44.120 (Supp. 1982).

125. D.C. CODE ANN. § 36-802(b) (1981).

126. MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1982).

127. *Id.*; DEL. CODE ANN. tit. 19, § 704 (1979).

of *Lawrence*,¹²⁸ police officers were implicated in a larceny and were told to take a polygraph. Relying on the statute, the officers refused. The court interpreted the aforementioned exception as a legislative recognition of the "interest of the employer in applying some pressure to assist an investigation leading to exoneration of the employee or the opposite."¹²⁹ Therefore, under this interpretation, a police agency may request or demand that an employee take a polygraph whenever a crime is suspected. The exception has also been interpreted to allow private employers to coerce employees into taking an exam when the exam is administered by police officers who are investigating a criminal violation.¹³⁰ Thus, when a crime is involved, the employer is able to accomplish indirectly what he cannot achieve directly.

To avoid this anomalous result, language such as that used in the New York statute is recommended. That statute expressly limits its applicability to employer/employee relationships and is not as vulnerable to misconstruction as the Massachusetts statute.¹³¹

VII. SAFEGUARDS

In the event that the Florida Legislature determines that certain classes of employees should be exempted from the protection of an anti-polygraph statute, that statute should include safeguards to ensure that the ensuing exam is as fair as possible. This area should cover competency of the device used, competency of the examiner, conditions under which an exam may be required or requested, the scope of the examination, the procedure used during the exam, and representation by counsel and/or union representatives.

A. Test Device

Many of the state statutes presently in force inadequately define the particular testing device that is to be used. Almost all the statutes prohibit the use of the polygraph or lie detector test. These statutes, however, may not be broad enough to prohibit other deception detection devices.¹³² The polygraph is the most reliable of

128. 409 N.E.2d 710 (Mass. 1979).

129. *Id.* at 714.

130. *Baldassare v. Delta Air Lines*, No. 79-1997-T, slip op. (D. Mass. Sept. 29, 1982).

131. N.Y. LAB. LAW § 733-35 (McKinney 1978).

132. See, e.g., statutes in Alaska (polygraph or lie detecting device), Hawaii (polygraph or lie detector), Maryland (polygraph or similar test), Massachusetts (lie detector tests),

any of these devices, and by narrowly wording the statutes to prohibit only this device, the less reliable tests are the ones being con-
 doned.¹³³ Some states have attempted to cure this problem with a
 broad definition of "polygraph."¹³⁴ The legislatures of two states,
 New York and Wisconsin, have apparently drawn the line around
 devices determined to be less reliable. The New York statute pro-
 hibits only the use of voice stress tests in the employment con-
 text.¹³⁵ The Wisconsin Legislature takes a more rational approach
 by first prohibiting everything, then accepting the test that it be-
 lieves most reliable and defining it by its physical characteristics
 rather than by a generic label.¹³⁶

None of the states that exclude particular classes of people from
 the protection of their statutes provide any minimum require-
 ments on the type of machine that can be used to test these indi-
 viduals. California, which gives police officers broader protection
 than other public sector employees,¹³⁷ takes a rather curious ap-
 proach by prohibiting employers from compelling police officers to
 take a "polygraph." Apparently, an officer in California could be

New Jersey (lie detector test), Washington (lie detector or similar test), *supra* note 6.

133. *McGinige v. Town of Greenburgh*, 399 N.Y.S.2d 250 (N.Y. App. Div. 1977), *rev'd*,
 425 N.Y.S.2d 61 (1978) (distinguishes polygraph from B & W psychometer in that the for-
 mer gives a permanent record of four bodily functions and can be expertly prepared and
 administered). In addition to the machine's assets, statutes such as that of Florida provide
 licensing requirements that facilitate operator competence. FLA. STAT. §§ 493.561-.569
 (1981). *See also* Quade, *Use of Honesty Tests Raises Privacy Issue*, 68 ABA L.J. 671 (1982)
 (Minnesota court rules that honesty test is not within the prohibition of the anti-polygraph
 statute).

134. *See, e.g.*, ME. REV. STAT. ANN. tit. 32, § 7153(4) (Supp. 1982-83) ("polygraph means
 a lie detector, polygraph, deceptograph, psychological stress evaluator or other device, mech-
 anism or instrument, regardless of what it is called, which is operated or the results of which
 are used or interpreted by a polygraph examiner for the purpose of detecting deception or
 verifying truth of statements"). *See also* CONN. GEN. STAT. ANN. §§ 31-51g (West 1958 &
 Supp. 1982) ("polygraph means any mechanical or electrical instrument or device of any
 type used or allegedly used to examine, test or question individuals for the purpose of deter-
 mining truthfulness").

135. Defined as a "mechanical device or instrument which purports to determine the
 truth or falsity of statements . . . on the basis of vocal fluctuations or vocal stress." N.Y.
 LAB. LAW § 733 (McKinney 1978).

136. The Wisconsin statute provides:

This subsection does not apply to the use of an instrument or device for the pur-
 pose of verifying truthfulness or detecting deception, or assisting in the reporting
 of a diagnostic opinion as to either of these, which, at a minimum, is capable of
 recording visually, permanently and simultaneously indications of a person's car-
 diovascular pattern and changes therein and a person's respiratory pattern and
 changes therein.

WIS. STAT. ANN. § 111.37 (West 1982).

137. *See supra* note 112 and accompanying text.

compelled to submit to a "voice stress test" or other less reliable instruments.

The point of this discussion is that, if it is the legislature's intent to prohibit all such testing, then the language used should be pervasive enough to prevent circumvention by the use of other machines not expressly prohibited by the statute.¹³⁸ If, however, the legislature intends to draw class exceptions to the statute, then those individuals should only be subject to tests on the most reliable device. Further, rather than merely naming the devices, the statute should describe the characteristics of the machine.

B. Examiner Competence

Approximately twenty states have now enacted legislation to regulate polygraph examiner competence.¹³⁹ Many of these statutes were enacted after one of the foremost authorities on polygraphs, Fred Inbau, revealed that eighty percent of all polygraph operators were incompetent.¹⁴⁰

While an analysis of these statutes is beyond the scope of this note, two comments on the Florida statute are relevant. First, the Florida statute applies only to polygraphs.¹⁴¹ Therefore, if any testing is allowed in the employment context, it should only involve machines that fall within the gamut of the licensing statute. Second, it should be noted that the licensing statute does not apply to examiners employed by municipal, county, state or federal agen-

138. See, e.g., Maine statute, *supra* note 134.

139. As compiled in Comment, *supra* note 63, at 115-16, these states are Alabama (ALA. CODE tit. 34, §§ 25-1 to -36 (1977 & Supp. 1981)); Arizona (ARIZ. REV. STAT. ANN. §§ 32.2701-.2715 (1976 & Cum. Supp. 1981)); Arkansas (ARK. STAT. ANN. §§ 71-2201 to -2225 (1979)); Florida (FLA. STAT. ANN. §§ 493.561-.569 (West 1981)); Georgia (GA. CODE §§ 84-5001 to -5016 (1975)); Illinois (ILL. REV. STAT. ch. 111, §§ 2401-2432 (1978 & Cum. Supp. 1981)); Kentucky (KY. REV. STAT. §§ 329.020-.990 (1977 & Cum. Supp. 1981)); Maine (ME. REV. STAT. ANN. tit. 32, §§ 7151-7169 (Cum. Supp. 1981)); Michigan (MICH. COMP. LAWS §§ 338.1701-.1729 (1970 & Supp. 1981)); Mississippi (MISS. CODE ANN. §§ 73-29-1 to -47 (1973)); Nevada (NEV. REV. STAT. §§ 648.055-.210 (1979)); New Mexico (N.M. STAT. ANN. §§ 67-31A-1 to -11 (1974)); North Carolina (N.C. GEN. STAT. §§ 66.49.1-.8 (1975)); North Dakota (N.D. CENT. CODE §§ 43-31-01 to -17 (1978 & Supp. 1979)); Oklahoma (OKLA. STAT. tit. 59 §§ 1451-1476 (West Cum. Supp. 1980)); Oregon (OR. REV. STAT. §§ 703.050-.140 (1979)); South Carolina (S.C. CODE ANN. §§ 40-53-10 to -250 (1976 & Supp. 1980)); Utah (UTAH CODE ANN. §§ 34-37-1 to -14 (1974 & Supp. 1979)); Vermont (VT. STAT. ANN. tit. 26, §§ 2901-10 (Supp. 1981)); Virginia (VA. CODE §§ 54-916 to -922 (1978)).

140. Comment, *supra* note 55, at 702 n.49 (citing *Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 88th Cong., 2d Sess. 168 (1964)).

141. FLA. STAT. § 493.561(5) (1981).

cies, provided that the examiners are using the device "in the performance of [their] official duties."¹⁴² Absent credible data showing that these examiners are as competent as licensed examiners (who must meet educational and internship requirements),¹⁴³ they should not be permitted to conduct examinations in the employment context. This will provide the employee some protection from incompetent examiners.

C. Prerequisites and Scope of Examination

If certain classes of employees are exempt from the protections of an anti-polygraph statute, (for example, police officers and/or persons having access to dangerous drugs), the statute should provide safeguards that will ensure that the examination is used only under circumstances when it is reasonably necessary to protect the asserted public interest. For example, drug store employees should not be required to submit to a polygraph examination, unless it has been established that drugs are missing and that the particular employee is "suspected," based on some objective criteria.¹⁴⁴ Similarly, police officers should not be subjected to the polygraph due to a concern over incidents which are minor in nature, such as non-criminal violations of departmental policy that would not ordinarily subject the officer to dismissal.¹⁴⁵ In all cases, the polygraph should not be used when less intrusive means of satisfactorily concluding the investigation are available.¹⁴⁶ This requirement was apparently satisfied in *Farmer*, since the FBI had investigated the incident for over a year and was unable to reach a solution.

In an often cited decision on this topic, the Washington Supreme Court, after articulating the seriousness of the allegations against the police officers and the need for a thorough investigation to restore public confidence, said:

Under these circumstances, we conclude and hold that if, in the exercise of prudent judgment, the investigating authority determines it reasonably necessary to utilize the polygraph examina-

142. FLA. STAT. § 493.562 (1981).

143. See FLA. STAT. §§ 493.566-.569 (1981).

144. Cf. N.J. STAT. ANN. § 2C: 40A-1 (West 1981) (unconditional exception).

145. Cf. *Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex. Civ. App. 1973), *rev'd on other grounds*, 513 S.W.2d (Tex. 1974) (held that a police officer can be required to take polygraph during investigation of any matter relating to his *efficiency* and *credibility*).

146. Cf. *Eshelman v. Blubaum*, 560 P.2d 1283, 1286 (Ariz. Ct. App. 1977) (polygraph always proper to verify statements regardless of whether or not all other avenues of investigation have been exhausted).

tion as an investigatory tool to test the dependability of prior answers of suspected officers to questions specifically, narrowly, and directly related to the performance of their official duties, then, such investigating authority may properly request such officers to submit to a polygraph test under pain of dismissal for refusal.

Bearing in mind that the reasonableness of an investigating authority's request, under varying circumstances, can be subjected to judicial scrutiny and abuses of discretion thereby curbed, coupled with the fact that, in any event, the results of a polygraph test and a subject's willingness or unwillingness to take the test cannot be admitted into evidence in subsequent criminal proceedings, we see no constitutional or legal barrier to the conclusion we have reached.¹⁴⁷

As stated by the Washington court, not only should the nature of the investigation warrant this extreme measure and the request be reasonable,¹⁴⁸ but the scope of the questioning should be narrow enough to comport with the requirements set forth in *Gardner*.¹⁴⁹

The scope of questioning in polygraph examinations has been the subject of considerable controversy.¹⁵⁰ This is due partially to the nature of the polygraph interview itself. Certain questions are used as controls to ascertain how the subject reacts when he tells the truth and when he lies.¹⁵¹ The problem is particularly acute for the prospective employee where the topic of questioning is very broad and can easily become an invasion of personal privacy.¹⁵² The scope of questions that may be asked of applicants should be limited by statute to exclude nonrelevant topics.¹⁵³

In the public sector, current employees are afforded some protection through the *Gardner* decision in that questioning must specifically relate to the performance of their duties. Of course, definitional problems come into play with regard to this requirement.¹⁵⁴

147. *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485, 493 (Wash. 1972).

148. *Cf. Myers v. Cook County Police and Corrections Merit Bd.*, 384 N.E.2d 805 (Ill. App. Ct. 1978) (order that officer take the polygraph need not be reasonable for discharge based on refusal to submit). *See Toomey, supra* note 88, at 383 (*Myers* decision is anomalous).

149. *See supra* notes 29-33 and accompanying text.

150. *State Dep't of Highway Safety & Motor Vehicles v. Zimmer*, 398 So. 2d 463, 467 (Fla. 4th DCA 1981) (scope of polygraph exam "virtually unlimited"); *Seattle Police Officers' Guild v. City of Seattle*, 494 P.2d 485, 496 (Wash. 1972) (technique of operator is to ask "irrelevant questions").

151. *See Hermann, supra* note 94, at 80-83.

152. *Id.* at 82-83.

153. *See, e.g., supra* note 94 and accompanying text.

154. *See, e.g., Talent v. City of Abilene*, 508 S.W.2d 592 (Tex. 1974) (theft of pickup

Conversly, private sector employees are not protected by the *Gardner* requirement. Any statute which excepts private sector employees should provide scope limitations similar to those afforded public employees through the *Gardner* decision. As one commentator concludes:

Mandatory lie detector examinations should be countenanced only when all of the following conditions exist: (1) serious employee misconduct is suspected, involving a substantial threat to production, discipline, or safety; (2) less drastic investigative techniques have been either unsuccessfully attempted or rejected as unworkable under the particular circumstances; (3) the employer has accumulated sufficient independent evidence to create a reasonable suspicion that the worker in question possesses relevant information that he has refused to disclose voluntarily. Even where a compulsory lie detector test is appropriate, the scope of inquiry should be as narrow as possible. Although the polygraph operator may have to ask personal questions not directly related to the present employment context for the purpose of calibrating the machine, none of the responses to such questions should be disclosed to management officials or other parties. Only answers directly related to the specific misconduct necessitating the examination should be divulged, and only to appropriate persons.¹⁵⁵

As to the test results, one state has added a precaution which prohibits disclosing the results of a polygraph test to anyone not authorized by the employee to receive them.¹⁵⁶ This additional precaution seems well advised and would help ensure that the employee's privacy interests are protected.¹⁵⁷

D. Procedures Used

In *Frey v. Department of Police*,¹⁵⁸ a police officer took three polygraph examinations, all within the course of a day. When the examinations proved inconclusive, he was ordered to return on the next day. He refused, claiming exhaustion, and requested a continuance, which was denied. The court, quoting the police super-

truck while off-duty was not sufficiently related to fireman's duties to give fire chief authority to require polygraph examination).

155. Craver, *supra* note 59, at 41-42.

156. MINN. STAT. ANN. § 181.76 (West 1980).

157. The constitutionality of this provision was upheld in *State v. Century Camera, Inc.*, 309 N.W.2d 735 (Minn. 1981).

158. 288 So. 2d 410 (La. Ct. App. 1974).

intendant's testimony that an immediate investigation into plaintiff's bribery activity was necessary, upheld the discharge for insubordination, rejecting the plaintiff's argument that the order was unreasonable.¹⁵⁹

In Florida, because of a statutory "Bill of Rights," law enforcement officers are probably protected from this type of practice.¹⁶⁰ In addition to statutory protections, employees in the public and private sectors may be protected by collective bargaining agreements. Nevertheless, any statute which authorizes the administration of polygraph tests should, for the benefit of applicants and non-union employees, set forth a procedure for the conduct of examinations covering such areas as: 1) timely notice of the conduct being investigated (including a list of the questions to be asked); 2) place of the interview; 3) compensation for the employee's time; 4) reasonable periods of rest during the questioning and between examinations, if more than one is given; 5) a cap on the number of exams that can be administered to an employee during the same investigation; 6) the right to explain any answers that the examiner believes are evasive or deceptive; 7) the right to have the printed graph interpreted by a second examiner; 8) the right to receive a copy of the results; and 9) the requirement that a copy of any statutory rights be given to the employee or applicant before the administration of the exam.

E. Representation

In addition to the aforementioned protections, an employee should be entitled to representation at the examination. In the public sector, because *Garrity* and *Gardner* protect the police officer against self-incrimination, most courts have held that there is no constitutional right to counsel at these examinations.¹⁶¹ In the private sector, it would seem that the same reasoning obtains; a compelled statement is not voluntary, and is, therefore, inadmissible. However, the absence of state action in the private context may alter the result in that scenario.

At a minimum, in the case of organized employees, it is clear that there exists a right to union representation during a polygraph

159. *Id.* at 412.

160. FLA. STAT. § 112.532(1) (1981 & Supp. 1982).

161. *See, e.g.,* *Grabinger v. Conlisk*, 320 F. Supp. 1213 (N.D. Ill. 1970); *Eshelman v. Blubaum*, 560 P.2d 1283 (Ariz. Ct. App. 1977). *Cf. Baxley v. City of North Charleston*, 533 F. Supp. 1248 (D.S.C. 1982) (holding that examinee is entitled to counsel when investigation involves criminal allegations).

exam. In a recent decision, the Public Employees Relations Commission held that a police officer is entitled to union representation at a polygraph exam.¹⁶² The Commission considered an argument that the presence of a third person at the exam would distort the results. It concluded, however, that this could easily be cured by use of a two-way mirror or microphone, through which the representative could monitor the exam.¹⁶³ The right to union representation at polygraph exams also inures to private sector employees.¹⁶⁴

The additional safeguard of representation should be provided by statute to protect employees who are not presently protected under case decision. This will ensure that the previously discussed protections are adhered to scrupulously.

VIII. PENALTIES

As a final measure to ensure employer compliance with the operative provisions of protective legislation, the statute proposed must include an effective penalty provision. For example, many states provide criminal penalties for violations.¹⁶⁵ Other states go further and provide criminal liability, tort liability and attorney's fees.¹⁶⁶ The Michigan statute provides for an amount equal to twice the lost wages as damages when a tort action is brought.¹⁶⁷ It must be remembered when dealing with large corporations that a small civil fine would hardly serve as a deterrent to those practices.¹⁶⁸

IX. CONSTITUTIONALITY

To date, constitutional attacks on polygraph prohibitions have been unsuccessful.¹⁶⁹ Arguments asserted by plaintiffs seeking to attack such legislation have included: 1) violation of due process and equal protection in that the employer is unable to protect his property, because requiring the employee to take a polygraph is

162. *Fraternal Order of Police v. City of Clearwater*, No. CA-82-043 (Nov. 1, 1982).

163. *Id.* at 4-5.

164. Craver, *supra* note 59, at 31 n.135.

165. See, e.g., statutes of Alaska, Delaware, Hawaii, Idaho, Maine, Maryland, Montana, New Jersey, and Washington, *supra* note 6.

166. Michigan, Minnesota, District of Columbia.

167. MICH. COMP. LAWS ANN. § 37.207(3) (1983).

168. See, e.g., MASS. GEN. LAWS ANN., ch. 149, § 19B (West 1973) (fine of not more than \$200), R.I. GEN. LAWS § 28-6.1-2 (1956) (fine of not more than \$200).

169. *State v. Century Camera, Inc.*, 309 N.W.2d 735 (Minn. 1981); *State v. Community Distribs.*, 317 A.2d 697 (N.J. 1974); *Nothdurft v. Ross*, 445 N.Y.S.2d 222 (App. Div. 1981).

forbidden,¹⁷⁰ 2) violation of due process and equal protection in that plaintiff's business (administering polygraph tests) was adversely affected by such a statute,¹⁷¹ 3) unconstitutional overbreadth,¹⁷² 4) unconstitutional vagueness.¹⁷³

The Minnesota Supreme Court held that the statute regulated commercial speech and was, therefore, reviewable under the four-part test of *Central Hudson Gas and Electric Corp. v. Public Service Commission*.¹⁷⁴ After determining that the speech was not protected under the commercial speech analysis, the court addressed the vagueness issue. The vagueness controversy centered around the following phrase: "polygraph, voice stress analysis, or any test purporting to test the honesty of any employee."¹⁷⁵ The court found it necessary to construe this phrase as including any test which measures physiological changes in the subject tested, thus excluding written psychological questionnaires.¹⁷⁶ Thus construed, the court upheld the constitutional validity of the statute.¹⁷⁷

X. CONCLUSION

Sparked by the *Farmer* decision, the 1983 session of the Florida Legislature was presented a bill that would have provided a well-drafted, comprehensive solution to the issues discussed in this note.¹⁷⁸ However, the bill did not progress beyond committee. Under the proposed legislation, employers, their agents, and employment agencies would have been prohibited from requesting or requiring employees and prospective employees to submit to a pol-

170. *State v. Community Distributions*, 317 A.2d 697, 700 (N.J. 1974).

171. *State v. Century Camera*, v. 309 N.W.2d 735, 745 (Minn. 1981); *Nothdurft v. Ross*, 445 N.Y.S.2d 222 (App. Div. 1981).

172. *Century Camera*, 309 N.W.2d at 738.

173. *Id.* at 744-45.

174. 447 U.S. 557, 566 (1980).

For commercial speech to come within (the protection of the first amendment), it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Century Camera, 309 N.W.2d at 742.

175. *Id.* at 745 (emphasis added).

176. *Id.*

177. *Id.* at 745-46.

178. Fla. HB 805 (1983).

ygraph examination.¹⁷⁹ The bill was made expressly applicable to public and private sector employees, and included a pervasive description of prohibited deception detection devices.¹⁸⁰ Further, the penalty provisions included criminal and civil liability (double damages for lost wages), and a provision entitling the plaintiff to reasonable attorney's fees.¹⁸¹

Since the bill did not exempt any particular class of employee (for example police officers) it was a more than satisfactory solution to the major considerations discussed in this note. Should the 1984 legislature consider the bill again, however, and elect to adopt the majority rule excepting police officers from its protective provisions, it is urged that the drafters give serious consideration to the suggested safeguards. If careful consideration renders it advisable, such an exception may be defensible. However, a blanket exception that is not carefully tailored to meet the policies that warrant its inception would be without practical or moral justification.¹⁸²

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179. *Id.* at § 3.

180. The prohibition is equally as pervasive as that provided by ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1982-83); *see supra* note 134.

181. Fla. HB 805, § 4 (1983).

182. In addition, the bill includes two features which are particularly noteworthy. First, the bill would prohibit employers from obtaining a waiver from employees of their rights under the statute. *Id.* at § (3)(c). While this provision might not be necessary (*see State v. Berkey Photo, Inc.* 374 A.2d 1226 (N.J. Super. Ct. App. Div. 1977)), it provides assurance that the statute will not be circumvented by savvy employers. *See also* Minnesota and Wisconsin statutes, *supra* note 6. Second, the Florida bill would prohibit the request to take the polygraph not only as a condition of employment, but also as a condition of promotion or change in status. This avoids the possibility of unfavorable interpretations of the phrase "conditions of employment." *Id.* at § 3.