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Lie Detectors in the Employment Context

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LIE DETECTORS IN THE EMPLOYMENT CONTEXT

"Polygraph them all. I don't know anything about polygraphs and I don't know how accurate they are, but I know they'll scare the hell out of people."

Richard M. Nixon
July 24, 1971 *

Senate Bill 432, proposed during the 1974 regular session of the Louisiana legislature, would have prohibited the use of the lie detector in employment and pre-employment screening. The bill would also have made it illegal for any employer or lie detector operator to transmit the results of a lie detector test to third persons. Despite the bill's failure in committee,[1] its introduction served to call attention to the major legal problems presented by employers' use of the lie detection method as a security measure.

At the heart of the legal controversy over employers' use of lie detectors are the conflicting interests of employer and employee. The employer's legitimate property interest in the security of his business and his prerogatives in predicating employment decisions upon standards of his own choosing are pitted against the interests of employees in personal privacy and in having decision-making affecting their job security based upon accurate data. Certain basic precepts of constitutional law, although applicable only to governmental action and not to private employer conduct, indicate a deep-rooted suspicion of the use of the device by forces wielding power over the individual.

The constitutional objection most frequently made to the lie detector is that it invades the constitutional right of privacy of the individual,[2] recognized by the United States Supreme Court in the landmark decision of *Griswold v. Connecticut*.[3] The untrammeled use

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).

1. LA. S. JOUR., 37th Reg. Sess., vol. 1 at 718 (1974).

2. *See, e.g.*, State v. Community Distrib., Inc., 64 N.J. 479, 317 A.2d 697 (1974); Seattle Police Officers' Guild v. City of Seattle, 80 Wash. 2d 307, 494 P.2d 485 (1972) (dissenting opinion); Bowman Transp. Co., 60 Lab. Arb. 837 (1973); Lag Drug Co., 39 Lab. Arb. 1121 (1962).

3. 381 U.S. 479 (1965). The right to privacy was first enunciated in 1890 as the "right to be let alone." Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The first significant recognition of the right to privacy came in *Boyd v. United States*, 116 U.S. 616, 630 (1885). The next seventy-five years saw sporadic development of the right in various fields. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Public Util. Comm. v. Pollak, 343 U.S. 451 (1952); Breard v. City of Alexandria, 341 U.S. 622 (1952); Nardone v. United States, 302 U.S. 372 (1937).

of lie detectors in searches conducted by state officials may also be constitutionally infirm under the rationale of *Katz v. United States*,[4] which held that the fourth amendment "protects people—and not simply 'areas.' "[5] That improper use of the polygraph may infringe upon the right against self-incrimination was indicated by the United States Supreme Court in *Schmerber v. California*:[6]

> Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.[7]

Finally, scientific evidence used in criminal trials must meet certain basic standards of reliability to fulfill the requirements of due process under the fifth and fourteenth amendments.[8] In *Frye v. United States*,[9] a federal court of appeals upheld the lower court's exclusion of lie detector results on the basis that the "test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony. . . ."[10] Since *Frye*, American courts have almost unanimously excluded test results in criminal cases,[11] oftentimes even when joint stipulations have been made.[12]

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4. 389 U.S. 347 (1967).

5. *Id.* at 353.

6. 384 U.S. 757 (1966).

7. *Id.* at 764.

8. *See generally* Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956); People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1966); State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (1968). *See also* Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313 (1964).

9. 293 F. 1013 (D.C. Cir. 1923).

10. *Id.* at 1014.

11. *See. e.g.*, United States v. Watts, 502 F.2d 726 (9th Cir. 1974); United States v. Cochran, 499 F.2d 380 (5th Cir. 1974); Cagle v. State, 132 Ga. App. 227, 207 S.E.2d 703 (1974); State v. Corbin, 285 So. 2d 234 (La. 1973); People v. Levelston, 54 Mich. 477, 221 N.W.2d 235 (1974). *Contra*, State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948) (test results allowed where defendant was made fully aware of the lie detection process and examiner's qualifications, and waived his right against self-incrimination); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960).

12. *See* State v. Hill, 40 Ohio App. 2d 16, 317 N.E.2d 233 (1974); White v. State, 496 S.W.2d 642 (Tex. Cr. App. 1973).

In light of the constitutional difficulties, it is not surprising that the state has been allowed to use lie detectors only in compelling circumstances. The results of lie detector examinations have been held to be inadmissible in disbarment proceedings,[13] and two jurisdictions have established that refusal by an employee to submit to a lie detector test is not "misconduct connected with the job" that will bar a claimant from obtaining unemployment compensation.[14] Moreover, several federal governmental agencies, including the Defense Department, the Commerce Department, the United States Postal Service, and the Atomic Energy Commission have voluntarily discontinued the use of the device,[15] one agency citing "intangible costs in employee morale" as a major reason for abandoning the test.[16]

Some use of the device by governmental agencies, however, has withstood legal challenge. Several decisions have upheld the right of police departments to administer the tests to individual policemen during internal security investigations. The issue has arisen in Louisiana courts four times in recent years,[17] the holdings accurately reflecting the majority American view on the question.[18] The leading case of *Roux v. New Orleans Police Department*[19] announced the rule

13. *In re* Moyer, 77 N.M. 253, 421 P.2d 781 (1966).

14. Swope v. Florida Indus. Comm'n Unemployment Compensation Bd. of Review, 159 So. 2d 653 (Fla. App. 1963); Charles Livingston & Sons, Inc. v. Constance, 185 N.E.2d 655 (Ohio App. 1961).

15. *See The Lie Detector as a Surveillance Device*, ACLU REPORTS, February, 1973, at 47.

16. *Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the Subcomm. of Foreign Operations and Government Information of the House Comm. on Government Operations*, 88th Cong., 2d Sess., pt. 1, at 168 (1964).

17. Frey v. Department of Police, 288 So. 2d 410 (La. App. 4th Cir. 1973); Dieck v. Department of Police, 266 So. 2d 500 (La. App. 4th Cir. 1972); Clayton v. New Orleans Police Dept., 236 So. 2d 548 (La. App. 4th Cir.), *writ denied*, 256 La. 867, 239 So. 2d 363 (1970); Roux v. New Orleans Police Department, 223 So. 2d 905 (La. App. 4th Cir. 1969), *writ denied*, 254 La. 815, 227 So. 2d 148, *cert. denied*, 397 U.S. 1008 (1970).

18. *See* Fichera v. State Personnel Bd., 217 Cal. App. 2d 613, 32 Cal. Rptr. 159 (1963); Coursey v. Board of Fire and Police Comm'rs, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967); Seattle Police Officers' Guild v. City of Seattle, 80 Wash. 2d 307, 494 P.2d 485 (1972). *See also* Kaczkowski v. Board of Fire and Police Comm'rs, 149 N.W.2d 547 (Wis. 1967). The minority view is represented by *Molino v. Board of Pub. Safety*, 225 A.2d 805 (Conn. 1966), and *Stape v. Civil Service Comm'n*, 404 Pa. 354, 172 A.2d 161 (1961). Four states provide specific exemptions for tests given policemen in their anti-polygraph laws. *See* ALAS. STAT. 23.10.037 (1964); CONN. GEN. STAT. ANN. § 31-51g (1967); PA. STAT. ANN. tit. 18, § 4666.1 (1969); WASH. REV. CODE § 49.44.120 (1965). Nebraska law contains a statute specifically requiring all sheriff's employees to submit to such examinations. NEB. REV. STAT. § 23-1737 (1969).

19. 223 So. 2d 905 (La. App. 4th Cir. 1969), *writ denied*, 254 La. 815, 227 So. 2d 148, *cert. denied*, 397 U.S. 1008 (1970).

that the importance of internal discipline and the overriding public duty of a policeman to uphold and defend the law makes the refusal of an order to submit to a test cause for dismissal of the officer.[20] The court recognized in dictum, however, that the officer's "refusal to obey the order is not evidence of guilt or of knowledge of the guilty party."[21]

Although the Constitution affords no bulwark against private misuse of polygraphs, the policies that underlie the limitations on the state's use of the device provide strong arguments for protecting individuals from private action, especially in so vital an area as the employment relation. The desire to protect employees from unfair treatment has been the basis for major legislation in the sphere of private employment[22] and has expressed itself in private adjudication. The largest body of decisional authority on private employer use of the lie detector exists in the field of labor arbitration. In determining just cause for dismissal, arbitrators have frequently refused to admit test results as evidence before arbitral tribunals and have opposed the use of the device by employers to investigate misconduct and to predicate discharge of employees.[23] One rationale suggested for exclusion of polygraph findings in arbitration proceedings is the general rule that if the alleged misconduct is of a kind involving an element of moral turpitude or criminal intent, arbitrators require proof beyond a reasonable doubt;[24] because the scientific reliability of the test is ques-

20. One supporting reason advanced by the court was that La. Const. art. XIV, § 15(P)(1) (1921) required state officials and employees to forfeit their offices if they refused to testify or to waive immunity from prosecution before any investigative or judicial tribunal of the state. 223 So. 2d at 908.

21. *Id.* at 912.

22. Title VII of the Civil Rights Act of 1964 is but one example of government action in the field of private employment predicated upon the protection of individual rights. 42 U.S.C. §§ 2000e — 2000e-15 (1970).

23. It is well established that "no individual's refusal to submit to a lie detector test should prejudice him in any way." Publishers' Ass'n of New York City, 32 Lab. Arb. 44, 48 (1959). Many arbitrators base their decisions on the negative opinions of the judiciary regarding the reliability of lie detectors. *See, e.g.*, Bowman Transp., Inc., 59 Lab. Arb. 283 (1972); Saveway Inwood Serv. Station, 44 Lab. Arb. 709 (1965). Accordingly, many decisions hold lie detector results to be of no probative value. *See, e.g.*, Grocers Supply Co., 59 Lab. Arb. 1281 (1972); American Maize-Prod. Co., 45 Lab. Arb. 1155 (1965). Only one decision was found solidly upholding the right of employers to force employees to submit to the test. Allen Indus., 26 Lab. Arb. 363 (1956). Five arbitrators have admitted results of the test as one factor influencing their findings. American Maize-Prod. Co., 56 Lab. Arb. 421 (1971); Owens-Corning Fiberglass Corp., 48 Lab. Arb. 1089 (1967); Westinghouse Elec. Corp., 43 Lab. Arb. 451 (1964); Illinois Bell Tel. Co., 39 Lab. Arb. 471 (1962); Wilkof Steel & Supply Co., 39 Lab. Arb. 883 (1962).

24. *See* Grocers Supply Co., 59 Lab. Arb. 1280 (1972); Skaggs-Stone, Inc., 40 Lab. Arb. 1273 (1963); Louis Zahn Drug Co., 40 Lab. Arb. 352, 358 (1963).

tioned,[25] the reasonable doubt standard cannot be satisfied by the results of the test alone. Aside from the objections centered upon evidentiary weaknesses of the tests, employer demands to take them are often viewed as "an invasion of privacy and an unwarranted exercise of management rights,"[26] unless expressly provided for in the bargaining contract.

The power of arbitrators to exclude lie detector results was upheld in *Amalgamated Meat Cutters v. Neuhoff Brothers Packing Co.*[27] The Fifth Circuit, in reversing the district court, found that although under the collective bargaining agreement the company expressly reserved the right "to require . . . polygraph tests of an employee in case the company suspects . . . theft of company property," dismissal was to be warranted only for "proper cause." The court held that the question of whether refusal to submit to the test was "proper cause" for dismissal was solely for the arbitrator to decide.[28] However, the holding would permit discharge for failing or refusing to take a lie detector test if it were so stipulated in the bargaining contract. Such stipulations would not be barred by any federal law.[29]

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25. *See, e.g.*, Bowman Transp. Co., 60 Lab. Arb. 837 (1973); Lag Drug Co., 39 Lab. Arb. 1121 (1962); Dayton Steel Foundry Co., 39 Lab. Arb. 745 (1962); Marathon Elec. Mfg. Corp., 31 Lab. Arb. 1040 (1959). The conditions of particular tests have been at issue in some cases. Spiegel, Inc., 44 Lab. Arb. 405 (1965); Coronet Phosphate Co., 31 Lab. Arb. 515 (1958).

26. Town & Country Food Co., 39 Lab. Arb. 332, 335 (1962). *Accord*, Lag Drug Co., 39 Lab. Arb. 1121 (1962); General American Transp. Corp., 31 Lab. Arb. 355 (1958). In addition, some arbitrators have indicated a belief that the polygraph infringes upon the employee's right against self-incrimination. Bowman Transp. Co., 60 Lab. Arb. 837 (1973); Illinois Bell Tel. Co., 39 Lab. Arb. 471, 480 (1962).

27. 481 F.2d 817 (5th Cir. 1973).

28. *Id.* at 820. The issue of lie detector use has recently become the subject of collective bargaining. *See The Lie Detector as a Surveillance Device*, ACLU REPORTS, February, 1973, at 55: "One example of such a contract is the agreement between Retail Store Employees Union Local 1262, AFL-CIO, and the Grand Union Company. Article 28 of the contract states, 'No employee covered by this agreement shall be required by any representative of the employer to be the subject of a polygraph test.'" [Citation omitted.] On the other hand, an arbitrator in *Warwick Electronics, Inc.*, 46 Lab. Arb. 95 (1965), held that (1) where the contract between the company and the union stipulated that the security guards involved would "co-operate fully in all investigations," (2) where the union had been informed by the company that this phrase meant employee submission to lie detector tests and (3) where the union had acquiesced to the demand during collective bargaining, the "right of guards to refuse to submit" to the tests had been "waived" by the union. *Id.* at 101.

29. Twice the General Counsel of the NLRB has refused to deem employer use of the polygraph an unfair labor practice per se under the provisions of Section 8(a) of the National Labor Relations Act. Case No. SR-211, 45 L.R.R.M. 1074 (1959); Case No. F-816, 43 L.R.R.M. 1377 (1958). The Board is firm, however, in its position that

Frequently, an employer will insist that employees sign a "consent" or "waiver" form agreeing to polygraph testing; this, they claim, makes the test "voluntary." Arbitrators have expressed a dim view of this contention, holding in one instance that such a practice thwarts the process of collective bargaining[30] and in another that no consideration was given the employee for his acquiescence.[31] The rationale behind the decisions regarding consent is aptly stated in *B. F. Goodrich Tire Co.*:[32]

> The implicit social threat to an employee in the setting of a plant community were he to refuse to submit to lie detector testing where crimes have concededly been committed so compels consent that a guiltless but emotionally fearful employee has practically no choice but to consent . . . .[33]

The decision also held that a "failure" of the test may not be used as proof of "insubordination" or "refusal to co-operate" by "not telling the truth."[34]

For employees who are not protected by collective bargaining agreements, the impact of lie detector results may prove more harmful. In *Peller v. Retail Credit*,[35] a plaintiff unsuccessfully attempted to invoke the protection of the Fair Credit Reporting Act[36] to remedy an alleged misuse of lie detector information. Plaintiff had applied for a job with Employer 1, but was not hired because he had failed a pre-employment polygraph test administered by an independent firm. Shortly afterward, he procured a job with Employer 2, but was released a few days later because of information obtained from Retail Credit, a large credit reporting agency, that the test taken for Em-

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an employer may not use the failure or refusal to take a lie detector test by an employee as a pretext for unfair labor practices. *See, e.g.*, National Food Serv., Inc., 196 N.L.R.B. No. 52, 80 L.R.R.M. 1017 (1972); Southwire Co., 159 N.L.R.B. No. 32, 62 L.R.R.M. 1280 (1966). The same is true of employer attempts to use the device to carry out unfair labor practices. *See, e.g.*, Glazer's Wholesale Drug Co., 152 N.L.R.B. No. 43, 59 L.R.R.M. 1157 (1965) (employer threatened to polygraph employees to force them to "tell the truth about the union").

30. Lag Drug Co., 39 Lab. Arb. 1121, 1122 (1962).

31. Louis Zahn Drug Co., 40 Lab. Arb. 352, 358 (1963).

32. 36 Lab Arb. 552 (1961).

33. *Id.* at 558. The arbitrator in *Goodrich* also points out that such consent cannot operate as an employer recognition of the scientific reliability of the tests or a waiver of the reasonable doubt standard. *Id.*

34. B.F. Goodrich Tire Co., 36 Lab. Arb. 552, 555 (1961) (arbitrator rejected company's contention).

35. 359 F. Supp. 1235 (N.D. Ga. 1973).

36. 15 U.S.C. §§ 1681—1681(t) (1970).

ployer 1 indicated that plaintiff had used marijuana. Employing a rather questionable construction of the statute,[37] the Georgia federal district court found the provisions of the F.C.R.A. inapplicable to the plaintiff's suit for invasion of privacy. The independent lie detection firm was exempt from the Act's operation because information regarding transactions solely between the consumer (plaintiff) and the person making the report (defendant-lie detection firm) was not regulated under the Act. Employer 1 escaped liability by virtue of the court's finding that it was not a "consumer reporting agency" within the meaning of the law, thus freeing its disseminations of information from scrutiny. Additionally, plaintiff had failed to allege that the information was furnished with malice or a willful intent to injure him as required to recover for invasion of privacy and defamation independent of the provisions of the Act.

Peller represents an abortive attempt to extend some federal remedy to persons aggrieved by employer use of lie detectors. Despite a congressional investigation and some proposed legislation,[38] there is still no federal protection; consequently, fourteen states now have in force statutes which either prohibit or severely limit the use of the polygraph in the employment context.[39] Important distinctions in the

37. Section 603 of the Act defines "consumer reporting agency" as "any person which . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . ." 15 U.S.C. § 1681a(f) (1970). Thus, Employer 1 could easily be deemed a "consumer reporting agency" if it furnished such information on its prospective employees to third parties on a regular basis, even if such activity was not the central purpose of its business. That a future reversal of the holding in *Peller* is possible is further evidenced by the announced purposes of the F.C.R.A. to insure accuracy, relevancy, and personal privacy in credit reporting. 15 U.S.C. § 1681 (1970).

38. The first significant congressional action on the subject of lie detectors came in 1963 when the House Government Operations Committee held an eleven day investigation which revealed widespread use of the device by the federal government. *Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the Subcomm. of Foreign Operations and Government Information of the House Comm. on Government Operations*, 88th Cong., 2d Sess. (1964). Recently, two bills have been introduced to limit the use of the lie detector in federal employment: S. 1035, 90th Cong., 1st Sess. (1967); S. 1438, 92d Cong., 2d Sess. (1971). Another bill, introduced by former Senator Sam Ervin, would have prohibited polygraphs in all industries affecting commerce. S. 2156, 92d Cong., 2d Sess. (1971).

39. ALASKA STAT. § 23.10.037 (1964); CAL. LAB. CODE § 432.2 (West 1953); CONN. GEN. STAT. ANN. § 31-51g (1967); DEL. CODE ANN. tit. 19, § 705 (1953); HAWAII REV. LAWS § 378-21 (1965); IDAHO CODE §§ 44-903, 44-904 (1973); MD. ANN. CODE art. 100, § 95 (1966); MASS. GEN. LAW. ch. 149, § 19 (1963); MINN. STAT. ANN. § 181.75 (1973); N.J. REV. STAT. § 2A:170-90.1 (1966); ORE. REV. STAT. §§ 659.225, 659.990 (1963); PA. STAT. ANN. tit. 18, § 4666.1 (1969); R.I. GEN. LAWS ANN. §§ 28-6.1-1, 28-6.1-2 (1964);

wording of these statutes reflect their relative strength based on the spectrum of employer conduct regulated. Five states prohibit the employer from "requiring" the test[40] and two prevent him from "demanding or requiring."[41] Such language has been interpreted to allow the employer to "ask or request" submission to a polygraph test, the tests being permitted when they are "voluntary."[42] Minnesota and New Jersey have the most inclusive bans on employers' use of the lie detector: Minnesota prohibits "requiring" or "requesting" by "indirect or direct coercion"; New Jersey outlaws "influencing, requesting, or requiring" polygraph tests.

In *State v. Community Distributors, Inc.*,[43] the New Jersey courts passed upon the issue of what degree of coercion was necessary to constitute an "influencing" or a "request." The defendant-employer pleaded his innocence, claiming he had merely "inquired of" employees whether they would "volunteer" for testing. The courts dismissed this argument, the lower court explaining:

> It is eminently clear that, although defendant's prospective employees are only "requested" to submit to lie detector tests, they are in fact "influenced" to do so psychologically by being introduced to an establishment where many employees take the tests.[44]

In the same case, defendant also challenged the antipolygraph statute on the grounds that it deprived employers of property without due process of law. In dismissing the challenge, the state courts recognized the legitimate state interest sought to be protected,[45] and found sufficient reasonableness in the exercise of the state's police power.[46]

WASH. REV. CODE §§ 49.44.120, 49.44.130 (1963) [hereinafter cited by state name only]. In response to the problem of polygraph test results, Minnesota has enacted, with its prohibitory law, a ban on the disclosure of test results by any person except with consent of the person tested. MINN. STAT. ANN. § 181.76 (1973). A number of American cities have also passed anti-polygraph ordinances. Among them are Baltimore, Cincinnati, Akron, Madison, and Shively, Kentucky. *See The Lie Detector as a Surveillance Device*, ACLU REPORTS, February, 1973, at 51.

40. Hawaii, Idaho, Oregon, Pennsylvania, Washington.

41. California, Maryland. "Subjecting or causing" is used by Massachusetts and Rhode Island, while Alaska, Connecticut and Delaware go a bit further and ban "requiring," "requesting," or "suggesting" in various combinations.

42. 43 OP. CAL. ATTY. GEN. 25 (1964).

43. 123 N.J. Super. 589, 304 A.2d 213 (County Ct. 1973), *aff'd*, 64 N.J. 479, 317 A.2d 697 (1974).

44. *Id.* at 598, 304 A.2d at 218.

45. *Id.* at 594, 304 A.2d at 216.

46. State v. Community Dist., Inc., 64 N.J. at 487, 317 A.2d at 701.

The New Jersey statute thus seems to provide adequate protection for the individual and should serve as a model for states contemplating regulation in the area.[47]

In addition to the states which have enacted prohibitory laws regarding lie detector use by employers, eleven states have chosen to regulate lie detectors by licensing firms and operators.[48] A significant need exists to upgrade the quality of many examiners,[49] the vast majority of whom are subject to no legal regulation, despite the suggestion that to license lie detection firms and operators is to concede the legitimacy of the process.[50]

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47. Other considerations may also prove important in the operation of these laws. With regard to the individuals subject to the laws, some states specify only "employers." (California, Hawaii, Maryland, Massachusetts, New Jersey). Others regulate any "agent" of the employer (Alaska, Minnesota, Oregon, Pennsylvania), while a few limit "individuals," "firms," "corporations," or "any business entity" from testing activity. (Connecticut, Delaware, Idaho, Washington). Various individuals are protected under the laws. Three statutes provide that "no employee" shall be subject to the tests (Hawaii, Oregon, Pennsylvania). Others protect "prospective employees" or "persons" (Alaska, California, Connecticut, Delaware, Idaho, Maryland, Massachusetts, Minnesota, Washington). Submission to or passage of a lie detector test cannot be a "condition for employment" or "condition for continued employment" under the laws of several states. (Alaska, California, Connecticut, Delaware, Hawaii, Idaho, Maryland, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington). With regard to exemptions, "local" and "state" governmental agencies are exempted in California, Connecticut, and Maryland. The laws of Alaska, Connecticut, Idaho, Pennsylvania and Washington exempt law enforcement agencies. Employment involving narcotic drugs is exempted by Pennsylvania and Washington. Minnesota and New Jersey have no exemptions in their laws. Most statutes declare violations misdemeanors. *See, e.g.*, Alaska, California, Maryland, Washington. *See also* New Jersey (violators deemed "disorderly persons").

48. ARK. STAT. ANN. §§ 71-2201—2225 (1967); FLA. STAT. ANN. §§ 493.40—.56 (1967); GA. CODE ANN. §§ 84-5001—5016 (1968); ILL. ANN. STAT. ch. 38, §§ 201-1—30 (1963); KY. REV. STAT. §§ 329.010—.990 (1962); MISS. CODE ANN. §§ 39.8920-61—84 (1968); NEV. REV. STAT. §§ 648.005—.210 (1965); N.M. STAT. ANN. §§ 67-31-4—14 (1963); N.D. CENT. CODE §§ 43-31-01—17 (1965); TEX. REV. CIV. STAT. art. 4413 (29cc) (1971); VA. CODE ANN. §§ 54-729.01—.018 (1968). The power to so regulate lie detector operators has been held to be within the bounds of the state police power. *See* Dovalina v. Albert, 409 S.W.2d 616 (Tex. Civ. App. 1966). *But see* Fletcher v. State, 439 S.W.2d 656 (Tex. 1969) (declared Polygraph Examiners Act unconstitutional for failure of title to give notice to all persons regulated under the Act).

49. One of the foremost authorities on and commercial proponents of the lie detector, Professor Fred Inbau of Northwestern University Law School, conceded before the Moss Subcommittee that approximately 80% of all polygraph operators were incompetent. *Hearings on Polygraphs, supra* note 16, at 8.

50. *But see, e.g., In re* Mayer, 77 N.M. 253, 255, 421 P.2d 781, 783 (1966), where a New Mexico court stated in response to a request for admission of test results: "The fact that the New Mexico legislature . . . has seen fit to license and regulate polygraphy in no sense raises that profession . . . to such scientific dignity as would justify

Although Louisiana has no express regulation of lie detectors, the newly adopted Constitution may provide a remedy to employees and others injured by private lie detector use. A constitutional right against "invasions of privacy" is now explicitly mandated by Section V of the Declaration of Rights of the Constitution and at least one commentator has suggested that this protection is applicable to private action.[51]

Absent a state statute strictly prohibiting employer use of lie detectors, the practical remedies afforded by the law to an individual employee are few. No federal law exists on point and only fourteen states have protective laws, many of which exempt from coverage vast sections of the working force. While unions may effectively bar the use of the device through collective bargaining agreements, a great number of American workers are not affiliated with labor unions. Thus, the legal setting is ripe for legislative action which would reconcile the rights of employer and employee with respect to the lie detector. The proposal rejected by the 1974 legislature would have so reconciled this conflict in favor of the privacy of the individual worker; it is hoped that a similar proposal will be enacted soon.

James P. Lambert

SEX DISCRIMINATION: AD HOC REVIEW IN THE HIGHEST COURT

Since its landmark decision in *Reed v. Reed*[1] in 1971, the United States Supreme Court has been reluctant to explain the extent to which the equal protection clause dictates the design of legislation employing sex-based classifications. In three recent cases,[2] the Court has continued its seemingly ad hoc approach to sex discrimination claims, insuring further inconsistencies in lower court review of such claims. Although the challenged statutes were upheld in each in-

our recognition of the results as admissible evidence." *See also* ARK. STAT. ANN. § 71-2225 (1967).

51. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 22-23 (1974).

1. 404 U.S. 71 (1971). Until *Reed*, the Court gave sex discrimination claims only passing review. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (statute exempting women from jury duty upheld); Geosaert v. Cleary, 335 U.S. 464 (1948) (denial of bartending license to women upheld); Muller v. Oregon, 208 U.S. 412 (1908) (upheld maximum hour law for women); Minor v. Happersatt, 88 U.S. (21 Wall.) 162 (1874) (statute denying women the vote upheld); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (statute denying women admission to the bar upheld).

2. Schlesinger v. Ballard, 95 S. Ct. 572 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974).