

Winter 1986

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Recommended Citation

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THE POLYGRAPH AND INTERNAL POLICE INVESTIGATIONS: WHEN WILL ILLINOIS LAWMAKERS SIDE WITH THE CITIZEN TO IDENTIFY INSTANCES OF POLICE MISCONDUCT?

Between 1979 and 1981, the Chicago Police Department resolved 237 cases of alleged police misconduct with the assistance of the polygraph.¹ Since December of 1983, the Chicago Police Department, like all Illinois police departments, has been deprived of the effective assistance of polygraph examinations in resolving cases of alleged official malfeasance.² The passage of the Uniform Peace Officer's Disciplinary Act ("Disciplinary Act") severely limited the use of polygraph examinations in internal police investigations.³ Although the Act is beneficial in affording police officers certain fundamental protections, it ultimately is detrimental to the good faith enforcement of Illinois laws.⁴

The Disciplinary Act guarantees a police officer certain basic rights during the course of an internal investigation. The main

1. J. BUCKLEY, AN UNPUBLISHED STUDY ON THE USE OF POLYGRAPH IN INTERNAL POLICE INVESTIGATIONS IN THE CHICAGO POLICE DEPARTMENT (1985) (available at John E. Reid and Associates, Chicago, Illinois) [hereinafter cited as BUCKLEY]. Buckley's material consists primarily of a compilation of statistics on the use of the polygraph in resolving cases of alleged police misconduct in the Chicago Police Department. All of the examinations were conducted by licensed examiners of John E. Reid and Associates.

It should be noted that it has been the standard practice of the Chicago Police Department to submit any complaining witnesses to a polygraph examination prior to the officer being asked to submit. During the three year period of this study, the complaining witnesses were tested in 85% (203 times) of the investigations. *Id.* In 33 of the cases there were no complaining witnesses. Therefore, in those cases where a complaint initiated the investigation, the complainant was tested before the officer 95% of the time. *Id.*

2. Uniform Peace Officer's Disciplinary Act, ILL. REV. STAT. ch. 85, § 2551 (1983); *See Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983), *cert. denied*, 464 U.S. 960 (1983) (polygraph results are not admissible in internal police and fire department proceedings).

3. ILL. REV. STAT. ch. 85, § 2564 (1983). Section 2564 does not completely ban the use of the polygraph, but limits its use in such a way as to eliminate any effective application of the truth-finding technique. *Id.*

4. ILL. REV. STAT. ch. 85, §§ 2553-63 (1983). Certain sections of the Act provide important protections to an officer during the course of an interrogation. It should be noted that the provisions of the Act are substantially similar to the collective bargaining agreement in force with the Chicago Police Department at the time the Act was passed. Illinois House of Representatives, 83rd General Assembly, Transcription Debate 163, 169 (May 11, 1983).

thrust of the Act protects an officer from abusive interrogational tactics. The Act limits the time,⁵ length,⁶ and location⁷ of interrogations, provides the officer with the right to counsel⁸ and, additionally, requires a complete transcript of the proceeding be made available to the officer without charge or undue delay.⁹ Section 2564 of the Disciplinary Act specifically addresses the use of polygraph instruments during internal investigations. Section 2564 prohibits the use of a polygraph instrument except under very limited circumstances.¹⁰ For instance, the polygraph may be used where an officer gives written consent,¹¹ during an informal inquiry,¹² or in situations

5. ILL. REV. STAT. ch. 85, § 2556 (1983). This section requires all interrogations to be conducted at a reasonable time, preferably during the officer's term of duty. *Id.*

6. *Id.* § 2558. This section provides for interrogations of a reasonable duration and permits the officer reasonable rest periods. *Id.*

7. *Id.* § 2554. This section requires interrogations to take place either at the officer's precinct facility or the facility with jurisdiction over the place where the incident occurred. *Id.*

8. *Id.* § 2562. This section also allows for the presence of a union representative if a collective bargaining agreement requires one to be present. *Id.*

9. *Id.* § 2560.

10. The Disciplinary Act, at section 2564, provides:

In the course of any Interrogation no officer shall be required to submit to a polygraph test, or any other test questioning by means of any chemical substance, except with the officer's express written consent. Refusal to submit to such tests shall not result in any disciplinary action nor shall such refusal to be made part of his or her record.

Id. § 2564. It was this section of the Act which received considerable debate in the Illinois Senate. Illinois Senate, 83rd General Assembly, Transcription Debate 122-24 (June 22, 1983). Senator Bloom voiced strong concern regarding the prohibition of the polygraph. He was critical of the extent to which the senate should follow the *Kaske* decision, due to its narrow factual holding. *Id.* at 122. Senator Bloom wanted an amendment that would require an officer to take a polygraph test if a complaining witness had previously taken the test and had been ascertained as truthful. *Id.* at 123. See also Nev. REV. STAT. § 289.070(2) (1983) (statute permits testing of officer where witness previously ascertained as truthful).

An examination of the language is necessary to a complete understanding of this section. The crucial wording is: "in the course of any interrogation. . . ." *Id.* It is necessary to refer back to section 2522(d) which defines interrogations as the questioning of any officer during the course of a "formal investigation." *Id.* § 2552(d). More importantly, section 2552(d) excludes from the meaning of interrogation any questioning which constitutes an "informal inquiry" or which relates to minor infractions that would not result in discharge or suspension in excess of three days. *Id.*

11. *Id.* § 2564. This section provides for the voluntary submission to a polygraph examination. However, the language has created a conflict between the intent of the sponsor of the bill, Senator Vadalabene, and the final form of the Act. Senator Vadalabene, in his debate with Senator Bloom, relied on the Illinois Supreme Court decision in *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983), for his argument favoring a complete ban on the polygraph. Illinois Senate, 83rd General Assembly, Transcription Debate 122 (June 22, 1983).

The *Kaske* decision, although not directly addressing the issue of a voluntary polygraph examination, did rely an earlier decision, *People v. Baynes*, 88 Ill. 2d 225, 430 N.E.2d 1070 (1981), as a springboard for its decision in *Kaske*. *Kaske*, 96 Ill. 2d at 203, 450 N.E.2d at 319. In *Baynes*, the court held that the polygraph was not admissible even if the results were stipulated to by both parties. *Baynes*, 88 Ill. 2d at 231, 430 N.E.2d at 1077. Stipulated agreements are considered to be voluntary. *Village of Schaumburg v. Franberg*, 99 Ill. App. 3d 1, 424 N.E.2d 1239 (1981). Therefore,

where the disciplinary consequences are considered minor.¹³ The Act's limitations are so extensive, however, that they eliminate any practical use of the polygraph in internal investigations.¹⁴ Likewise, while the Act's limitations appear extremely fair to the police officer under investigation, they have a disproportionate impact on society concerning the traditional use of the polygraph in this type of investigation.¹⁵

This comment will discuss the Act's inherent problems as well as offer a proposal for legislative reform. First, an explanation of the polygraph technique will indicate its reliability and utility in resolving questions of police misconduct. Second, the United States Supreme Court's position on internal inquiries will be analyzed and interpreted as supporting the polygraph's use in internal investigations. Third, the public interest in an honest police force will exemplify the Disciplinary Act's implicit weaknesses. Finally, a compromise will be discussed whereby the Illinois General Assembly may provide peace officers with sufficient procedural safeguards without interfering with the ability of Illinois citizens to identify instances of police misconduct.

The polygraph has long been the subject of substantial legal de-

the *Kaske* court, in adopting the reasoning of *Baynes*, has at least implicitly banned the voluntary submission to a polygraph examination.

12. ILL. REV. STAT. ch. 85, § 2552(d) (1983). It is necessary to read sections 2564, 2552(d), and 2552(b) together to understand this provision. Section 2564 limits the polygraph's use during the course of any interrogation. *Id.* § 2564. Sections 2552(d) excludes informal inquiries from the definition of interrogation. *Id.* § 2552(d). Section 2552(b) defines an informal inquiry as any meeting between an officer and supervisory personnel to "mediate a citizen complaint or discuss the facts to determine whether a formal investigation should be commenced." *Id.* § 2552(b). Therefore, the prohibitions of section 2564 do not apply where only an informal inquiry has been commenced. It may reasonably be assumed that an officer could be expected to submit to a polygraph examination for purposes of mediating a citizen complaint or deciding whether a formal investigation should be initiated. The Act does not indicate what, if any, discipline would be appropriate for an officer's refusal to submit to a polygraph examination during the course of an informal inquiry.

13. *Id.* § 2552(d). Again, a reading of sections 2564 and 2552(d) creates another small exception to the Act's purported ban of the polygraph. Section 2552(d) excludes questioning related to minor infractions of rules which would not result in discharge or suspension in excess of three days. *Id.* Therefore, the section 2564 ban on the use of the polygraph during an interrogation would not apply to questioning related to minor infractions. The Act is also unclear as to what discipline might be appropriate for an officer who refuses the polygraph examination during the course of minor questioning. Perhaps the three day suspension limit, which defines minor questioning, would be appropriate.

14. The Chicago Police Department is currently using the polygraph to test complaining witnesses only. Interview with Joseph P. Buckley, President of John E. Reid and Associates of Chicago (June 8, 1985). In fact, not one officer has submitted to a polygraph examination since the passage of the Act. Interview with an anonymous source within the Chicago Police Department, Internal Affairs Division in Chicago (July 31, 1985).

15. For a discussion of the need for internal disciplinary investigations, see *infra* notes 32-35 and accompanying text.

bate.¹⁶ While many courts have viewed polygraph evidence unfavorably,¹⁷ the recent trend has been to admit such evidence in limited

16. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* was the first case to address the admissibility of polygraph test results. The defendant in *Frye* was on trial for murder. He attempted to introduce the results of a Marston "systolic blood pressure" test that showed he was telling the truth when he denied committing the murder. The court refused to admit the evidence based on its lack of general acceptance in the scientific community. *Id.* at 1014.

It is important to note that the "polygraph" examination conducted on *Frye* was only capable of measuring relative changes in blood pressure. The modern polygraph is capable of measuring blood pressure changes, blood volume changes, respiration rate, and galvanic skin response. Although the *Frye* court seemed to rely on the lack of scientific development of the polygraph, modern courts still rely on *Frye* for barring admission of polygraph results even though the instrument and techniques have advanced far beyond the "Marston Polygraph" used in 1923.

The language of the *Frye* court has been subsequently cited by numerous courts:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable states is difficult to define. Somewhere in the twilight zone the evidential forces of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological authorities as would justify the court in admitting expert testimony deduced from the discovery, development and experiments thus far made. *Id.* See generally, Comment, *The Truth about the Lie Detector in Federal Court*, 51 TEMP L.Q. 69 (1978) (discusses Federal courts' adherence to *Frye*).

17. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *Pennington v. State*, 437 So.2d 37, 40 (Miss. 1983) (polygraph inadmissible for any reason); *Commonwealth v. Gee*, 467 Pa. 123, 354 A.2d 875, 883 (1976) (polygraph results inadmissible); *Odum v. Commonwealth*, 225 Va. 123, 132, 301 S.E.2d 145, 150 (1983) (polygraph results inadmissible). It should be noted that there are numerous state and federal court decisions that have been critical of the polygraph's evidentiary value, as well as its reliability and validity. It is a somewhat unsettled matter in the federal courts because the United States Supreme Court has never decided a case dealing with the polygraph. See generally Comment, *The Truth About the Lie Detector in Federal Court*, 51 TEMP. L.Q. 69 (1978) (only federal district courts and courts of appeals have decided admissibility question).

Historically, numerous courts have relied on the *Frye* reasoning in rejecting polygraph evidence. See, e.g., *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957) (scientific unreliability of polygraph cited as reason for inadmissibility); *State v. Arnwine*, 67 N.J. Super. 483, 171 A.2d 124 (1964) (cited *Frye* as reason for inadmissibility of polygraph); *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961) (relied on reasoning of *Frye* in holding polygraph inadmissible); *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938) (no evidence of polygraph's scientific reliability); *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961) (cannot distinguish polygraph from more reliable scientific evidence such as handwriting or fingerprint analysis). However, a court's reliance on the *Frye* standard for polygraph evidence is somewhat faulty. The polygraph has advanced far beyond the simplistic instrument first considered by the *Frye* court. After the Marston test, the polygraph went through several stages of development. First, John Larson developed an instrument capable of measuring blood pressure, pulse, and respiration simultaneously. Larson, *Modification of the Marston Deception Test*, J. CRIM. L. AND CRIMINOLOGY 390, 392 (1921). In 1926, Leonarde Keeler made additional improvements to the Larson polygraph. Keeler, *A Method for Detecting Deception*, 1 AMER. J. POL. SCI. 38, 39 (1930). In 1947, John Reid devised an instrument to record blood pressure, heart rate, respiration, galvanic skin response, and unob-

and controlled circumstances.¹⁸ Although Illinois has not followed this trend,¹⁹ Illinois courts have historically upheld the use of the polygraph in police administrative inquiries.²⁰ Only recently, in *Kaske v. City of Rockford*,²¹ did the Illinois Supreme Court rule that

servable muscular movements. Trovillo, *A History of Lie Detection* 1 J. CRIM. L. AND CRIMINOLOGY 29, 33 (1949). The polygraph in its present form is capable of measuring changes in blood pressure, heart rate, respiration, galvanic skin response, blood volume, and muscle movements. The two major concerns regarding polygraph evidence are its reliability and its influence and impact on the fact finding process. See *Baynes*, 88 Ill. 2d at 331, 430 N.E.2d at 1076; *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351, 356 (1983).

It is interesting to note that although courts have shown disfavor with the polygraph, it is not necessarily received with such distrust and criticism by those individuals who have been given a polygraph examination. Several recent opinion surveys have demonstrated a high degree of positive acceptance of the polygraph as a method of discovering dishonest employees. See Gerow, *Attitudes Toward the Use of the Polygraph*, 6 POLYGRAPH 266 (1977); Phannenstill, *Polygraph Passes the Test*, 12 POLYGRAPH 378 (1983); Silverberg, *Attitudes of Job Applicants and Employees Toward the Polygraph*, 9 POLYGRAPH 162 (1980).

18. Most courts admitting polygraph evidence have done so on a limited basis. See *United States v. Zeiger*, 475 F.2d 1280 (D.C. Cir. 1972) (court recognized admissibility under proper conditions); *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972) (polygraph results admitted in perjury case); *United States v. DeBetham*, 348 F. Supp. 1977 (S.D. Cal. 1972) (recognized admissibility of polygraph under proper circumstances); *Wynn v. State*, 423 So.2d 294 (Ala. Crim. App. 1982) (admitted with prior written stipulation); *Whiteside v. State*, 12 Ark. App. 271, 675 S.W.2d 645 (1984) (admitted with oral stipulation); *David v. State*, 461 So. 2d 67 (Fla. 1984) (admitted with stipulation); *State v. Losee*, 354 N.W.2d 239 (Iowa 1984) (admitted with stipulation). Two states have admitted polygraph results without stipulation and over the objections of opposing counsel. *Commonwealth v. A. Juvenile*, 365 Mass. 421, 313 N.E.2d 120 (1974); *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). See generally Symposium, *The Polygraph and the Courts*, 16 U. West L.A. L. Rev. 1 (1984).

Even though it still has a somewhat limited application, it is important to recognize the admissibility of polygraph evidence. It is a common misconception that the polygraph is completely inadmissible in all courts. Both Senators Vadalabene and Bloom, in their floor debate, were operating under the false assumption that polygraph evidence had never been admissible in court. Illinois Senate, 83rd General Assembly, Transcription Debate 122 (June 22, 1983). Such a misconception unfairly ignores the advances in the technique and the increased reliability of the testing procedure.

19. See *People v. Baynes*, 88 Ill. 2d 331, 430 N.E.2d 1070 (1982). See also Comment, *Lie Detector Tests: Possible Admissibility upon Stipulation*, 4 J. MAR. J. PRAC. & PROC. 244 (1971) (historical discussion of admissibility in Illinois prior to *Baynes*).

20. See *Washington v. Civil Serv. Comm'n*, 98 Ill. App. 3d 49, 423 N.E.2d 1136 (1981) (court held polygraph admissible in police administrative hearing); *Piotrowski v. State Police Merit Bd.*, 85 Ill. App. 3d 369, 406 N.E.2d 863 (1980) (officer can be ordered to take polygraph); *Myers v. Cook County Police and Corrections Merit Bd.*, 67 Ill. App. 3d 223, 384 N.E.2d 805 (1978) (order to take polygraph does not have to be demonstrably reasonable); *Buege v. Lee*, 56 Ill. App. 3d 793, 372 N.E.2d 427 (1978) (polygraph acceptable if questions directly relate to official duties); *Williams v. Police Bd.*, 8 Ill. App. 3d 345, 290 N.E.2d 669 (1971) (polygraph admissible in administrative procedure); *Coursey v. Board of Fire and Police Comm'rs*, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967) (polygraph admissible). But see *Sommer v. Goetze*, 102 Ill. App. 3d 117, 429 N.E.2d 901 (1981) (polygraph not admissible in administrative hearings); *McGowen v. City of Bloomington*, 99 Ill. App. 3d 986, 426 N.E.2d 328 (1981) (polygraph not admissible).

21. 96 Ill. 2d 298, 450 N.E.2d 314 (1983).

polygraph evidence is inadmissible in a disciplinary hearing, and further, that a police officer could not be compelled to submit to a polygraph examination.²² The supreme court's decision in *Kaske*, reflects a rejection of the legitimate public policy concerns that other courts have consistently recognized.²³

Traditionally, Illinois courts have relied primarily on public policy grounds when allowing or disallowing polygraph evidence in cases of police misconduct. A strong public interest in an honest police force has frequently been cited as the major reason for allowing the polygraph results.²⁴ Although the polygraph did not receive complete judicial support for its legal admissibility,²⁵ it was readily accepted as a useful investigative aid in administrative inquiries.²⁶ The polygraph's reliability for investigative purposes,²⁷ combined with a compelling need to monitor possible police corruption,²⁸ provided

22. *Id.* at 304, 450 N.E.2d at 319.

23. *Id.* at 307-08, 450 N.E.2d at 320. The court noted the need to maintain the personal integrity of public service employees. The court also recognized the need for maintaining authority within a police organization. The court even acknowledged the utility and value of the polygraph as an investigative aid. However, the court still held the polygraph to be inadmissible, and that an officer could not be required to submit to a polygraph examination as part of an internal investigation. *Id.*

On this last point, the court's only stated reason for not requiring an officer to submit to an examination was the inconsistency that it would create in their holding. *Id.* Justice Moran, in his dissent, criticized that part of the holding. *Id.* at 312, 450 N.E.2d at 321 (Moran, J., dissenting). Justice Moran emphasized the difference between the use of polygraph examinations as evidence and their use as an investigatory aid. The dissent further emphasized the utility of the polygraph in narrowing investigations and exonerating accused officers. It was also noted that police officers are in a special category of employees that require systematic authority and discipline. As trustees of the public, police officers have a special duty to cooperate with official inquiries pertaining to their duties. *Id.* For a discussion of an officer's duty to answer questions related to his official responsibilities, see *infra* notes 59-68 and accompanying text.

24. *Piotrowski*, 85 Ill. App. 3d at 376, 406 N.E.2d at 868-69 (public has strong interest in honest police); *Myers*, 67 Ill. App. 3d at 228, 384 N.E.2d at 809 (proper operation of a police force depends on honesty of officers); *Coursey*, 90 Ill. App. 2d at 43, 234 N.E.2d at 395 (authority and discipline are necessary to maintain honest police force).

25. See *People v. Zazzetta*, 27 Ill. 2d 302, 189 N.E.2d 260 (1963) (polygraph inadmissible in criminal proceeding); *People v. Monigan*, 72 Ill. App. 3d 87, 390 N.E. 562 (1979) (polygraph inadmissible at trial); *People v. Potts*, 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966) (polygraph inadmissible).

26. See *Washington v. Civil Serv. Comm'n*, 98 Ill. App. 3d 49, 423 N.E.2d 1136 (1981) (court recognized need for polygraph in administrative investigation); *Williams v. Police Bd.*, 8 Ill. App. 3d 345, 290 N.E.2d 669 (1972) (same principle); *Coursey v. Board of Fire and Police Comm'rs*, 90 Ill. App. 2d 31, 234 N.E.2d 339 (1967) (same principle).

27. See *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977) (polygraph is proper method of verifying officer's statements); *Richardson v. City of Pasadena*, 500 S.W.2d 175 (Tex. Civ. App. 1973) (polygraph is scientific instrument used by police as an aid in the search for truth). See generally *Kendrick, Use of Polygraph by Law Enforcement Agencies—A Survey*, 12 POLYGRAPH 18 (1983); *Quon, The Polygraph, The Courts and Law Enforcement*, 10 POLYGRAPH 106 (1981).

28. See *Baker v. City of Lawrence*, 379 Mass. 322, 409 N.E.2d 710 (1979) (of-

the basis for its judicial approval.

Similar to Illinois' historical recognition of the polygraph's utility, numerous jurisdictions currently permit the use of the polygraph during internal police investigations.²⁹ Statistically, Illinois is clearly in the minority of states which now prohibits polygraph examinations in internal disciplinary proceedings.³⁰ In fact, in those states that statutorily prohibit the polygraph's use as a condition of employment, nearly all of them exempt law enforcement personnel from those prohibitions.³¹ The Illinois General Assembly has disregarded the strong public policy concerns and the reasoning of its sister states, by creating a statute which is, in effect, detrimental to honest and effective law enforcement.

Police corruption is a problem that affects all citizens.³² Police misconduct threatens personal interests,³³ property interests,³⁴ and civil rights.³⁵ Uncontrolled police misconduct not only threatens life

ficer suspected of theft from crime scene); *Dolan v. Kelly*, 76 Misc. 2d 151, 348 N.Y.S. 2d 478 (N.Y. Sup. Ct. 1973) (officer suspected of theft from homicide victim). See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES (1981) (discusses wide range of police misconduct) [hereinafter cited as THE GUARDIANS].

29. See *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977) (polygraph admissible at administrative hearings); *Frey v. Department of Police* 288 So. 2d 410 (La. Supp. 1973) (same principle); *Baker v. City of Lawrence*, 379 Mass. 322, 409 N.E.2d 710 (1979) (same principle); *Dolan v. Kelly*, 76 Misc. 2d 151, 348 N.Y.S. 2d 478 (N.Y. Sup. Ct. 1973) (same principle); *Richardson v. City of Pasadena*, 500 S.W.2d 175 (Tex. Civ. App. 1973) (same principle). Cf. *Kersey v. Shipley*, 573 F.2d 730 (4th Cir. 1982) (termination of officers for refusal to undergo polygraph examination not violative of due process).

30. Those states which prohibit the use of polygraph are California, Hawaii, Michigan, Minnesota, New Jersey, Oregon, Washington and Wisconsin. See Note, *Police May Not Properly Be Dismissed For Refusal to Submit to a Polygraph Examination*, 11 FLA. ST. U.L. REV. 677, 678 n.5 (1983).

31. See ALASKA STAT. § 23.10.027(b) (1984); CONN. GEN. STAT. ANN. § 35-51g(d) (West 1985); DEL. CODE ANN. tit. 19, § 704(d) (1979); D.C. CODE ANN. § 36-801(b) (1981); IDAHO CODE § 44-904 (1977); ME. REV. STAT. ANN. tit. 32 § 7166(3) (1981); MASS. GEN. LAWS ANN. ch. 149, § 19B (1976); MONT. CODE ANN. § 41-119 (Supp. 1977); NEB. REV. STAT. § 23-1737 (1983); PA. STAT. ANN. tit. 18, § 7321(b) (Purdon's 1983); R.I. GEN. LAWS § 28-6.1-2 (1979). Cf. NEV. REV. STAT. § 289.070(2) (1983) (exempts police from prohibition where complaining witness passes polygraph first). But see HAWAII REV. STAT. § 378-21 (1976) (general prohibition applies to police); N.J. REV. STAT. § 2C:40A-1 (1982) (general prohibition applies); OR. REV. STAT. § 659.227 (1983) (general prohibition applies). Cf. WASH. REV. CODE ANN. § 49.44.120 (1985) (general prohibition applies to police except those seeking to attain rank of captain or higher).

32. See generally THE GUARDIANS, *supra* note 28; UNITED STATES COMMISSION ON CIVIL RIGHTS, POLICE PRACTICES AND THE PRESERVATION OF CIVIL RIGHTS (1979) [hereinafter cited as POLICE PRACTICES]; Arther, *The Subversive in the Police Department*, 2 J. POLYGRAPH STUDIES 1 (1968); Arther, *Why Does Police Work Attract So Many Failures?*, 12 LAW AND ORDER 62 (1964).

33. See Buckley, *supra* note 1. Included in the 237 cases were complaints of bribery, brutality, murder, harassment, sexual assault, false arrest, and battery. *Id.*

34. See Buckley, *supra* note 1. There were 121 complaints of theft, in addition to allegations of burglary, forgery, and damage of property. *Id.*

35. See Buckley, *supra* note 1. The most notable problems in this area were

and property but also erodes the confidence and trust which the public places in its police force.³⁶ It is, therefore, essential that every police department maintain an effective system of internal controls aimed at minimizing officer malfeasance.³⁷

Internal affairs units are one form of internal control normally responsible for investigating any charges of alleged police misconduct.³⁸ Because of the seriousness of police misconduct, internal affairs units should be allowed to utilize all effective means to investigate complaints. One effective investigative technique is the use of the polygraph³⁹ which is an extremely useful tool in resolving a variety of investigative problems.⁴⁰ In the case of citizen complaints, where the only evidence is the complaining witness' statement, the polygraph may be the only available means of resolving the case.⁴¹ It may also be used to vindicate officers,⁴² eliminate unnecessary and costly investigations,⁴³ and corroborate other evidence.⁴⁴ The poly-

allegations of illegal searches, perjury, and brutality. *Id.*

36. See *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977) (use of polygraph is consistent with maintenance of integrity of police department); *Dolan v. Kelly*, 76 Misc. 2d 151, 348 N.Y.S. 2d 478 (N.Y. Sup. Ct. 1973) (effective operation of department requires effective investigation of suspected misconduct).

37. See *THE GUARDIANS*, *supra* note 28, at 35, 94; *POLICE PRACTICES*, *supra* note 32, at 57-111.

38. In Chicago there are two units within the police department which handle allegations of official misconduct. Interview with Joseph P. Buckley, President of John E. Reid and Associates of Chicago, in Chicago (June 8, 1985). The Internal Affairs Division (IAD) investigates the largest portion of complaints. The Office of Professional Standards (OPS) is primarily concerned with allegations of brutality. Both units utilized the polygraph on a regular basis prior to 1983. *Id.*

39. See *Kaske*, 96 Ill. 2d at 305, 450 N.E.2d at 321; *Richardson*, 500 S.W.2d at 177. See also F. INBAU AND J. REID, *TRUTH AND DECEPTION: THE POLYGRAPH TECHNIQUE* 299-303 (1977) [hereinafter cited as *TRUTH AND DECEPTION*]; Kendrick, *Use of Polygraph by Law Enforcement Agencies*, 12 *POLYGRAPH* 18 (1983). See generally Bradshaw, *Employer Uses of Polygraph*, 11 *POLYGRAPH* 159 (1982) (discusses investigative value of polygraph in public and private employment).

40. See Inbau and Reid, *The Lie Detector Technique: A Reliable and Valuable Investigation Aid*, 50 A. B. A. J. 470, 473 (1964); Stockford, *The Polygraph: An Investigative Aid*, 26 *LAW & ORDER* 42, 43 (1978). See also Leahy on *Lie Detectors*, N.Y. TIMES, Nov. 9, 1985, at 5, col. 1 (Senator Leahy would use polygraph to resolve information leaks).

41. In some situations the polygraph may prove to be more accurate than eye-witness evidence. See Horvath and Widacki, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Investigation*, 7 *J. FORENSIC SCI.* 251 (1978).

42. *Kaske*, 96 Ill. 2d at 312, 450 N.E.2d at 321 (Moran, J., dissenting). Justice Moran noted that the polygraph is frequently used to exonerate accused officers. In the Chicago police study, 321 officers were given polygraph examinations as part of the internal investigation. Buckley, *supra* note 1. Ninety of those officers (twenty-eight percent) were cleared based on the examination results. *Id.* See generally Comment, *Defamation of a Police Officer in a Citizen Complaint: Vindicating the Rights of the "Blue" in Arizona*, 24 *ARIZ. L. REV.* 610 (1982) (increasing number of complaints has potential impact on officer's reputation and effectiveness).

43. The polygraph is an efficient investigative resource. The average examination takes about one hour. *TRUTH AND DECEPTION*, *supra* note 39, at 17. It is certainly a far quicker and less expensive method of verifying statements. See also *Dolan v.*

graph technique, if permitted under controlled conditions, is an extremely effective investigative aid. Therefore, the Disciplinary Act has only hampered internal affairs' investigators through its restrictions on polygraph use. Due to the following considerations, the legislature should reconsider the limitations it has placed on the polygraph's use.

THE POLYGRAPH'S RELIABILITY AND UTILITY

Although a compelling public interest exists in maintaining the integrity of police departments, the Illinois General Assembly apparently disregarded that interest because of the polygraph's perceived inadequacies.⁴⁵ The legislature, like the *Kaske* court, failed to recognize the polygraph's reliability when operated under controlled conditions and its overall utility as an investigative aid.⁴⁶ Misunderstanding the polygraph's reliability and capability has severely limited its potential utility.⁴⁷ However, a brief explanation of the polygraph technique should dispel some of the more common misconceptions surrounding its use and value.⁴⁸

Kelly, 76 Misc. 2d 151, 384 N.Y.S. 2d 478 (N.Y. Sup. Ct. (1973) (discusses value of polygraphs as investigative aid).

44. See *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977) (court discusses utility of polygraph to corroborate other evidence). See also Quon, *The Polygraph, The Courts and Law Enforcement*, 10 POLYGRAPH 113, 110 (1981) (discussed corroborative value and cost savings of polygraph).

45. See Illinois House of Representative, 83rd General Assembly, Transcription Debates 163 (May 11, 1983); Illinois Senate, 83rd General Assembly, Transcription Debates 122-24 (June 22, 1983). It is also important to note the *Kaske* decision. *Kaske*, 96 Ill. 2d 298, 450 N.E.2d 314. In *Kaske*, the court recognized both the utility of the polygraph and the public's interest in an honest police force. *Id.* at 309-12, 450 N.E.2d at 320. The court relied on the criticism of the polygraph's reliability in *People v. Baynes*, 88 Ill. 2d 225, 430 N.E.2d 1070 (1981), however, to prohibit its use in an internal police investigation. *Id.* at 308, 450 N.E.2d at 319.

46. See Abrams, *Polygraph Validity and Reliability: A Review*, 18 J. FORENSIC SCI. 313 (1973).

47. In those states that limit the use of the polygraph in internal investigations, they do so by a complete ban. See *supra* note 31. See also CAL. GOVT. CODE § 3307 (1980) (specific prohibition); HAWAII REV. STAT. § 378-21 (1976) (general prohibition); MICH. STAT. ANN. §§ 17.762(6)-17.65(9) (1985) (general prohibition); N.J. REV. STAT. § 2C:40A-1 (1982) (general prohibition); OR. REV. STAT. § 659.227 (1983) (general prohibition); UTAH CODE ANN. § 34-37-16 (Supp. 1983) (general prohibition); WASH. REV. CODE ANN. § 49, 44.120 (1985) (general prohibition); WIS. STAT. ANN. § 111.37 (West Supp. 1984) (general prohibition). Cf. N.Y. LAB. LAW § 733 (McKinney 1984) (prohibits use of voice stress evaluator in police internal investigations).

48. Polygraphs are designed to measure various physiological responses to specific questions. The polygraph instrument generally measures relative changes in respiration rate, pulse rate and blood pressure, and galvanic skin response (GSR). TRUTH AND DECEPTION, *supra* note 43, at 5. Generally most polygraphs are designed to measure respiration rate based on expansion and contraction of the abdominal and thoracic cavities. *Id.* at 5, 60. The attachments consist of two hollow, rubber tubes that are placed around the chest and abdomen which expand or contract with respiration. *Id.* at 5, 7. It should be noted that the respiration parameter is considered to be the most reliable indicator of truth or deception. *Id.*

The most important and least understood concept is that the polygraph alone cannot detect lies.⁴⁹ The polygraph examiner is the ultimate arbiter in the truth-finding process.⁵⁰ The reliability, utility, and ultimate effectiveness of the polygraph all depend upon the examiner's competence. The examiner must assess the case's facts,⁵¹ conduct the crucial pre-test interview,⁵² formulate the test questions,⁵³ and make the final interpretation of the test data.⁵⁴ The ex-

The polygraph also measures relative changes in blood pressure and pulse rate. S. Abrams, *A Polygraph Handbook for Attorneys*, 54 (1977) [hereinafter cited as POLYGRAPH HANDBOOK]; TRUTH AND DECEPTION, *supra* note 39, at 5, 16. An ordinary blood pressure cuff is placed around the subject's upper arm and inflated to a pressure about halfway between the subject's diastolic and systolic blood pressure. POLYGRAPH HANDBOOK, *supra* at 54. The examiner is then able to measure relative changes in the mean arterial blood pressure of the subject. These changes are recorded on the polygraph chart paper.

Through a system of comparative analysis the examiner will make a diagnosis in part based on the changes in the subject's pulse rate and blood pressure when specific questions are asked. *Id.* at 55; TRUTH AND DECEPTION, *supra* note 39, at 190. See Ansley, *A Comparison of Arm-Cuff and Wrist-Cuff Blood Pressure Patterns in Polygraph Charts*, 50 J. CRIM. L. 192 (1959) (discusses common methods of measuring blood pressure changes).

An examiner is also required to measure the subjects galvanic skin response (GSR). POLYGRAPH HANDBOOK, *supra* note 39, at 5, 15. The GSR measures the electrodermal resistance of the skin, usually on the palmar surface of the fingers. POLYGRAPH HANDBOOK, *supra* at 60. The GSR function is the least understood indicator of a subject's deception. TRUTH AND DECEPTION, *supra* note 39, at 277. Illinois statutorily requires the measurement and evaluation of respiration, blood pressure and GSR during any polygraph examination. ILL. REV. STAT. ch. 111, § 2403 (1983).

49. See POLYGRAPH HANDBOOK, *supra* note 48, at 53; TRUTH AND DECEPTION, *supra* note 39, at 5. See also Arnold, *Investigator-Get Full Value From a Polygraph Examination*, 6 POLICE 45 (1962) (the competence of the examiner is an essential factor in the accuracy of the polygraph); Pfaff, *The Polygraph: An Invaluable Judicial Aid*, 50 A.B.A.J. 1130 (1961) (same principle); Comment, *The Working Man's Nemesis—The Polygraph*, 6 N.C. CEN. L. REV. 94 (1974) (same principle); Note, *United States v. Ridling: The Polygraph Breaks the Twilight Zone*, 23 CATH. U.L. REV. 101 (1973) (same principle recognized in Federal courts).

50. See POLYGRAPH HANDBOOK, *supra* note 48, at 53, 64; TRUTH AND DECEPTION, *supra* note 39, at 5. See also Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35, 36 (1976). Illinois requires a bachelor's degree, a six month training program, and a licensing examination before one can qualify as a polygraph examiner. ILL. REV. STAT. ch. 111, § 2412 (1983).

51. TRUTH AND DECEPTION, *supra* note 39, at 11. It is during this interview that a polygraph examiner can lay the foundation for a comprehensive and effective examination. The examiner needs access to as many factors surrounding the investigation as possible to properly formulate test questions and informatively conduct an effective pre-test interview. Dates, locations, witnesses, descriptions, and information concerning the examinee will all be helpful. *Id.* at 417-19.

52. *Id.* at 13. The primary purposes of the pre-test interview are to formulate and review test questions, assess the suitability of the person for the polygraph technique, conduct a structured line of investigative questioning and explain the polygraph procedure to the subject. *Id.*

53. *Id.* For a discussion of the importance of the questions being specific and direct, see *infra* notes 59-68 and accompanying text.

54. The data consists of ink recordings which are made on moving graph paper during the questioning process. TRUTH AND DECEPTION, *supra* note 39, at 38. By giving the various reactions, indicated by the ink tracings at specific question locations, a value, the examiner is able to compare the responses to the control questions with the

aminer's qualifications are the key to reliable testing procedures. However, an understanding of the examiner's role does not end the concern about the polygraph as a reliable investigative aid.

The question of the polygraph's reliability and validity has historically impaired its acceptance by most courts. In fact, lack of reliability and lack of validity have been cited as the most frequent reasons for judicial rejection of polygraph evidence.⁵⁵ The reliability of the polygraph technique, however, when administered by a competent examiner, has been determined to be quite high. Numerous studies indicate the polygraph's accuracy to be in excess of eighty percent,⁵⁶ with several studies indicating an accuracy rate above ninety percent.⁵⁷ One study, in particular, found the polygraph technique to be more accurate than handwriting analysis or eyewitness identification, and only slightly less accurate than fingerprint analysis.⁵⁸ Such a high level of reliability should motivate the Illinois legislature to reconsider and amend its current position to allow the use of the polygraph in police disciplinary inquiries. An understanding of the accuracy of the polygraph technique, however, is not the only reason for accepting its use in internal investigations. Additional considerations prove equally persuasive.

responses to the relevant questions. *Id.* at 59-70.

55. See *People v. Baynes*, 88 Ill. 2d 225, 430 N.E.2d 1070 (1982) (unreliability cited as reason for inadmissibility of polygraph); *State v. Ledger*, 444 A.2d 404 (Me. 1982) (same principle); *Pennington v. State*, 437 So.2d 37 (Miss. 1983) (same principle); *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983) (same principle); *State v. Copeland*, 278 S.C. 527, 300 S.E.2d 63 (1983) (same principle).

56. See Barland, Podlesny and Raskin, *Validity and Reliability of Detection of Deception*, National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice 4, 8, 10 (1978) (reported accuracy rate of eighty-six percent); Barland, Podlesny and Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception*, Report No. 76.5, Contract 75—NI—99-0001, National Institute of Law Enforcement and Criminal Justice, University of Utah (1976) (reported accuracy of eighty-nine percent); Hare and Raskin, *Psychopathy and Detection of Deception in a Prison Population*, 15 *PSYCHOLOGY* 126 (1978) (reported accuracy of eighty-seven percent among psychopaths).

57. See Bersch, *A Validation Study of Polygraph Examiner Judgments*, 53 *J. APP. PSYCH.* 399 (1959) (accuracy rate of ninety-two percent); Blum and Osterlok, *The Polygraphy Examinations as a Means for Detecting Truth and Falsehood in Stories Presented by Police Informants*, 59 *J. CRIM. L. CRIMINALS AND POL. SCI.* 133 (1968) (accuracy rate of ninety-two percent); Lykken, *The GSR in the Detection of Guilt*, 43 *J. APP. PSYCH.* 385 (1959) (accuracy rate of ninety-three percent); Lyon, *Deception Tests with Juvenile Delinquents*, 48 *J. GENETIC PSYCH.* 494 (1936) (accuracy rate of one hundred percent).

58. Horvath and Widacki, *An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification*, 7 *J. FORENSIC SCI.* 215, 218 (1978). This is an important study to note since it showed the polygraph diagnosis to be correct in ninety-five percent of the cases which was greater than handwriting (ninety-four percent) and eyewitness identification (sixty-four percent). *Id.* Fingerprint evidence was accurate one hundred percent of the time. However, it was inconclusive in seventy-five percent of the cases compared to only a five percent inconclusive rate for the polygraph. *Id.*

AN OFFICER'S DUTY TO COOPERATE: THE SUPREME COURT'S POSITION

The United States Supreme Court has expressly stated that a police officer must answer questions "specifically, narrowly, and directly related" to his official duties.⁵⁹ In *Garrity v. New Jersey*,⁶⁰ the Court held that an officer could not be compelled to answer potentially incriminating questions.⁶¹ The Court, however, did not limit an officer's duty to respond to work-related inquiries.⁶² Likewise, in *Gardner v. Broderick*,⁶³ the Court ruled that an officer could not be forced to waive his right against self-incrimination.⁶⁴ However, the *Gardner* Court specifically differentiated between questions which are purely work-related and questions which are designed to obtain incriminating responses.⁶⁵ So long as the inquiry is not the basis of a criminal prosecution, the officer must cooperate or be subject to disciplinary action.

Although the Supreme Court has never directly addressed the

59. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). See also *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973).

60. 385 U.S. 493 (1967).

61. *Id.* at 500.

62. *Id.* at 494 n.1. In *Garrity*, certain police officers were questioned regarding their alleged involvement in a ticket-fixing scheme. The questioning was part of an investigation by the New Jersey Attorney General and was also ordered by the Supreme Court of New Jersey. The officers were advised that if they refused to answer questions from the Attorney General they would be removed from office. Each officer was warned that anything he stated could be used against him, that he had the right to refuse to answer, and if he refused he would be subject to discharge. In fact, an officer so discharged would be ineligible for appointment to any public office thereafter. *Id.* Several officers answered, and their answers were subsequently used in their criminal prosecution. *Id.* at 494. The Supreme Court held that when police officers were given a choice to incriminate themselves or to forfeit their employment, the fourteenth amendment prohibited the use of their confessions in a criminal proceeding. *Id.* at 500.

It is important to note that the *Garrity* Court was faced with a situation where the officer's answers led to a criminal action. It is the criminal nature of the proceeding that invokes the spirit of the Constitution. The fifth and fourteenth amendments provide protection to individuals against governmental intrusions. Nowhere in the opinion does the majority suggest that if the officer's answers were limited to internal disciplinary purposes that the officer would not have to answer.

63. 392 U.S. 273 (1968).

64. *Id.* at 278. In *Gardner*, an officer was discharged after he refused to waive his privilege against self-incrimination. Unlike *Garrity*, the officer refused to answer questions. The Court, however, viewed the forced refusal to be just as onerous as the compulsion of answers in *Garrity*. *Id.* at 279.

65. *Id.* at 278. Although the Court was consistent in its ruling regarding the constitutional protections afforded by the fifth and fourteenth amendments concerning criminal proceedings, the Court was more specific in its differentiation regarding strictly internal disciplinary action. *Id.* at 276. The Court noted that "[a]nswers may be compelled regardless of the privileges if there is immunity from state and federal use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." *Id.* (emphasis added). The Court expressly stated that if the officer had refused to answer questions "specifically, directly and narrowly related to the performance of his official duties . . . the privilege against self-incrimination would not be a bar to his dismissal." *Id.* at 278 (emphasis added).

issue of polygraph evidence admissibility,⁶⁶ its position regarding an officer's cooperation during internal investigations, is, by analogy, supporting the argument in favor of allowing polygraph evidence.⁶⁷ Even though the polygraph is designed to measure physiological responses to specific questions, the technique is merely another method of questioning.⁶⁸ A skilled interviewer asks direct questions and evaluates the responses in a fashion useful to obtaining relevant information.⁶⁹ The *Gardner* Court stated that an officer has a duty to answer such questions. Therefore, if an internal affairs investigator chooses to ask work-related questions in the form of a polygraph examination, then there is an implicit duty upon the officer to answer.⁷⁰ In light of the Supreme Court's view of an officer's duty to cooperate in an internal investigation, the Illinois General Assembly should re-evaluate its position prohibiting the use of the polygraph in internal investigations.

THE PUBLIC INTEREST IN HONEST LAW ENFORCEMENT

The Illinois legislature should not ignore the compelling public interest in an honest police force. A number of jurisdictions,⁷¹ by requiring police officers to submit to polygraph examinations, have recognized the need for official cooperation in maintaining the integrity of its police departments.⁷² Most courts which permit the poly-

66. The Supreme Court has denied certiorari on every case in which the polygraph was at issue.

67. The polygraph is a reliable method of questioning. See *supra* notes 45-58 and accompanying text. For a discussion of an officer's obligation to respond to relevant questioning, see *supra* notes 59-65 and accompanying text.

68. See *Baker*, 379 Mass. at 328, 409 N.E.2d at 716. The court in *Baker* recognized the link between the disclosure by public employees required by the Supreme Court and the disclosure through a polygraph examination. The court also noted the testimonial nature of a polygraph examination, in contrasting it to other investigative methods which produce physical evidence. *Id.* See also *Schmerber v. California*, 384 U.S. 757, 764 (1966) (the *Schmerber* Court considered polygraph results to be testimonial evidence).

69. See F. INBAU AND J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 25-108 (1981).

70. This connection has been recognized by other courts considering this matter. See *Dieck v. Department of Police*, 266 So.2d 500 (La. App. 1972) (officer has duty to answer questions directly related to official duties); *Baker v. City of Lawrence*, 379 Mass. 322, 409 N.E.2d 710 (1979) (same principle); *Dolan v. Kelly*, 76 Misc. 2d 151, 348 N.Y.S.2d 478 (N.Y. Sup. Ct. 1973) (same principle). For a thorough recent discussion of the applicability of the *Gardner/Garrity* line of reasoning to the use of the polygraph in an internal investigation, see *Knebel v. City of Biloxi*, 453 So.2d 1037 (Miss. 1984).

71. Some of the jurisdictions that require an officer to submit to a polygraph examination include Arizona, Iowa, Louisiana, Massachusetts, Missouri, New York, and Texas. See *infra* note 93.

72. See, e.g., *Eshelman v. Blubaum*, 114 Ariz. 376, 560 P.2d 1283 (1977); *City of Sioux City v. Fairbanks*, 287 N.W.2d 579 (Iowa 1980); *Baker v. City of Lawrence*, 379 Mass. 322, 409 N.E.2d 710 (1979); *Knebel v. City of Biloxi*, 453 So.2d 1037 (Miss. 1984); *Doland v. Kelly*, 76 Misc. 2d 151, 348 N.Y.S.2d 478 (N.Y. Sup. Ct. 1973); Rich-

graph's use in internal investigations have done so based on this same public policy rationale.⁷³ The public's interest in an honest and efficient police force⁷⁴ must be given priority over the individual officer's privacy interest.⁷⁵

Additionally, the need for discipline and order within a police department justifies requiring an officer to submit to a polygraph test.⁷⁶ Such discipline is necessary to properly maintain a police organization responsive to the public need.⁷⁷ Although a police officer should never be forced to incriminate himself,⁷⁸ the very nature of his position requires him to accept certain restrictions commensurate with his position of trust and respect.⁷⁹

The legislature's failure to respond to the public's need has placed Illinois citizens in a compromising and vulnerable position. Illinois citizens who may be required to submit to a polygraph ex-

ardson v. City of Pasadena, 500 S.W.2d 175 (Tex. Civ. App. 1973). Cf. Kaske v. City of Rockford, 96 Ill. 2d 298, 305, 450 N.E.2d 314, 321 (1983) (Moran, J., dissenting).

73. See, e.g., Eshelman v. Blubaum, 114 Ariz. 376, 560 P.2d 1283 (1977) (officer suspected of stealing gun parts); Frey v. Department of Police, 288 So.2d 410 (La. Ct. App. 1973) (officer arrested for violation of federal bribery statutes); Baker v. City of Lawrence, 379 Mass. 322, 409 N.E.2d 710 (1979) (officer suspected of theft from burglary scene); Dolan v. Kelly, 76 Misc. 2d 151, 348 N.Y.S.2d 478 (N.Y. Sup. Ct. 1973) (officer suspected of theft from homicide victim).

74. In those states where the judiciary has acted to limit or ban the use of the polygraph, the courts have not totally ignored the public interest argument. See Farmer v. City of Fort Lauderdale, 427 So.2d 187 (Fla. 1983), cert. denied, 464 U.S. 816 (1993) (court recognized public's interest in honest police force); Kaske v. City of Rockford, 96 Ill. 2d 298, 450 N.E.2d 314 (1983) (court discussed need to maintain integrity of officers). See also Note, *Police Officer May Not Properly Be Dismissed For Refusal to Submit To A Polygraph Examination: Farmer v. City of Fort Lauderdale*, 11 FLA. ST. U.L. REV. 697 (1983) (discusses courts' consideration of the public's need for honest police forces); Note, *Officers May Not Be Compelled To Undergo Polygraph Examination: Polygraph Results Inadmissible In Administrative Proceedings: Kaske v. City of Rockford*, 1 S. ILL. U.L. REV. 204 (1984).

75. Although an officer may have legitimate privacy interests, those interests have not been an articulated factor in the various court decisions regarding the use of the polygraph in internal investigations.

76. See Richardson, 500 S.W.2d at 177; Dolan, 76 Misc. 2d at 151, 348 N.Y.S.2d at 482. See also Kaske, 96 Ill. 2d at 305, 450 N.E.2d at 321 (Moran, J., dissenting). See generally THE GUARDIANS, *supra* note 34, at 35 (discusses need and benefit of internal discipline).

77. See THE GUARDIANS, *supra* note 34, at 35; McKee, *The Police and the Polygraph*, 37 POLICE CHIEF 52, 54 (1971); Territo and Smith, *The Internal Affairs Unit—The Policeman's Friend or Foe*, 43 POLICE CHIEF 66, 69 (1973).

78. See Gardner v. Broderick, 392 U.S. 273 (1968). See also Knebel v. City of Biloxi, 453 So. 2d 1037 (Miss. 1984). The Mississippi Supreme Court held that the plaintiff police officer did not have a constitutional right to not take a polygraph test under either the United States Constitution or under its state Constitution. *Id.* at 1038. The court noted that under the *Garrity/Gardner* line of cases, the police officer need only be given immunity as to any statements made during the course of the investigation (use immunity). *Id.* at 1040. The granting of immunity as to the entire investigation (transactional immunity) would not be required. *Id.*

79. For a discussion of an officer's duty to cooperate, see *supra* notes 59-68 and accompanying text.

amination as a condition of employment should legitimately expect their own police officers to undergo similar scrutiny when allegations of misconduct arise.⁸⁰ The legislature needs to re-examine the benefits of a thorough investigation in instances of alleged police misconduct.

A PROGRESSIVE PROPOSAL

A balance must be struck between the officer's legitimate interest in being free from undue intrusion into his or her privacy and the public's interest in a police force they can trust.⁸¹ Police officers should not be placed in a position of second class citizenship, yet their position of trust and responsibility demands constant scrutiny.⁸² The use of the polygraph, under strict legislative control can provide an effective and unintrusive method of investigation that will accomplish this delicate balance.

The Illinois legislature is in a unique position to make the necessary change. Illinois already has one of the most progressive polygraph licensing laws.⁸³ The qualifications for an Illinois polygraph examiner are among the most extensive anywhere.⁸⁴ Additionally,

80. There are no statutory prohibitions on the use of the polygraph in the private sector in Illinois. Barring any collective bargaining agreement, an employer may require a polygraph examination as a prerequisite to employment or as a condition of employment. See *Cipov v. International Harvester*, 134 Ill. App. 3d 522, 481 N.E.2d 22 (1985). In *Cipov*, the plaintiff was an at-will employee asked to submit to a polygraph examination after he was accused of theft. *Id.* at 23. The plaintiff refused to take the examination and was subsequently discharged based on that refusal. *Id.* The plaintiff brought an action for retaliatory discharge claiming that *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983), established a public policy prohibiting the discharge of private employees based on a refusal to submit to a work-related polygraph examination. *Id.* The appellate court held that *Kaske* does not establish a clearly mandated public policy related to private employees. *Id.* It is interesting to note that the court also referred to the lack of a statutory prohibition in upholding the plaintiff's discharge. *Id.* For a thorough discussion of the tort of retaliatory discharge in Illinois, see Note, *Midgett v. Sackett-Chicago, Inc.: The Short-Sighted Use of State Remedies to Protect Union Employees from Retaliatory Discharge*, 18 J. MAR. L. REV. 565 (1984). There are, however, some statutory limitations on the use of the polygraph. See ILL. REV. STAT. ch. 111, § 2401, (1983); ILL. ADM. CODE tit. 68, § 230 (1983).

81. There is obviously a need to afford police officers protections similar to those enjoyed by all citizens. Yet it seems capricious to do so in disregard to the needs of the public. The police are not prohibited from searching persons or places, but are limited by constitutional controls. Although the considerations are different, a balanced approach would serve the same purpose in respect to the use of the polygraph. Allowing the polygraph's use under strict controls would meet the need of both groups without unnecessarily threatening the interest of the police or the public.

82. See *Garrity*, 385 U.S. at 500.

83. ILL. REV. STAT. ch. 111, § 2401 (1983).

84. *Id.* § 2412. The section states that "[a] person is qualified to receive a license as an examiner:

- A. Who establishes that he is a person of good moral character;
- B. Who has passed an examination conducted by the Examiner Commit-

there are statutory limits on testing procedures that can minimize any potential abuse of the polygraph process.⁸⁵ The Illinois General Assembly, by incorporating existing protections into a more comprehensive statute, could achieve a compromise which would meet the needs of both society and law enforcement officers.

An amendment based on the following guidelines would protect the interests of all Illinois citizens and police persons, alike. First, the Disciplinary Act should expressly require the cooperation of a police officer in responding to questions "specifically, narrowly, and directly related to the investigation," even those presented in the form of a polygraph examination.⁸⁶ This would not only contribute to the resolution of many investigations, but would also be in line with Supreme Court precedent.⁸⁷ Such a requirement, utilized in conjunction with the present protections under the Act, would not necessarily subject an officer to abusive interrogational tactics.⁸⁸

Second, more stringent criteria should be established for use in assessing polygraph examiner competency, including minimum educational requirements,⁸⁹ previous or proven experience,⁹⁰ and continuing analysis and updating of testing procedures.⁹¹ Such requirements could be based on current statutory guidelines,⁹² or they could be expanded to provide further protection.⁹³ In conjunction

tee, or under its supervision, to determine his competency to obtain a license to practice as an examiner;

C. Who has had conferred upon him an academic degree, at the baccalaureate level, from an accredited college or university; and

D. Who has satisfactorily completed six months of study in detection of deception, as prescribed by rule.

Conviction of a misdemeanor involving moral turpitude or a felony may be considered but shall not be determinative, in determining whether an applicant is of good moral character.

Id. See also Romig, *State Laws and the Polygraph in 1975*, 5 POLYGRAPH 95 (1975) (Survey of State Licensing qualifications for polygraph examiners).

85. ILL. ADM. CODE tit. 68, § 230 (1983).

86. See *Gardner*, 392 U.S. at 273.

87. See *supra* notes 59-68 and accompanying text.

88. For a discussion of the Act's current provisions, see *supra* notes 5-9 and accompanying text.

89. Minimum standards for education and training would help insure competency as well as consistency. A baccalaureate degree with a minimum number of hours in psychology and physiology would be an excellent starting point.

90. Some courts require a minimum amount of experience before an examiner is allowed to testify as an expert. See *People v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962). Reid and Inbau recommend a minimum of three years experience before an examiner may qualify as an expert witness. TRUTH AND DECEPTION, *supra* note 39, at 55.

91. See ILL. ADM. CODE tit. 68, § 230 (1983).

92. ILL. REV. STAT. ch. 11, § 2401 (1983); ILL. ADM. CODE TIT. 68, § 230.

93. Guidelines comparable to those suggested for qualifying an examiner as an expert would be ideal requirements for examiners conducting polygraph tests for administrative purposes. See TRUTH AND DECEPTION, *supra* note 47, at 365. Reid and Inbau suggest the following requirements before polygraph test results are admitted

with examiner qualifications, limitations as to the types of questions asked during the examination should be established.⁹⁴ Questions should be limited to the specific facts of the investigation, exclusive of control questions,⁹⁵ in order to prevent the possibility of a polygraph "witch-hunt."

Third, certain procedural safeguards of a constitutional nature should be provided. Every officer should be allowed to consult with an attorney prior to an examination.⁹⁶ The attorney should be allowed to review the questions prior to the examination,⁹⁷ and should be advised of the test results immediately.⁹⁸ The attorney should also be allowed to monitor the testing process.⁹⁹ Furthermore, every officer should be advised of his rights under the Act,¹⁰⁰ and no polygraph results should be admissible in a criminal proceeding.¹⁰¹ However, any admissions made during or subsequent to a polygraph examination should be admissible at the disciplinary hearing.¹⁰²

Finally, if the basis of the investigation is a citizen's complaint,

into court: (1) the examiner possess a baccalaureate degree; (2) the examiner have at least six months supervised internship training; (3) the examiner have three years testing experience; (4) the polygraph records must be produced in courts; and (5) the examiner cannot divulge any control question admissions. *Id.*

94. Questions should be limited to those necessary to properly conduct an accurate polygraph examination. *See supra* note 52. Also, by limiting the relevant questions to those areas specifically and directly connected with the issue under investigation, the process would remain within the limitations set by the Supreme Court. *See Gardner*, 392 U.S. at 278. *See also* ILL. REV. STAT. ch. 111, § 2415.1 Section 2415.1 limits certain areas of inquiry on pre-employment examinations. Those areas include religious beliefs, racial matters, political affiliations, labor affiliations, or sexual preferences. Those areas may be questioned on an examination only if they are directly related to an employment requirement. *Id.*

95. For a discussion of control questions, see *supra* note 54.

96. This is currently provided under the Act. ILL. REV. STAT. ch. 85, § 2562.

97. This is the procedure currently followed at John E. Reid and Associates in Chicago. The actual formulation of the questions, however, should be the examiner's responsibility. *See supra* note 52.

98. If the officer's responses are ascertained as untruthful, the attorney should also be consulted prior to any further interrogation. The attorney should also receive a written copy of the test results within five days of requesting the results. *See* ILL. REV. STAT. ch. 111, § 2403 (examinee entitled to copy within five days).

99. This could be accomplished with the aid of microphones and/or cameras. However, due to the need for privacy during the testing process, the attorney should not be allowed in the examining room.

100. *See* ILL. REV. STAT. ch. 85, § 2561.

101. *See supra* notes 59-68.

102. Such admissions, where relevant, would substantiate the polygraph results as well as corroborate other evidence. Admissions made during or subsequent to a polygraph examination are currently admissible in court so long as they are voluntary. *See United States v. McDevitt*, 328 F.2d 282 (6th Cir. 1964); *People v. Taylor*, 58 Ill. 2d 69, 617 N.E.2d 97 (1974); *State v. Carey*, 188 N.C. 254, 218 S.E.2d 387 (1975); *State v. Iverson*, 225 N.W.2d 48 (N.D. 1974); *State v. Clifton* 271 Ore. 177, 531 P.2d 256 (1975); *State v. Ridgely*, 251 S.C. 556, 164 S.E.2d 439 (1968); *State v. Henderson*, 220 Tenn. 1, 413 S.W.2d 674 (1967). *See generally* INBAU AND REID, CRIMINAL INTERROGATION AND CONFESSIONS 143 (1981) (discusses voluntariness and admissibility of confessions).

then the complaining witness should be tested first.¹⁰³ The officer should only be tested where the veracity of the witness' responses are proven.¹⁰⁴ The result of these proposed statutory requirements would be to ensure official cooperation while guaranteeing protection from abusive treatment to the officer.

CONCLUSION

The Illinois legislature has gone too far in limiting the use of the polygraph in internal police investigations. The Disciplinary Act has a detrimental impact on the public's need for honest and effective law enforcement. As substantial data indicate, the polygraph is a reliable and effective method of determining the truthfulness of responses to specific and direct questions. In limiting its use, the legislature has ignored a strong public interest and has failed to recognize the duty of police officers to cooperate with internal investigations. The need to maintain integrity and discipline within our police departments is a significant reason for requiring officers to submit to polygraph examinations. The polygraph is a reliable aid in the resolution of allegations of professional misconduct. The legislature, however, has deprived police departments of a reliable resource for maintaining the integrity of their personnel.

Police misconduct is a reality. The public and the police department's image suffer when an officer oversteps his duties. In consideration of the high degree of trust and responsibility commensurate with the position of a police officer, the legislature needs to amend the Disciplinary Act in a fashion responsive to the public's needs; the very same public the officers are sworn to protect.

Milo W. Miller

103. This was a matter of practice when the Chicago Police Department was still utilizing the polygraph. Interview with Joseph P. Buckley, President of John E. Reid and Associates of Chicago, in Chicago (June 8, 1985).

104. See, e.g., NEV. REV. STAT. § 289.070(2) (1983) (statute permits testing of officer where witness previously ascertained truthful by polygraph examination).