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violence. Those who oppose the adoption of such a plan argue that the ultimate solution to the crime problem is to attempt to reduce the number of victims⁶⁸ by allocating to crime prevention the vast sums which would be expended annually on compensation. The proponents of compensation plans, however, argue that such plans are merely logical extensions of present government policy.⁶⁹ Compensation is not an acceptance of the present crime rates, nor does it preclude a vigorous program of crime prevention.

Critics of the existing and proposed legislation have relied heavily upon the argument that too many mechanical problems remain unsolved.⁷⁰ After examining some possible solutions to these problems, it is clear that the obstacles to a workable plan are not insurmountable and hopefully those legislative bodies currently drafting legislation in this area will find practical solutions to them.

ROBERT A. SANDLER

THE POLYGRAPH IN PRIVATE INDUSTRY: REGULATION OR ELIMINATION?

Throughout history man has attempted to find methods for determining the truth. Some of the earliest efforts aimed at distinguishing fact from fantasy were predicated on the physical reactions of the subject and included such practices as the primitive trial by ordeal (where the removal of an unharmed hand from a fire was determined by *judicium Dei*) and the Chinese method of chewing dry rice powder while being questioned.

Today, modern polygraphy ("lie detection") is more sophisticated than the ancient rice chewing of the Chinese yet the theory underlying both practices is essentially the same. The hypothesis of both methods is that emotional states of human beings are accompanied by observable physiological responses, such as changes in heart rate, breathing and skin temperature and that the psychological stress which results from telling a lie produces distinguishable physiological responses.

EXTENT OF THE POLYGRAPH'S USE IN INDUSTRY

The use of the lie detector by private industry and the government has greatly increased in recent years. The sharply multiplying number of polygraph examinations given by business firms and government agencies to present and prospective employees has become a matter of increasing national concern. One author has commented that "probably no other technique of intrusion will ultimately bring on more of a battle royal between the forces promoting its general

68. See *Compensation for Victims of Criminal Violence, A Round Table*, 8 J. Pub. L. 191, 218 (1959).

69. Note, *Compensation for the Victims of Criminal Violence*, 40 St. John's L. Rev. 67, 73 (1965).

70. See, e.g., Childres, *supra* note 26, at 283.

acceptance and the forces that consider it a vicious instrument for invading privacy."¹ Management has been swift to view the polygraph as a panacea to insure employee dedication because of its scientific nature and its apparent infallibility.

The purpose of this article is to provide some insight into the controversy surrounding industry's use of the polygraph. Emphasis will be placed on the limitations of the machine and the lack of scientific verification of the machine's reliability and accuracy. Public reaction to industry's use of the polygraph and management's justification for such procedure will be evaluated. The reaction of a number of state legislatures, including New York State, who have either prohibited use of the machine in employment, or sought to regulate its operators, will be appraised. Hopefully the extent of polygraph testing and the need for proof of its accuracy, as well as legislative protection from its shortcomings, will become apparent.

In private industry apologists of the machine contend that the polygraph examination can take up where regular investigative methods leave off or are ineffective. It is also asserted that polygraph examination has been useful in reducing thefts and screening potential and present employees for such undesirable characteristics as bad habits and sexual deviation. Advocates of the polygraph also claim that extensive reductions in pilferage and theft have resulted from its use. It has been reported that up to 33% of all business failures are attributable to employee thefts and that internal losses in money and merchandise approach 2 billion dollars annually representing 5% of the cost of goods to the consumer.² It has also been reported that an employee may pilfer for an average of three years before being caught by common investigative methods.³ To combat such losses many companies have engaged security agencies to conduct polygraph examinations⁴ and a few maintain their own examiners.⁵

Proponents of the machine in industry point to a few cases where its use has resulted in substantial theft reduction. For example, the supermarket operator who discovered through "lie detector" examinations that 90% of his employees were stealing over one million dollars a year, whereas upon reexamination a year later, only 3% were recidivists.⁶ Because of the controversy surrounding the machine, statistics revealing the extent of its use in industry are not readily available.

Several hundred investigative firms have leaped into the lucrative field of employee testing (the average cost for screening by commercial operators is

1. Brenton, *The Privacy Invaders*, pp. 91-92 (1964).

2. *N.Y. Times*, June 18, 1962, p. 14.

3. *Ibid.*

4. *E.g.* Dale System Inc., John E. Reid and Associates, Burns Detective Agency, Pinkerton National Detective Agency and Lincoln M. Zohn Inc.

5. McKesson and Robbins, world's largest distributor of drug products, has its own company examiners.

6. *Business Week*, *Business Uses the Lie Detector*, June 18, 1960, p. 98.

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twenty to thirty dollars per person) and it has been reported that there are about 1,500 commercial polygraph operators in the United States at the present time doing about 80% of their work for private companies and the remainder for police departments.⁷ Records of several commercial polygraph firms are some indication of the widespread and increasing use of the tests. John E. Reid and Associates of Chicago conducted approximately 5,200 tests in 1964, the majority for private companies. This was an increase of 4,400 tests over 1962 and 1963. Truth Verification, Inc., a Dallas firm, conducted 26,000 tests in 1963 and 42,000 tests in 1964.⁸ It has been claimed that in Texas alone approximately 5,000 firms now require employees to take periodic tests.⁹ It has also been reported that efforts have been made by at least one polygraph agency to introduce their detection methods to businesses and industries in South America and Australia.¹⁰ An official of one of the larger polygraph agencies told one commentator that every type of retail store and manufacturing outfit now uses the machine for pre-employment and pilferage checks.¹¹ An official for the John Reid agency related that almost every big company uses lie detectors occasionally.¹² The Dale System, polygraphic agency, states that among others it works for Westinghouse Electric Corp., Howard Johnson, Grand Union Co. and W. T. Grant Co.¹³ McKesson and Roberts, Inc., wholesaler of pharmaceuticals, uses the lie detector as a regular part of its employment process on a nationwide basis to screen out undesirable employees who would otherwise have access to dangerous drugs and narcotics. The company security director reports that such use of the polygraph is carefully controlled and tests are given by staff members with college degrees in psychology.¹⁴

Companies normally require employees and applicants to sign a statement of consent and release before taking the examination. This release absolves the company of any liability in connection with the test. According to one labor publication, some releases give blanket authority for using the test results for any purpose desired by the company.¹⁵ This would, of course, allow it to turn over the test results to other employers. The release may also confer upon the employer the right to discharge the employee at any time if he refuses to take the test or fails to be cleared by it.¹⁶

Where the employer engages an outside polygraph firm the usual procedure

7. Suffridge, *The Silent Assault on the Right to Privacy*, The Federationist, Aug. 1965, p. 1.

8. Coghill, *The Lie Detector in Employment—A Review of Current Efforts to Ban It*, Technical Reports Series, p. 5 (The Industrial and Labor Relations Library, N.Y. School of Industrial and Labor Relations, Sept. 1965); Wall Street J., April 8, 1965, p. 1.

9. Packard, *The Naked Society*, p. 47 (1964).

10. *Ibid.*

11. Brenton, *supra* note 1, at 93.

12. Coghill, *supra* note 8, at 5.

13. Packard, *supra* note 9, at 47.

14. Industrial Relations News, Special Report, March 1963, p. 1-4.

15. *What Happens When the Lie Detector is Wrong?*, The Advocate, Dec. 1964, p. 2.

16. *Ibid.*

is to have the applicant or employee execute a second waiver for the protection of the agency. Since the test will not be given without the waiver a refusal to sign is a refusal to be tested. The waiver relieves the examiner of any responsibility for erroneously finding an innocent worker "guilty" of a theft thus causing loss of employment and serious impairment of future job opportunities.¹⁷

The federal government's use of the polygraph was investigated in 1964 by the House Committee on Government Operations.¹⁸ These hearings indicated that 19 federal agencies using 639 operators and 512 machines conducted approximately 20,000 tests at a cost of almost 4½ million dollars in the fiscal year ending mid-1963.¹⁹ Only the CIA and NSA use the polygraph routinely for pre-employment screening.²⁰ The FBI uses the polygraph as an investigative aid in carefully selected cases involving criminal and security violations but does not use it in interviewing job applicants or in personnel screening.²¹

All indications are that both the government and private industry have become devoutly proselytized to the apparent efficacy of the polygraph in resolving their suspicions about employees' loyalty and honesty. Such use of the machine has raised many serious questions concerning its reliability and accuracy, the competency of its operators, its invasion of privacy and degradation of human dignity and the self-incrimination of its subjects. These problems, and the appropriate legislative response, are the subject of this discussion.

THE INSTRUMENT, THE TEST AND THE OPERATOR

The polygraph is a relatively simple instrument when contrasted with other contemporary electronic devices. Its three components are: (1) a pneumograph—a corrugated rubber tube which is fastened around the chest and which expands and contracts as the subject breathes, thus measuring respiration rate; (2) a cardiosphygramanometer—an inflated rubber cuff, such as used by physicians to measure blood pressure and pulse rate; (3) two electrodes which are attached to the hand to measure galvanic skin response (G.S.R.), which is the flow of electric current across the hand as the perspiration rate increases.²² Each of these devices activates a pen which records the particular physiological response on a graph.

Prior to the test every effort is made to convince the subject of the infallibility of the machine. It has been stated that the most ideal subject is the

17. *Ibid.*

18. *Hearings before the Subcommittee of the Committee on Government Operations of the House of Representatives on the Use of the Polygraph by the Federal Government*, 88th Cong., 1st Sess., pts. 1-5 (1964) [hereinafter cited as 1964 *Hearings*].

19. House of Representatives Report No. 198, 89th Cong., 1st Sess., table of agency replies (1965) [hereinafter cited as 1965 House Report No. 198].

20. *Id.* at 16.

21. 1964 *Hearings* at 514. During the fiscal year the FBI handled 666,982 investigative matters with the polygraph utilized in 593 investigations or in .09 per cent of the investigations.

22. Inbau and Reid, *Lie Detection and Criminal Interrogation*, 5-9 (1953).

one who feels powerless before this "marvel" of the electronic age²³ and the subject must have fear and respect for the technique if he is to be responsive.²⁴ The usual test takes approximately forty-five minutes and is entirely oral. The examiner usually conducts a trial run or "pre-test" to establish a responsive norm for the subject. Questions designed to evoke "normal" responses are asked in order to develop the "normal" base lines for each subject on the graphs which the examiner later uses to interpret the subject's reactions to more pertinent questions.²⁵ Presumably all deviations from the norm when crucial questions are asked indicate emotional stress and thus deception on the part of the subject. It is almost standard procedure for the questions to be read or shown to the subject before the test, the theory being that if he is the thief or has something to hide he will instantly recognize the crucial questions, *i.e.*, those that pertain to past dishonesties, and fix his attention on them. Hence, in spite of himself he will build up tensions as the crucial questions approach and any lies will be clearly indicated.²⁶

An adequately trained and experienced examiner is alleged to be essential for a proper polygraph examination.²⁷ One authority in the field commented that the polygraph is "only as reliable and valid as the examiner."²⁸ Proponents of the machine assert that its usefulness depends entirely upon the way the operator questions his subject and interprets the physiological responses. Virtually anyone of average intelligence can learn to operate the polygraph within a short time. The interrogation techniques and the interpretation of the results, however, are alleged to require a high degree of intelligence and perception.²⁹ "The key to accuracy is the examiner himself, and his own personality, motivation, training and experience."³⁰

There are, at present, a number of schools offering courses in polygraphy, varying in length from six weeks to six months.³¹ There are at least four associations representing polygraph examiners, but they primarily operate as media for the exchange of ideas, have no enforceable standards, and are by no means trade associations.³² These organizations do recommend basic qualifications for examiners, *i.e.*, that he be a college graduate and of high moral character. The

23. Laymon, *Lie Detectors—Detection by Deception*, 10 S.D.L. Rev. 1, 5. (1965)

24. 1964 *Hearings* at 18.

25. Higheyman, *The Deceptive Certainty of the Lie Detector*, 10 Hastings L.J. 47, 55 (1958); Inbau and Reid, *supra* note 22, at 13-63.

26. Skolnick, *Scientific Theory and Scientific Evidence*, 70 Yale L.J. 694 (1961).

27. Testimony before the 1964 *Hearings* at 457, indicated that there are no restrictions on purchasing a polygraph, which may cost from \$600 to \$2,000. Thus anyone can become a "lie detector" operator for just the purchase price.

28. Arthur, *The Lie Detector—Is it of Any Value?*, 24 Fed. Prob., Dec. 1960, p. 36.

29. Bennett, *A Penal Administrator Views the Polygraph*, 24 Fed. Prob., Dec. 1960, p. 40.

30. *Ibid.*

31. 1964 *Hearings* at 183.

32. 1964 *Hearings* at 39. These associations are: The National Board of Polygraph Examiners, The American Academy of Polygraph Examiners, The International Association of Polygraph Examiners and The Academy for Scientific Interrogation.

number of examiners in the country today has been estimated at about 1,500, most of whom have received no more than six months training in its use.³³

VALIDITY AND LIMITATIONS OF THE INSTRUMENT AND ITS OPERATORS

Champions of the polygraph have estimated its accuracy at ninety-five per cent with a four per cent margin of indefinite determination and a one per cent margin of possible error.³⁴ Testimony given at the hearings of the House Committee on Governmental Operations on the Federal Government's Use of the Polygraph has indicated, however, that proof of such accuracy was only obtained in 18.9 per cent of the cases involved.³⁵ One expert from the Institute of Defense Analysis who analyzed the entire field, with specific reference to a ten year period covering approximately 200,000 tests given by the department, concluded that "up to the present time it has proved impossible to uncover statistically acceptable performance data to support the view held by polygraph examiners that lie detection is an effective procedure."³⁶ The simple fact is that the necessary data has not been kept and that an impartial appraisal of the device has not yet been accomplished. Not only is there an absence of verification but, unfortunately, few psychologists or psychiatrists have conducted research in this area. The congressional committee concluded that ". . . research completed so far has failed to prove that polygraph interrogation actually detects lies . . ."³⁷ It recommended that the federal government prohibit use of the machine in all but the most serious national security cases and that comprehensive research to determine the validity and accuracy of polygraph examinations be conducted.³⁸

Proponents of the polygraph have stated that the machine operator's interrogative and interpretative skills are the most important factor in the technique, yet they also acknowledge that only about twenty per cent of the current operators are duly qualified.³⁹ Experts testifying before the federal sub-

33. 1964 *Hearings* at 60, 61; Sternbach, Gustafson & Colier, *Don't Trust the Lie Detector*, Harv. Bus. Rev., Dec. 1962, p. 127.

34. Inbau and Reid *supra* note 22, at 111, state that this estimate of accuracy involved a study of 4,280 suspects of criminal offenses. Of this number, 64.5% were reported by the polygraph to be innocent of the crime, 31.1% were reported guilty, and 4.4% were indefinite. According to Sternbach *supra* note 33, at 130 however,

Of the group of persons reported guilty, only 791 (59.3%) were 'interrogated with the aim of obtaining a confession,' and of these only 61.4% did confess. In other words, only 36% of the individuals who were reported as guilty on the basis of their polygraph records were actually verified as such. Together there were 18.9% of total cases verified as correct. The percentage of *verified* errors was 0.07% (the figure of .0007% cited in the book is incorrect).

According to testimony before the congressional committee, 1964 *Hearings* at 32, the Inbau and Reid estimate of 95% is based on the fact that later confessions from the polygraph subjects conclusively verified all but 1% of the 18.9% reported verified.

35. *Ibid.*

36. 1964 *Hearings* at 426-27.

37. 1965 House Report No. 198, *supra* note 19, at 1.

38. *Id.* at 2.

39. Inbau and Reid, *The Lie Detector Technique: a Reliable and Valuable Investigative Aid*, 50 A.B.A.J. 470 (1964); McDonald, *The Lie Detector Era, Part I*, The Reporter, June

committee were unanimous in agreeing that minimum qualifications for a polygraph examiner should include a college degree and at least five years of investigative experience. Of the five states which presently regulate polygraph examiners only one approaches these criteria in setting qualifications for a license to operate a polygraph.⁴⁰

It is recognized that any validity which the polygraph might have can be defeated by a number of psychological or physiological conditions present in certain individuals.⁴¹ These are: (1) *Extreme Nervousness*—high emotional tension or nervousness caused by fear of being accused or arising from a guilt complex involving matters unrelated to the issues at hand. Several Harvard psychologists have concluded that although lying will produce physiological changes,

other factors often produce physiological changes which are very similar. For example, there is the real danger that the changes which occur are not the result of a 'feeling of guilt' itself, but rather of recalling some information or of a shift in attention, or perhaps a sudden fear of the consequences of being pronounced guilty.⁴²

(2) *Physiological Abnormalities*—abnormally high or low blood pressure, heart diseases, and respiratory disorders are examples of the types of physical abnormalities that can lead to inaccurate test results. (3) *Mental Abnormalities*⁴³—such a feeble-mindedness, psychoses or insanities, e.g., paranoids, schizophrenics; psychoneuroses and psychopathia. Pathological liars or persons who can rationalize a falsehood to the extent it becomes true to themselves can also frustrate the tests. For example, a mental patient who said he was Napoleon and believed it was telling the truth according to the polygraph.⁴⁴ (4) *Unresponsiveness*—a lack of emotional response can seriously hinder accurate testing. Such unresponsiveness could be due to (a) a lack of fear of detection, (b) an

8, 1954, p. 10. McDonald stated that leading professionals admit that not more than 10% are truly competent.

40. Ill. Ann. Stat., ch. 38, § 202-1 to 30 (Smith-Hurd 1964).

41. Inbau and Reid, *supra* note 22, at 19-25; 1965 House Report No. 198, *supra* note 19, at 12.

42. Sternbach, *supra* note 33, at 128.

43. The often quoted example is that of the case study of the maladjusted bank vice-president by Dearman and Smith, *Unconscious Motivation and the Polygraph Test*, 119 *The American Journal of Psychiatry* 1017 (1963), where a routine polygraph test taken by a bank vice-president indicated he had stolen some funds, yet a complete audit failed to reveal any shortages. A second and third test convinced the polygraph examiner that the official had stolen some money and that it was between eight and eleven hundred dollars. Another audit however failed to reveal any deficits so the vice-president was referred for psychiatric examination. The psychiatrists found that the young man had strong ambivalent feelings for his mother and wife. Both were customers of the bank and had been involved in quite legitimate financial transactions with him to the extent of eight to eleven hundred dollars. When asked by the polygraph examiner, "Have you ever stolen from the bank or its customers?" he unconsciously responded to the customers part of the question inasmuch as he identified his wife and mother as customers and inasmuch as he felt guilty about the financial dealings he had with them.

44. 1965 H.R. No. 198, *supra* note 19, at 12. One commentator has suggested that sex may also affect the reliability of the tests, "because women lie more skillfully and stick to a lie with greater resolution." *Id.* at 13.

ability to control one's responses through certain mental attitudes or sets, or (c) mental fatigue. (5) *Bodily Movement*—Physical movement, pain or muscular activity can lead to misleading blood pressure and hence inconclusive test results. Examiners caution subjects against such movement. If any movement is seen by the operator the reading of the machine can be disregarded. However, if unobserved, muscular activity can produce misleading results.

These uncontroverted deficiencies in the polygraph technique, the critical lack of any public body of knowledge to support the percentage of accuracy claimed by its proponents, and the acknowledged lack of competent operators have been the primary considerations on which adverse judicial, legislative and public reaction to the device has been founded. The majority of courts have continually refused to admit the results of polygraph tests into evidence.⁴⁵ As will be shown, arbitrators have been almost unanimous in deprecating its use by employers, and organized labor has been successful in securing legislative prohibition of the tests in seven states. The polygraph associations have also been successful in securing legislative licensing and regulation of their profession in a small number of states.

LABOR ARBITRATION AND THE POLYGRAPH

Significant protection for the unionized employee from industry's increasing use of the polygraph has been granted by labor arbitrators. Such protection has been extended where unions, rightly concerned about justice for the employees they represent, have resisted the lie detector through union-management contracts which provide for the settlement of labor disputes by arbitration.

In a landmark case in 1958,⁴⁶ an employer proposed that all employees in a particular department be required to take lie detector tests in order to ascertain who had been making false incentive reports. No employee was bound by a pre-employment agreement to take such a test. Despite the fact that the company proffered testimony as to the machine's alleged ninety-five per cent accuracy, the arbitrator ruled that the employer could not use the machine as a substitute for its obligation to monitor incentive plans. He stated that the time has not yet come when management can consign to a machine the job of supervision, especially when the machine is to take the employee in its embrace and measure his most intimate, vital processes.⁴⁷ This "penetrating analysis of the problem

45. The courts have been almost unanimous in refusing to admit the results of "lie detector" tests into evidence. Inbau and Reid, *supra* note 22, at 122 conclude, after an exhaustive survey of significant court decisions in all jurisdictions, that at the present time the tests have no judicial recognition. They also state that until the estimated accuracy of 95 per cent is generally attainable, and a much higher degree of standardization achieved, the courts should continue to withhold judicial sanction of the test results.

The usual reason for rejection given by the courts is that lie detection by means of the polygraph has not yet gained such standing and scientific recognition as to justify its admissibility. Moenssens, *Licensing of Detection of Deception Operators in Illinois*, 41 Chi.-Kent L. Rev. 115 (1964).

46. General American Transportation Corp., 31 Lab. Arb. 355 (1958).

47. *Ibid.*

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in the context of modern industry has set a course which has been largely followed since."⁴⁸

The arbitration decisions have largely paralleled the position of the courts in refusing to admit polygraph tests as evidence because of their lack of reliability and accuracy.⁴⁹ Where the employee has refused to submit to the test such refusal has been held not to be proof of his guilt and not to be prejudicial to him in any way.⁵⁰ Refusal to take the test has also been held not to be such insubordination as to warrant a discharge.⁵¹ Where an employee failed the test, the result has been held not to be proof of guilt and insufficient to support a discharge.⁵² Even where an employee, upon being hired, agreed to take a test whenever asked to do so by the employer as a condition of continued employment, his later refusal has been held not to be insubordination and insufficient to warrant a discharge.⁵³

The National Labor Relations Board has also dealt with the use of polygraphs. In one recent case⁵⁴ the employer threatened to use the machine to force employees to reveal their union activities. The Board held the employer guilty of unfair labor practice in violation of 8(a)(1) of the N.L.R.A. These decisions indicate that the polygraph technique, in the eyes of a majority of arbitrators, has not yet attained sufficient validity and accuracy to justify its use to resolve employment problems. It must be pointed out, however, that arbitrators are delineating the "common law of the shop"⁵⁵ only where the employees are unionized and their contracts with management have provided for arbitration in such situations. One commentator feels that future arbitration is "likely to limit the use of the lie detector in industry as much as courts have limited their use in litigation."⁵⁶ The use of polygraph tests in the pre-employment context, however, is not ordinarily subject to the labor agreement.⁵⁷ It is against such use of the machine by industry that organized labor is seeking and has attained to a limited extent aid from the legislatures.

LEGISLATIVE REACTION TO THE POLYGRAPH

Organized labor is wholly in opposition to the use of the polygraph in industry and government. The union position was reiterated and reaffirmed in

48. Burkey, *Lie Detectors in Labor Relations*, 19 Arb. J. 195, 198 (1964).

49. *E.g.*, *Saveway Inwood Service Station*, 44 Lab. Arb. 709 (1965); *Continental Air Transport Co.*, 38 Lab. Arb. 778 (1962) (Tests inadmissible even with employees' consent because they have no probative value); *Brass-Craft Mfg. Co.*, 36 Lab. Arb. 1177 (1961) (It is a diagnosis rather than a conclusive determination of truth or falsehood); *B. F. Goodrich Tire Co.*, 36 Lab. Arb. 552 (1961) (Lie detector tests alone cannot prove or establish fact).

50. *Sanna Dairies, Inc.*, 43 Lab. Arb. 16 (1964).

51. *Skaggs-Stone, Inc.*, 40 Lab. Arb. 1273 (1963).

52. *Louis Zahn Drug Co.*, 40 Lab. Arb. 352 (1963).

53. *Lag Drug Co.*, 39 Lab. Arb. 1121 (1962).

54. *Glazer's Wholesale Drug Co. Inc.*, 1965 CCH NLRB 9311 (1965); See also, *Dale Industries and United Industrial Workers*, 1964 CCH NLRB 12,853 (1964).

55. Burkey, *supra* note 48, at 198.

56. *Ibid.*

57. *Id.* at 204.

1965, when the Executive Council of the AFL-CIO adopted a strong resolution condemning the use of the polygraph in private and public employment. The council stated:

We object to the use of these devices, not only because their claims of reliability are dubious but because they infringe on the fundamental right of American citizens to personal privacy.

Neither the government nor private employers should be permitted to engage in this sort of police state surveillance of the lives of individual citizens.⁵⁸

In addition, a special subcommittee was appointed by the council to campaign for legislation to eliminate the use of the polygraph.

There are at present two basic forms of polygraph legislation in a small number of states. One type has completely forbidden use of the device by business as a condition to employment. The form of enactment has sought to license and regulate the polygraph operators.

ANTI-POLYGRAPH LEGISLATION

Several states have paid heed to the protests of labor unions and have enacted anti-polygraph legislation.⁵⁹ These statutes generally prohibit employers from making initial or continued employment of an individual contingent upon his submission to a polygraph test. Such legislation has generally exempted only governmental or law enforcement use of the device. The state of Washington, however, in enacting the latest polygraph statute, has specifically exempted law enforcement agencies, the narcotic and drug industries and persons in sensitive positions directly involving national security.⁶⁰ The California statute is typical of anti-polygraph legislation. It provides:

No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph . . . test . . . as a condition of employment or continued employment. The prohibition of this section shall not apply to the federal government . . . or the state government. . . .⁶¹

The Massachusetts statute, however, seems to extend the protection to situations where an employee is required to take a test to qualify for a raise or promotion. It reads:

Any employer who subjects any person employed by him, or any person applying for employment, to a lie detector test, or causes, di-

58. Suffridge, *supra* note 7.

59. Cal. Labor Code § 432.2; Mass. Gen. Laws Ann. Ch. 149, § 19(B) (1963); R.I. Gen. Laws Ann. § 28-6.1-1 to 2 (1964); Ore. Rev. Stat. § 659.230 (1963); Alaska Stat. § 23.10.037 (1964); Wash. Rev. Code Ann. § 49.44-(1)-(2) (1965). Similar legislation is now being pressed for in a number of other states. In addition, several municipalities have outlawed its use in industry. *Congressional Committee Hits the Lie Detector Myth*, The Advocate, June 1965, p. 3.

60. Wash. Rev. Code Ann. § 49.44-(1)-(2) (1965).

61. Cal. Labor Code § 432.2.

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rectly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This section shall not apply to lie detector tests administered by law enforcement agencies in the performance of their official duties.⁶²

Penalties for violation of these statutes may reach as high as a one thousand dollar fine and one year imprisonment.⁶³

LICENSING AND REGULATION OF POLYGRAPH EXAMINERS

Five states have acknowledged the polygraph problem and have enacted measures regulating the polygraph industry itself.⁶⁴ These states require examiners to be licensed by the state and have set differing qualifications for issuance. Such legislation is intended to reduce the number of unscrupulous and unqualified examiners and the resultant harm they cause. Even apologists of the polygraph acknowledge that a mere twenty per cent of polygraph operators are competent.⁶⁵ These regulatory statutes establish standards and qualifications for examiners as to citizenship, age, moral fitness and integrity, and absence of a criminal record. They also require that a polygraph which measures at least two of the usual physiological patterns be used. Only Illinois, however, requires that the applicant for a polygraph license have an academic degree, of at least baccalaureate level.⁶⁶ Texas requires a baccalaureate degree or five years of investigative experience.⁶⁷ All of the licensing states except New Mexico require either that the applicant be a graduate of a polygraph examiner course approved by the state or that he successfully complete internship training. All but Kentucky require the applicant to pass a state examination.

LEGISLATION IN NEW YORK STATE

In 1965 two anti-polygraph bills, of the same nature as those passed in other states, were passed by the state legislature but failed to receive gubernatorial approval.⁶⁸ Another bill which provided for limited restriction of the use of the polygraph in business, and examination, licensing and regulation of

62. Mass. Gen. Laws Ann. Ch. 149, § 19(B) (1963).

63. Alaska Stat. § 23.10.037(d) (1964).

64. Ill. Ann. Stat. Ch. 38, § 202-1 to 30 (Smith-Hurd 1964); Ky. Rev. Stat. § 329.010-990 (1962); N.M. Stat. Ann. § 67-31-1 to 14 (1965); N.D. Cent. Code § 43-31-01 to 17 (1965); Tex. Rev. Civ. Stat. Ann. Art. 2615f-2 (1965).

65. Inbau & Reid, *supra* note 39.

66. Ill. Ann. Stat. Ch. § 202-11(F) (Smith-Hurd 1964).

67. Tex. Rev. Civ. Stat. Ann. Art. 2115f-2, § 7(5) (1965).

68. Senate Bill, Intro 279, stated, No employer shall require or subject any person to a lie detector test as a condition of employment or of continuing employment. Any person violating this section is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars or imprisonment of not more than thirty days, or by both. This bill was vetoed. Governor's Disapproval Memorandum No. 61 (1965) stated the reasons as ambiguities as to scope of the Terms "lie detector" and "employer" in the bill. Assembly Bill Intro 4439, specifically allowed lie detector tests for state and local police forces. This bill was also vetoed, Disapproval Memorandum No. 173, because of its immediate effective date, thus imposing criminal sanctions without adequate notice.

polygraph examiners failed to reach the floor of the assembly before the end of the session.⁶⁹

This year, 1966, four bills were introduced to the state legislature and were committed to respective committees.⁷⁰ Three of these bills are of the anti-polygraph type.⁷¹ The fourth proposes a limited restriction on use of the polygraph and examination of licensing of examiners.⁷²

Anti-polygraph Bills—(1) *Senate Bill 1342*—prohibits the requirement of a lie detector test of any person as a condition to securing or maintaining employment.⁷³ (2) *Senate Bill 1549*—also prohibits an employer from requiring a polygraph test as a condition of employment or continuing employment. This bill, however, specifically exempts any employer engaged in the manufacture or wholesale distribution of narcotics, hypnotics and barbiturates.⁷⁴ (3) *Senate Bill 1176*—goes somewhat further and prohibits use of the device not only as a condition of employment but for *any* purpose in connection with actual or prospective employment. This construction would seem to prevent use of the polygraph by an employer for purposes of employee promotion, etc. This bill goes even further in extending protection for employees by forbidding any business from soliciting or using results of tests of prospective employees who have submitted to tests outside the state in determining employability. The scope of such protection is limited however, for the bill exempts all employees of the state and its municipal subdivisions.⁷⁵

Polygraph Operator Licensing Bill—(4) *Senate Bill 1198*—prohibits use of the polygraph only where the employer requires submission to the test as a condition of continuing employment. This bill does not extend any protection to prospective employees. It exempts governmental and law enforcement use of the device and requires that a machine which records the three basic physiological reactions be used. In regulating polygraph operators it proposes qualifications of good moral character, a baccalaureate degree, at least one hundred and fifty formal hours of training in courses approved by the state, and a state examination in order to secure an examiner's license.⁷⁶

69. Senate Bill, Intro 3535. This bill not only established qualifications for an examiner's license but also prohibited the employer from requiring the taking of an examination as a condition of employment. It mandated a pre-examination procedure whereby the subject must be advised of the voluntariness of the test and the fact that a refusal to take it cannot lead to a discharge.

70. Intro S. 1342, Print 1367; Intro S. 1176, Print 1189; Intro S. 1549, Print 1577; Intro S. 1198, Print 124; Intro A. 1991, Print A. 2013.

71. Intro S. 1342, Print 1367; Intro S. 1176, Print 1189; Intro S. 1549, Print 1577.

72. Intro S. 1198, Print 1214; Intro A. 1991, Print A. 2013.

73. Intro S. 1342, Print 1367 (introduced by Senator Brownstein).

74. Intro S. 1549, Print 1577 (introduced by Senator Laverne).

75. Intro S. 1176, Print 1189 (introduced by Senator Mackell). This bill also forbids any use or solicitation of test results from without the state.

76. Intro S. 1198, Print S 1214 (introduced by Senator Bloom). Intro A. 1991, Print A. 2013 (introduced by Assemblyman Cincotta).

INVASION OF PRIVACY AND CONSTITUTIONALITY

Opponents of polygraph use by industry not only point to the shocking lack of proof of the device's reliability and accuracy, but also claim that the procedure constitutes an unwarranted invasion of the subject's privacy and a violation of the privilege against self incrimination.⁷⁷

Invasion of Privacy—Representative Moss, at one point in the 1964 congressional hearings on the federal government's use of the polygraph, called pre-employment testing "a major invasion of privacy of individuals not even suspected of a crime, where the price they must pay for seeking employment is the probing on a broad basis in not only their conscious but their subconscious mind, where dossiers are built up and transferred from one employer to another and permanent prejudice can be created."⁷⁸

Tort remedies for the invasion of privacy at the present time, however, have been extended to four distinct kinds of invasion wholly concerned with the publication or commercial use of private facts.⁷⁹ Even if such remedies were to be extended, the employer would argue that the tests are voluntary, and in fact, that it is routine procedure to require a signed consent from the individual.⁸⁰ Where, however, prospective or continued employment is predicated by industry upon submission to a polygraph test it is, realistically, impossible to find any sincere voluntariness on the part of the individual. The refusal to take the test is too often a presumption of guilt. One authority feels that "the interest threatened by these new instruments is the same as that which underlies the tort cases."⁸¹ Nevertheless, since the employee has no basic common law right to secure or retain a job with any company,⁸² and since submission to the test is entirely "voluntary" it is unlikely that the courts will extend the invasion of privacy concept to such a degree.

Critics of the polygraph fervently look to the Constitution, and more specifically to the fourth and fifth amendments, to substantiate their claims that the polygraph is an arbitrary intrusion on individual privacy and that it causes unlawful self-incrimination of the employee. A somewhat cursory but nevertheless necessary answer is that any protection extended under the fourth and fifth amendments has been so granted only against government action. Constitutional guarantees with respect to self incrimination are only applicable at trial or in

77. Suffridge, *supra* note 7.

78. 1964 *Hearings* at 373.

79. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960) has stated the right to privacy to be a complex of four torts extending to: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs (2) Public disclosure of embarrassing facts (3) Publicity which puts the plaintiff in a false light and (4) Appropriation to the defendant's advantage of plaintiff's name and/or likeness.

80. *Restatement, Torts* § 892 (1939) states "a person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct."

81. Bloustein, *The Right of Privacy*, 39 N.Y.U.L. Rev. 962, 1006 (1964).

82. *United States Steel Corp. v. Nichols*, 229 F.2d 396 (6th Cir. 1956).

proceedings by the government or someone acting by the authority of the government.⁸³

CONCLUSION

In evaluating industry's present use of the polygraph and the relatively recent legislative response to it, one must give serious consideration to the primary reason for such use. It has already been stated that internal theft losses in money and merchandise by industry now approach two billion dollars annually and that for many companies rooting out workers who steal is a matter of survival.⁸⁴ It is estimated that seven out of ten workers steal something from their employers.⁸⁵ It is understandable then that industry would welcome any scientific apparatus which seems to make detection of such dishonesty more sure and discouragement of such malefactions more likely. One appraisal of the polygraph controversy has suggested that the present legislative approach to the dilemma by prohibiting the use of the machine ignores any present utility it may have and may retard research and development. It suggests that the better approach to the problem would be a balancing of interests, providing protection for the employee from abuse and misuse of the device and allowing the employer a limited use of it.⁸⁶

It is, nevertheless, manifestly dangerous and detrimental to the public interest to allow industry any use of the device until further research in the area has proven the extent of its accuracy and reliability. The results attained by certain employers in reducing thefts may be primarily attributed to the deterrent effect of the machine caused by its present Orwellian image and not to the apprehension of the culprits through use of "lie detector" tests. Employees view the tests as an indication of management suspicion and distrust and the implications are that the employment environment will be adversely affected. Workers knowledgeable of the technique and its limitations, but nevertheless innocent of any wrongdoing towards their employer, will be forced to attempt to "beat"⁸⁷ the polygraph or succumb to a procedure so fraught with sources of error that it may well pronounce them guilty. Traditional psychological tests, questionnaires, investigations, interviews and observations of performance may cost the employer more time than the polygraph, but they are demonstrably more effective and reliable.⁸⁸ The polygraph in its present stage is a tool for mental intimidation, often eliciting unwarranted and irrelevant personal revelations from the

83. Menocal and Williams, *Lie Detectors In Private Employment: A Proposal for the Balancing of Interests*, 33 George Wash. L. Rev. 932 (1965).

84. N.Y. Times, June 18, 1962, p. 14.

85. 1966: *A Year of Decision for the Polygraph*, Occupational Hazards, Dec. 1965.

86. Menocal and Williams, *supra* note 83.

87. 1965 House Report No. 198, *supra* note 19, at 12. There are three ways to "beat" the polygraph. These are: (1) modified yoga—the separation of the self from the outside stimuli and the maintenance of an abstract frame of mind; (2) muscle tension—such as tensing one's toes and; (3) exciting imagery—a mental reproduction of an exciting image which the subject knows will get him excited or upset.

88. Lampert, *Lie Detectors—Industrial Use of the Polygraph*, 13 DePaul L. Rev. 287 (1964).

COMMENTS

subject even prior to the connection of the apparatus. The technique frequently causes self-humiliation and loss of self-respect on the part of the individual tested. It would seem that the legislature need only look to the manifest absence of any proof of the polygraph's reliability and accuracy as an investigative method to justify any condemnation of its use.⁸⁹ Hence, the most equitable step for the New York State Legislature at the present time would be enactment of a statute prohibiting any use of the device by any employer, whether it be for continued employment, initial employment, a raise, promotion or a mere loyalty check. Such legislation should, however, permit use of the polygraph by law enforcement agencies and sensitive positions involving national security. Industry, having the resources available, should be called upon to prove the reliability and accuracy of the polygraph before it can be allowed to subject millions of workers to the machine's determination of "truth" or "falsity."

RONALD J. THOMAS

REFERRAL SALES CONTRACTS: TO ALTER OR ABOLISH?

PROLOGUE

The buyer originally admitted the television salesman to his home to present his sales talk only as a favor to a friend. The friend had recently purchased a set from the same company, under a contract calling for the friend to set up appointments with other persons who might be interested. For each appointment the friend made, he received a cash payment; if the friend submitted enough names the entire cost of his color TV would be reimbursed by these "referral" payments. When the friend called to get permission to refer the seller to our buyer, he had been quite enthusiastic.

By a stroke of good fortune, the salesman was authorized to offer the same deal to the buyer and his wife. After hearing the carefully rehearsed and artfully structured sales talk, the buyer became genuinely interested. They did need a new TV, but really hadn't been able to buy one. A *free* TV—especially a color set—would be a different matter.

Of course near the end of his glittering sales talk the salesman did require a few signatures on certain forms, but he had assured them that there was

89. As Representative Reuss stated during the congressional hearings, 1964 *Hearings* at 332, "Nobody has ever made a study of the actual lie detector cases to determine whether, not in the laboratory or in the quasi-laboratory, but in the field of activity, they are in fact worth anything or not." According to the 1965 House Report No. 198, *supra* note 19, at 24, "the Federal Government has spent more than \$300,000 for research projects on various phases of the polygraph. . . ." Included in these were studies to determine the value of the device:

in counterinsurgency situations (such as Vietnam), experiments to expand the basic polygraph instrument by including additional sensors . . . and attempts to add a computer to the polygraph for purposes of objective measurement. These . . . all relate to expanding the use and the instrumentation of the polygraph device. However, none of the research is the basic work necessary to prove scientifically that the polygraph technique is an effective tool for interrogation purposes.