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The Working Man's Nemesis - The Polygraph

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tem was set up primarily for his benefit.²⁵ Reginald Heber Smith praised the small claims system when he wrote *Justice and the Poor*, claiming that small claims courts could eliminate the defects of the traditional administration of justice.²⁶

Recent studies have shown this, in fact, not to be the case.²⁷ These studies have revealed that the individual litigant appeared most often in small claims court as a defendant, and that he usually lost. Corporations, proprietorships and government agencies were plaintiffs in over 80% of the cases surveyed, while the individual appears as defendant in 93.3% of the cases.²⁸

These studies revealed that finance companies, typically those specializing in credit sales of furniture and appliances have discovered the ease and efficiency of the small claims court as a collection device.

The elimination of N.C.G.S. Section 7A-227 would help prevent ultimate abuse at the small claims level. The law should be rewritten to specifically compel the Clerk of the Superior Court or the Court itself, when there is an appeal *de novo* to the District Court, to waive all costs including undertakings when necessities of life are involved in the litigation.

The elimination of N.C.G.S. Section 7A-227, and the writing of a statute which compels the Clerk or Court to stay execution would guarantee the litigant that his constitutional right to a trial by jury is not abridged by the present web of the small claims system. This elimination and building of new statutory law would promote due process and equal protection under the law.

RICHARD G. MILLER

The Working Man's Nemesis—The Polygraph

Much has been said about the use of the polygraph by employers in both the public and private spheres. Vociferous objections against and strong justifications for the use of the polygraph permeate any discussion pertaining to the submission to a polygraph examination as a

25. *Report of Committee on Small Claims and Conciliation Procedure* 10 A.B.A.J. 828 (1924).

26. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1658 (1969).

27. Ragter, McCloskey, Reinis, *The California Small Claims Court*, 52 CAL. L. REV. 876, 885 (1964); Doty, *Small Claims Court as Collection Agencies*, 4 STAN. L. REV. 237 (1951); Moulton, *supra* note 26.

28. Moulton, *supra* note 26, at 1660.

condition of employment or continued employment. In *State v. Community Distributors Inc.*,¹ a recent New Jersey Supreme Court decision, this controversial issue has been dealt with by upholding a statutory prohibition against the use of polygraphs to screen employees.² Such a sweeping prohibition runs contrary to the lack of restrictions on polygraph use in the great majority of jurisdictions. It is the New Jersey Court's reasoning, supporting such an extensive band, which becomes the focal point of discussion on the topic of employer use of the polygraph.

In *Community Distributors* the defendant, an operator of a chain of drugstores in New Jersey trading as Drug Fair, had requested a number of its employees to take or submit to polygraph tests. Each of the employees signed a form captioned "Consent To Taking A 'Lie Detector' Test." The form stated that "Drug Fair has not influenced, requested, or required me to take this lie detector test as a condition of employment or continued employment." The defendant later stipulated, however, that "all tests were given at the request of the employer."

The defendant was charged in the Freehold Township Municipal Court with violations of N.J.S.A. 2A:170-90.1. After conviction, the defendant appealed to the Monmouth County Court where it argued that the statute deprived it of

[T]he ability to protect its property, thereby violating due process; that it should be exempt from the statute because it is in the business of dispensing narcotics and dangerous drugs; and that the statute was not violated because the tests were not given as a condition of employment and continued employment.

The County Court rejected these contentions and adjudged the defendant guilty as charged. Before the New Jersey Supreme Court the defendant renewed its contention that the statute was "unconstitutional as applied" and that the statute was not violated in any event, since "it [the defendant] did not give the lie detector tests as a condition of employment."

The Supreme Court of New Jersey found each of the defenses to be lacking in substance. As to the defendant's protection of property argument the court dispensed with it by citing the authority by which the Federal and State governments may place restrictions on business through the exercise of the police power.³

1. 317 A.2d 697.

2. N.J.S.A. 2A:170-90.1 declares that

Any person who as an employer shall influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment, is a disorderly person.

3. See *Burton v. Sills*, 53 N.J. 86, 102, 238 A.2d 521 (1968), *appeal dismissed*, 394 U.S. 812, 89 S. Ct. 1486, 22 L.E.2d 748 (1969), in which this court pointed out that the police power is "a comprehensive one and may be invoked by the Legislature whenever it deems it necessary for the protection of the public health, safety, morals

In answer to the contention that dispensers of drugs should be exempt from the statute, the court stated that since the legislature clearly had the opportunity and authority to make certain exemptions and it chose on behalf of the public welfare to abstain from doing so, the court cannot intervene to grant such an exemption. The court stressed the comprehensiveness of the statute in its inclusion of employers who "influence, request or require" the submission to a polygraph examination as a condition of employment or continued employment. It declared that "the legislative goal would be frustrated if Drug Fair's procedure were now judicially declared to be outside the prohibitory orbit."

Justification of the statute through the police power to protect the general welfare implicitly suggests one of the major issues of the controversy surrounding the polygraph—its *reliability*. The prime contention of the polygraph's opponents has been that the instrument has not been sufficiently developed so as to achieve "general acceptance" in the scientific community. This same argument was the basis upon which the court in *Frye v. United States*⁴ rested its decision. *Frye* was the first case in which the introduction of polygraph evidence was attempted. Since *Frye* there have been few courts which have reached a contrary decision and most have relied on the polygraph's failure to meet the "general acceptance" standard established by *Frye*.⁵ Recently, however, there have been notable exceptions to such rejection which discount the allegations of unreliability and assert that time for recognition of the polygraph as a credible scientific technique is here.⁶

The majority of reported cases of labor arbitrators and administrative agencies have adhered to the majority view of the courts and have refused admission of polygraph evidence in proceedings before them. Restrictions generally established by arbitrators may not prescribe absolute prohibition of the use of lie detectors but they limit their usage. In *Louis Zahn Drug Co.*,⁷ it was declared that the refusal of an employee suspected of dishonesty to take a lie detector test generally will

or general welfare." See also *David v. Vesta Co.*, 45 N. I. 301, 212 A.2d 345 (1965) where Justice Procter pointed out that "private Property rights are always subject to the 'reasonable exercise of the police power'; and that in the exercise of its police power the state 'has placed myriad restrictions' " thereon.

4. 54 App. D.C. 46, 293 Fed. 1013 (1923).

5. See, e.g. *People v. Wochnick*, 98 Cal. App. 2d 124 (1950), 219 P.2d 70, cert. denied 342 U.S. 888, 72 S. Ct. 179; *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933); *U.S. v. Wainwright*, 413 F.2d 796 (10th Cir. 1969), 2d 169 (1961), cert. denied 396 U.S. 1009 (1970); *State v. Foye*, 254 N.C. 704, 120 S.E.2d 169 (1961); *Zupp v. State*, 283 N.E.2d 540 (Ind. 1972); *Grant v. State*, 213 Tenn. 440, 374 S.W.2d 391 (1964); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43, 189 S.W.2d 541 (1945); *People v. Boney*, 28 Ill. 2d 505, 192 N.E.2d 920 (1968).

6. *U.S. v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972); *A v. B* — Misc. 2d —, 336 N.Y.S.2d 839 (Fam. Ct. Niagara Co. 1972).

7. 40 Lab. Arb. 352 (1963).

not be allowed to prejudice him. It has also been held that discharge allegedly based on failure of a lie detector test but actually a subterfuge for anti-union sentiment is forbidden.⁸ Yet another dispute was settled in which it was stated that discharge based on a lie detector test, if permitted at all, must be accompanied by a specific accusation and corroborative evidence.⁹ In *Lag Drug Co.*¹⁰ the employee, as a condition of employment, signed an agreement to submit to polygraph examinations at any time. The agreement also contained a provision that he could be dismissed for refusing. In spite of such an agreement the arbitrators concluded not only that lie detectors lacked proven accuracy and legal authority to constitute competent evidence, but went further to declare that it was an invasion of the "right of privacy and the constitutional rights against self-incrimination." Although the arbitrators did not decide the issue of "whether the company could properly refuse to hire an employee based upon his refusal to take a lie detector test,"¹¹ they denied enforcement of the employer's contract, reasoning that use of individual contracts on an extensive scale would be too detrimental to the union bargaining position. "From *Lag Drug* it can be argued that required polygraph testing is unconscionable in a non-union setting, given the superior bargaining power of the employer."¹²

Decisions against polygraph use by employers have also been based on the invasion of privacy of the employee.¹³ Consideration of possible invasion of privacy was indicated in *Lag Drug Co.* and *General American Transportation Corp.*¹⁴

The widespread lack of confidence in the lie detector inevitably begs the question as to the reason for such condemnation. One of the primary reasons for skepticism is the basis upon which the instrument relies in supposedly detecting untruthfulness. It is universally accepted that fear of detection by the instrument is requisite for an accurate analysis of whether or not the examinee is being truthful. A lack of fear results in an unresponsive subject which, in turn, fails to produce deception criteria on the lie detector record.¹⁵

Where the subject is impressed with the idea that his lies will be de-

8. Lone Star Co., 57 LRRM 1365 (1964).

9. B.F. Goodrich Tire Co., 36 Lab. Arb. 552 (1961).

10. 39 Lab. Arb. 1121 (1962).

11. *Id.* at 1122-23.

12. Herman, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 94 (1971).

13. See *Town and Country Food Co.*, 39 Lab. Arb. 332, 335 (1962). The arbitrators held:

Under such circumstances the Company's demand that the four men take 'lie detector' tests or face discharge for insubordination was an invasion of privacy and an unreasonable and unwarranted exercise of management rights.

14. 31 Lab. Arb. 355, 356 (1958).

15. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 2, at 47 (2d ed. 1948).

tected there is still no assurance that an accurate analysis of his credibility can be ascertained. There are many factors which must be considered in interpreting the test results. A prime example is the possible effects of an innocent person's nervousness which may result in responses indistinguishable to an inexperienced examiner from those of a guilty person.¹⁶ Moreover, even a polygraph operated by a qualified and experienced examiner is limited to verifying truthful statements, i.e., "determining whether or not the subject believes what he is saying is true. The polygraph cannot determine the actual fact, hence it cannot determine guilt or innocence."¹⁷ Among the major shortcomings of the polygraph, then, are the failure to recognize that "truth" and "falsity" are not absolute, and that deviations in autonomic responses do not always reflect conscious deviations from the truth.¹⁸

Experts in the field of lie detection allege that the accuracy of the polygraph is very precise. The percentage of known errors with the technique used in the laboratories of John Reid and associates is purportedly less than 1%.¹⁹ George Lindberg, a Chicago, Illinois operator explained the derivation of the one percent accuracy figure through extrapolating from the fact that they were less than 1% in error in the 18.9% of the cases where the results were definitely verified and corroborated.²⁰ These figures were based on a study of 4,280 cases by one office in Chicago, Illinois and not the industry as a whole. Of these, 64.5% or 2,759 were reported innocent. Of these 323 or 11.7% were actually verified by someone else's confession as being innocent. The polygraph indicated that 1334 were guilty. Confirmation by subsequent confessions amounted to 486, or 36%.²¹

In further defense of their position, proponents of the polygraph have countered by comparing the accuracy of the polygraph technique with that of various judicially recognized scientific techniques and tests. They point to the admissibility in court of testimony of psychiatrists as to the mental condition of a person or the legal responsibility of defendants in criminal cases even though the science of psychiatry is far from definite and certain. Moreover, the testimony given by one psychiatrist in a criminal case is often contradicted by another.²²

16. *Id.*, at 47.

17. Note, *Lie Detectors In Private Employment: A Proposal for Balancing Interests*, 33 GEO. WASH. L. REV. 932, 935 (1965).

18. Dearman and Smith, *Unconscious Motivation and the Polygraph Test*, 119 AM. J. PSYCH. 1017 (1963).

19. Reid and Inbau, *Truth and Deception: The Polygraph (Lie Detector) Technique*, p. 234 (1966) (hereinafter cited as REID AND INBAU).

20. *Hearings on Use of Polygraphs as "Lie Detectors" by the Fed. Gov't Before a Subcomm. of the House Comm. on Gov't Operations*, 88th Cong., 2d Sess., and 89th Cong., 1st Sess. (1964-65) (hereinafter cited as HEARINGS).

21. LAYMON, at 19.

22. REID AND INBAU, at 234.

Nevertheless, scientific verification of polygraph test results is a very real and significant problem due to the fact that verification can be determined only by subsequent confessions, themselves often unverifiable.

Verification is even more complicated in pre-employment tests because the applicants judged deceptive are not ordinarily hired, and because no follow-up investigation is conducted to confirm the judgment.²³

In addition, the claims of accuracy are based upon the presumption that the examiner is qualified.²⁴

The expertise of the examiner is of crucial importance. It has been stated that his interpretations account for up to 95% of the over-all determination, the instrument itself playing a comparatively minor role. Yet, even the most renowned experts in the field admit that probably 80% of all examiners do not meet desired standards of competency.²⁵ It has been alleged that almost any person of average intelligence can learn the mechanics of polygraph examination, but the interrogative techniques and the interpretation of the results require a high degree of intelligence and perception.²⁶

Much of the criticism of examiners is due to the fact that there is disagreement in the industry as to the requirements for qualification. No enforceable professional standards of competency have been established within the industry, and the few associations of polygraph operators which exist function only as media for the exchange of ideas.²⁷

Training courses for polygraph examiners usually range from six weeks to six months.²⁸ The typical course includes a limited number of instructional hours devoted to the physiological and psychological complexities involved in interpreting polygraph test results.²⁹

In view of the widespread disapproval of the polygraph technique, the question undoubtedly arises as to the reasons for continued utilization of the instrument on such an extensive scale. As justification for

23. *Supra* note 17 at 934.

24. INBAU AND REID, *LIE DETECTION AND CRIMINAL INTERROG.*, 112 (1953).

25. Inbau and Reid, *The Lie Detector Technique: A Reliable and Valuable Investigative Aid*, 50 A.B.A.J. 470 (1964) (hereinafter cited as *Technique*).

26. Bennett, *A Penal Administrator Views the Polygraph*, 24 *FED. PROB.*, Dec. 1960, p. 40.

27. *HEARINGS*, at 39.

28. LAYMON, at 24.

29. A typical example is the training offered at the Army Provost Marshal General School, Fort Gordon, Ga. In 1965 the course there extended 7 weeks and was composed of 258 hours of classroom practice and examinations. It included 5 hours of lecture on constitutional rights; 2 hours on the mechanics of the lie detector, including instructions on quick repairs; 10 hours for the physiology of the nervous system and the cardiovascular and respiratory systems; and 16 hours for normal and abnormal psychology. *Id.*, at 24.

the use of polygraphs, employers argue its necessity in eliminating untrustworthy and filching employees. Such necessity is considerable in light of the degree to which businesses are affected by employee thefts. It has been estimated that up to 33% of all business failures are attributable to employee thefts.³⁰ In 1962 internal theft losses in money and merchandise approached two billion dollars annually³¹ which represents an approximate 5% of the cost of goods to consumers.³² It is also estimated that 70% of all workers steal something from their employers.³³

Industry is also concerned about maintaining valuable trade secrets. Its efforts are thus designed to reveal latent tendencies toward dishonesty, verify intentions of job permanency, and detect falsifications on the employment applications. As a result, 25% of those who otherwise would have been hired are rejected because of unfavorable polygraph reports.³⁴ Employers stress the importance of pre-employment screening because a pilfering employee may go undetected in a particular firm for an average of three years.³⁵

Proponents of the polygraph allege that its use results in substantial theft reduction.³⁶ They further contend that periodic checkups serve as a "moral vaccination" in posing a continuing threat which is the deterrent to internal thefts. It is also argued that the checkups will vindicate the innocent and thereby lessen employer suspicion.³⁷

An examination of statistics reveals vast usage of the polygraph by private companies and government agencies.³⁸ In 1964 the state of Texas allegedly had approximately 5,000 firms which required employees to take periodic tests.³⁹ An official of one of the larger polygraph agencies related to a commentator that every type of retail store and manufacturing outfit now uses the machine for pre-employment and

30. N.Y. Times, June 16, 1963, s. 1, p. 1, col. 2.

31. *Id.*

32. N.Y. Times, June 17, 1962 (Bus. and Finan.), p. 14.

33. 1966: *A Year of Decision for the Polygraph, Occupational Hazards*, Dec. 1965.

34. HEARINGS 110.

35. N.Y. Times, June 16.

36. BUSINESS WEEK, *Business Uses the Lie Detector*, June 18, 1960, p. 98. One super market operator reported having discovered through polygraph examination that 90% of his employees were stealing 1½ million dollars a year. Upon re-examination a year later, the recidivist rate was a mere 3%.

37. 50 A.B.A.J. at 472.

38. 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 Journal, April 8, 1965, p. 1. 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, a Dallas firm, conducted 26,000 tests in 1963 and 42,000 in 1964.

39. PACKARD, *THE NAKED SOCIETY*, p. 47 (1964) (hereinafter cited as PACKARD).

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pilferage checks.⁴⁰ The Dale System, a polygraphic agency, listed Howard Johnson, W.T. Grant Co., Grand Union Co., and Westinghouse Electric Corp. among its clients.⁴¹

Federal agencies have also utilized the polygraph in screening employees. During the fiscal year ending mid-1963, 19 federal agencies conducted approximately 20,000 tests at a cost of almost 4½ million dollars.⁴²

One of the principal objections to the use of the polygraph is derived from the inaccessibility of test results. This effectively denies the applicant the opportunity to disprove or even discover an adverse result; he simply never gets the job. In addition pre-employment screening is usually not subject to labor agreements, leaving even prospective union members without recourse to arbitration.⁴³ That 30% of those tested are rejected is illustrative of the effect of such screening.⁴⁴

Although the consequences of an adverse result usually amount to a loss of a job opportunity, the employee or prospective employee lacks a judicial remedy because the employee has no basic common law right to secure or retain a job.⁴⁵

In the states that do have statutes prohibiting polygraph use by employers, the punishment for its violation is a mere misdemeanor which subjects the violator to a small fine or imprisonment or both.⁴⁶ Since there is no statutory remedy specifically afforded an employee discharged as a result of a lie detector test, he may be confined to an arbitration remedy or to an action for breach of contract.⁴⁷ There is a possibility that in those states where employer use of polygraphs is prohibited, a court might infer a legislative intent to create civil liability on the part of the employer where the statute was violated. There have been no reported cases, however, which imposed such civil liability.⁴⁸

40. BRENTON, *THE PRIVACY INVADERS*, p. 93 (1964).

41. PACKARD, at 47.

42. H.R. Rep. No. 198, 89th Cong., 1st Sess., table of agency replies (1965). The CIA and NSA were the only two at that time that were using the polygraph routinely for pre-employment screening.

43. *Supra* note 17 at 937.

44. LAYMON, at p. 31.

45. *U.S. Steel Corp. v. Nichols*, 229 F.2d 396, 399 (6th Cir. 1956).

46. At least 14 states have legislatively prohibited their industrial use. See ALASKA STAT. § 23.10.037; LABOR CODE OF CALIF., § 432.2; CONN. GEN. STAT. ANN. § 31-51g; DEL. CODE ANN. tit. 19, § 705; HAWAII REV. STAT. §§ 378-21, 378-22; IDAHO CODE §§ 44-903, 44-903; MD. ANN. CODE art. 100, § 95; MASS. GEN. LAWS ANN. c. 149, § 19B; MINN. STAT. ANN. § 181.75; N.J.S.A. 2a:170-90.1; ORE. REV. STAT. §§ 659.225, 659.990 (7); PA. STAT. ANN. tit. 18, § 4666.1; R.I. GEN. LAWS ANN. §§ 28-6.1-1, 28-6.1-2; WASH. REV. CODE ANN. §§ 49.44.120-49.44-130.

47. *Supra* note 17 at 939.

48. HERMANN, at 99.

No state statute specifically prohibits polygraph use by employers in testing those who voluntarily request to be examined. Proof of voluntariness, however, would seem so difficult to prove that it effectively prohibits tests.⁴⁹

In several of the prohibitory statutes, local, state, and federal governmental agencies are specifically exempted from coverage.⁵⁰ Some of the statutes exempt policemen, persons entrusted with drugs, and persons involved with national security.⁵¹

One of the contributing factors that prompted prohibitive statutes was the impact that the polygraph examination or the threat of such examination has on the subject. He may feel mentally intimidated or even humiliated as a result of the assault upon his dignity. Employees may view the tests as an indication of management suspicion and distrust. Such beliefs may create an atmosphere of hostility and an unfavorable working environment.⁵²

Concern has also been expressed as to the extent of inquiry by polygraph examiners in examining employees or prospective employees. Apprehension centers upon the fact that there is no guarantee that disclosures of a very private nature will be maintained in confidence. Since the information given is not considered privileged information, the examiner is not precluded from relating any incriminating details to police.⁵³ In the governmental setting, safeguards for the rights of the employees vary from agency to agency but the overall implication is that the results of the examination may influence to some extent the course of subsequent investigation.⁵⁴

Although arbitrators have uniformly held that consent to take a polygraph test is nugatory in view of the economic compulsions facing the employee or prospective employee, one author contends that

. . . the privilege [against self-incrimination], apart from the constitutional limitations, is inapplicable in the employment setting. Society's interest in the effective administration of justice rests on a different foundation and involves different considerations from the interest of the employer in weeding out disloyal employees.⁵⁵

49. *Id.*, at 98.

50. California, Connecticut, and Maryland exempt local and state government agencies. California and Maryland also exempt federal agencies. Alaska, Delaware, Hawaii, and Washington specifically apply their prohibitions to government agencies.

51. Policemen exemptions are in statutes of Alaska, Connecticut, Pennsylvania, and Washington. Pennsylvania and Washington exempt persons entrusted with drugs. Washington exempts those involved in national security.

52. Lampert, *Lie Detectors—Industrial Use of the Polygraph*, 13 DEPAUL L. REV. 287 (1964).

53. LAYMON, at 28.

54. *Id.*, at 23.

55. *Supra* note 17 at 951.

The privilege against self-incrimination in *State v. Community Distributors Inc.* was not a direct basis upon which the court reached its decision, but it did allude to the fact that organized labor viewed the use of polygraphs in the industrial field as involuntary self-incrimination. It may therefore be concluded that, in situations where there is no statutory prohibition, the issue of self-incrimination may very well have to be reckoned with.

The final issue to be encountered concerning employer polygraph use is one which elicits some of the strongest opposition. This matter involves the general right of privacy. The right of privacy has been defined as "the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity."⁵⁶ The United States Constitution does not provide for a general right of privacy, "but the Supreme Court has found protections of the right inherent in the first, third, fourth, fifth, ninth and fourteenth amendments."⁵⁷ The fourth amendment right against unreasonable searches and seizures, and fifth amendment protection against self-incrimination furnish only modest protection of the right of privacy. The highest court in Germany has held, however, that the polygraph test violates the freedom of the individual to form his own decisions and to act according to his own will.⁵⁸

What actually constitutes an invasion of privacy has been the subject of much litigation. The typical case for which civil liability is incurred involves the publication of writings or pictures of a living person without his consent. In the case at hand, privacy of a more serious nature is involved. The magnitude of the problem is realized by an analysis of what a polygraph examination consists of. Based on a polygraph technician's instruction manual for applying the polygraph in pre-employment screening, one author has categorized the questions asked into four broad categories.

. . . [f]irst, questions about past dishonesty or criminal activity, detected or undetected, related or unrelated to work; second, questions about past work record and attitude toward the job for which application is being made, and underlying motives of the person seeking employment; third, questions about mental or physical problems, or about family difficulties which may affect work activity; and fourth, questions about accident experiences, personal habits, political activity, and personal association. The questions and the accompanying comments make it clear that the interest of the examiner is much broader

56. 77 C.J.S. Right of Privacy § 1 (1952).

57. Comment, *The Lie Detector and The Right to Privacy*, 40 N.Y. STATE BAR J. 102 (1968).

58. Kaganiec, *Lie-Detector Test and "Freedom of the Will" in Germany*, 51 N.W.U.L. REV. 446 (1956).

than the questions [which are themselves intimately personal] and that the questions are meant to elicit explanatory remarks from the subject from which the operator can extract an even greater amount of personal data.⁵⁹

Proponents of the polygraph counter with the argument that its use reveals facts which would ordinarily require weeks to discover by ordinary investigative methods.⁶⁰ They also stress the efficiency with which the polygraph detects deceptive defenses and frustrates the subject into confessing his "guilt". In addition they argue that the polygraph may also reveal repressed beliefs and guilt feelings.⁶¹

Professor Hermann groups the general criticism of pre-employment screening into three categories.

First, the polygraph is designed to obtain a response with regard to a specific incident. Its utility for determining a broad question such as the suitability of an individual for a particular position is marginal when the broad inquiry is being made for predictive purposes. It is doubtful that the polygraph is a reliable means of determining whether an individual will be a good worker, or will be dependable, or will steal. Second, the nature of the inquiry during preemployment screening is to focus on past acts, a focus appropriate for criminal investigation but which is entirely inappropriate in the context of future employee conduct. The . . . examination extracts information and implicitly executes judgment for the offense. It negates the possibility of reformation . . . Third, the use of the polygraph in pre-employment screening, even in critical areas such as national security, is ill-conceived since those individuals who are supposed to be ferreted out by the test often go undetected.⁶²

Of great concern also is the fact that in many instances where a polygraph examination is required, the subject must sign a waiver which relieves the examiner of all responsibility for an erroneous finding of guilt which could seriously impair future job opportunities if this information is transmitted to other companies.⁶³ By signing a waiver the subject may be giving blanket authority for using the test results for any purpose desired by the company.⁶⁴

Despite the many shortcomings and criticisms of the polygraph technique the number of states which flatly prohibit or substantially restrict its use are few. There is an absence of judicial control of polygraph use by employers and no federal legislation requiring licensing or

59. HERMANN, at 82.

60. MARSTON, *THE LIE DETECTOR TEST*, 46 (1938).

61. HERMANN, at 84.

62. *Id.*, at 85, 86.

63. *What Happens When the Lie Detector is Wrong?*, *THE ADVOCATE*, Dec. 1964, p.2.

64. *Id.*, at p. 2.

other subjective methods to assure expertise of the examiner or to provide safeguards in the administration and interpretation of the tests.

Legislators and courts are aware of the staunch opposition to the polygraph by labor unions and they have witnessed negative decisions made by arbitrators with respect to polygraph use in industry. They also recognize the plight of the individual employee with no bargaining power and they know the extent to which employers engage in polygraph usage. A congressional committee recommended a national prohibition in the use of the polygraph except in the most serious national security cases, and that research should be conducted to determine the accuracy of polygraph tests.⁶⁵ Even eminent polygraphers advise industrial clients against the use of lie detector results as the sole determinant in personnel evaluation.⁶⁶

The court in *State v. Community Distributors, Inc.* alluded to most, if not all, of the relevant issues surrounding the controversy of polygraph use by the employer. It referred to the alleged inaccuracy of the lie detector in addition to the necessity for competent examiners. Although the court only took notice of possible self-incrimination and invasions of privacy, its most significant declaration dispensed with the employer's argument that his property interest was paramount to the general welfare of the citizens of the state of New Jersey. The court stated that the Legislature was aware of such interests when it was considering the bill banning use by employers of the polygraph. It pointed out that the Legislature, on the other hand, "was also aware that its use involved matters of evidential reliability and industrial conflict," including the hostility expressed by organized labor.⁶⁷ Thus, in weighing the competing interests of the employers' property interest and the employees' interests of privacy and a harmonious working environment, the court, decided in favor of the employees on the very solid basis of the state police power to protect the "public health, safety, morals or general welfare."⁶⁸

The most noteworthy aspect of *State v. Community Distributors, Inc.* is the fact that a statute was upheld which provided for absolute restriction, without exemptions, of the use of the polygraph by employers for screening employees. In view of the current state of uncertainty as to the reliability of the polygraph and the possible effects on the personal privacy of individuals, such a holding can only be applauded.

65. 1965 House Report No. 198, at 1.

66. TECHNIQUE, at 473.

67. 317 A.2d 697.

68. *Supra* note 3.

Such a decision, wherein the sole determining factor is not the inaccuracy of the polygraph, will become increasingly significant as scientific accuracy of the instrument becomes accepted.⁶⁹

Although the employer certainly runs a risk in abstaining from polygraph screening, of hiring a prospective employee who may possess undesirable personal characteristics or physical defects, the risk should be borne "when there is a great sacrifice of human dignity and privacy, as there is in screening polygraphy, in order to obtain what may be only marginally useful information."⁷⁰ The assault upon the employee's dignity and privacy cannot be remedied even by the most precise instrument or the most competent examiner.⁷¹ The mere fact that one is requested or required to submit to a polygraph examination is a disturbing attack upon the integrity of the employee which indicates that his veracity is questionable. Such result occurs regardless of how apologetic the employer is or how routine a procedure he alleges it to be.

Conclusion

Prohibition of the polygraph does not mean that the employer is left without a method to discover the desired information. He may rely on "work references, work record, investigatory procedures, and review of probationary work records."⁷²

In addition to absolute prohibition of the polygraph for employer use in screening employees there should be specific civil liability prescribed by statute with an allowance for minimum recovery. Even the New Jersey statute does not serve as a sufficient deterrent to the abuse of the polygraph by employers. Realizing the value of the dollar, businessmen may be more observant of a law that affects their pecuniary interests. In lieu of absolute prohibition, a number of reasonable suggestions have been made which place stringent limitations on employer use while at the same time preserving the utility of the lie detector to an employer.⁷³ Any restriction, however, that is less than absolute

69. *Supra* note 57 at 109.

70. HERMANN, at 87.

71. *Id.*, at 102.

72. *Id.*, at 152.

73. See 33 GEO. WASH. L. REV. 1965 where Menocal and Williams enumerate their suggestions: (1) Bar absolutely use of the lie detector in pre-employment and periodic screening except in jobs concerned with national security; (2) Limit use to investigation of specific thefts; (3) Prohibit disciplinary action based solely on a refusal to take, or the results of lie detector examinations; (4) Provide that no pre-executed agreement should operate as consent to a specific test; (5) Erect thorough licensing minimum qualifying standards; (6) Establish rigid procedures and standards of conduct for lie detector examinations; (7) Require that every employee asked to submit to a test be given a printed explanatory statement setting forth his rights in full; and (8) Provide a remedy of reinstatement or damages for employees discharged in violation of the statute.

does not alleviate one of the main objections to polygraph use by the employer. As Congressman Cornelius Gallagher stated, "even if the polygraph testing was trustworthy, there is still no possible justification for such mental wire-tapping."⁷⁴

Possible vehicles for employee protection against polygraph testing include "judicial recognition of the right of privacy, together with the demise of the 'doctrine' of privilege in government employment and the increasing recognition of the 'state action' elements involved in Corporate enterprise."⁷⁵ The most effective method of protection, however, would be through federal legislation which recognizes the employee's right of privacy. In many states, it is certainly a needed recognition and would indeed be a welcomed one.

VICTOR JEROME BOONE

Non-Renewal of Untenured Teacher's Contract: *Cook v. Hudson*

In *Cook v. Hudson*,¹ the court presented a somewhat unique approach in interpreting the rights of untenured teachers. The court in *Cook* upheld the school board's action in refusing to renew plaintiffs one-year contract without giving them a hearing concerning their discharge. This note will analyze the meaning of *Cook v. Hudson* with respect to the "subjective expectancy" of employment doctrine as it relates to public employees. Additionally the note will be concerned with the effect of *Cook* on procedural rights of untenured teachers in the light of *Perry v. Sindermann*² and *Roth v. Board of Regents*.³

The litigation in *Cook* arose when the plaintiffs as teachers in the Calhoun City, Mississippi refused to keep their children in the city school system as required by the school board. The school board had verbally adopted a policy in 1972, requiring new and existing teachers living in the city to send their children to the public schools of the county. The policy was established to prohibit public school teachers from enrolling their children in racially discriminatory private schools.⁴ Although this policy was unwritten, it had been made known to the teaching staff. Upon plaintiffs refusal to comply with the policy, the

74. *House Rep't on Polygraphs*.

75. HERMANN, at 154.

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1. 365 F. Supp. 855 (N.D. Miss. 1973).
 2. 408 U.S. 564 (1972).
 3. 408 U.S. 593 (1972).
 4. 365 F. Supp. at 857.