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## THE POLYGRAPH PROTECTION ACT OF 1985: BOBBING PINOCCHIO'S NEW NOSE?

There are worse things than a lie. I have found . . . that it may be well to choose one sin in order that another may be shunned.<sup>1</sup>

The polygraph, or lie detector, measures and records the observable physiological responses of a subject in a controlled environment on the theory that lying produces measurable physiological changes.<sup>2</sup> Private employers increasingly use polygraph examinations of employees and prospective employees to combat insider theft.<sup>3</sup> The use of the polygraph by private employers, however, frequently brings the employer's legitimate property interests into conflict with the worker's privacy and dignity concerns.<sup>4</sup> Many commentators question the accuracy and propriety of the polygraph,<sup>5</sup> and express concern that information extracted during polygraph examinations is susceptible to misuse.<sup>6</sup> Although most states regulate the use of polygraph examinations by private employers,<sup>7</sup> critics claim that the regulations lack uniformity and that employers can circumvent the regulations.<sup>8</sup> To correct

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1. A. TROLLOPE, *DR. WORTLE'S SCHOOL*, p. 64 (1929).

2. See J. REID & F. INBAU, *TRUTH AND DECEPTION: THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE*, 3 (1966) (describing theory of polygraph technique); *infra* notes 17-22 and accompanying text (discussing in detail theory and procedure of polygraph examination).

3. See Jussim, *The Privacy Invaders: Lies, Damn Lies—And Polygraphs*, *NATION*, Dec. 21, 1985, at 665 (estimates of polygraph examinations administered in private sector range from several hundred thousand to two million). Nagle, *The Polygraph in the Workplace*, 18 *U. RICH. L. REV.* 43, 62-63 (1983) (explaining popularity of polygraph in private employment); *infra* notes 56-61 and accompanying text (discussing depth and seriousness of employee theft).

4. See Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in the Workplace*, 21 *SAN DIEGO L. REV.* 295, 296-97 (1984) (introducing competing interests of worker and employer); *infra* notes 29-61 and accompanying text (discussing in detail competing interests of worker and employer).

5. See Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 *YALE L. J.* 694, 696 (1961) (detection of deception through physical change reminiscent of trial by ordeal); *Hearings on Polygraph Control and Civil Liberties Protection Act Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st and 2d Sess. 31, 445 (1977-78) (reporting polygraph expert David Raskin's remark that polygraph in private employment possibly no more accurate than Ouija board) [hereinafter cited as *Polygraph Hearings*]; press, *First the Lie Detector, Then the Chemicals*, *NEWSWEEK* Jan. 27, 1986, at 56 (reporting polygraph expert David T. Lykken's remark that polygraph is a fake). *But cf.* *Polygraph Technique*, *supra* note 2, at 304 (reporting 95% accuracy in criminal investigations); Nagle, *supra* note 3, at 59 (citing reliability studies indicating 77-95% accuracy).

6. See Gardner, *supra* note 4, at 306 n.81 (discussing dangers of polygraph information dissemination). Among the dangers presented by the polygraph in private employment are criminal-incrimination, destruction of examinee's credit-rating, and the poisoning of job opportunities with other employers. *Id.*

7. See *infra* notes 66-128 and accompanying text (discussing nature and extent of state regulation of polygraph in private employment).

8. See 131 *CONG. REC.* 14553 (1985) (remarks of Senator Hatch introducing Polygraph Protection Act of 1985); *infra* notes 66-128 and accompanying text (discussing in detail state approaches to polygraph regulation and resulting case law).

the perceived ineffectiveness and lack of uniformity of state polygraph regulation, United States Senators Orrin B. Hatch and Edward M. Kennedy introduced the Polygraph Protection Act of 1985 (the Act) which prohibits the use of polygraphs by private employers engaged in interstate commerce.<sup>9</sup>

The polygraph is not the first attempt to devise a means of discovering truth and deception. Although many earlier cultures developed methods of truth verification from religion or superstition,<sup>10</sup> some cultures relied upon psychophysiological principles to detect deception.<sup>11</sup> Erasistratus, a Greek physician in the royal court of Syria around 250 B.C., discovered one psychophysical principle ultimately important to the development of the polygraph when he observed that an individual's pulse rate increases during emotional strain.<sup>12</sup> The modern polygraph<sup>13</sup> typically measures variations in blood pressure, pulse, respiration, and galvanic skin response.<sup>14</sup> The theory behind the polygraph examination assumes that emotions such as fear and anxiety attend the act of lying, producing measurable physiological change.<sup>15</sup> In theory, variations in the physiological phenomena recorded by the polygraph and interpreted by the polygraph examiner can indicate truthfulness or deceptiveness.<sup>16</sup>

Various forces, however, can render a polygraph examination invalid.<sup>17</sup> For example, the polygraph may not detect deception if a subject does not fear exposure.<sup>18</sup> Conversely, the polygraph may detect a subject's fear that

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9. See S. 1815, 99th Cong., 1st Sess. § 2, 131 CONG. REC. 14553 (1985) (elucidating purpose of Polygraph Protection Act); *infra* notes 129-46 and accompanying text (discussing in detail provisions and effect of Polygraph Protection Act).

10. See S. ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS, 11-12 (1977) (discussing early history of truth verification). In Tibet, the ability to retrieve a stone from a cauldron of boiling water indicated veracity. *Id.* at 11. In India, authorities required individuals suspected of deception to hold fire and remain unburned to prove truthfulness. *Id.* In Africa, an accused ingested poison or the accused placed his arms in boiling water to demonstrate honesty. *Id.* In the West, often trial by combat determined guilt or innocence. *Id.*

11. See S. ABRAMS, note 10, at 11-12 (discussing early history of truth verification). The Orientals, noting that frequently fear decreases salivation, required persons suspected of deception to chew and then spit out dry rice. *Id.* Reasoning that the fear of detection would depress salivation, the Orientals judged guilty those suspects who had difficulty spitting out the rice. *Id.* Similarly, the Arabs touched hot irons to the tongues of those suspected of deception. *Id.* Honest individuals should have no fear, the Arabs reasoned, and could coat the tongue with saliva for protection. Deceptive suspects, fearing detection, would not produce saliva and burn. *Id.*

12. See Nagle, *supra* note 3, at 45 (discussing evolution of truth verification).

13. See *id.* at 45-48 (discussing in detail history and evolution of polygraph).

14. See Hurd, *Use of Polygraph in Screening Job Applicants*, 22 AM. BUS. L. J. 527, 530 (1985) (discussing mechanics of modern polygraph).

15. See Skolnick, *supra* note 5, at 699-700 (discussing polygraph theory).

16. *Id.*; see also *infra* note 18-44 and accompanying text (discussing polygraph examination procedure and various forces affecting results).

17. See *infra* notes 18-23 and accompanying text (discussing various forces that distort polygraph record).

18. See Gardner, *supra* note 4, at 303 (fearless, unresponsive subjects may fool polygraph because polygraph measures physiological responses induced by fear of detection).

the examination will expose information unconnected to the investigation.<sup>19</sup> In addition, the polygraph may simply detect a subject's general fear of the examination.<sup>20</sup> Moreover, a variety of physical and mental disorders can disturb the polygraph record.<sup>21</sup> The reliability and accuracy of the examiner's interpretation of the polygraph record, therefore, depends upon the correct administration of the examination and the professional competence of the examiner because the polygraph examiner must consider the possible effects of so many different variables.<sup>22</sup>

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19. *Id.*; see also Hurd, *supra* note 14, at 530-31 (discussing forces that distort polygraph record). *But see* Nagle, *supra* note 3, at 51-52 (discussing methods competent examiners employ to diminish significance of such distortion).

20. See Gardner, *supra* note 4, at 303 (discussing forces that skew polygraph record); Hurd, *supra* note 14, at 530-31 (same). *But see* Nagle, *supra* note 3, at 51-52 (discussing methods competent examiners employ to diminish significance of distortion).

21. See Hurd, *supra* note 14, at 530-31 (citing heart and respiratory ailments, high or low blood pressure, level of intelligence, and mental stability as possible invalidating forces); Waiel, Orne, Cook & Orne, *Meprobamate Reduces Accuracy of Physiological Detection of Deception*, *Sci.*, Apr. 3, 1981, at 71-72 (indicating use of a tranquilizer can void results of polygraph examination). *But see* J. REID & F. INBAU, *supra* note 2, at 184-202 (results for those afflicted with various abnormalities more inconclusive than inaccurate).

22. See Nagle, *supra* note 3, at 54-58 (dissecting polygraph examination procedure). The polygraph examination consists of a pretest interview, the test, and a posttest interview. *Id.* During the pretest interview, the examiner records no physiological data. *Id.* at 54. Instead, the examiner explains the purpose and format of the examination, notes variables that could invalidate the examination, previews the examination questions, and attempts to put the subject at ease. *Id.* at 54-55; see also J. REID & F. INBAU, *supra* note 2, at 10-16 (discussing purpose and procedure of pretest interview). The examiner explains the polygraph examination both to put the truthful subject at ease and the deceptive subject on the defensive. See Nagle, *supra* note 3, at 54-55 (discussing purpose of pretest interview); J. REID & F. INBAU, *supra* note 2, at 10-11 (same). The examiner formulates examination questions to provoke simple yes or no answers and previews the questions to eliminate ambiguity. See J. REID & F. INBAU, *supra* note 2, at 16-17 (indicating examiner must ask questions with clear, precise meaning). Clear and precise questions prevent a subject from answering one aspect of an ambiguous question, while the examiner is investigating another aspect. *Id.* Ambush questions are avoided because such questions naturally trigger exaggerated physiological reactions and distort the polygraph record. *Id.* at 21; see also ABRAMS, *Polygraphy in Scientific and Expert Evidence* 755, 783 (E. Imwinkelkreid, 2d ed. 1981) (discussing character of questions asked in polygraph examination). The test consists of control, irrelevant, and relevant questions. See J. REID & F. INBAU, *supra* note 2, at 16-21 (describing types and purpose of examination questions); see also Nagle, *supra* note 3, at 56 (discussing types and purpose of examination questions); Comment, *Privacy: The Polygraph in Employment*, 30 *ARK. L. REV.* 35, 44 (1976) (same). Control questions are designed to provoke deceptive answers and establish a polygraph pattern against which the examiner can examine responses to relevant questions for deception. See Comment, *supra*, at 44 (discussing function of control questions); Nagle, *supra* note 3, at 56 (same); Hurd, *supra* note 14, at 531 (same); Gardner, *supra* note 4, at 298 (same). Irrelevant questions are designed to provoke truthful answers and establish a truthful polygraph pattern. See Comment, *supra*, at 37 (discussing function of irrelevant questions); Nagle, *supra* note 3, at 55 (same); Hurd, *supra* note 14, at 531 (same); Gardner, *supra* note 4, at 298 (same). Relevant questions relate to the matter that inspired the investigation. See Comment, *supra*, at 37 (discussing function of relevant questions); Nagle, *supra* note 3, at 55 (same); Hurd, *supra* note 14, at 531 (same); Gardner, *supra* note 4, at 298 (same). Deception is indicated by a response to a relevant question

The professional competence of the polygraph examiner is the most important consideration in assessing the accuracy and reliability of the polygraph.<sup>23</sup> Examiners must be able to inspire trust and elicit cooperation because most polygraph subjects are apprehensive and ill at ease, emotional states that can invalidate an examination.<sup>24</sup> Moreover, because the accurate analysis of the polygraph record requires familiarity with several fields of study, including physiology and psychology, ideally an examiner should have a college education and at least five years of field experience.<sup>25</sup> Unfortunately, many examiners do not meet these minimum standards of competence.<sup>26</sup>

Despite potential imperfections in the administration of a polygraph examination, many private employers use the polygraph in the workplace. Employers use preemployment polygraph examinations to identify and disqualify poor employment risks.<sup>27</sup> Typically, employers use a preemployment examination to check the accuracy of information provided on employment applications,<sup>28</sup> screen applicants susceptible to chemical abuse,<sup>29</sup> and expose previous misdeeds, especially theft.<sup>30</sup> In addition to preemployment examinations, some private employers conduct periodic examinations of randomly selected workers to deter employee theft.<sup>31</sup> Finally, private employers use polygraphs to investigate specific instances of misconduct.<sup>32</sup>

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that provokes a polygraph pattern similar to the pattern provoked by responses to the control questions. See Comment, *supra*, at 37 (discussing significance of physiological reactions to relevant, irrelevant, and control questions). Truthfulness is indicated by a pattern similar to the pattern provoked by responses to irrelevant questions. *Id.* During the posttest interview, the examiner may offer the subject an opportunity to explain polygraph patterns that indicate deception. See Nagle, *supra* note 3, at 58 (describing posttest interview). The examiner must inform the subject if no deception is suspected. *Id.* at 58 n.79.

23. See Nagle, *supra* note 3, at 52 (competence of examiner, as well as procedure of examination, more important than machine); J. REID & F. INBAU, *supra* note 2, at 234 (polygraph accurate in hands of competent, trained examiner); NOTE, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120, 1124 (1973) (polygraph of little value in hands of inexperienced or incompetent examiner).

24. See J. REID & F. INBAU, *supra* note 2, at 235 (discussing characteristics of competent examiner).

25. See *Polygraph Hearings*, *supra* note 5, at 249 (discussing standards of examiner competence). But see J. REID & F. INBAU, *supra* note 2, at 235 (indicating six months adequate field experience).

26. See Nagle, *supra* note 3, at 52 (noting incompetent examiners conduct many polygraph examinations and plague polygraph examiner industry); J. REID & F. INBAU, *supra* note 2, at 235 (same); Gardner, *supra* note 4, at 305 (same). But see Nagle, *supra* note 3, at 53-54 (citing industry self-regulation and state regulation as examples of efforts to improve examiner competence).

27. Nagle, *supra* note 3, at 60; see also Hurd, *supra* note 14, at 535 (discussing employer justification of polygraph as employment screening device). But see Hermann, *Privacy, The Prospective Employer, and Employment Testing*, 47 WASH. L. REV. 73, 85-86 (1971) (questioning usefulness of polygraph as employment screening device); *infra* notes 44-55 and accompanying text (discussing weaknesses of polygraph as employment screening device).

28. See Nagle, *supra* note 3, at 60 (discussing purpose of preemployment examination).

29. *Id.*

30. *Id.*

31. *Id.* at 61.

32. *Id.* at 62.

Private employers contend that management prerogative and employee theft justify polygraph examinations of employees and prospective employees.<sup>33</sup> Although conceding that the polygraph disqualifies some bona fide applicants, employers argue that, despite imperfections, the polygraph is at least as accurate and reliable as other, unchallenged, subjective personnel practices.<sup>34</sup> More fundamentally, employers are primarily interested in identifying untrustworthy applicants rather than in hiring every qualified applicant.<sup>35</sup> Proponents maintain that the polygraph, properly administered by a competent examiner, is a valid element in employment decision making.<sup>36</sup> In addition, employers often contend that employees and prospective employees voluntarily submit to polygraph examinations.<sup>37</sup> Moreover, employers contend that polygraph examinations are justified as a tool to thwart employee theft.<sup>38</sup> Although precise estimates are impossible, experts attribute business losses of as much as fifteen billion dollars annually to employee theft.<sup>39</sup> Some commentators state that employee theft accounts for nearly one-third of all business bankruptcies,<sup>40</sup> that seventy percent of all employees commit theft on the job,<sup>41</sup> and that, on average, a thieving employee remains

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33. See Comment, *The Working Man's Nemesis—The Polygraph*, 6 N.C. CENTRAL L. J. 94, 100 (1974) (discussing use of polygraph in workplace and noting employers argue setting standards for personnel decisions within law management prerogative); *infra* notes 34-43 and accompanying text (discussing seriousness of untrustworthy employees as threat to business survival).

34. See Nagle, *supra* note 3, at 76 (arguing that, despite imperfections, polygraph more valid than subjective considerations presently allowed in personnel decision making).

35. See Hurd, *supra* note 3, at 540 (discussing reasons polygraph used in private employment); see also Comment, *The Polygraph and Pre-employment Screening*, 13 HOUS. L. REV. 551, 558-62 (1976) (arguing employer can justify any screening device in name of expediency).

36. See Nagle, *supra* note 3, at 76 (arguing polygraph, although imperfect, more valid than subjective considerations presently allowed in personnel decision-making).

37. See Comment, *supra* note 35, at 558-62 (discussing employee waiver and consent to polygraph testing). *But see Polygraph Hearings*, *supra* note 5, at 251 (worker consent in order to keep jobs); Hermann, *supra* note 27, at 77 (economic reality, given relative employer-employee bargaining positions, is that consent is coerced, not voluntary); Hurd, *supra* note 14, at 546-47 (labor arbitrators and courts recognize that waivers given under threat of economic harm not voluntary); see also *Polsky v. Radio Shack*, 666 F.2d 824, 828-29 (3d Cir. 1981) (given unequal bargaining strength of worker and employer, release given under threat of economic retaliation invalid); *infra* note 78 (discussing *Polsky* in greater detail).

38. See Hurd, *supra* note 14, at 535 (concluding employers largely motivated by serious problem of employee theft); Nagle, *supra* note 3, at 62-63 (same); Gardner, *supra* note 4, at 296 (same); see also Nagle, *supra* note 3, at 62-63 (citing authorities estimating between \$2 and \$15 billion lost annually to employee theft); Hurd, *supra* note 14, at 296 (citing authorities estimating between \$5 and \$10 billion lost annually to employee theft).

39. See Comment, *supra* note 33, at 100 (citing N.Y. Times, June 16, 1963, s.1, p.1, col.2).

40. See Comment, *supra* note 33, at 100 (citing N.Y. Times, June 16, 1963, s.1, p.1, col.2).

41. See Hurd, *supra* note 14, at 535 (discussing severity of employee theft); Nagle, *supra* note 3, at 63 (same); Comment, *supra* note 33, at 100 (citing N.Y. Times, June 16, 1963, s.1, p.1, col.2).

undetected for three years.<sup>42</sup> Employers understandably are unwilling to incur the costs and the harm dishonest employees can inflict on a business reputation, Employers, therefore, argue that, despite flaws, the polygraph is a legitimate and rational means of combatting the serious and devastating problem of employee theft.<sup>43</sup>

Opponents of the use of the polygraph in private employment concede that employee theft is a staggering problem, but maintain that because of the polygraph's flaws and limitations, the polygraph is not a reliable prophylactic.<sup>44</sup> For example, experts point out that the emotional state of an examinee and the professional competence of an examiner can affect profoundly the validity and reliability of an examination.<sup>45</sup> Although many experts support the general accuracy of the polygraph as used in criminal investigations,<sup>46</sup> most critics maintain that the polygraph is unsuitable for use in the private employment context.<sup>47</sup> The polygraph examination in a criminal investigation focuses on specific matters such as whether the subject robbed the state bank on Main Street last Thursday at noon.<sup>48</sup> In private employment, especially in periodic and preemployment examinations, often the polygraph examination investigates general matters such as whether the subject has ever stolen merchandise from an employer.<sup>49</sup> Critics contend that a polygraph examination may not produce reliable results because general

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42. See Hurd, *supra* note 14, at 535 (discussing severity of employee theft); Nagle, *supra* note 3, at 63 (same); Comment, *supra* note 33, at 100 (citing N.Y. Times, June 16, 1963, S.1, p.1, col.2).

43. See Hurd, *supra* note 14, at 535 (explaining employer rationale for polygraph use in private employment); Nagle, *supra* note 3, at 62-63 (same); Gardner, *supra* note 4, at 296 (same).

44. See Hermann, *supra* note 23, at 85-86 (because polygraph designed for specific matters, polygraph of little utility as a speculative preemployment or periodic screen device); *infra* notes 40-51 and accompanying text (discussing weaknesses of polygraph in employment context).

45. See *supra* notes 18-27 and accompanying text (discussing possible distortion caused by condition of examinee or incompetence of examiner).

46. See J. REID & F. INBAU, *supra* note 2, at 304 (reporting 95% accuracy in criminal investigations); Nagle, *supra* note 3, at 59 (citing reliability studies indicating 77-95% accuracy). *But see supra* notes 44-55 and accompanying text (accuracy of polygraph not without critics). *Cf.* Skolnick, *supra* note 5, at 696 (polygraph's detection of deception through physiological change reminiscent of trial by ordeal); Press, *First the Lie Detector, Then the Chemicals*, NEWSWEEK Jan. 27, 1986, at 56 (reporting polygraph expert David T. Lykken's remark that polygraph is a "fake").

47. See Hermann, *supra* note 27, at 85-86 (outlining polygraph's unsuitability for use in employment context); *Polygraph Hearings*, *supra* note 5, at 445 (reporting polygraph expert David Raskin's remark that polygraph in private employment possible no more accurate than Ouija board).

48. See Hermann, *supra* note 27, at 85-86 (distinguishing use of polygraph in criminal investigation from use in private employment); Gardner, *supra* note 4, at 301 (same); Hurd, *supra* note 14, at 536 (same).

49. See Hermann, *supra* note 27, at 85-86 (distinguishing use of polygraph in private employment from use in criminal investigations); Gardner, *supra* note 4, at 301 (same); Hurd, *supra* note 14, at 536 (same).

questions can elicit unclear responses capable of misinterpretation.<sup>50</sup> An examinee's response might simply be anxiety over the pencils he took from the office three years ago, while the examiner is looking for more substantial misconduct. Polygraph examinations achieve more accurate results if specific questions are presented to examinees.<sup>51</sup> Moreover, criminal investigation focuses on matters that have occurred. In preemployment examinations, however, employers are attempting to assess prospective employees' honesty and predict the prospective employees' future behavior on the basis of general answers to general questions about the subjects' past behavior.<sup>52</sup> Critics argue that to deny employment on the basis of evidence of such questionable accuracy and reliability is arbitrary and unconscionable.<sup>53</sup>

Critics also charge that the use of polygraphs in private employment is not only unreliable, but too intrusive.<sup>54</sup> Critics argue that the polygraph violates a worker's right to privacy because a polygraph examinee cannot control the information divulged<sup>55</sup> and because examiners often ask dehumanizing questions.<sup>56</sup> Examinees need not answer aloud because the polygraph measures physiological responses to questions automatically and involuntarily.<sup>57</sup> Consequently, an examinee is vulnerable to various intrusive questions and cannot refuse to answer,<sup>58</sup> and therefore, no real limit exists to the type of question an examiner may ask.<sup>59</sup> In addition, critics argue that the unprivileged character of the information disclosed during an examination heightens an examinee's loss of control.<sup>60</sup> Critics charge that the use of the polygraph in the workplace often constitutes nothing less than an invasion

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50. See Hermann, *supra* note 27, at 85 (warning of dangers of ambiguous questions and effect on polygraph reliability); J. REID & F. INBAU, *supra* note 2, at 16-17 (same).

51. See J. REID & F. INBAU, *supra* note 2, at 16-17 (discussing importance of formulating clear and precise examination questions).

52. See *supra* notes 27-32 and accompanying text (polygraph used in private employment to identify and disqualify untrustworthy workers).

53. See Skolnick, *supra* note 5, at 727 (criticizing use of polygraph in private employment); Hermann, *supra* note 27, at 85-86 (same).

54. See J. ALBANESE, JUSTICE PRIVACY, AND CRIME CONTROL 21-22 (1984) (warning use of polygraph in private employment violates right to privacy).

55. See *infra* notes 56-65 and accompanying text (discussing possible intrusiveness of polygraph in private employment context).

56. See Herman, *supra* note 27, at 82-83 (examiner's questions often extremely personal and unrelated to legitimate employer interest); cf. *Osborn v. United States*, 385 U.S. 323, 341-43 (1966) (Douglas, J., dissenting) (attempts to uncover individual's private personality and beliefs assaults citizens' privacy and dignity).

57. See *Polygraph Hearings*, *supra* note 5, at 255-56, 263 (discussing implications of polygraph theory); Hermann, *supra* note 27, at 129 (same).

58. See Hermann, *supra* note 27, at 130, 153-54 (discussing threat posed to privacy by polygraph in employment).

59. See *Polygraph Hearings*, *supra* note 5, at 249-50, 255 (discussing boundaries of polygraph examination questions).

60. See Gardner, *supra* note 4, at 306 (discussing privacy implications of polygraph in private employment); *id.* at 306 n.81 (citing examples of abusive dissemination of information obtained through polygraph examinations in private employment).



of privacy.<sup>61</sup> Critics argue that the polygraph's unreliability and potential for abuse outweigh any utilitarian value gained from the use of the polygraph in the workplace.<sup>62</sup>

The debate over the use of the polygraph by private employers is not new, and most states regulate the use of the polygraph by private employers.<sup>63</sup> State regulation of the use of the polygraph by private employers falls into three broad categories. Twenty-one states prohibit the use of the polygraph by private employers in a manner similar to the proposed Act.<sup>64</sup> States that prohibit private employers from utilizing the polygraph typically exempt from coverage certain public agencies and personnel.<sup>65</sup> Twenty-four states,

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61. See *id.* at 318 (arguing right to privacy diminished when employers expose employee's private personality without employee's consent); Hermann, *supra* note 27, at 127-28 (mere employment context should not deprive worker of privacy rights).

62. See Gardner, *supra* note 4, at 321 (polygraph's threat to humanitarian and constitutional values outweigh employer's legitimate interests, especially in light of polygraph's imperfect accuracy and reliability).

63. See *infra* notes 67-69 and accompanying text (surveying state regulation of polygraph in private employment); see also *infra* notes 70-128 and accompanying text (discussing in detail case law applying various state statutes regulating polygraph in private employment).

64. See ALASKA STAT. § 23.10.037 (1984) (prohibiting employers from requiring submission to polygraph examination as condition of employment or continuing employment); CONN. GEN. STAT. § 31-51g (1972 & Supp. 1985) (same); DEL. CODE ANN. tit. 19, § 704 (1985) (same); HAWAII REV. STAT. tit. 21, §§ 378-21 through 378-22 (1976) (same); IDAHO CODE §§ 44-903 through 44-904 (1977) (same); IOWA CODE ANN. § 730.4 (1979 & Supp. 1985) (same); ME. REV. STAT. ANN. tit. 32, § 7166 (1978 & Supp. 1985) (same); MD. ANN. CODE art. 100, § 95 (1979 & Supp. 1984) (same); MASS. GEN. LAWS ANN. ch. 149, § 19B (1981 & Supp. 1985) (same); MINN. STAT. § 181.75 (1976 & Supp. 1985) (same); MONT. CODE ANN. § 39-2-304 (1985) (same); NEB. REV. STAT. § 81-1932 (1981) (same); N.J. STAT. ANN. § 2C:40A-1 (1982 & Supp. 1985) (same); N.Y. CONS. LAWS §§ 733-738 (1977 & Supp. 1986) (same); OR. REV. STAT. § 659.225 (1979 & Supp. 1985) (same); 18 PA. CONST. STAT. ANN. § 7321 (1983) (same); R.I. GEN. LAWS §§ 28-6-1 through -2 (1979) (same); WASH. REV. CODE §§ 49.44.0 through .130 (1962 & Supp. 1986) (same); W. VA. CODE § 21-5-5b (1985) (same); WIS. STAT. § 111.37 (1980 & Supp. 1985) (same); D.C. CODE ANN. §§ 36-801 through -803 (1981) (same).

65. See, e.g., NEB. REV. STAT. § 81-1932 (1981) (exempting from coverage public law enforcement personnel); 18 PA. CONST. STAT. ANN. § 7321(b) (1983) (same); R.I. GEN. LAWS §§ 28-6.1-2 (1979) (same). *But see* Oberg v. City of Billings, Mont., \_\_\_\_\_, 674 P.2d 494, 495 (1983) (holding similar exemption violated public law enforcement agency employee's equal protection rights under state constitution). In *Oberg*, the Billings Police Department investigated an allegation that plaintiff, officer Oberg, had assaulted a hand-cuffed citizen the plaintiff arrested. *Id.* at \_\_\_\_\_, 674 P.2d at 494-95. As part of the investigation, the police department requested that plaintiff submit to a polygraph examination. *Id.* at \_\_\_\_\_, 674 P.2d at 495. Plaintiff refused, claiming that the clause exempting law enforcement personnel from Montana's statute prohibiting the use of polygraph examinations as a condition of employment or continuing employment violated plaintiff's federal and state constitutional rights. *Id.* at \_\_\_\_\_, 674 P.2d at 495; see MONT. CODE ANN. § 39-2-304(1) (1985) (regulating use of polygraph in employment). The Billings Police Commission found that plaintiff's refusal to submit to the polygraph examination constituted insubordination and recommended plaintiff's suspension without pay for 25 days and a six-month probationary period. *Id.* at \_\_\_\_\_, 674 P.2d at 495. The Yellowstone County District Court subsequently upheld the police commission's finding and enforced the commission's recommended punishment. *Id.* at \_\_\_\_\_, 674 P.2d at 494. On appeal, the Montana Supreme Court stated that the statute must bear a rational relationship to

rather than specifically prohibiting the use of the polygraph in private employment, attempt to regulate the competence of polygraph examiners and the administration of the examination.<sup>66</sup> Six states, Colorado, Kansas, Missouri, New Hampshire, Ohio, and Wyoming, have no statutes regulating the use of the polygraph.

Two of the most restrictive of the twenty-one states that prohibit the use of the polygraph by private employers are West Virginia and Pennsylvania.<sup>67</sup> West Virginia's polygraph statute prohibits private employers from requiring polygraph examinations of employees or prospective employees as a condition of employment, and from knowingly using the results of polygraph examinations conducted outside the state in employment decisionmaking.<sup>68</sup> The

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a legitimate governmental purpose to withstand plaintiff's challenge. *Id.* at \_\_\_\_\_, 674 P.2d at 496. Noting that the legislative history evinced no explicit purpose for the challenged exemption, the court concluded that the challenged exemption was vague and overbroad. *Id.* at \_\_\_\_\_, 674 P.2d at 496. The court, therefore, held the exemption violated plaintiff's right to equal protection under the state constitution. *Id.* at \_\_\_\_\_, 674 P.2d at 496. The court in *Oberg* refused to hypothesize that the legislature exempted public law enforcement employees because law enforcement employees occupy a uniquely high position of public trust and, therefore, the integrity of these employees warrants unusual scrutiny. *Id.* at \_\_\_\_\_, 674 P.2d at 496. The court stated that the legislature must indicate clearly that the legislature created the exemption to ensure the integrity of police officers because of the police officers' position of trust in the community before the court would uphold the statute. *Id.* at \_\_\_\_\_, 674 P.2d at 497. The court in *Oberg* stated that the statute provided to limit to the exemption. *Id.* at \_\_\_\_\_, 674 P.2d at 496. For example, a court might construe the statute to exempt dog catchers and meter maids as well as police officers. *Id.* at \_\_\_\_\_, 674 P.2d at 496. The court declared that the legislature must define clearly the class exempted and the rational connection to a legitimate governmental interest before the legislature can deny protections expressly granted other employees. *Id.* at \_\_\_\_\_, 674 P.2d at 497.

66. See ALA. CODE §§ 34-25-1 through -36 (1984) (establishing licensing requirements for polygraph examiners); ARK. STAT. ANN. §§ 71-2201 through -2225 (1979) (same); CAL. BUS. & PROF. CODE §§ 9300-9321 (1975 & Supp. 1986) (same); FLA. STAT. ANN. §§ 493.561 through .579 (1981 & Supp. 1985) (same); IND. CODE ANN. §§ 25-30-2-1 through -5 (1982 & Supp. 1985) (same); KY. REV. STAT. §§ 329.010 through .990 (1983) (same); LA. REV. STAT. ANN. §§ 37:2831 through 2854 (1974 & Supp. 1986) (same); MICH. COMP. LAWS §§ 338.1701 through .1729 (1976 & Supp. 1985) (same); MISS. CODE ANN. §§ 73-29-1 through -47 (1973 & 1985) (same); N.C. GEN. STAT. §§ 74C-1 through 33 (1985) (same); N.D. CENT. COL. §§ 43-31-01 through -17 (1978 & Supp. 1985) (same); OKA. STAT. Tit. 59, §§ 1451 through 1476 (1971 & Supp. 1985) (same); S.C. CODE ANN. §§ 40-53-10 through -250 (1977 & Supp. 1984) (same); S.D. COD. LAWS ANN. §§ 36-30-1 through -3 (1977 & Supp. 1984) (same); TEX. STAT. ANN. art. 4413 (29cc) (1976 & Supp. 1986) (same); UTAH CODE ANN. §§ 34.27-1 through .37-14 (1974 & Supp. 1985) (same); VA. CODE §§ 54-916 through -922 (1982) (same); VT. STAT. tit. 26, §§ 2901 through 2910 (1975 & Supp. 1985) (same); see also ARIZ. REV. STAT. ANN. §§ 32.2701 through 32.2715 (1976 & Supp. 1985) (establishing licensing requirements for polygraph examiners and restricting areas of polygraph examination inquiry); GA. CODE §§ 84-5001 through -5016 (1984 & Supp. 1985) (same); ILL. REV. STAT. ch. 111, §§ 2401 through 2432 (1978 & Supp. 1985) (same); NEV. REV. STAT. §§ 648.005 through .210 (1979) (same); N.M. STAT. ANN. §§ 61-26-1 through -13 (1978 & Supp. 1985) (same); TENN. CODE ANN. §§ 62-27-101 through -124 (1982 & Supp. 1985) (same).

67. See W. VA. CODE § 21-5-5b (1985) (prohibiting use of polygraph by private employers); 18 PA. CONST. STAT. ANN. § 7321 (1983) (same).

68. *Id.* § 21-5-5b. Employers who violate West Virginia's polygraph statute is guilty of a

statute exempts military and law enforcement personnel, and personnel involved in the manufacture, distribution, and dispensation of certain drugs.<sup>69</sup> The Supreme Court of West Virginia recently described the state's polygraph statute in *Cordle v. General Hugh Mercer Corp.*<sup>70</sup> as embodying a facet of the state's long-recognized public policy protecting the individual's interest in privacy.<sup>71</sup> Pennsylvania's polygraph statute is less elaborate and simply

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misdeemeanor and subject to a fine of up to \$500. *Id.* § 21-5-5d(a). The statute also creates a private cause of action for employees or prospective employees of employers who violate the statute. *Id.* § 21-5-5d(c). Private litigants can recover treble damages, including back pay for missed or denied employment, as well as reasonable costs, under the statute. *Id.*

69. *Id.* § 21-5-5d(c).

70. \_\_\_\_ W. Va. \_\_\_\_, 325 S.E.2d 111 (1984).

71. *Cordle v. General Hugh Mercer Corp.*, W. Va. at \_\_\_\_, 325 S.E.2d at 117. In *Cordle v. General Hugh Mercer Corp.*, the defendant corporation operated a Holiday Inn and engaged plaintiffs Cordle, Billings, and Hall as at-will employees between May 1977 and May 1978. *Id.* at \_\_\_\_, 325 S.E.2d at 112. The corporation later discharged the plaintiffs when, despite a written agreement, the plaintiffs refused to submit to polygraph examinations. *Id.* at \_\_\_\_, 325 S.E.2d at 113; *see also id.* at \_\_\_\_, 325 S.E.2d 112 n.2 (reprinting original agreement); *id.* at \_\_\_\_, 325 S.E.2d 112 n.3 (quoting plaintiffs' affidavit to effect consent given under threat of economic retaliation); *id.* at 113 n.5 (reprinting defendant's letter to plaintiff advising them that refusal would result in discharge). After plaintiffs initiated a wrongful discharge action in the Mercer County Circuit Court, defendant corporation filed a motion to dismiss the complaint. *Id.* at \_\_\_\_, 325 S.E.2d at 113. Holding that plaintiffs' discharge for refusing to submit to polygraph examinations violated a substantial public policy, the circuit court dismissed the defendant's motion for summary judgment. *Id.* at \_\_\_\_, 325 S.E.2d at 113. On appeal, the West Virginia Supreme Court concluded that, although the facts of the case occurred before West Virginia enacted the polygraph statute in 1983, the polygraph statute simply codified an aspect of the state's public policy recognizing an individual's interest in privacy. *Id.* at \_\_\_\_, 325 S.E.2d at 117. West Virginia recognizes a public policy exception to the general rule that an employer may discharge an at-will employee at any time for any reason. *See Harless v. First Nat'l Bank in Fairmont*, 152 W. Va. 116, 124, 246 S.E.2d 270, 275 (1978) (holding employer's right to discharge at-will employee absolute as long as discharge violates no substantial public policy); *see also infra* note 84 (discussing history of at-will doctrine and development and scope of public policy exception). Relying on West Virginia case precedent establishing an individual's right to privacy, the court held that the discharge of the plaintiffs violated an established facet of West Virginia's public policy, if not the state's polygraph statute. *Cordle*, W. Va. at \_\_\_\_, 325 S.E.2d at 11; *see id.* at \_\_\_\_, 325 S.E.2d at 116-17 (discussing three West Virginia cases court states indicate on-going concern for individual's interest in privacy); *Roach v. Harper*, 143 W. Va. 859, 874, 105 S.E.2d 564, 568 (1958) (holding landlord's listening device violated tenant's right to privacy and gave rise to common-law right of action for damages); *Sutherland v. Kroger Co.*, 144 W. Va. 573, 584, 110 S.E.2d 716, 724 (1959) (holding illegal search of customer by store's employee invaded customer's right to privacy); *Golden v. Board of Ed. of the County of Harrison*, W. Va. \_\_\_\_, \_\_\_\_, 285 S.E.2d 665, 669 (1981) (holding dismissal of teacher for immorality impinged upon teacher's right to privacy, unless immorality impaired teacher's fitness); *see also Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 n.2 (1974) (citing *Sutherland* and *Roach* as indication West Virginia recognizes legally protected interest in privacy). *But see Cordle*, W. Va. at \_\_\_\_, 325 S.E.2d at 117-18 (Miller, J., dissenting) (arguing no state public policy prohibiting use of polygraph in private employment existed prior to enactment of polygraph statute). The dissenters in *Cordle* argued that West Virginia passed the polygraph statute precisely because no public policy on the matter existed. *Id.* at \_\_\_\_, 325 S.E.2d at 117. The majority, the dissenters noted, cited no West Virginia case permitting an at-will employee to recover damages for a discharge resulting from a refusal to submit to a polygraph examination. *Id.* at \_\_\_\_, 325 S.E.2d at 117.

states that any employer requiring submission to a polygraph examination as a condition of employment or continuing employment is guilty of a second-degree misdemeanor.<sup>72</sup> Pennsylvania, like West Virginia, exempts law enforcement personnel and personnel who dispense or have access to certain drugs.<sup>73</sup> In *Perks v. Firestone & Rubber Co.*,<sup>74</sup> the United States Court of Appeals for the Third Circuit held that Pennsylvania's polygraph statute, like West Virginia's, embodies a recognized state public policy concern for the vulnerability of the worker in the workplace.<sup>75</sup>

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72. See 18 PA. CONST. STAT. ANN. § 7321 (1983) (prohibiting use of polygraph in private employment).

73. *Id.* § 7321(b).

74. 611 F.2d 1363 (3d Cir. 1979).

75. *Perks v. Firestone & Rubber Co.*, 611 F.2d at 1366. In *Perks v. Firestone & Rubber Co.*, defendant, Firestone, employed plaintiff, Perks, at-will for thirty years. *Id.* at 1364. While investigating allegations that defendant's employees accepted kickbacks from supplier representatives, defendant's auditors received information that one representative, G. Joseph Pilotti, procured the services of a prostitute for plaintiff. *Id.* Plaintiff denied the allegation, and defendant requested that plaintiff submit to a polygraph examination as corroboration. *Id.* Defendant discharged plaintiff after plaintiff refused to submit to the polygraph examination. *Id.* Plaintiff filed a complaint alleging that the discharge was unlawful because the discharge violated a clear public policy of Pennsylvania. *Id.* The United States District Court for the Eastern District of Pennsylvania found no evidence that defendant fired plaintiff for refusing to submit to the requested polygraph examination. *Id.* at 1366. Concluding instead that defendant discharged plaintiff for violating a company policy prohibiting accepting kickbacks, the district court granted summary judgment to defendant. *Id.* at 1364. On appeal, the United States Court of Appeals for the Third Circuit noted that Pennsylvania recognized a public policy exception to the general rule that an employee at will is subject to discharge at any time and for any reason. See *id.* at 1365 (analyzing Pennsylvania case law recognizing public policy exception to at-will doctrine); *Geary v. United States Steel Corp.*, 456 Pa. 171, 184, 319 A.2d 174, 180 (1974) (noting in dicta possibility public policy might justify exception to at-will doctrine); *Reuther v. Fowler*, 255 Pa.Super. 28, 34, 385 A.2d 119, 121 (1978) (holding discharge of employee for serving jury duty violated public policy); see also *infra* note 84 (discussing history of at-will doctrine and development and scope of public policy exception). The Third Circuit further found that Pennsylvania, in enacting the polygraph statute, prohibited the use of the polygraph in private employment as a matter of public policy. *Perk*, 611 F.2d at 1366. In concluding that the polygraph statute embodied a recognized aspect of Pennsylvania public policy, the court acknowledged that the history of the statute shed little light on the intent of the legislature. *Id.* at 1366 n.5. The court instead relied on another court's analysis of a similar polygraph statute. *Id.* at 1365-6; see *State v. Community Distrib., Inc.*, 64 N.J. 479, 487, 317 A.2d 697, 699 (1974) (describing New Jersey's polygraph statute as embodying state's concern regarding polygraph's accuracy, voluntariness of worker's consent to examinations, and worker's privacy). Satisfied that similar concerns motivated the Pennsylvania legislature, and that Firestone's motive for discharging Perks presented an issue of fact, the Third Circuit reversed the district court's summary judgment. *Perks*, 611 F.2d at 1366. The Third Circuit elucidated the scope of Pennsylvania's public policy exception in *Polsky v. Radio Shack*, in which the Third Circuit considered the validity of a release from liability for a violation of Pennsylvania's polygraph statute. *Polsky v. Radio Shack*, 666 F.2d 824, 826 (3d Cir. 1981). Noting that Pennsylvania's statute prohibits employers from requiring polygraph examinations as a condition of employment, the Third Circuit described the statute as the legislature's recognition of the worker's vulnerability, given the worker's unequal bargaining position in the economic marketplace. *Id.* at 828. The court stated that economic reality and the threat of denied or terminated

Many states, however, attempt to regulate the competence of polygraph examiners and the administration of polygraph examinations, rather than prohibit the use of polygraph examinations by private employers.<sup>76</sup> Illinois,<sup>77</sup> for example, empowers the State's Department of Registration and Education and the Department's director to oversee the licensing and regulation of polygraph examiners.<sup>78</sup> In addition, Illinois created a polygraph examiner committee to advise the Department and the director,<sup>79</sup> and specifies acceptable polygraph devices.<sup>80</sup> To obtain a license, an applicant must also register with the Department, pass an approved six-month course of instruction, and have a bachelor's degree from an accredited school.<sup>81</sup> Finally, an applicant must pass an examination conducted by the examination committee.<sup>82</sup> Illinois also restricts the areas into which an examiner may inquire.<sup>83</sup> For example, Illinois prohibits an examiner from inquiring into an examinee's religious beliefs, political persuasions, union affiliations, or sexual life.<sup>84</sup> In states, like Illinois, that do not specifically prohibit the use of the polygraph by private employers, workers complaining of the use of polygraph examinations as a condition of employment or continuing employment must demonstrate that the employer contravened a clearly recognized and clearly defined state public policy.<sup>85</sup>

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employment often effectively renders a worker's action involuntary. *Id.* The Third Circuit stated that to allow an employer to coerce a worker into releasing the employer from liability under the statute would allow employers to accomplish indirectly what the statute directly proscribed. *Id.* The court in *Polsky*, therefore, held that submission to the examination and the release of an employer from claims under the statute, if based on the threat of economic retaliation, contravened the statute and state public policy. *Id.* at 829. Despite the court's ruling, the court in *Polsky* refused to hold that the natural imbalance of bargaining power alone is sufficient to void a release. *Id.*

76. See *supra* note 86 and accompanying text (surveying states permitting private employers to use polygraph under varying degrees of regulation).

77. See ILL. REV. STAT. ANN. §§ 32.2701 through .2715 (1978 & Supp. 1985) (regulating polygraph and polygraph examiners).

78. *Id.* § 2415.

79. *Id.* § 2407.

80. *Id.* § 2403.

81. *Id.* § 2412(c), (d).

82. *Id.* § 2412(b).

83. *Id.* § 2415.1.

84. *Id.*

85. See *infra* notes 87-112 and accompanying text (discussing attempts in Illinois and Arizona to demonstrate discharges wrongful because polygraph in private employment violated public policy). States that do not prohibit specifically the use of the polygraph in private employment generally recognize a public policy exception to the general rule that an employer may discharge an at-will employee at any time for any reason. See, e.g., *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 133, 421 N.E.2d 876, 880 (1981) (holding discharge of employee for providing information to police violated public policy); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App.2d 184, \_\_\_\_\_, 344 P.2d 25, 27 (1959) (holding discharge of employee for refusing to commit perjury violated public policy); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 648, 245 N.W.2d 151, 153 (1976) (holding discharge of employee for filing workmen's compensation claim violated public policy). The doctrine that an employer can

The extent to which Illinois' treatment of the polygraph in private employment differs from West Virginia's and Pennsylvania's is manifest in *Cipov v. International Harvester Co.*<sup>86</sup> In *Cipov*, the Illinois Court of Appeals considered whether the discharge of an employee for refusing to take a polygraph examination constituted the tort of retaliatory discharge.<sup>87</sup> Inter-

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discharge an employee at will originated as a rule of evidence in Horace Wood's 1877 Treatise on the Law of Master and Servant. See H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877) (discussing construction of employment contracts); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-20 (1976) (discussing history of at-will doctrine). Wood's rule of evidence assumed that, absent specific terms, an employment contract was terminable at will. See H. WOOD, *supra* § 134, at 272 (discussing construction of employment contracts). Commentators have noted that Wood's rule of evidence departed from the common law presumption of a one-year employment contract, absent a specified duration. Feinman, *supra*, 119-20. Moreover, the authority Wood cited for the at-will rule of evidence did not support Wood. *Id.* A rapidly industrializing economy coupled with the popularity of the freedom-of-contract philosophy of the late nineteenth and early twentieth centuries, however, inspired most state courts to accept the at-will doctrine. See Feinman, *supra*, at 125-29; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1826 (1981) (discussing roots of at-will doctrine's acceptance). The at-will doctrine has eroded over the years as unionization strengthened job security. See Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979) (noting collective bargaining agreements covering nearly 25% nonagricultural workforce require just cause for dismissal). In addition, federal, state, and local governments employ nearly twenty percent of the workforce and protect most public employees from capricious dismissals through civil service regulations. *Id.* at 8-9. Moreover, a myriad of statutes provide protection from discriminatory dismissals based on membership in a protected class group. See, e.g., Civil Rights Act of 1964, § 703(a), 42 U.S.C. §§ 2000e-2a (1976) & Supp. 1985) (Title VII) (prohibiting discriminatory dismissals based on race or sex); Age Discrimination in Employment Act of 1967, § 4(a), 29 U.S.C. § 623(a) (1976 & Supp. 1985) (prohibiting discriminatory dismissals based on age); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1976 & Supp. 1985) (prohibiting discriminatory dismissals based on physical handicap). Finally, some state courts created a public policy exception to the at-will doctrine. See Seligman, *At-Will Termination: Evaluating Wrongful Discharge Actions*, Trial, Feb. 1983, at 60, 61 (public policy exception to at-will terminations most widely accepted of new wrongful discharge causes of actions). A wrongful discharge under this exception must threaten a clearly-defined and well-established public policy. See *Petermann v. International Bhd. of Teamsters*, 174 Cal. App.2d 184, \_\_\_\_\_, 344 P.2d 25, 27 (1959) (holding discharge of agent for refusing to commit perjury justified judicial intervention); Comment, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 622 (1981) (explaining scope of public policy exception); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 156 (1981) (same). Courts have recognized public policy exceptions to the at-will doctrine for discharges based on an employee's performance of an important civic obligation, exercise of a statutory right or privilege, or refusal to commit an unlawful act. See, e.g., *Reuther v. Fowler & Williams*, 255 Pa. Super. 28, 34, 386 A.2d 119, 121 (1978) (holding discharge of employee for serving jury duty violated public policy); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 648, 245 N.W.2d 151, 153 (1976) (holding discharge of employee for filing workmen's compensation claim violated public policy); *Petermann v. International Bhd. of Teamsters*, 174 Cal. App.2d 184, \_\_\_\_\_, 344 P.2d 25, 27 (Cal. App. Ct. 1959) (holding discharge of agent for refusing to commit perjury violated public policy).

86. 134 Ill. App.3d 522, 481 N.E.2d 22 (1985).

87. *Cipov v. International Harvester Co.*, 134 Ill. App.3d 522, 481 N.E.2d 22 (1985). In

national Harvester employed plaintiff, Cipov in November 1981 as a general foreman and required that plaintiff submit to a polygraph examination.<sup>88</sup> After receiving anonymous letters accusing plaintiff of theft in May 1982, and after plaintiff refused to submit to another polygraph examination, International Harvester discharged plaintiff.<sup>89</sup> The Cook County Circuit Court subsequently dismissed plaintiff's retaliatory discharge complaint.<sup>90</sup> Plaintiff appealed to the Illinois Court of Appeals.<sup>91</sup>

On appeal, the court in *Cipov* first noted that the tort of retaliatory discharge is a public policy exception to the general rule that an at-will employee is subject to discharge at any time and for any reason.<sup>92</sup> The court stated that public policy involves questions of justice that affect every citizen of the state.<sup>93</sup> Although the line between purely personal interests and public policy interests is unclear, the court stated that a public policy issue must involve the fundamental rights, duties, and responsibilities of a citizen.<sup>94</sup> The plaintiff argued that the Illinois Supreme Court previously had established a public policy prohibiting the discharge of employees for refusing to submit to polygraph examinations.<sup>95</sup> The court in *Cipov*, however, concluded that

*Kelsay v. Motorola Inc.*, the Illinois Supreme Court first recognized the tort of retaliatory discharge. *Kelsay v. Motorola Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (Ill. 1978). In *Kelsay*, an employer fired an at-will employee for submitting a workmen's compensation claim. *Id.* at 179, 384 N.E.2d at 354-55. After considering the legislative history and intent of the state's Workers' Compensation Act, the *Kelsay* court concluded that allowing employers to fire employees for filing workmen's compensation claims would defeat the public policy behind the Act. *Id.* at 181-82, 384 N.E.2d at 357. The *Kelsay* court therefore created the tort of retaliatory discharge, a public policy exception to the general rule that at-will employees are subject to dismissal at any time for any reason. *Id.* at 183-84, 384 N.E.2d at 35. *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 133, 421 N.E.2d 876, 880 (1981) (cause of action for retaliatory discharge created to protect clearly-mandated public policies). *But cf.* *Barr v. Kelso-Burnett Company*, 106 Ill.2d 520, 527, 478 N.E.2d 1354, 1358 (1985) (favoring narrow interpretation of retaliatory discharge exception to at-will employment doctrine, and discouraging expansion of exception).

88. *Cipov*, 134 Ill.3d at \_\_\_\_, 481 N.E.2d at 22.

89. *Id.* at \_\_\_\_, 481 N.E.2d at 22-23.

90. *Id.* at \_\_\_\_, 481 N.E.2d at 22.

91. *Id.*, 481 N.E.2d at 22.

92. *Id.* at \_\_\_\_, 482 N.E.2d at 23; *see supra* note 87 and accompanying text (discussing history of tort of retaliatory discharge in Illinois); *supra* note 85 (discussing history of employment-at-will doctrine and development and scope of public policy exception).

93. *See Cipov*, 134 Ill.3d at \_\_\_\_, 481 N.E.2d at 24 (citing *Palmateer* for definition of public policy issue); *supra* note 99 (discussing history of employment-at-will doctrine and development and scope of public policy exception).

94. *Id.*; *see, e.g.*, *Reuther v. Fowler*, 255 Pa. Super. 28, 34, 385 A.2d 119, 121 (1978) (holding dismissal of employee for serving jury duty contravened public policy); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (holding dismissal of employee for refusing to violate professional code of ethics contravened public policy); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 648, 245 N.W.2d 151, 153 (1976) (holding dismissal of employee for filing workmen's compensation claim contravened public policy).

95. *Cipov*, 134 Ill.3d at \_\_\_\_, 481 N.E.2d at 23. Plaintiff's claim that the use of a polygraph in private employment was based on *Kaske v. City of Rockford*. *Id.* at \_\_\_\_, 481 N.E.2d at 23-24; *Kaske v. City of Rockford*, 96 Ill.2d 298, 450 N.E.2d 314, *cert. denied*, 464 U.S. 960 (1983). In *Kaske*, the Illinois Supreme Court considered enjoining the administration

the Illinois Supreme Court had held simply that polygraph examination evidence is too unreliable to form the basis for the just cause dismissal of a public employee or civil servant, such as a police officer.<sup>96</sup> The court noted that the plaintiff was an at-will employee and, therefore, subject to discharge at any time and for any reason, absent a violation of public policy.<sup>97</sup> The court declared that the key distinction is that private employers in Illinois may discharge at-will employees, unlike public employees, without just cause.<sup>98</sup> The court in *Cipov*, therefore, held that plaintiff failed to demonstrate that use of a polygraph in private employment violated a clear public policy.<sup>99</sup> In states that, like Illinois, attempt to regulate the competence of the polygraph examiner or the conduct of the examination, but do not recognize some public policy limiting the use of the polygraph in private employment, the at-will employee has little protection from polygraph test abuse.

In states that allow private employers to use the polygraph, however, workers are not completely unprotected. An Arizona<sup>100</sup> case, *Valley Vendors*,

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of polygraph examinations to two police officers accused of using marijuana. *Id.* at 304, 450 N.E.2d at 317. In *Kaske*, after one of the officers filed for divorce, his wife threatened to "take his job." *Id.*, 450 N.E.2d at 317. The estranged wife then went to the officers' superiors, alleging that the two officers had smoked marijuana at several social gatherings. *Id.*, 450 N.E.2d at 317. The wife later recanted, but the officers' superiors insisted that the officers submit to polygraph examinations. *Id.*, 450 N.E.2d at 317. The chief of police informed the officers that information obtained through the examination might be used against either or both officers in a hearing before the board of fire and police commissioners. *Id.* at 305, 450 N.E.2d at 317. Additionally, the chief of police informed the officers that refusal to submit to the polygraph examination would result in disciplinary actions before that board. *Id.*, 450 N.E.2d at 317. The plaintiffs filed a complaint in the Winnebago County Circuit Court demanding a declaratory judgment enjoining the administration of the polygraph examinations. *Id.* at 304, 450 N.E.2d at 316. The circuit court twice granted motions to dismiss. *Id.*, 450 N.E.2d at 316-17. After the Illinois Court of Appeals affirmed the circuit court's dismissal, the officers appealed to the state supreme court. *Id.*, 450 N.E.2d at 316-17. On appeal, the court in *Kaske* noted that the results of the polygraph examinations probably would determine the board's decision in the matter. *Id.* at 309, 450 N.E.2d at 319. Reasoning that the polygraph results would not be reliable enough to provide competent evidence, the court concluded that a disciplinary board could not admit polygraph evidence in an administrative hearing. *Id.*, 450 N.E.2d at 319. The court in *Kaske* therefore held that the board could not take disciplinary action against the officers for refusing to submit to the polygraph examinations. *Id.* at 310, 450 N.E.2d at 320. Plaintiff argued that because the court in *Kaske* emphasized the unreliability of the polygraph, the Illinois Supreme Court had established a public policy against disciplining employees for refusing to take polygraph examinations. *Cipov*, 481 N.E.2d at 23-24.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See ARIZ. REV. STAT. ANN. §§ 32-2701 through 2715 (1976 & Supp. 1985) (regulating use of polygraph in Arizona). Arizona's polygraph statute, in a manner similar to Illinois, empowers the state's Public Safety Department and the Department's Director to formulate and revise regulations to administer the statute, license polygraph examiners, and appoint an advisory board to assist in the formulation of state regulations governing the use of the polygraph. *Id.* § 32-2702. Under the statute, a prospective polygraph examiner must complete



*Inc. v. Jamieson*,<sup>101</sup> provides one example of the protection offered workers discharged for refusing to submit to a polygraph examination. In *Valley Vendors*, the Arizona Court of Appeals considered whether an employee's discharge for refusing to submit to a polygraph examination disqualified the employee from receiving unemployment benefits.<sup>102</sup> The defendant, Valley Vendors, employed the plaintiff, Jamieson, as a vending machine mechanic.<sup>103</sup> As a condition of employment, plaintiff agreed to take a polygraph examination to verify information on the application, and submitted to approximately four more polygraph examinations over the next four years.<sup>104</sup> Defendant later demanded that plaintiff submit to another polygraph examination or leave work until plaintiff was willing to comply.<sup>105</sup> After

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an approved course of polygraph instruction. *Id.* § 32-2703(3). In addition, an applicant must have a bachelor's degree from an accredited college or university and five years investigative experience with the federal, state, county, or municipal government. *Id.* § 32-2703(3)(a), (b); see also ARIZ. REV. STAT. ANN. § 32-2703(4) (applicant may avoid degree requirement by passing written or oral examination prescribed by department). Before receiving a polygraph examiner license, an applicant may serve a six-month internship under the supervision of a state-licensed polygraph examiner. ARIZ. REV. STAT. ANN. § 32-2707. All licensed polygraph examiners and interns also must post a surety bond of \$5000 to cover judgments recovered for violation of the statute. *Id.* § 32-2704. The statute classifies a violation of the statute as a misdemeanor. *Id.* § 32-2715. The statute also specifies 20 possible grounds for the refusal, suspension, or revocation of a polygraph examiner's license. *Id.* § 32-2713. The statute prohibits, for example, the failure to inform the examinee of the examinee's right to refuse the examination, inquiries into an examinee's religious, labor, political, or sexual life, and inquiries that might violate Title VII of the Civil Rights Act of 1964. *Id.* §§ 32-2713(5), (6).

101. 129 Ariz. 238, 630 P.2d 61 (1981). *But see* *Larsen v. Motor Supply Co.*, 117 Ariz. 507, \_\_\_\_, 573 P.2d 907, 908-09 (1977) (holding employer rightfully discharged employees for refusing to submit to truth verification examinations). In *Larsen v. Motor Supply Co.*, the defendant, Motor Supply, employed plaintiffs, Larsen and Jacobs, as at-will employees. *Id.* at 907. In May of 1974, the company instituted a policy requiring all employees to take a "psychological stress evaluation test." *Id.* The test analyzes voice recordings to detect deception. *Id.* The plaintiffs failed to take the test because plaintiffs refused to sign the prerequisite consent forms. *Id.* Defendant subsequently fired plaintiffs. *Id.* Plaintiffs brought a wrongful discharge action against defendants which the Maricopa County Superior Court dismissed summarily. *Id.* On appeal, the court in *Larsen* noted that Arizona recognized the general rule that at-will employees, with a few narrow exceptions defined by statute or public policy, are subject to discharge at any time and for any reason. *Id.* at 907-08. Holding that plaintiffs failed to present a case falling into one of the narrow exceptions to the general employee-at-will doctrine, the *Larsen* court affirmed the summary dismissal of the employees' wrongful discharge action. *Id.* at 908-09.

102. *Valley Vendors, Inc. v. Jamieson*, 129 Ariz. 238, \_\_\_\_, 630 P.2d 61, 62 (1981).

103. *Id.* at \_\_\_\_, 630 P.2d at 62.

104. *Id.* at \_\_\_\_, 630 P.2d at 62-6; see also *id.* at \_\_\_\_, 630 P.2d at 62 n.1 (reprinting text of application form containing polygraph agreement).

105. *Id.* at \_\_\_\_, 630 P.2d at 63. In *Valley Vendors*, plaintiff testified that he refused to take the polygraph examination because suspected the request was harassment. *Id.* at \_\_\_\_, 630 P.2d at 63. Plaintiff testified that he had suffered acts of harassment since his earlier involvement in union activities, and had filed a grievance with the National Labor Relations Board just a few days before employer requested plaintiff submit to the polygraph examination. *Id.* at \_\_\_\_, 630 P.2d at 63. Valley Vendors presented evidence that Valley Vendors suspected employees of stealing from vending machines. *Id.* at \_\_\_\_, 630 P.2d at 63. Moreover, Valley Vendors

defendant discharged plaintiff for refusing to submit to the polygraph examination, plaintiff successfully applied for unemployment benefits.<sup>106</sup> Defendant appealed to the Arizona Court of Appeals after the superior court upheld the state's decision to grant the unemployment benefits.<sup>107</sup>

On appeal, the court considered defendant's contention that the requested polygraph examination was a condition of employment, and that plaintiff's refusal, therefore, was wilful misconduct that disqualified plaintiff from unemployment benefits.<sup>108</sup> The court in *Valley Vendors*, however, noted that plaintiff originally agreed to submit to a polygraph examination merely to verify information on plaintiff's employment application.<sup>109</sup> Finding no evidence that the parties had modified the agreement, the court concluded that the requested polygraph examination was not a condition of employment.<sup>110</sup> Finally, defendant, acknowledging administrative decisions from a number of states holding that the refusal to submit to a polygraph examination is not misconduct justifying the loss of unemployment compensation, argued that similar generosity in the instant case would thwart the intent of the Arizona Employment Security Act.<sup>111</sup> The court in *Valley Vendors*, however, concluded that the great weight of judicial authority and administrative decision supported a finding that plaintiff's refusal to submit to the polygraph examination did not warrant the forfeiture of unemployment benefits.<sup>112</sup> Describing the polygraph as intrusive and unreliable, the court held that plaintiff's refusal to submit to the requested polygraph examination was not misconduct disqualifying plaintiff from unemployment compensation.<sup>113</sup>

A few states have enacted no statutes regulating the use of the polygraph in private employment.<sup>114</sup> Workers in these states have no statutory protection from polygraph test abuse, and must rely on traditional tort theories that

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presented evidence that Valley Vendors scheduled all employees with access to the cash boxes of machines for polygraph examinations. *Id.* at \_\_\_\_, 630 P.2d at 63. Finally, Valley Vendors presented testimony indicating that plaintiff was not singled out for discharge, but that Valley Vendors dismissed other employees who refused to submit to the polygraph examination. *Id.* at \_\_\_\_, 630 P.2d at 63.

106. *Id.* at \_\_\_\_, 630 P.2d at 63.

107. *Id.* at \_\_\_\_, 630 P.2d at 63.

108. *Id.* at \_\_\_\_, 630 P.2d at 64; see ARIZ. REV. STAT. ANN. § 23-775(2) (disqualifying employees discharged for wilful or negligent misconduct in course of employment) (1976 & Supp. 1985); A.C.R.R., R6-3-5105 (1976 & Supp. 1985) (defining employment misconduct as material or substantial breach of employment contract or action which impairs material or significant interest of the employer).

109. *Valley Vendors*, 129 Ariz. at \_\_\_\_, 630 P.2d at 64.

110. *Id.* at \_\_\_\_, 630 P.2d at 64.

111. *Id.* at \_\_\_\_, 630 P.2d at 66.

112. *Id.* at \_\_\_\_, 630 P.2d at 66-67.

113. *Id.* at \_\_\_\_, 630 P.2d at 66-67.

114. See *supra* notes 67-69 and accompanying text (surveying state regulation of polygraph in private employment). Colorado, Kansas, Missouri, New Hampshire, Ohio, and Wyoming have no state statutes regulating the use of the polygraph.

are difficult to assert and prove. A Missouri case, *Gibson v. Hummel*,<sup>115</sup> illustrates the vulnerability of these workers. In *Gibson*, the plaintiff, Gibson, was employer at-will as a full time clerk at a 7-Eleven in St. Louis County.<sup>116</sup> After continually severe monthly inventory shortages at plaintiff's store, the store demanded that plaintiff and two other full-time employees submit to polygraph examinations or face dismissal.<sup>117</sup> The polygraph examination's results failed to indicate deception conclusively, but plaintiff confessed to stealing approximately 100 dollars worth of merchandise at the store.<sup>118</sup> Plaintiff quit after the supervisor gave plaintiff the choice of quitting, dismissal, or facing criminal charges.<sup>119</sup> After plaintiff successfully brought an action for intentional infliction of distress,<sup>120</sup> both the Southland Corporation, the owner and operator of the store, and Hummel, the store's supervisor, appealed to the Missouri Court of Appeals.<sup>121</sup>

On appeal, the court in *Gibson* stated that plaintiff's theory of action required proof that the defendants' conduct was extreme and outrageous, that defendants' actions were intentional or reckless, and that consequently, plaintiff suffered severe emotional distress resulting in severe bodily harm.<sup>122</sup>

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115. Mo. App.\_\_\_\_\_, 688 S.W.2d 4 (1985).

116. *Gibson v. Hummel*, No. App.\_\_\_\_\_,\_\_\_\_\_, 688 S.W.2d 4, 5 (1985).

117. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. Although the court in *Gibson v. Hummel* noted that there was no evidence that employees were responsible for the specific inventory shortfalls, plaintiff's employer, the Southland Corporation, estimated that employee theft and "grazing" accounted for at least over 50% and as much as 83% of all inventory losses. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. Plaintiff's store had suffered inventory shortages accounting for more than the allowed limit of one percent of sales several times. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. In the month before plaintiff lost her job, audits at plaintiff's store revealed inventory shortages of over \$2,000.00. An atmosphere of extreme mistrust pervaded the store—in part the result of procedures the store adopted to control the inventory losses. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. Plaintiff's store instructed managers to mistrust and spy on employees. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. The unsatisfactory job rating plaintiff's supervisor received in part because inventory losses at the supervisor's store were nearly double the allowable one percent of sales only added to the tension. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. At one point, the supervisor reportedly told Gibson that "heads were going to roll." *Id.* at \_\_\_\_\_, 688 S.W.2d at 6.

118. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6-7.

119. *Id.* at \_\_\_\_\_, 688 S.W.2d at 9.

120. *Id.* at \_\_\_\_\_, 688 S.W.2d at 5. In *Gibson*, plaintiff testified that although she could not remember signing the consent form admitted into evidence, she did not take the examination voluntarily. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. In addition, the examiner asked preliminary questions about plaintiff's economic self-sufficiency and drug and alcohol use that plaintiff found highly offensive. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. Plaintiff further testified that the examination room made her feel claustrophobic and that the polygraph machine frightened her because plaintiff thought the machine resembled an octopus and might electrocute her. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. During the polygraph examination, plaintiff slipped in and out of consciousness, and was unable to control her breathing and foot tapping. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. A psychiatrist subsequently attributed a serious mental disorder from which plaintiff suffered to the events surrounding plaintiff's termination of employment. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6. A jury awarded plaintiff \$125,000.00 actual damages jointly against the defendants, \$400,000.00 punitive damages against the Southland Corporation, and \$30,000.00 punitive damages against Hummel. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6.

121. *Id.* at \_\_\_\_\_, 688 S.W.2d at 6.

122. *Id.* at \_\_\_\_\_, 688 S.W.2d at 7.

The court noted the seriousness of the inventory shortages, the evidence that employee theft accounted for more than one-half of inventory losses, and plaintiff's admission that she stole approximately 100 dollars worth of merchandise at the store.<sup>123</sup> Moreover, the court stated that the defendant could require the plaintiff to submit to a polygraph examination as a condition of continued employment because the plaintiff was an at-will employee.<sup>124</sup> The court held, therefore, that plaintiff failed to support a finding that the defendants were guilty of extreme or outrageous actions that intentionally or recklessly caused plaintiff emotional distress.<sup>125</sup> *Gibson* illustrates the vulnerability of workers in states that have enacted no statutory regulation of the polygraph in private employment and who must rely on traditional tort theories for protection against polygraph test abuse.

A possible solution to the uneven state regulation of the polygraph in private employment is the proposed Polygraph Protection Act of 1985.<sup>126</sup> The Act proscribes the use of polygraphs and other truth verification devices by employers involved in or affecting interstate commerce.<sup>127</sup> Although the sponsors of the Act acknowledge that presently more than half of the states regulate the use of polygraph examinations by private employers, the sponsors note the lack of uniformity among the regulations.<sup>128</sup> Moreover, the sponsors argue that employers can circumvent the regulations of individual states.<sup>129</sup> The sponsors described the proposed Act as an attempt to provide workers with uniform protection from polygraph test abuse.<sup>130</sup> The Act broadly defines truth verification devices and persons covered by the Act.<sup>131</sup> The Act directs the Labor Department to post notices in places of employ-

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123. *Id.* at \_\_\_\_\_, 688 S.W.2d at 8.

124. *Id.* at \_\_\_\_\_, 688 S.W.2d at 8; *see also supra* note 84 (discussing employment-at-will doctrine).

125. *Id.* at \_\_\_\_\_, 688 S.W.2d at 8. The court in *Gibson* reversed the jury's actual and punitive damages awards because *Gibson* failed to support a finding that defendants were guilty of extreme or outrageous actions that intentionally or recklessly caused emotional distress. *Id.* at \_\_\_\_\_, 688 S.W.2d at 9.

126. S. 1815, 99th Cong., 1st Sess., 131 CONG. REC. 14553-55 (1985).

127. *See id.* § 2 (elucidating purpose of Polygraph Protection Act).

128. *See* 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch introducing Polygraph Protection Act); *supra* notes 86-90 and accompanying text (surveying state regulation of polygraph in private employment).

129. *See* 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch introducing Polygraph Protection Act). Employers can circumvent an individual state's regulation of the polygraph, Hatch suggested, by hiring an employee in a state permitting use of the polygraph by private employers and transferring the employee to a state prohibiting the use of the polygraph. *Id.* *But see* W. VA. CODE § 21-5-5b (1985) (explicitly prohibiting employer from knowingly using results of polygraph examination administered outside state in personnel decision-making).

130. *See* 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch introducing Polygraph Protection Act).

131. *See* S. 1815, 99th Cong., 1st Sess. § 9(2), 131 CONG. REC. 14553 (1985) (defining term lie detector to include any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any mechanical, electrical, or chemical device used to detect deception or verify truthfulness).

ment informing workers of the illegality of polygraph testing.<sup>132</sup> Additionally, the Act instructs the Labor Department to cooperate with state and local authorities in the enforcement of the Act.<sup>133</sup> Under the Act, the Secretary of Labor has broad power to delegate authority, issue rules and regulations, appoint agents and employees, require recordkeeping, and conduct investigations to facilitate administration of the Act.<sup>134</sup> The Fair Labor Standards Act of 1938 provides the remedial and procedural provisions of the proposed Act.<sup>135</sup> If enacted, the Polygraph Protection Act will create a private cause of action against employers who violate the Act.<sup>136</sup> The Polygraph Protection Act exempts from coverage federal, state, and local employees, as well as employees of defense contractors.<sup>137</sup>

The propriety of the proposed Act turns on the Act's necessity and how fairly the Act balances the competing legitimate interests of employers and workers.<sup>138</sup> The sponsors claim the Act is necessary to provide workers with uniform protection from polygraph test abuse.<sup>139</sup> State regulation of the use of the polygraph in private employment is uneven and uniform protection

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132. *Id.* § 4(b).

133. *See id.* § 6(2) (instructing secretary to cooperate with state and local authorities and cooperate and furnish technical assistance to employers, labor organizations and employment agencies to facilitate enforcement of the Act).

134. *Id.* § 6(1), (3).

135. *See id.* § 7 (adopting powers, remedies, and procedures of sections 11(b), 16, 17 of Fair Labor Standards Act). *See* Fair Labor Standards Act of 1938, §§ 11(b), 16, and 17, 29 U.S.C. §§ 211, 216, 217 (1975 & Supp. 1985) (providing in part procedures, penalties and remedies of Fair Labor Standards Act). Section 11(b) of the Fair Labor Standards Act provides that the administrator of the Wage and Hour Division of the Department of Labor may use, with the consent and cooperation of state authorities, the services of state and local authorities to facilitate enforcement of the Act. Fair Labor Standards Act of 1938, § 11(b), 29 U.S.C. § 211 (1975 & Supp. 1985). Section 16 provides for fines of up to \$10,000 and imprisonment of up to six months for violations of the Act, and creates a private cause of action for employee aggrieved by violations of the Act. *Id.* § 16, 29 U.S.C. § 216 (1975 & Supp. 1985). Section 17 gives courts authority to issue injunctions to restrain violations of the Act. *Id.* § 17, 29 U.S.C. § 217 (1975 & Supp. 1985).

136. *Id.*; *see* Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. §§ 201-216, 217-219, 557 (1975 & Supp. 1985) (allowing any one or more employees to maintain action against employer for violation of Act).

137. *Id.* § 8. The House of Representatives expanded the scope of the exemption when it passed an amended version of the Polygraph Protection Act on March 12, 1986, by a 173 to 47 vote. *See* 734 LAB. L. REP. (CCH) 1 (March 14, 1986) (reporting vote on Polygraph Protection Act in House of Representatives). As amended, the Act also permits polygraph examinations of current or prospective employee in the pharmaceutical industry with access to controlled substances. *Id.*

138. *See* Hurd, *supra* note 14, at 549 (arguing that debate over use of polygraph in private employment involves weighing legitimate, but competing interests); Gardner, *supra* note 4, at 314 (same); *supra* notes 33-65 and accompanying text (discussing competing interests of worker and employer).

139. *See* 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch introducing Polygraph Protection Act); *supra* notes 66-69 and accompanying text (surveying state regulation of polygraph in private employment); notes 70-128 and accompanying text (examining in detail various state statutes and resulting case law).

for workers in all states is arguably desirable.<sup>140</sup> As proposed, however, the Polygraph Protection Act of 1985 wields a Draconian sword when a scalpel is more appropriate. Although the polygraph is susceptible to abuse in the workplace, it is unreasonable to prohibit employers from making any use of the polygraph.<sup>141</sup> The proposed Act exempts public employees because the Act's sponsors recognized that polygraph examinations administered by competent professionals in an objective manner are useful under certain circumstances.<sup>142</sup> In light of the serious problem of employee theft, Congress should amend the proposed Act to allow private employers to use the polygraph in the investigation of specific incidents of employee misconduct, when the polygraph examination is administered by a competent professional in an objective manner.<sup>143</sup>

The Act prohibits any direct or indirect use of truth verification devices by private employers in interstate commerce largely because of the alleged inaccuracy and unreliability of the polygraph.<sup>144</sup> Despite the debate over the accuracy and reliability of the polygraph, however, strong evidence indicates that polygraph examinations limited to specific matters are accurate and reliable.<sup>145</sup> For example, many experts maintain that polygraph examinations are accurate and reliable when used to investigate criminal matters.<sup>146</sup> The sponsors of the Act implicitly recognized the efficacy of the polygraph under similar circumstances in exempting public employees and the employees of defense contractors.<sup>147</sup> In light of the staggering cost of employee theft to businesses, therefore, the Act should allow private employers to use the polygraph for specific matters. Conversely, polygraph results are apparently much less accurate and reliable when used in more undefined, general matters.<sup>148</sup> Much of the information sought by private employers through

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140. See *supra* notes 66-69 and accompanying text (surveying state regulation of polygraph in private employment); notes 70-128 and accompanying text (discussing in detail examples of various state polygraph statutes and resulting case law).

141. See J. REID & F. INBAU, *supra* note 2, at 304 (reporting 95% accuracy of polygraph examinations in specific criminal investigation); Nagle, *supra* note 3, at 59 (citing reliability studies indicating 77-95% accuracy); *supra* notes 56-61 (discussing seriousness of employee theft as threat to business survival); see also Hurd, *supra* note 14, at 549; Gardner, *supra* note 4, at 314 (agreeing that debate over use of polygraph in private employment involves weighing legitimate, but competing interests).

142. See 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch explaining proposed Act's exemption of public personnel and personnel involved in defense contracting).

143. See *supra* notes 39-42 and accompanying text (discussing seriousness of employee theft as threat to business survival).

144. See 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch explaining impetus behind proposed Act).

145. See Nagle, *supra* note 3, at 59-60 (citing results of various validity studies indicating 77-95% accuracy).

146. See *supra* notes 46-48 and accompanying text (distinguishing use of polygraph in criminal investigations from use in private employment).

147. See 131 CONG. REC. 14553 (1985) (remarks of Senator Hatch explaining exemption of public personnel and personnel of defense contractors).

148. See *supra* notes 67-73 and accompanying text (discussing weakness of polygraph in speculative investigations).

the polygraph, such as medical and criminal records, is available through other means.<sup>149</sup> Private employers, therefore, should use alternative, less intrusive, means to acquire such information. Moreover, because the polygraph subject cannot refuse to answer and little real limitation is placed on the type of questions an examiner may ask, the Act should limit examination questions strictly to specific acts of wrongdoing under investigation.<sup>150</sup> Finally, because the conduct of the examination<sup>151</sup> and the competence of the examiner<sup>152</sup> determine the accuracy and reliability of the polygraph, the Act should establish uniform federal standards of examiner competency and the conduct of the polygraph examination. Such an Act would strike a fair balance between the competing interests of employers and employees.

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149. *Id.*

150. *See supra* notes 74-83 (discussing intrusiveness of polygraph in private employment context).

151. *See supra* notes 18-22 and accompanying text (discussing various forces that can invalidate polygraph examinations).

152. *See supra* notes 23-29 and accompanying text (discussing importance of examiner competence to polygraph accuracy and reliability).