ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA ASSEMBLY SESSION

MINUTES

April 11, 1975

This meeting of the Assembly Judiciary Committee was called to order by the Chairman, Robert Barengo, on Friday, April 11, 1975.

MEMBERS PRESENT: Messrs. BARENGO, BANNER, HEANEY, HICKEY, LOWMAN, POLISH, SENA, Mrs. HAYES and Mrs. WAGNER.

MEMBERS ABSENT: NONE.

Guests present at this meeting included Cindy Guernsey, Vocational Rehabilitation Department; Dennis R. Schemenor; Georgie Weathers, deaf language interpreter; Joseph D. Weber, interpreter; Don C. Desher; Pamela Porter; Susan Banner; Russ Jones, Russ Jones & Associates; Sue Weber, interpreter; Rusty Nash, Deputy District Attorney from Washoe County; John R. Kimball, 16-County Advisory Committee on the Aging; Paul McComb; and Blaine Rose, Vocational Rehabilitation Department. Attached to these Minutes is a copy of the Guest Register from the meeting.

The first bill to be considered at this meeting was S.B.319. And, first to testify was Cindy Guernsey, Area Supervisor, Reno Bureau of State of Nevada Department of Vocational Rehabilitation. This bill would provide some basic necessities for the deaf person if he is arrested and held in custody, which necessities include writing paper and pencils. In addition, this bill would provide and pay for deaf interpreters during court proceedings. Ms. Guernsey said that there are over 400,000 deaf people in the United States today. 957 of them are in the State of Nevada. If the deafness occurs in infancy, the effect is devastating to the speech development which enables adequate functioning in the adult world. Ms. Guernsey gave statistics of the academic functioning of the deaf people. This poses many problems during legal and court procedures. Writing is not practical for the deaf during court proceedings, because of the lack of time. Therefore, it is necessary to have an interpreter to adequately express what the deaf want to say.

A deaf person presents a problem in establishing a person as a competent witness. He has to understand the questions which are put to him and effectively answer them. Ms. Guernsey stated that the deaf are presently experiencing problems in this regard. 31 states have this type of legislation. The Registry of Interpreters of the Deaf is trying to get legislation passed in all states. In Nevada alone there have been several incidents. Apparently, the problem in Nevada with having the interpreters in court is the cost, which is approximately $4.00 per hour.

Mrs. Blaine Rose, Vocational Rehabilitation representative, stated that the sum of $250.00 is a general fee for any kind of witness.

Pam Porter and Sue Weber testified next in regard to S.B.319. These two ladies testified as to a particular situation which happened to Mrs. Porter's husband. He was arrested and it was several days before she knew what had happened to him. The police would allow him to call, but they would not call for him. Mrs. Weber interpreted for Mrs. Porter.

Mrs. Rose commented that interpreters are allowed in court if they happen to be a family friend or if the family provides for the interpreter.

Ms. Guernsey stated that the burden of protecting a deaf person's rights has been on the person himself rather than on the court. There is no fiscal note on this bill, as the cost would be counted as a court cost. If the deaf person was indigent, it would be a county cost.

Chairman Barengo pointed out that the Assembly passed a bill stating that they would not pass a bill without a county or city fiscal note attached if it was found that the bill should have one.

Mrs. Rose further explained the fiscal note situation, and she stated that the county has been contacted regarding this.

Next to testify was Paul McComb, who is a teacher of deaf children in Reno. Joe Weber interpreted for Mr. McComb. Attached to these Minutes is a copy of Mr. McComb's complete statement. He stated that legal problems generally are difficult to handle for the deaf person, because of the communication problem. Therefore, the opposing viewpoint is often never really explained to the deaf person so he may not understand what the conflict is that exists.

Next, this Committee heard the testimony of Louis Paley, Executive Secretary-Treasurer to the Nevada State A.F.L.-C.I.O. The bill in question was S.B.351, and Mr. Paley stated that this bill merely adds the labor organization to three sections of the statutes. It allows them to register their insignia. Their insignia was the only one not registered, and they believed in the past that it was until they discovered someone else using it. This is a national insignia, but it has to be registered in each state. Therefore, someone else could use the insignia in Nevada presently. Chairman Barengo commented he thinks present law regarding any association is broad enough to cover this problem. Mr. Paley replied that they thought so, too, but their attorney said they had better get to this Session of the Legislature and get theirs registered.

Washoe County Deputy District Attorney, Rusty Nash, Esq., testified in regards to S.B.215. He passed out copies of suggested amendments to the bill to this Committee. Mr. Nash stated that he was present to speak partially in favor of the bill, and partly in opposition to it. He suggested two amendments. As it was passed

by the Senate, by and large, the legislation is good because the increase in the value of items exempt is necessary in these days of inflation. However, Mr. Nash said the provision relating to allowing one automobile to be exempt is not a good idea. Most families, especially in this state, need two cars if both parties are working. Many of the husbands and wives work different shifts, and since there is no adequate transit system for the people who live a distance out of town, many people are unable to hold a job and pay off creditors. It is a necessity in these instances to exempt two family automobiles. Only exempting one automobile will harm a lot of low income families very much. If you take away someone's automobile who needs it to get to work, and he loses his job, he will have trouble staying on a job, and this will in the long run hurt the creditors.

Mr. Nash testified that the first proposed amendment has to do with the debtor's earnings which are exempt from garnishment. Mr. Nash said that in 1969 NRS 21.090 was revamped and added a section which would exempt certain amounts of a person's earnings from garnishment. He referred to the federal law, and stated that this is the reason that Nevada originally adopted this in 1969. The language was wrong and did not comply with federal law, so it was amended and it still does not comply with federal law. Unfortunately, the Nevada statute still doesn't say what it should. Mr. Nash suggests a minor change which would make the law conform to the federal statute. At the present time you have a law on the books which is not being followed. He gave examples of the minimum wage at the present time, and stated that the federal law said 30 times that wage is exempt from attachment. Nevada law says that below $80.00, only 75% is exempt, so Nevada is exempting a lesser amount than the federal law does. In 1969, the exemption for clothing was neglected, and of course, this is a very basic necessity. In the bankruptcy court the bankruptcy law will recognize state exemptions for execution and will exempt those from the taking by a bankruptcy trustee. Mr. Nash said that the bankruptcy trustees are very much in support of the law exempting clothing up to a certain amount. It would exclude furs and other items of this sort.

Next on today's agenda was A.B.357, and in this regard the Committee was given a demonstration of the polygraph machine. Mrs. Wagner volunteered to be the subject. Mr. Russ Jones, Russ Jones & Associates, gave the test and explained to this Committee the various procedures involved. Assemblyman Robert Price, the main introducer of the bill, was present.

Assemblyman Price testified next, and he spoke about the exemption to allow the use of the polygraph, and this would be in the area of law enforcement. He believes that they should take lie detectors away from business and let management live with financial losses.

Mr. Jones testified and referred to a number of articles on the polygraph. He left numerous periodicals and magazines with this Committee for its review, but wished to have them returned when

the Committee decides on this bill. Mr. Jones said he feels that this bill should be held in Committee.

Assemblyman Price continued to testify regarding this bill, A.B.357. He wanted to clarify about a previous quote, and stated that he quoted from the National Enquirer Magazine. An investigation of the national representatives into the polygraph machine showed that the accuracy of the machine may be in question. Mr. Price referred to the Minutes of the previous hearing on A.B.357, which are dated March 21, 1975. He referred further to the testimony of Mr. Russ Jones on Page 3 of those Minutes, in which Mr. Jones spoke of the very strict requirements for becoming a polygraph operator. Mr. Price looked into this situation and was very surprised to learn that they had only 4 licensed operators in the state, as stated by Mr. Jones. Mr. Price found that there are, in fact, 6, and these comprise not just 6 people, but 6 companies. There are 6 agencies working and some unknown larger number giving tests, this larger number being unlicensed. The six companies are Carl Smith of Las Vegas, Nielsen Detective Agency of Las Vegas, Russ Jones & Associates, Ray Slaughter of Las Vegas, Dick Pierce, and Wackenhut Corporation. Those people who are licensed may have others use their license.

Mr. Price stated that what was being proposed was "Are we going to have something facing us for the convenience of the employer or employee, or are we talking about principle?" He commented further that when a person is charged with a crime, the authorities go to the expense of protecting his rights. The polygraph results are only part of the evidence used against him. They go to every extreme to protect the people who are eventually convicted. Yet, when a person starts a job, he most go through this procedure and his records will be maintained by the company. You have no idea of where these records will end up or if they will even be sold. Is this right just for the convenience of the employer? Mr. Price pointed out that the members of this Committee may in the future be faced with seeing elected officials being required to take this type of test.

Mr. Price said another area which must be considered while these tests are being administered is examiner bias. The employees or prospective employees are on the defensive, because the examiner must have some bias because he is hired and paid by the employer in question.

Mr. Price then quoted from the Congressional subcommittee's November, 1974 report relating to A.B.357. Copies of this report were furnished to each member of this Committee for review and study. A copy will be attached to the original Minutes only because of the length of the report.

Mr. Price said that at this time under the statutes in Nevada (NRS 648.190) which regulate and control polygraph operators, the relationship between employer and employee is excluded. Therefore, a company can hire its own examiner and the rules and regulations which apply to other examiners throughout the state do not apply in this case. A model bill in this regard was introduced during the 57th Session by Mr. May, a copy of which is attached to the original Minutes only becuase of its length. Mr. Price said he would like to see this Committee take action this session to regulate polygraph operators more thoroughly. The proposed amendments which he presented to this Committee on March 21, 1975 are those which he still would wish to see incorporated in this bill.

Stan Jones, Labor Commissioner for the State of Nevada, testified next regarding A.B.357. He stated that he was not certain of the testimony at the previous hearing of this bill, which was held March 21, 1975, but his office receives a good many calls from employees who were requested to take a polygraph test as a condition of employment. He related that these people were asked a lot of extremely personal questions, and he gave a few examples. Then, there are the situations where no test is given before the employee is hired, but the employee is given a written authorization to sign stating that he may be requested to take a polygraph test during the course of his employment. Mr. Jones gave an example to this Committee of a particular employee who was discharged as a result of this. Mr. Jones further testified that he has evidence that some of the employers are responsible for some of the problems they are trying to accuse the employees of. In most instances, these employees are not aware of remedies; they do not have the financial ability to obtain legal counsel; and, there are very few lawyers who want to take a case like this. Mr. Jones said he was testifying just to present his experiences in the regard of employees being requested to take these polygraph tests. There are no remedies available in Mr. Jones' office for this type of problem, and their office has referred some of these matters to the Office of the Attorney General in Carson City, but to his knowledge, no action has been taken. Mr. Jones said his office has filed no specific complaints, but they have asked the Attorney General if these various personal questions asked of the various employees are proper questions. He has not received any opinions on this matter which were rendered by the Office of the Attorney General.

Chairman Barengo questioned Mr. Jones as to whether he favors A.B.357 or the bill proposed during the 1973 Session, which proposes having adequate licensing and standards for the polygraph operators. Mr. Jones said he favors the 1973 proposed bill.

Mr. Polish questioned Mr. Jones as to whether or not his office did any follow-up on the complaints received, and Mr. Jones replied that there was no follow-up done, as his office did not have proper jurisdiction in the matter, saying that there was nothing in the law at the present time to allow his office to make additional inquiry of the person making the complaint.

Mr. Bob Nolan, a polygraph examiner from Las Vegas who is employed by Ray Slaughter, commented on the individual testing situation, and said if he personally knew of an examiner who asked extremely personal questions during an examination, he would do whatever he could do to take some sort of action against this person. He said he feels the licensing procedures are presently inadequate. There are no real controls over the examiners, and a lot of the points brought up by Mr. Price were correct. There has to be some better solution as far as licensing and control in order to maintain the qualifications. He says the job is a full-time one and you have to stay in it full-time or you will not be a good, effective operator. As a polygraph examiner you deal with a person's life and livelihood; therefore, the examiner must be qualified and sincere. Mr. Nolan urges passage of some type of controlling legislation, and he favors the model 1973 Session bill. There are some minor things in that bill with which he disagrees, but for the most part he agrees and would support that particular bill. Mr. Nolan said he is not licensed yet because he has not met the three-year requirement for licensing. He will in August. He feels this time period is not fair, because someone can give examinations part-time for three years and not give as many examinations as someone who did it full-time for three years. There is no requirement as to the number of examinations which an examiner must give. The Committee then questioned Mr. Nolan.

Chairman Barengo announced to the Committee that after adjournment today the film on capital punishment would be shown in this Committee Room.

Next to testify against A.B.357 was Captain John D. McCarthy, Las Vegas Metropolitan Police Department. His complete prepared statement is attached to these Minutes. He is a thoroughly trained polygraph examiner and listed his credentials for the Committee. Capt. McCarthy stated that " . . . it is not the instrument itself, or the technique, that should be ridgedly controlled, but rather the integrity of the examiner should be the subject of this scrutiny." He also stated that if this law were passed and these tests were forbidden, this could possibly hamper the police investigations. And, even if an exception was made for police investigations, people would be extremely reluctant to take the examinations because there was a law saying people should not be required to take them. His remarks were on behalf of the Metro Police and law enforcement in general.

Mr. Lowman commented on S.B.63 and A.B.481. He was appointed to a subcommittee to look into these two bills further before this Committee took action on them. He said the subcommittee was satisfied with S.B.63 since it is limited to law enforcement people in the State of Nevada. This is acceptable to two people they met with from the Sheriff's Office in Las Vegas and the Narcotics Division.

As to A.B.481, Mr. Lowman said they propose an amendment to Section 2 to this effect: " Nothing in this section is meant to exclude possession or use of such documents as noted in Section 1 by officers of local police and sheriffs' departments in investigation while engaged in special undercover narcotics or prostitution investigations."

Mr. Lowman moved DO PASS A.B.481 WITH AMENDMENTS, and Mr. Heaney seconded. Brief discussion was had with a vote following which showed 9 in favor of this motion. Legislation Action Form is attached to these Minutes.
MOTION CARRIED DO PASS A.B.481 AS AMENDED.

Mr. Lowman moved DO PASS S.B.63 as it now reads. Mr. Heaney seconded. The vote was 9 Committee members in favor of passage of this bill. Form attached.
MOTION CARRIED DO PASS S.B.63.

See exhibit, p. 631

Regarding A.B.192, Mr. Lowman passed out amending language to this bill, which was prepared by two of his constituents in his district.

Chairman Barengo reminded this Committee of the special meeting next Monday evening, April 14, 1975 to discuss previously considered bills.

Mr. Hickey asked if discussion could be had as to A.J.R.16, 17 and 18 (from the 57th Session). Mr. Barengo said that in view of the lateness of the hour, the Committee would take these up at the Monday evening, April 14, meeting.

Mr. Walter Shea, Jr., polygraph examiner for Carex, Inc., was requested to supply this Committee with a written copy of his testimony on March 21, as well as a list of the questions he asks on behalf of Carex, Inc. during a testing session. His reply dated April 7, 1975 is attached to these Minutes.

After a motion and a second, and after seeing no further business at hand, Chairman Barengo adjourned this meeting at the hour of 10:30 a.m.

ASSEMBLY JUDICIARY COMMITTEE

GUEST REGISTER

DATE: April 11, 1975

| NAME | BILL NO. | SPEAKING | REPRESENTING |
|---|---|---|---|
| Vicki Thurnell | 319 | Yes | Vocational Rehabilitation |
| Dennis R. Schemenauer | 319 | No | ~~Interpreter~~ Deaf |
| Georgie Weathers | 319 | yes. | Interpreter (deaf) |
| Joseph D Weber | 319 | No | Interpreting |
| Don C Decker | 319 | No | Interested person - |
| Pamela Porter | 319 | Yes | Civil Case |
| Susan Banner | | No | |
| Russ Jones | 357 | Yes | Polygraph Industry |
| Sue Weber | 319 | No | Interpreting - |
| Rusty Nash | 215 | Yes | Washoe County District Attorney |
| John R. Kimball | 215 | | Member 16 Co. Dist. Atty adv. Commission on Crim. |
| Paul McComb | 319 | Yes | Deaf consumers |
| Blaine Rose | 319 | Yes | Rehabiletation |

Mr. Chairman, members of this committee, ladies, and gentlemen:

I am Paul McComb, here today as a representative for the deaf citizens of Nevada. I am a teacher of the deaf children at Veteran's Memorial School in Reno. I have been acting as a consultant on deafness to various interest groups for 4 years.

The deaf citizens support this bill, S.B. 319 and wish to see it enacted. Thirty-one states have an interpreting law. If this amendment were enacted, it would be the first law of its kind for the deaf in the state of Nevada and would greatly aid in their advancement.

Deafness cuts across every level of society from every age level, every race, every occupation, and every level of education. This makes it difficult to make any general statements about the deaf that will be completely accurate. Almost every general statement will have numerous exceptions.

Deafness is caused by a wide range of factors. Many persons are born deaf. Others become deaf at an early age because of childhood illness. Injuries, occupational factors, brain conditions, and various diseases may produce deafness also; and in a large number of cases deafness develops without any known cause. Brain-damaged persons who are unable to speak have similar problems. In many cases the disease or injury that causes deafness will also cause other physical defects. Cases of multiple-handicapped deaf persons are becoming more numerous.

A person who has been deaf from birth or early childhood is basically quite different from one who becomes deaf in later life. A person who becomes deaf in infancy enters a silent world before acquiring the fundamental language skills that are the foundation for all future education. He is cut off from many of the most important and fundamental experiences of life. To give such a child even a rudimentary understanding of language and communication is an immensely difficult task which can be accomplished only by many years of intensive effort by experts in that field. Thus the deaf person has the additional handicap of weakness in the use of language in reading, writing and speaking and the ability to use and understand abstract ideas.

"Legal problems generally represent a conflict between one person and another. But, because of the communication problem, the opposing viewpoint is often never explained to the deaf person, and so he frequently does not understand at all why the conflict exists. He may be aware only of his own viewpoint, and none other. A great deal of trouble can be avoided in legal cases involving the deaf if a special effort is made to help the deaf person understand the opposing viewpoint in the language of signs...." according to Lowell J. Myers, J.D., in his book, "The Law and the Deaf".

There are two methods generally used to take testimony of a deaf person. First, by submitting the questions to the witness in writing and having the witness answer them in writing. Second, by using the sign language of the deaf and having an interpreter to translate the signs. It is generally considered preferable to conduct the examination in the sign language through the use of an interpreter.

This method is much faster and, if a properly qualified interpreter is used, it almost always produces better results and avoids misunderstandings due to poor language skills on the part of the handicapped individual.

Let me read a brief excerpt from a speech by Judge Pernick of Detroit, Mich. presented at the National Workshop on Legal Rights for the Deaf last year.

"The deaf, like those who can hear, sometimes commit crimes, but when they become involved with law enforcement and the judicial process they are often treated differently."

This is true. I would like to give an example of an incident that occurred in Reno last year. A young deaf man came to me for help. He had been stopped very late one night by a young police officer because of a suspected violation of the law. When the officer learned that the suspect was deaf, he frisked him roughly and then "mouthed " a few words to him in the poorly lit area. In a few moments, he was taken in a paddy wagon to a police station. He was not informed of his rights at all! As he was put into jail, he asked the officers to make several phone calls; one to his wife and one to his lawyer and was denied seven times. How many times in other places has this occured and the person or persons detained for unreasonable amounts of time and deprived of their constitutional rights - not knowing where to turn?

This bill, if passed, will guarantee the deaf client"s fundamental right to know the nature of the charges against him and to assist in his own defense.

Please offer us your support in gathering help for people much in need of assistance during legal complexities. Thank-you.

PROPOSED AMENDMENT OF NRS 21.090

SECTION 1(h) to be repealed and replaced by the following:

For any pay period, 75 percent of the disposable earnings of a judgment debtor during such period, or his disposable earnings for each week of such period equal to 30 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938 and in effect at the time the earnings are payable, whichever is greater. The exemption provided in this paragraph does not apply in the case of any order of a court of competent jurisdiction for the support of any person, any order of a court of bankruptcy or of any debt due for any state or federal tax. As used in this paragraph, "disposable earnings" means that part of the earnings of a judgment debtor remaining after the deduction from those earnings of any amounts required by law, to be withheld.

SECTION 1(o) to be added as follows:

Personal clothing and effects, including wedding and engagement rings, but excluding furs, jewelry or other items of unusual value, not to exceed $1000.00 in value, belonging to the judgment debtor, to be selected by him.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

The proposed amendment to NRS 21.090(1)(h) is for the purpose of reconciling its language with the mandate of the Federal Consumer Credit Protection Act, 15 USC, Section 1673 (Chapter 41). This section was originally added to NRS 21.090 because of the above-mentioned Federal Act, but it was inadvertently drafted improperly. The proposed amendment would not change the current practice in the State of Nevada, which has been to follow, as it must, the Federal legislation. However, it would bring the language of the Nevada statute in line with the Federal law.

With respect to the proposed addition of Section 1(o), the intent is again to add an exemption to the current law, which has been inadvertently omitted. Previously, such an exemption was a part of the Nevada Statute, but it was somehow overlooked when the statute was amended several years ago. Its inclusion seems imperative under mandate of Article 1, Section 14, of the Nevada Constitution, which states in part: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted...." I might add that the current statute has caused much confusion in the Federal Bankruptcy Court since these statutory exemptions are applicable to bankruptcy proceedings.

1672. Definitions.—For the purposes of this title [§§ 1671–1677 of this title]:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt. (May 29, 1968, P. L. 90–321, Title III, § 302, 82 Stat. 163.)

1673. Restriction on garnishment.—(a) Except as provided in subsection (b) and in section 305 [§ 1675 of this title], the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 [29 § 206(a)(1)] in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) The restrictions of subsection (a) do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act [11 §§ 1001–1086].

(3) any debt due for any State or Federal tax.

(c) No court of the United States or any State may make, execute, or enforce any order or process in violation of this section. (May 29, 1968, P. L. 90–321, Title III, § 303, 82 Stat. 163.)

1674. Restriction on discharge from employment by reason of garnishment.—(a) No employer may discharge any employee by reason of the fact that his earnings have been subject to garnishment for any one indebtedness.

(b) Whoever willfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both. (May 29, 1968, P. L. 90–321, Title III, § 304, 82 Stat. 163.)

Mr. Chairman - ladies and gentlemen of the Assembly Judiciary Committee:

My name is John D. McCarthy and I am here to testify in opposition to A.B. 357. I am a Captain with the Las Vegas Metropolitan Police Department. I have been a police officer in Las Vegas for 18½ years, and during that time, I have been assigned to work in every aspect of law enforcement except the Traffic Bureau. I hold an Associate of Science Degree in Law Enforcement, I am a graduate of the FBI National Academy, and a trained polygraph examiner.

I was trained at the Keeler Polygraph Institute in Chicago, Illinois and have received a Certificate of Completion and a Graduate Certificate from that institution.

Prior to being accepted for training by the Keeler Institute, I was required to pass a vocabulary test, an intelligence test, and was given a 500 question Minnesota Multiphasic Personality Inventory. Additionally, I was required to submit to a polygraph examination administered by one of the Keeler staff. This examination was designed to probe areas concerned with honesty, integrity, loyalty and morality. Of an original class of 35 students, representing a cross-section of the country's law enforcement personnel, only 22 successfully completed the training.

In my work as a polygraph examiner, I have administered over 500 criminal polygraph examinations. I make this distinction between criminal and other types of examinations which include pre-employment and periodic screening type examinations, which I have never done.

I would like to state my opposition to this bill because of the ramifications its passage would have in the law enforcement area.

The use of the polygraph as an investigative aid in law enforcement has been proven time after time over the past 50 years, and I believe any knowledgeable law enforcement officer would testify to that.

Now comes a bill that proposes to put yet another obstacle in the path of scientific law enforcement - that would severely limit the resources available in the investigation of embezzlements, thefts, and a multitude of other "white collar" crimes.

Consider, for example, an embezzlement of funds from the cage of a major resort hotel. There may be 7 or 8 persons who had access to the missing money. Without the employer's urging (either real or implied), the employees could conceivably refuse to take a polygraph examination, because if they stick together, they have nothing to lose - not even their employment. Innocent people could be persuaded to agree to this pact because of their "righteous indignation" and suffer under a cloud of suspicion and distrust by their employer because of their refusal.

The employer would be required to take additional measures to prevent subsequent thefts. These measures would not only be more expensive to his operation, but perhaps degrading to the employee, such as electronic surveillance, strip searches, and closer supervision.

The proposed Bill prohibits the employer from demanding or requiring an applicant or an employee to submit to any polygraph examination. This may be construed by some employers as a prohibition against asking the employee to take one, and the employer may be hesitant to ask for fear of being in violation of the law. This condition could also severely inhibit a police investigation

In this hypothetical situation, the polygraph would provide a safer method where a person can be cleared of unwarranted or unjust accusation. I am certain that it comes as no news to you that there are people in this world who seek out jobs with the full intent in mind to cause an inventory shrinkage. The inability of employers to screen out potential thieves also causes a drain on police resources.

"White collar" crime in the United States costs billions of dollars a year - and who do you imagine pays for it.

Prohibitive legislation on the application of polygraph testing would severely limit an employer's responsibility to the community in examples such as drug wholesalers.

There is so much diversion of legitimately manufactured drugs in this country that it boggles the mind. This would increase tenfold if the drug industry did not have the prerogative to use the polygraph.

Finally, A.B. 357 is discriminatory in that employees of the State of Nevada, or any political subdivision thereof, are not subject to its protection.

It seems to me that the proponents of this sort of legislation have been misled to believe that the polygraph is an evil to be shunned and cast out, when in actuality it is not the instrument itself, or the technique, that should be ridgedly controlled, but rather the integrity of the examiner should be the subject of this scrutiny.

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 11, 1975

BILL NO. A.B. 481

MOTION: _____

Do Pass ✓ Amend _____ Indefinitely Postpone _____ Reconsider _____
as amended.

Moved By Mr. Lowman Seconded By Mr. Heaney

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

| | MOTION | | AMEND | | AMEND | |
|---|---|---|---|---|---|---|
| VOTE: | YES | NO | YES | NO | YES | NO |
| Barengo | ✓ | | | | | |
| Banner | ✓ | | | | | |
| Hayes | ✓ | | | | | |
| Heaney | ✓ | | | | | |
| Hickey | ✓ | | | | | |
| Lowman | ✓ | | | | | |
| Polish | ✓ | | | | | |
| Sena | ✓ | | | | | |
| Wagner | ✓ | | | | | |

TALLY:

ORIGINAL MOTION: Passed ✓ Defeated _____ Withdrawn _____

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 11, 1975
Date

ASSEMBLY JUDICIARY COMMITTEE
58th NEVADA SESSION

LEGISLATION ACTION

DATE April 11, 1975

BILL NO. S.B. 63

MOTION: _____

Do Pass ✓ Amend _____ Indefinitely Postpone _____ Reconsider _____

Moved By Mr. Lowman Seconded By Mr. Heaney

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

AMENDMENT: _____

_____

Moved By _____ Seconded By _____

| | MOTION | | AMEND | | AMEND | |
|---|---|---|---|---|---|---|
| VOTE: | YES | NO | YES | NO | YES | NO |
| Barengo | ✓ | | | | | |
| Banner | ✓ | | | | | |
| Hayes | ✓ | | | | | |
| Heaney | ✓ | | | | | |
| Hickey | ✓ | | | | | |
| Lowman | ✓ | | | | | |
| Polish | ✓ | | | | | |
| Sena | ✓ | | | | | |
| Wagner | ✓ | | | | | |

TALLY:

ORIGINAL MOTION: Passed ✓ Defeated _____ Withdrawn _____

Amended & Passed _____ Amended & Defeated _____

Amended & Passed _____ Amended & Defeated _____

Attach to Minutes April 11, 1975
Date

W. Shea, Jr.
Polygraph Examiner
Carex, Inc.
130 South Fourth
Las Vegas, Nevada

April 7, 1975

Robert Barengo, Assemblyman
Nevada State Assembly
Carson City, Nevada

Dear Sir:

As you requested, the following is a copy of the statement I made to you and the members of your Judiciary Committee concerning Assembly Bill 357.

It is indeed unfortunate that the general populace has little factual knowledge concerning the Polygraph.

Most generally, the opponents of the use of the Polygraph expound on the popular TV version of its use, ie, an individual, totally unprotected, sitting in a chair, sweating profusely, with wires and tubes dangling from his body, surrounded by several bullies (wearing very large guns), firing questions in an unrelenting staccato that is intended to totally demoralize that person and wrench the truth hidden within his bosom. In the same scene, another person, generally depicted in a white coat, is sitting at a machine either leeringly viewing the wiggly little lines that are being produced on the machine by the now near faint individual in the chair or is non-committally making little black marks next to those wiggly little lines.

Ladies and gentlemen of the Committee, that is pure poetic license but nonetheless, indelibly imprinted in the mind of the uninformed viewer and most unfortunately, grist for those opposed to the use of the Polygraph in private industry.

The factual truth of the matter is, that unless the use of an interpreter is required, no one but the Examiner and the Examinee is present in a room that is necessarily devoid of any distracting decor. The Examinee is fully, and with great care, acquainted with the procedure to be used, apprised of the questions to be asked and the sequence of their presentation. Demeaning or embarrassing questions are meticulously avoided. The vernacular, most familiar to the subject, is used to ensure total understanding and to eliminate any possibility of misunderstanding or misinterpretation of the full import of the questions to be asked.

Since the beginning of recorded history, man has attempted to devise a means of insuring himself that his fellow man was being truthful. The Chinese, centuries ago, used the dry rice powder method. The assumption being that the truthful individual would not be able to spit out the powder because if he had nothing to fear his salivary function would be normal. Conversely, the guilty or fearful persons' salivary function would not be operating properly and he could spit out the powder because his mouth would be so dry. Ladies and gentlemen, we have surely, technicologically, advanced far beyond that point.

Another of the favorite statements of opponents to the use of the Polygraph in private industry - 'the use of such a machine - twentieth century witchcraft - is an invasion of my rights'. At the doorstep of that statement lies the real root of the problem. Does anyone have the right to steal, lie or cheat his fellow man under a specious application of the Law? Does an employer have the right to lie about or destroy by inuendo a former employee who has unwittingly used his previous employer as a reference? Does an employee have the right to steal from or lie to an employer who is paying for his services?

No ethical, professional Polygraph Examiner would allude to or imply that this scientific technique is infallible. It is however, the most reliable method yet devised to effectively verify truthful statements as opposed to those of questionable origin.

Infallible, what man or instrument is? Are a doctor's diagnosis of x-rays always correct - as yet no one has stopped seeking a doctor's advice about their ailments. Are lawyers always getting what their clients want - yet anyone seeking advice and guidance through our maze of legal nuances seeks out a lawyer. The point, of course, is that when opponents of the use of the Polygraph in private industry present isolated cases indicating abuses of its use or incidents of someone not getting a job because of some minor indiscretion in their juvenile history, the information is generally not based on factual knowledge and is most often a 3rd or 4th hand story that has had ample amounts of remolding to suit the immediate requirements of the teller. However, just as in any other of the professional disciplines, when we become aware that, inffact, an abuse has occurred the American Polygraph Association and the cognizant state association is advised and appropriate admonishments are made.

The ocassional, credentialed, scholar who expounds on the efficacy and validity of Polygraphy by taking pot-shots at its usefulness, generally belies his academic credentials by exploring only that segment of a problem or target that his level of comprehension and limited research can handle comfortably. Unfortunately, the

credentialed scholar or the statured political figure or the civil servant who offer their unqualified statements to the public, through the mass communications media, are accepted at face value.

In conclusion Mr. Chairman and Ladies and Gentlemen of the Judiciary Committee, I sincerely hope that no one has misunderstood my intent in objecting to AB 357. As written, it is discriminatory and argumentive as a legal document. However, although I am not a spokesman for my colleagues, I am quite sure that if we and/or the State of Nevada regulatory agency that governs our licensing had been approached and offered an opportunity, a properly viable and constructive bill, in consonance with those who are opposed to the indiscriminate use of the Polygraph, would have been produced.

Respectfully,

Walter Shea, Jr.
Polygraph Examiner

WS/am

To the members of the Judiciary Committee:

As requested by several members of the Judiciary Committee, listed below are a selection of several of the questions I ask during a pre-employment screening examination. Following each selected question is a brief summary of the point of intent concerning the questions.

3. Regarding your employment application, did you answer all the questions truthfully?

4. Have you knowingly or deliberately given any false information on your employment application?

Summary of intent:

Placing the right person in the right job rests in a large degree on what the applicant has conveyed to the employer or personnel manager though the employment application. Obviously if the employer's organization is adequately staffed and each applicant is carefully screened, the probabiltiy of unqualified applicants receiving extensive and costly briefing/orientation training is minimalized. Unfortunately, only an extremely limited number of organizations have that capability. Under the former circumstance an organization has two options, delay hiring the individual for as long as it takes to check out his references by mail, telephone or telegram. Or request that the subject take a Polygraph examination to quickly verify the applicant's information and qualifications and put him right into the system. The latter option, of course, is most advantageous to the applicant in that there is no delay in employment and to the client a qualified employee is rapidly on the way to being a productive employee.

5. Have you ever been fired from a job? (if answered yes, then Question 5a is asked)

5a. Have you ever been fired from a job for dishonesty?

Summary of intent:

To the employer this question is of great significance. The applicant who has been fired by his last few employers is probably not a good employment risk or has not as yet found the job that is within his realm of capability. Now, the employer must decide, 'are we going to hire this individual, will he meet our needs, will the job meet the prospective employee's needs'. To the cost oriented employe, an employee is not productive until he becomes self-sufficient in his work and requires little or no close supervisory assistance in carrying out his assigned tasks. The cost factor is of course relative to the complexity of the task but nonetheless must be reconciled by the employer when deciding 'should I employ this person'.

7. Have you ever deliberately stolen money from a previous employer?

8. Have you ever deliberately stolen food or merchandise from a previous employer?

Summary of intent:

At first glance the questions seem rather self-explanatory. However, they are not. How many persons, with any employment history at all, have not taken something from an employer! Does the accumulation of pens, paper clips, a ruler or company paper for personal correspondence, disqualify you from the position applied for! Of course not, however the deliberate theft of reams of paper, or cases of pencils and paper clips now puts you in an entirely different area of evaluation.

The various insurance companies and business houses that conduct studies into such matters indicate that the business community in being victimized and 'rip-off' by internal theft, to the tune of millions of dollars per year. With that sort of input, to the uninformed, the logical assumption is that, there can't be too many honest employees. We rarely ever catagorize ourselves individually in that manner and rightly so. The millions of dollars that are being stolen and/or embezzled are the work of a miniscule segment of the labor force in this country. The acceptance of that premise brings to light the inestimable value of the Polygraph in private industry, in that, the honest individual is not placed within the aura of indiscriminate suspicion and mistrust.

12. Are you deliberately withholding or concealing information that would affect your acceptance by the ABC Company?

Summary of intent:

The question is closely related to Question 3 and Question 4 and is generally used for comparative analysis of the physiological responses produced by the subject at those questions.

15. Are you now or have you ever used or sold marijuana?

Summary of intent:

The question is becoming less and less important to many business houses. Unless the subject indicates that he/she is a dealer, the probability of not being hired for a job is remote.

16. Are you now or have you ever used or sold narcotics?

Summary of intent:

The admission of current activity in the use or sale of narcotics would most probably disqualify the applicant. However, past experimental use of having taken 'the cure' in many instances has not disqualified the applicant.

*17. Have you ever been arrested?

*18. Have you ever been convicted of a misdemeanor?

*19. Have you ever been convicted of a felony?

Summary of intent:

The admission to any of these questions is not generally disqualifying unless the client's bonding or insuring agency has issued restrictions in this area. I have examined a number of ex-felons and recommended employment. Although several have not been successful in private industry, there are many who are.

*If either question is answered yes, I will also ask 'to the best of your knowledge are there any warrants for your arrest in existance'.

93d Congress
2d Session

COMMITTEE PRINT

# PRIVACY, POLYGRAPHS, AND EMPLOYMENT

A STUDY PREPARED BY

THE STAFF OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
SECOND SESSION

NOVEMBER 1974

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
41-270 WASHINGTON : 1974

624

## COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

JOHN L. McCLELLAN, Arkansas
SAM J. ERVIN, JR., North Carolina
PHILIP A. HART, Michigan
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
QUENTIN N. BURDICK, North Dakota
ROBERT C. BYRD, West Virginia
JOHN V. TUNNEY, California

ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
HUGH SCOTT, Pennsylvania
STROM THURMOND, South Carolina
MARLOW W. COOK, Kentucky
CHARLES McC. MATHIAS, JR., Maryland
EDWARD J. GURNEY, Florida

---

## SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

SAM J. ERVIN, JR., North Carolina, *Chairman*

JOHN L. McCLELLAN, Arkansas
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JOHN V. TUNNEY, California

EDWARD J. GURNEY, Florida
ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
STROM THURMOND, South Carolina

LAWRENCE M. BASKIR, *Chief Counsel and Staff Director*
IRENE R. MARGOLIS, *Professional Staff Member*
MARTHA E. FREEMAN, *Research Assistant*

backgrounds and employees' performances. Expediency is not a valid reason for pitting individuals against a degrading machine and process that pry into their inner thoughts. Limits, beyond which invasions of privacy will not be tolerated, must be established. The Congress should take legislative steps to prevent Federal agencies as well as the private sector from requiring, requesting, or persuading any employee or applicant for employment to take any polygraph test. Privacy is a fundamental right that must be protected by prohibitive legislation from such unwarranted invasions.

O

## PREFACE

The primary responsibility of the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary is to examine matters pertaining to constitutional rights. In fulfilling this responsibility, the Subcommittee has, since the early 1960's engaged in studies of the right of privacy. These efforts have been aimed at curbing unwarranted governmental invasions of the privacy of individual citizens. The use of polygraph testing for employment purposes has been one such threat investigated by the Subcommittee. Over the years, much information has been gathered and assessed by the Subcommittee staff. The results of these studies have formed the basis for legislation, which I introduced, seeking to prevent the practice of subjecting employees to an unconstitutional polygraph procedure.

In 1967, I introduced, along with 55 cosponsors, S. 1035, a bill designed to ban unjustified intrusions by the government into employee privacy. Section (f) of S. 1035 made it unlawful for any officer of any executive department or agency to require or request, or attempt to require or request, any civilian employee serving in the department or agency, or any person applying for employment in the executive branch of the federal government "to take any polygraph test designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters." This measure, in fundamentally identical form, was introduced subsequently in the 92nd Congress as S. 1438, and again in the 93rd Congress as S. 1688. These measures have passed the Senate on five separate occasions.

In June of 1971 I introduced S. 2156, a bill differing from the earlier bills in that it was aimed exclusively at the use of polygraphs. S. 2836, submitted to the Senate in December of 1973, was a reintroduction of this measure. The legislation made it unlawful for any executive department or agency of the federal government, or for any business affecting interstate commerce, "to require or request, or to attempt to require or request, any officer or employee . . . or any individual applying for employment . . . to take any polygraph test in connection with his services or duties . . . or in connection with his application for employment." The bill also provided that no individual be denied promotion or employment for refusing to submit to a polygraph test.

This report is a staff analysis of the materials collected in the course of the inquiry. As I have already stated, it was on the basis of these materials that polygraph legislation was formulated. The report represents the culmination of the staff investigation into the important area of polygraph use for employment purposes and its threat to the right of privacy.

SAM J. ERVIN, Jr.,
*Chairman, Subcommittee on Constitutional Rights.*

sitting in the chair has his mechanical energy changed to electrical energy which is broadcast to hidden recording instruments. Thus, the response detection can go on completely without the subject's knowledge.

Another type of examination that is gaining acceptance in American business is the Psychological Stress Evaluator (PSE).[116] The PSE registers the FM vibrations in a person's voice. The premise is that under stress the FM modulation is altered due to mouth and throat tightening. A graphic picture of the voice's modulations is made, and the presence and absence of stress are judged according to the character of the markings. The obtaining of the conversation to be assessed can be done secretively with the use of hidden tape recorders. The questions posed by this method are the same as those that critics of the polygraph have been raising, and proponents have been trying to refute, for years. Can the stress in a person's voice be directly attributed to lying? Can the evaluator objectively and accurately detect lies from physiological recordings of the voice? What of the constitutional problems of testing a speaker without his knowledge, so easily accomplished by the PSE technique?

These two innovations indicate that rather than being curtailed, use of the polygraph is being expanded, particularly in private business. Attitudes of employers, insofar as polygraph testing is concerned, are characterized in the following: "If a person refused to take the test, we probably wouldn't hire him." [117] "I use the polygraph because I got tired of playing God. It's hard to tell things by looking at people." [118] Even a U.S. Court of Appeals has lent its approval to polygraph testing:

> A statement challenged on the ground that it was obtained [from a polygraph examination administered to petitioner as a part of a hiring procedure] as the result of economic sanctions must be rejected as involuntary only where the pressure reasonably appears to have been of sufficiently appreciable size and substance to deprive the accused of his "free choice to admit, to deny, or to refuse to answer" . . . But the threat of discharge for a job as a driver's assistant, which Sanney had held for one or two days, can hardly be labelled a "substantial economic sanction" rendering his statement involuntary.[119]

These comments indicate that if polygraphs are here to stay, so, in fact, are the constitutional problems inherent in their use.

The right to privacy is basic to the American way of life and recognized as inherent in and guaranteed by the constitutional provisions of the First, Fourth and Fifth Amendments. The federal government ordinarily strives to curtail and prevent infringements of individual rights such as these. But the polygraph, as a tool of public and private employers, clearly demands more attention. Compulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individuals' privacy. Employers have a multitude of less objectionable resources at their disposal for investigating applicants'

---

[116] Fred P. Graham, "Lie Detecting By a Voice Is Center of Controversy," *New York Times*, June 5, 1972, p. 1.
[117] Bill Bradley of Eckerd Corp. quoted in "To Catch A Thief," *Newsweek*, Sept. 23, 1974, p. 80.
[118] St. Petersburg, Fla. Chevrolet dealer quoted in "To Catch A Thief," *Newsweek, Ibid.*
[119] From a Court of Appeals opinion, *Sanney* v. *Montanye*, 6/20/74, reported in *The United States Law Week*, 43 LW 2027, 7-23-74.

employee or applicant to submit to a polygraph exam. Most include some penalties for violations.

Though the legislative efforts of the states exhibit a needed interest in the controlling of polygraph testing in the job market, in the staff's view, the requirements placed upon examiners and the restrictions imposed on employers fall short of the strong stand that should be taken against the polygraph. Licensing statutes often, though not always, require a B.A. degree for operators,[108] yet the amount of advanced education necessary for polygraph interpretation is still being argued. Several of the regulations provide clauses that exempt examiners who have been operating for a length of time from the qualification demand, and in some instances the proficiency test demand.[109] Attempting to constrain polygraph use by regulating examiners does not approach the relevant problems of doubtful instrument reliability or infringement of constitutional rights.

The prohibiting statutes are a stronger step, yet most contain weaknesses and the punishments for violations are, in most cases, not very stringent.[110] Only two states provide no exemptions from the requirements of the law;[111] most exclude either law enforcement agencies, or federal, state and local government, or both from the scope of the statute.[112] Nebraska even provides a statutory mandate that polygraph testing be a condition of employment and continuing employment in the classified service. Some states also leave open the possibility for "voluntary" submission to an exam.[113]

Court cases which provide for the admissibility of polygraph evidence upon stipulation or court supervised examinations and legislative acts which seek to upgrade the quality of examiners or restrict polygraph use in employment situations are attempts by conscientious authorities to compensate for the polygraph's complex of faults. They indicate at the least that there is indeed popular concern about possible abuse stemming from the use of polygraphs.

### The Polygraph Test: Conclusions

A congressional subcommittee has concluded:

> There is no "lie detector," neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood.[114]

But whether or not the polygraph is a myth, it seems clear that it is here to stay. And, given modern ingenuity, it is not unreasonable to expect that new techniques and devices will be devised in an attempt to facilitate determining honesty. There are, in fact, some already in use. The "wiggle seat" is a new contraption for lie detecting derived from the original polygraph.[115] It, too, measures and records physiological changes due to heart action and a person's nervous movements, but with an added advantage over the polygraph. The wiggle seat's sensing is mounted in an ordinary office chair. A subject

[108] Ala., Ark., Fla., Ga., Ill., Miss., S.C., Tex.
[109] Ala., Ark., Fla., Ga., S.C., Tex.
[110] Del., Md., Mass., N.J., Ore., Pa., R.I., Wash.
[111] N.J., Ore.
[112] Alas., Cal., Conn., Del., Haw., Md., Mass., Minn., Pa., R.I., Wash.
[113] Cal., Haw., Md., Ore., Pa., Wash.
[114] Hearings, p.

## INTRODUCTION

Harvard law professor Arthur R. Miller has described "privacy" as "the right of the individual to decide for himself, with only extraordinary exceptions in the interest of the whole society, when and under what conditions his thoughts, speech, and acts should be revealed to others." [1]

This definition, proposed in 1965 hearings held before the Senate Subcommittee on Constitutional Rights, is one articulation of a fundamental principle of the American way of life: the right to privacy, to personal autonomy, to private thoughts and desires. Not only is privacy basic to the concept of independent citizens in a free society, but it is basic to the development of human nature and personality. Our constitutional system has recognized the necessity of allocating to the individual a sphere of personal activity free from governmental intrusion by distinguishing between acts and beliefs and prohibiting inquiry into beliefs.[2] "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred . . . the right to be let alone . . ." [3]

In their important 1890 *Harvard Law Review* article, "The Right to Privacy," Samuel D. Warren and Louis D. Brandeis maintained that the courts should take the lead in protecting this vital right, and the courts have responded. Citing variously the First Amendment freedoms of speech and association, the Fifth Amendment privilege against self-incrimination and the Fourth Amendment prohibition of unreasonable searches and seizures, courts have, in fact, recognized the validity and constitutionality of a right to privacy.[4]

### The Polygraph Test: Privacy and Employer Use

In our modern age there have been, and will continue to be, many advances in technology made with the intended purpose of bringing about some benefit to mankind. Though much of this progress provides a step forward toward greater human happiness, we must be on our guard against technological innovations which deprive us of important aspects of our humanity. The polygraph or "lie detector" poses such problems. In use for fifty years, the polygraph machine has been promoted as an objective, scientific method for solving the age-old dilemma of separating truth from falsehood. The polygraph emerged as a potential legal tool to determine verdicts in criminal cases. While, after fifty years, the admissibility of polygraph test results

[1] Quoted in Donald H. J. Hermann III, "Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing," 47 Wash. L. Rev. 73 (Nov. 1971), pp. 127-128.
[2] See *Yates* v *U.S.*, 354 U.S. 298 (1957); *Barenblatt* v. *U.S.*, 360 U.S. 109 (1959), particularly the dissenting opinions; *Gitlow* v. *New York*, 268 U.S. 652 (1925).
[3] *Olmstead* v. *U.S.*, 277 U.S. 438 (1928), Brandeis dissent, p. 478.
[4] *Griswold* v. *Connecticut*, 381 U.S. [illegible] *Rochin* v. *California*, 342 U.S. 165 (1952); *Schmerber* v.

in court is still being debated by lawyers and judges, the application of this technique has spread into the mainstream of American life—into both governmental and private sectors—for purposes of employment and pre-employment screening. Here, clear and serious questions of encroachment upon the right to privacy, particularly upon First Amendment freedoms, exist. A person does not relinquish to either his public or private employer his First Amendment rights or the privacy of his thoughts and beliefs, when he enters into the employment process. Nor should he be expected to relinquish protections against self-incrimination or unreasonable searches and seizures. The prevalent use of polygraph testing to check into employee suitability, as well as the composition of the test procedure itself, poses these constitutional issues of individual rights. But before one can appreciate constitutional issues, he should have an understanding of the extent of polygraph use for employment purposes in this country.

In 1965, the House Subcommittee on Foreign Operations and Government Information issued a report on hearings it had held to determine the amount, kind and desirability of polygraph testing in agencies of the federal government. In response to a 1963 Subcommittee questionnaire, nineteen agencies reported the use of polygraphs in conducting agency business, advancing reasons of security, criminal infractions, misconduct, personnel screening and medical measurements.[5] The total number of tests found to have been conducted in 1963 was 19,796, a figure which did not include the thousands of required tests taken by CIA and NSA employees and job applicants.[6] Those agencies classified their figures as security information.[7]

As a response to these hearings and further expressions of congressional concern, the federal agencies have been operating since 1965 under civil service regulations governing the use of polygraphs.[8] The new regulations limit the use of polygraphs to agencies with intelligence or counter-intelligence missions directly affecting national security, and then only if the agency receives written authorization from the chairman of the Civil Service Commission. Yet, despite these restrictions, seven federal agencies reported in 1973 that they had authorized and conducted a total of 6,882 tests, distributed primarily through the Defense Department (6,318), the U.S. Postal Service (485) and the Justice Department (79).[9] Thus, while polygraph testing in the Federal Government has diminished, the number still being given is substantial. Once again, the number of CIA tests conducted was classified.[10]

Outside of government, polygraphs are most widely used by businesses which sell or distribute drugs or manufacture small parts, as well as in banking, insurance, metal and oil industries, food processing and vending, meat packing, automobile manufacturing, mail order,

[5] Hearings on Use of Polygraphs as "Lie Detectors" by the Federal Government before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, Tenth Report, 89th Cong., 1st Sess., (1965), pp. 29-39 (hereinafter cited as Hearings).

[6] *Ibid.*, p. 31.

[7] *Ibid.*

[8] See "Use of Polygraph in Personal Investigation of Competitive Service Applicants and Appointees to Competitive Service Positions," ch. 736, Appendix D, *Federal Personnel Manual* (January 1972).

[9] Compiled for the Federal Operations and Government Information Senate Subcommittee from information provided by the agencies without modification, validation, or authentification.

[10] *Ibid.*



other sources.[100] The highly questionable reliability of the polygraph is a common basis for most decisions, but many arbitration cases have reached the issues of constitutional rights and invasions of privacy. In *B.F. Goodrich* v. *Teamsters Local 743*,[101] the arbitrator held that an employee's consent to take a polygraph examination was not reason enough for allowing the use of the results because the pressure to consent in the employment setting amounted to a compulsion to submit. *Lag Drug Co.* v. *Teamsters Local 723*[102] went even farther in expressing a lack of confidence in the polygraph, holding that due to the evidence of the procedure's inaccuracy and constitutional objections an employee could not be dismissed for refusing to be tested, even though he had signed an agreement as a condition of employment to take a test at any time. The most damning case against the polygraph, however, was stated in *General American Transport Corporation* v. *United Steelworkers Local 1133*:[103]

> [I]f we admit such an encroachment upon the personal immunity of an individual where in principle can we stop? Suppose medical discovery in the future evolves a technique whereby the truth may infallibly be secured from a witness by trespassing his skull and testing the functions of the brain beneath. No one could contend that the witness could be forced against his will to undergo such a major operation at the imminent risk of his life, in order to secure evidence in a suit between private parties. How then can he be forced to undergo a less dangerous operation, and at what point shall the line be drawn? To my mind, it is not the degree of risk to life, health or happiness which is the determining factor, but the fact of the invasion of the constitutional right to privacy.

It should also be noted, as a related point, that employment standards which disproportionately affect minorities or sex groups have been held unconstitutional.[104] In a recent Court of Appeals decision, the Equal Employment Opportunity Commission prevailed in its argument that it should be provided with a company's records of its polygraph testing program in order to determine if an inherent bias against certain racial and ethnic groups was exhibited by employment practices based on the results of polygraph interviews of applicants.[105]

State legislatures have begun regulating the growing use of polygraphs in employment. Two approaches are taken: 15 states have prescribed licensing and training requirements for examiners; [106] 13 states have banned or restricted the polygraph's use.[107] The licensing statutes include provisions for licensing boards to oversee the process of giving proficiency exams and licenses to aspiring examiners, instrument specifications and qualification requirements. The prohibiting statutes are designed to keep employers from requiring or coercing an

[100] See *B.F. Goodrich Co.* v. *Teamsters Local 743*, 36 Lab. Arb. 553 (1961); *Lag Drug Co.* v. *Teamsters Local 723*, 39 Lab. Arb. 1121 (1962); *General American Transportation Corp.* v. *United Steelworkers Local 1133*, 31 Lab. Arb. 355 (1958); *Marathon Electric Manufacturing Corp.* v. *Local 1116, UAW*, 31 Lab. Arb. 1040 (1959); *In re Skaggs-Stone, Inc., and Teamsters Local 353*, 40 Lab. Arb. 1273 (1963).

[101] 36 Lab. Arb. 553 (1961).

[102] 39 Lab. Arb. 1121 (1962).

[103] 31 Lab. Arb. 355 (1958), quoted in Hermann, *op. cit.*, p. 97.

[104] *Griggs* v. *U.S.*, 91 S. Ct. 848 (1971).

[105] *Circle K. Corp.* v. *EEOC*, U.S. Ct. App., 10th Circuit, case no. 72-1367, Nov. 21, 1972.

[106] Ala.—*Code of Ala.* tit. 46 sections 297 (22nn) to 297 (22oo); Ark.—*Ark. Stat. Ann.* sections 71-2201 to 71-2225; Fla.—*Fla. Stat. Ann.* sections 493.10 to 493.50; Ga.—*Ga. Code Ann.* sections 84-5001 to 84-5009; Ill.—*Ill. Stat. Ann.* ch. 38, sections 202-1 to 202-30; Ky.—*Ky. Rev. Stat.* sections 329.010 to 329.990; Mich.—Mich. Public Act 295, Laws 1972, Nov. 12, 1972; Miss.—*Miss. Code Ann.* sections 8920-61 to 8920-86; Nev.—*Nev. Rev. Stat.* sections 648.005 to 648.210; N.M.—*N.M. Stat. Ann.* sections 67-31-1 to 67-31-14; N.D.—*N.D. Cent. Code* sections 43-31-01 to 43-31-17; Okla.—*Okla. Stat. Ann.* tit. 59 sections 1451-1476; S.C.—S.C. General and Permanent Laws—1972, No. 1487, sections 1-26; Tex.—*Tex. Rev. Civ. Stat.* art. 2015 f3, sections 1-30; and Va.—*Va. Code Ann.* sections 54-729.01 to 54-729.018.

[107] Alas.—*Alas. Stat.* section 23.10.037; Cal.—*Cal. Labor Code* (*West's*) sections 432.2, 433; Conn.—*Conn. Gen. Stat. Ann.* section 31.51g; Del.—*Del. Code Ann.* tit. 19, section 705; Haw.—*Haw. Rev. Laws* sections 378-21 to 378-22; Md.—*Md. Ann. Code* art. 100, section 95; Mass.—*Mass. Gen. Laws* ch. 149 section 19B; Minn.—6 Minn. Sess. Laws '73, ch. 667, S.F. No. 612, sections 1-181.75 to 1-181.77; N.J.—*N.J. Rev. Stat.* sections

probed and questioned so deeply, to be expected to reveal personal attitudes and beliefs under conditions such as those imposed by polygraph testing, is to be subjected to searches and seizures that are unreasonable, to coerced self-incrimination, to loss of civil liberties that amount to a true invasion of privacy.

## The Polygraph Test: Current Status

The polygraph was given its first court test in the 1923 case of *Frye* v. *United States*.[93] The court was faced with the attempt to submit polygraph test results, as testified to by an expert examiner, in a criminal case. The court's reasoning, in excluding the results from evidence, was that the polygraph did not conform to the standard required of any scientific principle or discovery admissible in court proceedings. The polygraph, stated the court in *Frye*, had not gained "general acceptance in the particular field in which it belongs."[94]

The "general acceptance" theory was adhered to regularly by the courts for fifty years. Only recently has the polygraph been gaining some judicial recognition. *United States* v. *Zeiger*[95] held that the general acceptance level had been reached by the polygraph. This decision was reversed, however, without comment, by an appeals court. *United States* v. *DeBetham*,[96] though not admitting the test results in this particular case, stated that the polygraph should no longer be treated differently from other scientific evidence. *United States* v. *Ridling*[97] allowed the admission of expert testimony regarding the results of a defendant's polygraph examination upon prior stipulation, by all parties concerned, that if the accused was tested by a court-appointed examiner, all results would be admitted. Some state courts, also, are warily beginning to admit polygraph results as evidence in certain specific circumstances, where the parties agree by stipulation or under court-directed conditions and requirements.[98]

Though the courts are still leery of the polygraph device and examiner testimony, there is a trend toward cautious admissibility. Yet the polygraph's accuracy has not been proven, as discussed previously. Still, as one authority warned, the small group of prominent professional polygraph operators might be able to impress a court with their confidence in the process.[99] The danger that the polygraph will simply slide into acceptance is real. Courts, in dealing specifically with polygraphs, have largely not confronted the question of constitutional rights involved. Their concern has been with their reliability. It is inevitable, however, that constitutional objections must be treated, even ones arising in non-criminal contexts.

Labor arbitrators have consistently excluded polygraph evidence and ruled against attempts to punish or dismiss employees for refusal to submit to testing, or for negative results obtained under suspicious circumstances, or those in which guilt has not been established by

[93] 293 F. Supp. 1013 (1923).
[94] *Ibid.*, p. 1014.
[95] 350 F. Supp. 685 (D.C. 1972).
[96] 348 F. Supp. 1377 (S.D. Cal. 1972).
[97] 350 F. Supp. 90 (S.D. Mich. 1972).
[98] See *People* v. *Cutter*, 12 Crim. L. Rep. 3122 (Nov. 6, 1972); *State* v. *McDaniel*, 12 Crim. L. Rep. 2344 (Dec. 18, 1972); *State* v. *Cutter*, 12 CrL 2133 (1974); *State* v. *Alderete*, N.M. CtApp, 2/27/74; *Commonwealth* v. *A Juvenile* (No. 1), Mass. Sup. Jud. Ct., 6/12/74; *State* v. *Stanislawski*, Wis. Sup. Ct., 4/2/74.
[99] Lee J. Radek, "The Admissibility of Polygraph Results in Criminal Trials: A Case for the Status Quo," 2 Loyola (Chicago) Univ. L. Journal, Summer 1971, p. 291.



and other retail operations.[11] No complete statistics exist showing the extent of polygraph testing in private business. Knowledgeable estimates, however, run from 200,000 to 300,000 polygraph tests performed each year by about 3,000 polygraph examiners. These tests are used by private companies as a method of pre-employment screening or employee investigation.[12] It has been estimated, though, that the use of lie detecting machines in the private sector significantly increased in recent years—an estimate by one authority maintains that 500,000 polygraph tests were conducted in 1968 for employer purposes.[13] With increasing concern over employee theft in industry, polygraph operators expect the demand for their services to continue to grow.[14]

Heavy rates of theft is one of the prominent reasons advanced by employers for the use of polygraphs in both employment matters and pre-employment screening.[15] Employers feel, due to these economic considerations, that it is necessary for them to have some means to evaluate the honesty of their employees or prospective employees. Because of the ease, speed and relative inexpensiveness with which the polygraph questions can be administered and evaluations obtained, businesses are increasingly depending upon polygraphs to investigate other employment-related areas. For instance, polygraph tests are administered to employees suspected of drug use. Loyalty, security and questions of employee contentment or dissatisfaction are similarly the subject of polygraph checks. In fact once a job applicant submits to a polygraph examination, his background, career history, criminal record and other matters of interest to an employer, otherwise verified by checking references, former employers, and other records, can be investigated with savings in time and money. All of these reasons, then, and perhaps others,[16] have prompted the growth of polygraph testing in private business.

According to the AFL–CIO, "Some well-meaning employers have been duped by the 'myth of infallibility' created by the purveyors of polygraphs and have been led to use the machines in attempts to prevent or reduce real or alleged theft, pilferage and embezzlement."[17] Job seekers and employee groups and unions are, as could be expected, generally displeased with the use of polygraphs in the American marketplace. They complain that polygraph testing, or the threat of it, can be used by management as a union-breaking device. They suggest that employers could and should rely instead upon less obtrusive means, such as employment interviews and references, to answer their legitimate inquiries. The most strenuous objections raised by employees to the practice of polygraph testing are that the tests violate one's personal pride and dignity, invade his privacy, violate his right against self-incrimination and undermine the American principle of a presumption of innocence until guilt is proven. Though these objections[18] are acknowledged by some associated with the administering of

[11] Lee M. Burkey, "Privacy, Property and the Polygraph," *Labor Law Journal*, February 1967.
[12] "Protection Against Invasion of Privacy," Resolution Adopted by the Sixth Constitutional Convention of the AFL–CIO on Dec. 14, 1965 (hereinafter cited as AFL–CIO Resolution).
[13] Patricia Brown, Stephen Carlson, and John Shattuck, "The Lie Detector As a Surveillance Device," *ACLU Reports*, N.Y., February 1973, p. 1 (hereinafter cited as ACLU Report).
[14] Ben A. Franklin, "Lie Detector's Use By Industry Rises; Rights Peril Feared," *New York Times*, Nov. 22, 1971, p. 45.
[15] ACLU Report, p. 2.
[16] *Ibid.*
[17] AFL–CIO Resolution, p. 1.
[18] *Ibid.*

polygraph tests in business, they view them as being outweighed by practical business considerations. *J. Kirk Barefoot*, a former president of the American Polygraph Association, maintains that "there comes a time when your privacy and mine has to be weighed against a company being stolen blind and put out of business." [19] And, declares John E. Reid, the director of a major polygraph company and school: "I also believe that a person who is innocent owes society an obligation to cooperate and help the authorities prove him innocent rather than be defiant and say 'let them try to prove my guilt.' " [20]

The scope of the polygraph operator's investigation in employment interviews can be pervasive. Questions of personal history can and often do pertain to a previous work record, military service, and criminal convictions, and can also delve into subjects such as drug and alcohol use, gambling activities, health information, family problems and sexual behavior.[21] All this information is solicited as relevant to a person's suitability for employment. It is often the case, furthermore, that much of the information obtained from these examinations is placed in personnel files and thus follows a person throughout his or her career, circulating among employers or possible employers.

The voluntary nature of the polygraph examination in business is an argument generally offered by its proponents for the continuation of its use, but one unanimously rejected by employees. Though submission to a polygraph test may, in theory, be voluntary, in actuality the employee or potential employee has little choice in the matter. When so many people in the job market are now offered polygraph examinations, when a refusal to take an exam frequently results in loss of a job opportunity, and when continued employment is conditioned on the submission to further exams, the element of coercion is high and the freedom to refuse limited.

Though the most significant objections to polygraph testing for employment purposes are those based on constitutional principles of privacy, workers and their defenders also criticize the polygraph on the grounds that its results are unreliable and its use in an employment context is inappropriate. They point to certain studies into the accuracy of the polygraph procedure, showing its reliability is not proven. Further, they argue, the device was designed for use in criminal cases, for determining answers to specific questions and establishing past actions relating to a certain event. In the instance of screening applicants or employees, however, the situation and circumstances are usually quite different. The information sought is of a broad, wide-ranging nature and is used in an attempt to predict the future conduct of an employee. The fitness of the polygraph as a predicting device, while its accuracy as an indicator of past conduct remains questionable, must be even more improbable.

Science and technology play a vital role in modern society, but unless one is wary, respect for machines and technical experts can lead one to ignore their implications for a free society. The polygraph is reputed to be a scientific device for detecting lies, and many jump at the opportunity to substitute a machine's objectivity for human judgment, assuming it must be more reliable. The assumption may



which the Court held that the taking of a blood sample over petitioner's objections did not violate constitutional requirements, the polygraph was discussed in relation to the difficulties inherent in the process of separating physical evidence from communications. The opinion noted:

> Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.[81]

The technique applied to extract information from an individual must also be weighed against Fourth Amendment considerations. Methods for obtaining evidence, though in theory permissible, must, the Court has held, adhere to other principles as well as strict constitutional ones. In *Rochin* v. *California*,[82] the Court deemed it proper to refer to the sense of the community in determining whether drugs obtained from a forced stomach pumping could be used to achieve a conviction. The opinion concluded that "conduct that shocks the conscience" must be prohibited: "They are methods too close to the rack and the screw to permit of constitutional differentiation." [83]

The Fourth Amendment protection against unreasonable searches and seizures does not apply merely to criminal matters. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." [84] In dissenting from a 1928 opinion upholding the constitutionality of wiretaps, Justice Brandeis, gazing into the future, predicted and worried that:

> Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions . . . Can it be that the Constitution affords no protection against such invasions of individual security? [85]

The Fourth Amendment has now been recognized as applying to more than simple physical trespass.[86] Electronic listening devices,[87] police "stop-and-frisk" procedures,[88] the taking of fingernail scrapings,[89] all have come under its purview. The retention of an individual's privacy, in the face of ever increasing odds against it, is obviously a significant concern. Courts have found it to be their legitimate duty to protect this fundamental principle, as set forth in *Mapp* v. *Ohio:* [90]

> We find that as to the federal government, the Fourth and Fifth Amendments and, as to the states, the freedom from unconscionable invasions of privacy and the freedom from convictions based on coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] only after years of struggle." [91]

In the staff's view, polygraphs used in employment indisputably fall within the areas of constitutional concern presented here. To many knowledgeable commentators the relationship is evident.[92] To be

---

[81] *Ibid.*, p. 764.
[82] 342 U.S. 165 (1952).
[83] *Ibid.*, p. 172.
[84] *Camara* v. *Municipal Court*, 387 U.S. 523 (1966), p. 530.
[85] *Olmstead*, Brandeis dissent, p. 474.
[86] *Katz* v. *U.S.*, 389 U.S. 347 (1967).
[87] *Ibid.*
[88] *Terry* v. *Ohio*, 392 U.S. 1 (1968).
[89] *Cupp* v. *Murphy*, 412 U.S. 291 (1973).

court. Congressional hearings into the use of polygraphs in federal employment determined that:

> The polygraph technique forces an individual to incriminate himself and confess to past actions which are not pertinent to the current investigation. He must dredge up his past so he can approach the polygraph machine with an untroubled soul. The polygraph operator and his superiors then decide whether to refer derogatory information to other agencies or officials.[73]

The concern in *Miranda* was to compensate for the coercive aura of a police station to insure that all precautions are taken so that a suspect does not feel compelled to speak. Where obtaining or retaining a job is dependent upon the taking of a polygraph test, the environment can be just as coercive. Employment is vital to existence and survival in our modern society, and the competition for jobs is great. The submission to polygraph examinations in pre-employment interviews is deemed voluntary, but the knowledge that a refusal will automatically end the employment opportunity undermines this claim. Furthermore, the onus of guilt, of hiding potentially damaging revelations that accompanies a refusal to be tested by a polygraph further reduces the voluntary aspect. Many job offers are conditioned upon an agreement to submit to future polygraph tests, entirely eliminating any element of choice. For a person seeking or obtaining a job to be coerced to reveal private knowledge, thoughts, and beliefs would appear repugnant to Supreme Court cases which recognize the constitutional rights of employees.[74] The price of gaining employment must not be a surrendering of civil liberties.

The polygraph examiner's questions themselves can be extremely coercive resulting from "the subject's defensive willingness to elaborate on his answers because he fears that unless he reveals all the details, the machine will record that he is lying even when his basic story is true." [75] Freedom from being compelled to make self-incriminating disclosures, a part of every citizen's right to privacy, should be applicable to a business setting, expecially where polygraphs are in use, for, as one commentator summarizes:

> . . . the nature of an employer's inquiries about past deeds and guilt is often indistinguishable from criminal interrogation. Moreover, the loss of personal liberty or property which would result from a criminal conviction is often no more significant than the denial of livelihood which may result from compelled testimony concerning past and present activities, associations, and even beliefs during preemployment or promotion screening via personality and polygraph testing.[76]

Another matter germane to the self-incrimination discussion is the question of how the responses elicited by the polygraph machine and examiner are characterized. In response to the growing complex of investigative techniques available for the identifying of a suspect in a criminal case, a distinction has emerged between physical as opposed to communicative evidence. Thus, a person may be compelled to provide a sample of his handwriting,[77] to speak,[78] or to exhibit his body for identification,[79] but he may not be expected to be a source of testimonial evidence against himself. In *Schmerber* v. *California*,[80] in

[73] Hearings, pp. 19–20.
[74] See *Slochower* v. *Board of Education*, 350 U.S. 551 (1955); *Garrity* v. *New Jersey*, 385 U.S. 493 (1966); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).
[75] ACLU Report, p. 35.
[76] Hermann, *op. cit.*, p. 131.
[77] *Gilbert* v. *California*, 388 U.S. 263 (1967).
[78] *U.S.* v. *Dionisio*, [illegible] (1973).
[79] *U.S.* v. [illegible] (1967).
[illegible]



be wrong, and if so, reliance on the machine may be dangerous. Moreover, there are further reservations to consider beyond simple reliability. The right to privacy of every individual is accepted and recognized. With the vast scientific possibilities for infringement of that right that exist, we must begin now to determine how much intrusion into our private affairs and personal autonomy we will permit. The use of polygraphs by government and private employers raises these issues which must be confronted.

For all its implications for the future, the polygraph curiously resembles a method of determining truth and falsity now consigned to the history books, where the veracity of an accused person was determined by whether he would drown when thrown into water with his hands and feet bound, or whether his feet would burn when he crossed a bed of heated rocks. There is a resemblance here to the polygraph, with its respiration tubes strapped around a subject's chest and blood pressure cuffs and electrodes attached to his arms and wrists. Notes one commentator, "Lie detection through physical change is actually a throwback to early forms of trial by ordeal." [22]

This report sets out what the staff has been able to determine with regard to the reliability of polygraphs and, most importantly, their impact on the constitutional rights of employees. The need for Federal legislation in this regard, to stop this abuse of privileges fundamental to our free society, should become apparent.

## The Polygraph Test: Reliability

The theory behind the polygraph procedure and its results involves physiological responses purportedly related to the act of lying. It is professed that lying causes conflict to arise within the individual subject. The conflict produces fear and anxiety which, in turn, produce physiological changes which the polygraph devices can measure and record. Thus, the assumption underlying the polygraph test is that a uniform relationship exists between an act of deception, certain specific emotions, and various bodily changes.[23]

A typical polygraph examination may contain several features. The subject to be investigated is usually ushered into a waiting room where it is hoped he will avail himself of the favorable polygraph literature left for his attention. His reactions to these readings are often observed by the secretary or receptionist and reported to the examiner prior to his encounter with the subject.[24] The purpose of this conditioning is that the person to be examined carry with him into the test a belief in the reliability, accuracy and even infallibility of the polygraph. Examiners maintain that it is important and helpful in obtaining good responses for an individual to be convinced that his lies will be detected, thus heightening his sensitivity to the questions and the likelihood of clear physiological changes.[25] The "spy" in the waiting room reports to the examiner the degree of skepticism or acceptance exhibited by the subject while reading the polygraph literature. In this way, it is claimed, the examiner can better understand and compensate for all types of recorded responses to his questions.

[22] Jerome H. Skolnick, "Scientific Theory and Scientific Evidence: An Analysis of Lie Detection," 70 Yale L. Journal [illegible] (April 1961), p. 696.
[23] *Ibid.*, pp. [illegible]
[illegible]

Still prior to his being connected to the machine, the subject is brought into the testing area, usually a room sparsely decorated and furnished to avoid the presence of outside distractions or stimuli. At this point, some polygraph operators may make use of "two-way" mirrors to further observe the individual's behavior.[26] Then, with the machine in view, the examiner typically conducts a preliminary interview which aids him in assessing the type of person he is dealing with, and in obtaining other knowledge he might deem helpful in his interpretation of the results of the polygraph test.[27] The general questions pertaining to the circumstances being investigated are typically gone over to familiarize the subject with them and to allow the operator the opportunity to alter them where he feels it is necessary to elicit clear, definite responses.[28] The pneumograph tube, measuring respiration, is then placed around the subject's chest, the blood pressure and pulse cuff around his upper arm, and electrodes, which record galvanic skin responses (the change in the electrical conductivity of the skin due to increased skin perspiration) are attached to his hands. The examiner then proceeds with the questioning as he sits behind his control desk watching and marking the recordings of these devices.

How reliable is this process in determining the veracity of an individual? A study conducted at the Massachusetts Institute of Technology concluded:

> . . . There exists no public body of knowledge to support the enthusiastic claims of operators. There are no publications in reputable journals, no facts, no figures, tables, or graphs. In short, there is nothing to document the claims of accuracy or effectiveness except bald assertions.[29]

Though studies and experiments to assess the polygraph's effectiveness have been done, even when interpreted favorably, their results seem far from convincing of the polygraph's reliability. In an experiment conducted for the Defense Department, subjects were tested to determine the effect of their faith in the polygraph on the ability of the examiners to detect their lies.[30] The study concluded that a belief in the machine's accuracy did aid the detection of responses under certain types of questioning,[31] but it is significant to note the figures derived for the accuracy of the examiners' interpretations: only 83 percent of the subjects were correctly classified as guilty or innocent in the paradigm used.[32]

Even a study conducted by a large, well-known polygraph firm, yielded results which, when scrutinized, are unsettling. The experiment was set up so that examiners worked independently and solely with the records of polygraph tests.[33] The analyses of the ten examiners, averaged, produced 87.75 percent accuracy in identifying guilty and innocent subjects.[34] The experimenters were quick to point out that the examiners involved in the project did not have the benefit of observing or interviewing the subject so as to "make allowances for a resentful or angry attitude, a condition which could cause an error in

[26] ACLU Report, p. 4.
[27] Skolnick, *op. cit.*, pp. 704 and 705.
[28] ACLU Report, p. 5.
[29] Barkey, *op. cit.*, p. 81.
[30] Martin T. Orne and Richard I. Thackery, "Methodological Studies in Detection of Deception," distributed by the Clearinghouse for Federal Scientific and Technical Information, Dept. of Commerce.
[31] *Ibid.*, summary.
[32] *Ibid.*
[33] Frank S. Horvath and John E. Reid, "The Reliability of Polygraph Examiner Diagnosis of Truth and



Justice Goldberg went on to say that in deciding what rights are fundamental we must examine our traditions to discover the principles rooted there. In *Griswold*, the controversy revolved around the marriage relationship and the privacy traditionally accorded its intimacies. The Court declared, "We deal with a right to privacy older than the Bill of Rights . . ." [66] Certainly the right to privacy in our minds, to speak or keep silent about our thoughts, is one of the oldest and most basic principles of human individuality and life. Such a valued tradition should not be tampered with for reasons of alleged expediency.

Though the *Griswold* decision focused on the right to privacy as peripheral to First Amendment rights, it was noted that other constitutional guarantees manifest this same purpose:

> The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.[67]

*Boyd* v. *United States* [68] recognized that in questions of privacy the Fourth and Fifth Amendments are closely tied, as explained in a passage from the Court's opinion:

> The principles laid down in this opinion [of Lord Camden] affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government and its employers, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense . . . any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods is within the condemnation of that judgment [of Lord Camden]. In this regard the Fourth and Fifth Amendments run almost into each other.[69]

Several of the points made in *Boyd* can be related to the issues of a federal employee's rights, to the nature of the self-incrimination and unreasonable search and seizure protections outside of criminal proceedings. Clearly, the Constitution does not limit these guarantees to a criminal context. In the landmark decision *Miranda* v. *Arizona*,[70] in which guidelines were first set forth for the questioning of suspects to secure the Fifth Amendment protection, the Supreme Court maintained that "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' " [71] The Court further noted that, "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves." [72]

These tenets of *Boyd* and *Miranda* are indeed relevant to employment situations and polygraph-induced confession even though the purpose of such tests is not to elicit incriminating evidence for a

[66] *Ibid.*, p. 486.
[67] *Ibid.*, p. 484.
[68] 116 U.S. 616 (1886).
[69] *Ibid.*, p. 630.
[70] 384 U.S. 436 (1966).
[71] *Ibid.*, p. 460, quoting *Malloy* v. *Hogan*, 378 U.S. 1 (1964).
[72] *Ibid.*, p. 467.

the admissibility of polygraph results as evidence: (1) the jury's role would be undermined by a test purportedly as related to the determination of truth as the polygraph; (2) the test data offered by a defendant couldn't be cross-examined; (3) the problems of assuring that consent to be examined has been completely uncoerced are great; (4) with the polygraph usable as evidence, the presumption of innocence would certainly be damaged by a refusal to take the test; and (5) a polygraph exam could violate the privilege against self-incrimination,[59] as well as other constitutional provisions. These last considerations and concerns are also relevant to the use of polygraphs in employment, where this method of investigation threatens to violate the right to privacy possessed by every individual.

The right to privacy is not one of the *specific* guarantees enumerated in the Bill of Rights. Yet it has been recognized as an implicit right, intended by the Constitution and its framers, a result of the entwinement of express constitutional mandates and necessary to the preservation and viability of these liberties.

In particular, the provisions of the First Amendment have been among those deemed related to the right to privacy. "The right of freedom of speech and press includes . . . freedom of thought . . . Without those peripheral rights the specific rights would be less secure." [60] Freedom in our thoughts and beliefs has been long acknowledged as being within the First Amendment freedom of speech. In *Palko* v. *Connecticut* [61] this point was clearly stated:

> Of that freedom [of thought, and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago as it was, that liberty is something more than exemption from physical restraints . . .[62]

Freedom of thought, then, has been held to be a fundamental right. In fact the connection between liberty of thought and the right to keep those thoughts private is inescapable.

*Griswold,* v. *Connecticut* [63] is a landmark Supreme Court case upholding the constitutionality of this right of privacy. The Court stated that, along with the other amendments, "the First Amendment has a penumbra where privacy is protected from governmental intrusion." [64]

In a concurring opinion, Justice Goldberg urged that privacy does not have to be inferred from enumerated freedoms. Instead, the Ninth Amendment can be turned to, for it "simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." [65]

---

[59] Howard S. Altarescu, "Problems Remaining for the 'Generally Accepted' Polygraph," 53 Boston Univ. L. Rev. 325 (1973), p. 376.
[60] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), pp. 482-483.
[61] 302 U.S. 319 (1937).
[62] *Ibid.*, p. 327. For other related discussions see *Abrams* v. *U.S.*, 250 U.S. 616 (1919), Holmes dissent; *Whitney* v. *California*, 274 U.S. 357 (1927), Brandeis concurrence.
[63] 381 U.S. 479 (1965).
[64] *Ibid.*, p. 483.
[65] *Ibid.*, Goldberg concurrence, p. 492. For another discussion of privacy see *Poe* v. *Ullman*, 367 U.S. 497 (1961), Harlan dissent.



interpretation of polygraph records." [35] Further, when figures were calculated separately, experienced examiners achieved an accuracy of 91.4 percent, whereas the accuracy of inexperienced examiners was 79.1 percent.[36] The enthusiasm expressed by supporters of the polygraph for results such as these seems unfounded. Even an eight or nine percent fallibility figure is substantial, and there is admittedly a large degree of subjectivity in the examiner's estimation of the subject's state of mind. The fact that there are no uniform standards or qualifications which require a minimum level of competence for examiners cast their subjective evaluations into even greater doubt.

Polygraph promoters and examiners generally quote a 95 percent accuracy rate for the tests performed in actual, as opposed to experimental, situations. They also hasten to add that most errors are made in attaching an innocent label to a guilty individual, a fact they apparently view as comforting. The proponents' statistics are based on test results checked against the future dispositions of the subjects: an admission of guilt, confession to a crime, or the judgment of a jury. Yet even these means of verification are not conclusive. Whether or not a person has lied can never be known beyond any doubt; the confession or jury verdict may, in fact, be false or wrong. The staff, in short, has found no independent means for confirming the results of actual polygraph examinations.[37]

There is an established probability theory, however, which purports to sustain the validity of polygraph results. The theory of conditional probability maintains that, unless a diagnostic instrument has been demonstrated to be completely infallible, the probability that it will be accurate in any one test depends upon the prevalence of the condition being diagnosed in the group being tested.[38] In a group of 1,000 subjects, supposing 25 to be liars, and with a 95 percent accuracy rate assumed for the polygraph, the conditional probability for the lie detector is that for every one true liar, or "employment risk," found, two people will be falsely classified as such.[39]

Another objection to the claims of reliability for the polygraph test centers around the meaning of the physiological responses recorded. In hearings held before the House Foreign Operations and Government Information Subcommittee, chaired by Representative John Moss, experts declared that, given a physiological response under the polygraph test procedure, any of three inferences could be made: either the subject was lying; or he was telling the truth but some emotional factor, such as anger or embarrassment, caused the reaction; or the response was generated by a neurotic pre-condition of the subject.[40] Other less frequent or obvious factors possibly affecting the machine-measured replies include extreme nervousness; physiological abnormalities, such as heart conditions, blood pressure problems, headaches and colds; deep psychological problems; the use of drugs and alcohol; fatigue; simple bodily movements; and even the subject's sex.[41] Thus, the fact that peculiar physiological responses may be caused by physiological factors unrelated to whether the subject is lying casts the validity of these tests into further disrepute.

---

[35] *Ibid.*, p. 281.
[36] *Ibid.*, p. 278.
[37] Skolnick, *op. cit.*, p. 699.
[38] *Ibid.*, p. 715.
[39] *Ibid.*, pp. 717-718.
[40] [illegible] 39-41.

Furthermore, are there mental activities besides deception that can cause the physical changes recorded by the polygraph? Psychiatric experts state that any situation or stimuli that produced feelings of frustration, surprise, pain, shame, or embarrassment could be responsible for such physiological responses.[42] In fact, humans do respond differently to emotional stresses. No one would claim the physical responses of different people would be the same even under similar stimuli.[43] Nor, for that matter, has there been any relationship proven between lying and feelings of fear and anxiety:

> . . . people cannot go through life without some lying, and every individual builds up his own set of responses to the act. Lying can conceivably result in satisfaction, excitement, humor, boredom, sadness, hatred, as well as guilt, fear, or anxiety.[44]

Negative polygraph results could be obtained because of feelings such as hostility, possessed unconsciously by a mentally-unbalanced subject.[45]

Are there other individual differences which could affect the polygraph? Studies conducted have shown that many individual factors, including skin pigment, may affect the galvanic skin response, heartbeat, and respiratory response measured by this device.[46] In a study conducted for the Air Force to determine the role played by environmental stress in the ability to detect lies,[47] the experimenters unexpectedly discovered another potential problem area. They found that the galvanic skin reactivity of an individual was not predicated only upon environmental or situational circumstances producing increased perspiration and electrical conductivity of the skin. Instead, it appeared that these physical responses differed among individuals, as recorded by the polygraph, in a way not accounted for in the experimenters' predictions. Further investigation seemed to point to biological, racially attributable differences as the reason.[48]

A related problem inherent in the polygraph test pertains to questions of cultural differences. It is generally recognized that values and moralities—honesty and truth—are, in part, culturally acquired; a serious lie in one person's view could, based on a different personal experience and background, be, in another's eye, inconsequential.[49] This throws further suspicion on the validity of a technique which depends upon accepted notions of morality for its value.

If the public were aware of the fallibility of the polygraph, would its effectiveness decrease? An important feature of the examination procedure, as previously explained, is the attempt to convince the subject of the machine's accuracy. Thus, as one authority notes, "Were the machine regarded as capable of error, fear of detection would be reduced, and this lowering of fear would result in diminishing physiological response." [50] One polygraph study concluded that the more a guilty subject could control his own attitudes and answers, the greater

[42] H. B. Dearman, M.D. and B. M. Smith, Ph. D., "Unconscious Motivation and the Polygraph Test," *The American Journal of Psychiatry*, May 1963, p. 1015.
[43] Skolnick, *op. cit.*, p. 701.
[44] *Ibid.*, p. 700.
[45] Dearman and Smith, *op. cit.*, pp. 1017-1018.
[46] Equal Employment Opportunity Commission brief related to *Circle K. Corp.* v. *EEOC.*, U.S. Ct. of Appeals, 10th Circuit, case No. 72 1367, p. 8 (hereinafter cited as EEOC brief).
[47] S. Kugelmass, "Effects of Three Levels of Realistic Stress On Differential Physiological Reactivities," report for the Air Force Office of Scientific Research.
[48] *Ibid.*, pp. 22-23.
[49] EEOC brief, p. 7.
[50] Skolnick, *op. cit.*, p. 705.



the contamination he could produce in the polygraph results; an intelligent subject could often succeed in eluding detection.[51]

What is the examiner's influence in the polygraph procedure and results? Interpretation is the essence of the process, making lie detecting a highly subjective business. Judgments about the subject's attitude and personality, about the composition of questions, and regarding the meanings of the machine's recordings are all made by the examiner. The results presented are solely the assessment of an operator of the lines recorded on the graphs of his machine. The expertise requisite in making such interpretations raises several questions as to the reliability of polygraph reports. Familiarity with several medical specialties and an understanding of clinical and social psychology should be required and expected of examiners; yet, the curriculum offered by a leading polygraph school, a program lauded by advocates as producing truly reputable examiners, amounts to a mere 244 hours of study with only 14 hours in psychology and 31 hours in "medical aspects." [52] Even the mere possession of an academic degree, unless an advanced one in physiology or psychology, should not be enough qualification.[53] Clearly, the level of most examiner competence across the country, when the finest of the profession receive the minimal training noted here, falls far short of these criteria.

Another consideration is the possibility that examiner bias will be injected into the test. There are examiners who sympathize with the employer who is seeking protection from thieving employees,[54] who believe that most of the people who resist the tests are trying to hide something incriminating,[55] and who maintain that the polygraph is an effective instrument for bringing out a person's compulsion to confess.[56] The chance for an unprejudiced examination and interpretation, with underlying examiner attitudes such as these, greatly diminishes.

With this number of potential troublespots involved, doubt must be cast upon the objectivity, accuracy, and reliability of the polygraph test. It has been noted that the acceptance of the machine is the product of circular logic: belief in the device induces confession, and the rate of confessions creates faith in the polygraph's effectiveness.[57] In reality:

> The polygraph technique only provides measures of various autonomic responses. The stimuli that elicit these responses, the intervening variables (constitutional predisposition, past learning, conscious and unconscious motivation, etc.) and the interpretations made of the resulting graphs are highly complex and are inferences made from more or less incomplete data.[58]

## The Polygraph Test: Constitutionality

The courts have been embroiled in the polygraph issue for a half-century, contending with questions of reliability and, in related contexts, with the deeper constitutional implications for individual rights. Reservations have been expressed again and again concerning

[51] Joseph F. Kubis, "Studies In Lie Detection," report for the Air Force Systems Command, N.Y. June 1962.
[52] Skolnick, *op. cit.*, p. 707.
[53] Burkey, *op. cit.*, p. 87.
[54] Pete J. Perras, "Polygraph Invaluable Tool," *The Charlotte Observer*, July 6, 1971.
[55] Franklin, *loc. cit.*
[56] *Ibid.*
[57] *Ibid.*
[58] Dearman and Smith, *op. cit.*, p. 1019.

# A. B. 817

ASSEMBLY BILL NO. 817—MR. MAY (by request)

MARCH 23, 1973

Referred to Concurrent Committees on Judiciary and Ways and Means

SUMMARY—Creates board of examiners to license polygraph examiners. Fiscal Note: No. (BDR 54-1688)

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to polygraph examiners; creating a board of examiners; providing definition; providing licenses and qualifications therefor; establishing fees; authorizing the board to establish rules and regulations; providing administrative hearings; providing injunctive relief; providing a penalty; and providing other matters properly relating thereto.

*The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:*

SECTION 1. Chapter 648 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 30, inclusive, of this act.

SEC. 2. *As used in sections 2 to 30, inclusive, of this act, unless the context otherwise requires:*

*1. "Board" means the polygraph examiners board.*

*2. "Secretary" means the member of the polygraph examiners board elected by the board to the position of secretary.*

*3. "Internship" means the period prescribed for the study of polygraph examinations and the administration of polygraph examinations by a trainee under the personal supervision and control of a polygraph examiner according to a course of study prescribed by the board at the commencement of such training.*

*4. "Person" means any natural person, firm, association, partnership or corporation.*

*5. "Polygraph examiner" means any person who, for compensation, uses any polygraph or similar device to determine the truth of any statement made by a person examined by him.*

SEC. 3. *1. Any instrument or device used for the purpose of determining the truth of any statement shall record visually, permanently and simultaneously:*

*(a) The cardiovascular pattern of the person being questioned;*

*(b) Respiratory pattern of the person being questioned; and*

*(c) Any other physiological changes which may be recorded or observed in addition to the patterns specified in paragraphs (a) and (b).*

SUMMARY OF ASSEMBLY BILL - 192

The Stanley vs. Illinois U. S. Supreme Court decision (405 U. S. 657) has created a problem in the placement of children for adoption; particularly infants, when relinquished by a mother shortly after birth. Stanley vs. Illinois recognized the parental rights of the putative father. Therefore, the welfare division when accepting children for adoptive placements has held children in foster care for periods in excess of six months awaiting the termination of parental rights of the putative father. In 1974, 16 children remained in foster care over six months awaiting parental termination. Assembly Bill 192, provides for the consideration of the time elapsed during the pregnancy, when the mother of the child has received no support or contact by the prospective putative father. This allowance would enable notification for the termination of parental rights, and a hearing to be held shortly after the child's birth; thereby, accelerating the placement of a child into an adoptive home. The adjustment of the child to an adoptive home is easier for both parent and the child, when the child is three months old or younger. The cost of care, for six months for an infant in a foster home, is a minimum of $660. The changes proposed in Assembly Bill 192, would reduce the nonbeneficial time in foster care for the child, as well as reduce the cost of care.

Under NRS 128, parents whose children are in foster care, have been able to prevent permanent placements, such as adoption for the children, by making a token effort to contact the child. Since this slight effort prevents termination of parental rights, they are able to continue to fail to provide for the support of the child or to provide an adequate home. This action, while beneficial to the parent, has proven very detremental to the child as he continues to experience rejection by the parent and the impermanency of foster care. The proposed changes in Assembly Bill 192, would provide for the termination of parental rights for the parent who only sends a postcard or calls

every six months in order to maintain contact. This change would decrease the time spent in foster care; thereby, reducing the effects on the children and the cost of foster care.

The intent of the Assembly Bill 192 is to clarify the terminology used in NRS 128, as well as to provide for a more rapid termination of parental rights in certain instances.

SE/sf