Banning the Truth-Finder in Employment: The Employee Polygraph Protection Act of 1988

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The law is often asked to resolve disputes between parties with widely disparate interests who have clashed on a particular point. The issue of polygraph or lie detector examinations in private employment is no exception. Supporters of polygraph use espouse the legitimate rights of businesses to protect themselves from employee misconduct. Opponents argue just as vehemently that to probe someone's body to make a determination of whether he is telling the truth is inherently offensive to civil rights. Throw into the fray significant disagreement over whether and to what extent the polygraph machine is effective and it becomes clear that the issue of polygraph examinations in the employment area was ripe for legal action. Responding to these concerns, the United States Congress, after over twenty-five years of debate, passed the Employee Polygraph Protection Act of 1988. The Act attempts to resolve many of the conflicts which surround polygraphs by banning the machine's use except in narrow cases where such use is deemed justified.

This Article will analyze the Act and its likely effects. Part I details the history of the polygraph machine, showing how the battle lines have

2. "The polygraph is indispensable in protecting the customers, employees, inventories, and assets of American business and industry... and they... are entitled to access to the polygraph." Polygraphs in the Workplace: Hearings before the Comm. on Labor and Human Resources, 100th Cong., 1st Sess. 46 (1987) [hereinafter Hearings 1987] (testimony of William J. Scheve, Jr., Pres., American Polygraph Ass'n).
4. See infra notes 16-29 and accompanying text.
been drawn. Part II discusses the Act itself and includes relevant points which the Act does not address. Part III predicts the likely ramifications of the Act in the courts and on employment.

I

In 1929, John Larson developed the first polygraph machine, building on a theory that humans exhibit different physical responses when they are lying than when they are telling the truth. Larson developed a machine which measured the subject’s blood pressure, pulse, and respiration. Later, an assistant to Larson, Leonarde Keeler, added a galvanic skin reading. This is the basic machine in use today. Despite its awe-inspiring name, the lie detector actually just measures a subject’s physiological characteristics in response to questions.

Typically, pneumatic tubes measure the rate and depth of the subject’s respiration; a blood pressure check monitors his cardiovascular activity; and electrodes attached to his fingertips measure his skin conductance. The subject then responds to questions from the examiner while his phys-

6. Comment, Employer-Employee Relations - The Employee Polygraph Protection Act: Eliminating Polygraph Testing in Private Employment is Not the Answer, 11 S. Ill. U.L.J. 355, 357 n.7 (1987) [hereinafter Employer Relations]. For a discussion of primitive methods of lie detection, see Nagle, The Polygraph in the Workplace, 18 U. Rich. L. Rev. 43, 44-45 (1983), where the author discusses the Code of Hammurabi, whereby one accused of lying was thrown into a sacred river and if he did not drown, he was telling the truth. In India, a subject was given dry rice to chew, and if he spit it out, he was deemed not guilty on the theory that one who lies cannot produce saliva. The Arabs would place a hot iron on the tongue of a suspected liar, reasoning that a liar would not produce saliva and, thus, burn his tongue. See also Comment, The Polygraph Protection Act of 1985: Bobbing Pinocchio’s New Nose?, 43 Wash. & Lee L. Rev. 1411, 1412 n.10 (1985) (citing S. Abrams, A POLYGRAPH HANDBOOK FOR ATTORNEYS 11-12 (1977)), stating that in Tibet, retrieving a stone from boiling water indicated truthfulness and in Africa, poison or boiling water was used. See generally Hurd, Use of the Polygraph in Screening Job Applicants, 22 Am. Bus. L.J. 529, 529-30 (1985); Toomey, Compelled Lie Detector Tests and Public Employees: What Happened to the Fifth Amendment?, 21 S. Tex. L.J. 375, 376 (1981). For a discussion of the history of the development of the polygraph, see Hermann, Privacy, the Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing, 47 Wash. L. Rev. 73, 77-79 (1971); Nagle, supra, at 46-47; Toomey, supra, at 376.

7. Hermann, supra note 6, at 77-79; see also Toomey, supra note 6, at 376; Nagle, supra note 6, at 46-47; Employer Relations, supra note 6, at 357.


9. "Conductance," as used in this context, is a measurement of the human body’s resistance. As one sweats, the conductance of the body increases. Supporters of the polygraph claim that as someone lies he tends to sweat more.
iological characteristics are continuously measured. The examiner interprets all changes in deciding whether the subject is telling the truth.10

Polygraph examiners use three general methods to make these truth determinations: the relevant/irrelevant test; the control question test; and the concealed knowledge test.11 The relevant/irrelevant (R/I) test was the first method developed. It requires the examiner to ask both relevant and irrelevant questions. The examiner then measures the physiological response, the theory being that one who is lying will respond differently to questions which are relevant than to those which are irrelevant. Similarly, a truthful subject should have the same reactions to all questions. Thus, the test detects lying subjects based upon physiological changes manifested after being asked the relevant questions.12

The second method, the control question technique (CQT), builds upon the R/I method. The examiner still asks relevant and irrelevant questions, but interspersed are various “control” questions. These questions probe the background of the subject for one of two reasons: either to determine whether the subject shows a pattern of behavior which indicates he is the type of person who will commit the act in question (i.e., stealing from an employer); or to determine the subject’s base by measuring his response to questions concerning situations which all people have faced (e.g., Have you ever stolen anything—ever?), so that his reactions to the control questions can be compared to those of the relevant questions.13 Hence, the

10. It is for this reason that many people feel that polygraphs should not be used. For a discussion of the difference when an experienced polygrapher gives a test as opposed to an inexperienced examiner, see Nagel, supra note 6, at 52; Comment, Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence, 15 U.C. DAVIS L. REV. 113, 124-26 (1981); see also Gardner, supra note 3, at 304-05. For an argument that the device does not detect lies, but that the examiner does, see D. LYKKEN, A TREMOR IN THE BLOOD 85 (1981); Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 YALE L.J. 694, 699 (1961). For an argument that the most experienced examiners will be the most consistently correct, see Horvath & Reid, The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, 62 J. OF CRM. LAW 276 (1971); accord Hartfield, Polygraphs, 36 LAB. L.J. 817, 830 (1985) (citing Office of Technology and Assessment Report, Scientific Validity of Polygraph Testing, Nov. 1983 [hereinafter OTA Report], which states experienced polygraphers were correct 91.4% of the time and inexperienced polygraphers were correct only 77.5%).

11. Wiseman, supra note 8, at 29.

12. A good discussion of the relevant/irrelevant technique can be found in Raskin, The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence, 1986 UTAH L.J. 29, 32-34. The article discusses specific questions which can be asked and how they are applied. See also Hartfield, supra note 10, at 830, stating that both relevant and irrelevant questions must be asked during a polygraph examination. For a general discussion on polygraph interrogation, see Hermann, supra note 6, at 79-83.

13. Wiseman, supra note 8, at 29. For a discussion of the control question technique, see supra note 12.
R/I and CQT are similar; each tries to determine deception from a certain base; however, the base is different for each test.

The third method, the concealed information technique (also called the guilty knowledge test), is more limited. It seeks to find deception by asking a series of questions including at least one of which only a person with knowledge of the act in question would know is important. The theory behind this technique is that those who have no connection to the incident will react the same to all questions, while those who were involved will react differently to questions directly concerning the incident. Nonetheless, in each of the methods, the polygraph examiner does not detect lies, but simply interprets results of physiological changes in relation to the predicted response for truth tellers and for liars.

Many studies have tried to determine the accuracy of polygraphs. Their results are varied, ranging from Department of Defense estimates of a near perfect record of detecting deception to American Medical Association claims that the accuracy rate is so low that an examiner might just as well flip a coin to determine whether the subject is lying. Between these extremes are many other studies, none of which proves conclusively the accuracy of polygraph results. Inherent problems with any study done to determine the polygraph's validity may be one explanation of this uncertainty. There are basically two kinds of studies, laboratory and field. Laboratory studies involve assigning volunteers to roles of either the "guilty" or "innocent" party in a mock theft. The polygraph examiner then attempts to determine which subjects are telling the truth and which are lying. The difficulty with such tests is that the "guilty" subject does not have a guilty mental state; since he knows nothing will happen to him if he is caught, his

14. Wiseman, supra note 8, at 29. For an argument that the guilty knowledge test should be the only lie detection test allowed, see Kleinmuntz & Szucko, On the Fallibility of Lie Detection, 17 LAW & SOCIETY REV. 83, 98-101 (1983).

15. Wiseman, supra note 8, at 29.

16. Hearings 1987, supra note 2, at 54. The Department of Defense report suggests that it tested 3,993 persons with only 13 being found to be deceptive, eight of whom made admissions during the testing of their guilt. The Defense Intelligence Agency reports that of 13,595 persons tested, only 17 were found to be deceptive and many had satisfactory explanations for the polygraph reading. It is not known how many false negatives (that is, guilty people who actually tested innocent) were found by the study.

17. Hearings 1987, supra note 2, at 19. The AMA indicated that the best that could be said was that the polygraph was an indication of guilt, but that a subject is no better off than if the examiner had flipped a coin to decide whether or not he was being truthful.

18. For a compilation of polygraph studies with widely disparate results, see Tiner & O'Grady, Lie Detectors in Employment, 23 HARV. C.R.-C.L. L. REV. 85 (1988). The studies cited there indicate a high reading of 91% accuracy and a low of nearly 50% accuracy.

19. Id. at 92.
responses may differ from those of an actual guilty party. Therefore, the examiner may have a more difficult time determining who is telling the truth. Field studies, on the other hand, compare the results of polygraphs given to suspects with their final adjudication. The problem with this approach is obvious. Not all those who are adjudged guilty actually are, and vice versa. Hence, the question of which process is more accurate is not clear. If the polygraph examiner determines the subject was innocent, but the criminal process adjudges him guilty, it is not clear which decision is correct.

One study tried to alleviate this problem by examining the results of one hundred polygraph subjects, fifty of whom later confessed to the full crime and fifty where another confessed to the crime. The study found that the false positive rate—an innocent person being labeled as guilty—was 37 percent, and led the authors to conclude "the lie detector test is indeed highly fallible, and that this fallibility translates into a strong bias against the innocent respondent." The majority of the field studies have concentrated on polygraphs given to criminals and to alleged participants in other identifiable incidents, and not in the area of pre-employment screening. Whether the results of these studies can transfer easily into the pre-employment screening area is unknown. Such pre-employment poly-

20. Id. This study details four laboratory studies of polygraphs. One done by the University of Utah in 1975 staged a mock theft and student volunteers were assigned to either the "guilty" or the "innocent" roles. The study found that 35% of the tests were inconclusive and 12% were incorrect. The highest percentage reached by any study was an 80% correct rate for deceptive subjects. Interestingly, the highest correct reading cited was by a visual examination of the subjects by the examiner—86%.
21. Id.
23. Id.
24. Hermann, supra note 6, at 85, notes:
The polygraph is designed to obtain a response with regard to a specific incident. Its utility for determining a broad question such as the suitability of an individual for a particular position is marginal when the broad inquiry is being made for predictive purposes. It is doubtful that the polygraph is a reliable means of determining whether an individual will be a good worker, or will be dependable, or will steal.
Id. (footnote omitted). The author notes three other objections to the use of polygraphs in pre-employment screening: 1) that it can only obtain information on post-conduct, 2) often the ones who should be caught get away, and 3) civil libertarian grounds. Id. at 85-86. See also Skolnick, supra note 10, where the author states:
Whatever the unconditional accuracy of the lie detector, the number of false positives it diagnoses is going to be related to the number of true positives in the population being tested. This fact would make the use of lie detectors, even if they had high unconditional accuracy, questionable in those situations, such as personnel screening in which there are a few
Polygraph examinations have been called "quickie" tests because they last only about fifteen minutes. Studies have shown consistently that the shorter the polygraph examination, the less chance it has of being accurate. In the context of widespread polygraph use, this inaccuracy becomes very important. The private sector gave an estimated two million polygraph tests in 1987, up from 250,000 just ten years previously. Of these, over 70 percent were pre-employment screening or "quickie" tests, 15 percent were post-employment random tests and another 15 percent were responses to a specific incident of conduct. Thus, private employers gave the least accurate of the polygraph exams more frequently than other types.

true positives in the population.

Id. at 727. Another factor which may tend to increase the number of false positives is the fact that the polygraph operator works for the employer and is more likely to keep his job if he sacrifices some false positives in order to catch all of the suspected individuals. Hence, he has a reason to call as many people as possible untruthful. For an analysis of this phenomenon, see L. TAYLOR, SCIENTIFIC INTERROGATION: HYPNOSIS, POLYGRAPHY, NARCOANALYSIS VOICE STRESS AND PULSOMETRICS 243-44 (1984) (cited in Tiner & O'Grady, supra note 18, at 100-01).

25. The name comes from the fact that the test given is a short 15 minute test which purports to determine if the subject is lying. Even many of those who support the polygraph believe that this is an invalid test. F. Lee Bailey, a strong supporter of polygraphs, so indicated, stating that in his view the quickie tests were a misnomer and that to get an accurate polygraph test one would need a minimum of several hours. 1988 U.S. CODE & CONG. ADMIN. NEWS (102 Stat.) 731.

26. See supra note 18; see also 134 CONG. REC. S1797 (daily ed. Mar. 2, 1988) (statement of Sen. Hatch) ("I am sick and tired of people using this instrument in an improper way, knowing that with 15-minute quickie polygraphs, virtually all of them are not accurate."). The American Polygraph Association is quoted as saying:

Despite many years of development of the polygraph, the scientific evidence is still unsatisfactory for the validity of psychophysiological indicators to infer deceptive behavior. Such evidence is particularly poor concerning the polygraph use in employment screening.

Id. at S1644.

27. See, e.g., Hearings 1987, supra note 2, at 9, 18 (testimony of Ernest Dubester and John F. Berry III). The two million figure has been attributed to the American Polygraph Association; however, its president denied claiming the two million figure. Id. at 53 (testimony of William J. Scheve, Jr.).


29. Studies indicate that a large number of businesses use the polygraph machine. One study attempted to determine how many of the major United States firms used the polygraph, the manner and purpose of the tests, and the rationale for using the polygraph. The study (done in 1978) indicated that over one-fourth of all major firms used the polygraph machine, especially banks and retail companies. Of these companies, one-third used polygraphs in pre-employment screening and for random post-employment tests. Ninety percent, however, used polygraphs to investigate specific instances of conduct. Another significant number was that 40 percent of the companies not using polygraphs at that time would consider using them in the future. Hard, supra note 25 at 533 n.32 (citing Belt & Holden, Polygraph Usage Among Major U.S. Corporations, PERSONNEL J. 80 (Feb. 1978)).
The problems surrounding the polygraph did not go unnoticed among the states. When the federal Polygraph Protection Act was passed, only seven states had not enacted any kind of legislation concerning the use or regulation of polygraphs. Thirty states not only ban an employer from requiring a polygraph examination, but also ban an employer's requesting the employee to take an examination. Ten other states ban only a requirement of the use of the polygraph as part of employment, but allow an employer to request the exam be taken. Finally, twenty-one states have imposed various forms of regulation on the polygraph machine and on polygraph examiners, but have not banned its use.

When the federal legislation was proposed, much of the opposition in Congress was based on the fact that most of the states had acted in regard to polygraphs. The opponents concluded that the federal government should not intrude in an area which was governed, for the most part, by state law. Supporters, however, claimed that the state systems and controls did...


34. See, e.g., Minority View of Senator Quayle, U.S. Code Cong. & Admin. News, supra note 25, at 744-45. Senator Quayle opposed the legislation, not based upon any belief of the reliability of the polygraph, but because he does not believe that this is an area in which the federal government should intrude. Compare the opinion of Justice Stevens: "Today there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions..."
not work. They pointed to situations where a company that wished to hire an employee in a state which banned polygraph use would instead "hire" the employee in a nearby state that did not prohibit polygraphs, force the prospective employee to take the exam, then if the subject passed the exam, "transfer" her back to the original state.\textsuperscript{35} In this manner, employers could and did circumvent tough state laws regulating the use of polygraphs and take advantage of more lax restrictions in neighboring states.

Dismissals of employees for failing polygraph examinations and for refusing to submit to an examination have produced many lawsuits. Decisions in these suits generally parallel the jurisdiction's laws concerning polygraph examinations. States which have not passed laws on the subject hold that no cause of action arises because an employer can fire an at-will employee for any reason or no reason at all and that the discharge violates no public policy.\textsuperscript{36} States which have restricted polygraph use have allowed a cause of action for wrongful discharge against an employer who dismisses an employee based upon the failure of or refusal to take a polygraph examination.\textsuperscript{37} Thus, in general, for a dismissed employee to recover on a theory of wrongful discharge, the state in which he was employed must have restricted the use of polygraphs.\textsuperscript{38} Further, government employees who have challenged mandatory polygraph tests as a condition of employment on constitutional grounds have had limited success. While some courts hold that the government has an interest which overrides the protection, others have held that the mandatory use violates the Constitution.\textsuperscript{39}

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\textsuperscript{35} See, e.g., \textit{Hearings 1987, supra} note 2, at 83-84 (statement of Floyd S. Perlman), where Mr. Perlman describes his application for employment process. Mr. Perlman was applying for a position in Maryland, which allows an employer to request a polygraph exam. He was told that if he refused, he would be assigned to the Virginia office where he would have been forced to take an examination. \textit{See generally Gardner, supra} note 3, at 310-14; Hermann, \textit{supra} note 6, at 97-102; Hurd, \textit{supra} note 6, at 541; Comment, \textit{supra} note 6, at 1418-22.


\textsuperscript{38} \textit{But see}, e.g., Hood v. Alabama State Personnel Bd., 516 So. 2d 680 (Ala. Civ. App. 1987) (holding that an employee could not be fired for refusing to take a polygraph even though there was no Alabama law prescribing its use).

\textsuperscript{39} See, e.g., Anderson v. City of Philadelphia, 845 F.2d 1216 (3d Cir.)
II

It was against this backdrop that Congress passed the Employee Polygraph Protection Act. The Act attempts to provide a balance between the competing interests of the employee's right to privacy and the employer's right to protect his business. It does this by banning the use of the polygraph for any pre-employment screening use, yet retaining its use in well-delineated circumstances where a theft of an employer's property has occurred. The basic premise of the Act is that the "quickie" polygraph tests given during pre-employment screening are inherently inaccurate and that they should not be allowed; however, when given in a thorough manner and when not used as the sole criterion for determining guilt or innocence, the polygraph can be an effective tool to help prevent employee theft.

The Act defines "lie detector" broadly to include not only the polygraph test, but also voice stress analyzers, deceptographs, psychological stress evaluator or any other device which purports to determine the truth or honesty of an individual. By using the broad definition, Congress brought within the auspices of the Act all tests and machines which attempt to determine whether an individual is lying. Thus, although the Act's title suggests that only the polygraph is treated, its coverage is actually broader.

The Act also gives a broad definition to "employer", covering anyone who acts directly or indirectly in the interest of any employer, thereby covering both the employer itself and its agents.

The Act states that no employer may: request, require, suggest, or cause any employee or prospective employee to take a polygraph examination; use any results of the lie detector test; discharge an employee or deny employment to a prospective employee who refuses to take a lie detector test; nor discharge an employee because he filed a complaint or caused any proceeding to be instituted based upon a violation of the Act. Thus, the Act proscribes not only the use of polygraph tests and their results, but also bans actions by an employer which are taken in retaliation to an employee exercising his rights under the Act. This prevents an employer from doing indirectly what he cannot do directly—fire an employee for not taking a polygraph examination.

1988), holding that governmental interests overrode the constitutional protections, and Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation, 746 S.W.2d 203 (Tex. 1987), holding that the mandatory polygraph test offended the employee's right to privacy.

41. Id. § 2001(3).
42. Id. § 2001(2).
43. Id. § 2002(1)-(4).
44. Without this protection, an employer could fire an employee and frustrate the purpose of the Act. The retaliation clause is similar to the judicially created doctrine banning retaliatory eviction; see, e.g., Robinson v. Diamond Housing

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The ban on polygraphs is effective for both employees and prospective employees. The Act bans the unreliable “quickie” lie detector along with other, longer tests. Further, it requires that all employers post a notice, prepared by the Secretary of Labor, of the Act’s provisions. The notice must be posted in a conspicuous area where notices are generally posted for both employees and applicants.

The Act has separate enforcement provisions. It states that an employer who violates the Act can be subject to a civil penalty of up to $10,000, based upon the employer’s previous record and the gravity of the violations. It provides the Secretary of Labor with the power to bring an action in federal court to enjoin an employer from further violations. An employee cannot waive his rights under the Act unless such waiver is part of a written settlement. Finally, and most importantly, the Act creates a private cause of action for employees and prospective employees against employers for its violations. The employer can be held liable for any appropriate legal or equitable relief, including reinstatement, employment, back wages, promotion, and benefits. The Act provides for Federal and State court

46. Id. § 2003. The Secretary of Labor must distribute the notice within 90 days after the effective date of the Act. Temporary regulations were issued by the Department of Labor on October 21, 1988. These temporary regulations will govern the enforcement of the Act from its effective date until the final regulations are published. The Labor Department’s Employment Standards Administration has noted several issues subject to change such as the scope of the exceptions and the definitions of “prospective employee” and “on-going investigation.” An analysis of these concerns can be found at 57 U.S.L.W. 2277-78 (1988).
47. Employee Polygraph Protection Act of 1988, 29 U.S.C.A. § 2002(1)-(4) (1988). The notice must be placed in an area where notices are generally posted for applicants because the Act covers prospective employees. Obviously, prospective employees would not be able to see the notice if it were placed only in employees’ areas; hence, the additional protection is required. Section 2004 of the Act empowers the Secretary to make inspections to ensure that the notices are posted and also gives him power of subpoena for any hearing or investigation under the Act.
48. Id. § 2005(a)(1)-(2). The Act also states that the fines shall be collected in the same manner as fines under the Migrant and Seasonal Agriculture Worker Protection Act in § 2005(a)(3).
49. Id. § 2005(b).
50. Id. § 2005(d). This clause shows that any employee’s right to be free of the polygraph cannot be waived at all. It is intended to avoid strong-arm tactics by an employer to get an employee to freely give his “consent.” See, e.g., Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1987). However, reasonably, the Act allows an employee to waive his rights pursuant to a written settlement—a device to help settle lawsuits before they go to trial.
52. It would, of course, be impossible to reinstate an employee who has never been hired, a prospective employee. Damages for these persons would probably more likely take the form of monetary recoveries.
jurisdiction for such causes of action and a three year statute of limitations. The court as well has discretion to award reasonable costs including attorneys’ fees to the prevailing party. Significantly, the Act does not create any cause of action against the polygraph examiner or the company employing the examiner. Thus, the onus of compliance falls squarely on the shoulders of the employer, who is solely responsible for any liability which may result from a violation of the Act.

The Act provides for several situations (discussed below) where an employee can be required to take a lie detector test, regardless of the Act’s general prohibition. In these situations, the Act secures certain rights to such employees. The employee’s primary right is that the employer cannot use the polygraph examination as the sole basis for taking an employment action, whether dismissal, denial of employment or promotion, or other action. It can be used only as supporting evidence for the decision. Further, the Act limits the types of questions an examiner may ask, and states that the employer may not administer the exam if the examinee’s physician provides sufficient written evidence that the examinee is medically at risk if he takes the exam. If the employee takes the examination, the Act mandates that the examinee may terminate the test at any time and that the employer may not use such refusal or termination as the sole criterion for making an employment decision. The Act details other rights of employees who are subject to a polygraph test for the pre-test, actual test, and post-test phases.

54. See infra notes 60-78 and accompanying text.
56. Id. § 2007(b)(1). For example, the employee cannot be asked about his religious beliefs, beliefs on racial or political (including union activities) matters, nor anything dealing with sexual behavior. These types of questions were often asked in the past, often with no justifiable reason. Many people found these questions offensive and opposed polygraph exams because of them. See generally Hearings 1987, supra note 2, at 125-26 (statement of William H. Wynn) (citing OTA report, supra note 10, at 32); Gardner, supra note 3, at 299-300; Hermann, supra note 6, at 79-88; Tiner & O’Grady, supra note 18, at 87-89; Comment, Employee Polygraph Testing, supra note 3, at 299-300.
57. The rights granted are very specific. In the pre-test phase, the subject must be provided with reasonable written notice of the date and location of the exam, as well as his right to obtain legal counsel. The examinee must also be told in writing of the nature and extent of the polygraph exam and whether two-way mirrors or other observation devices will be used. A recording of the test may be made by either the examiner or the subject, as long as both agree to it in a written statement. Further, the subject must sign a written statement informing him: that he cannot be forced to take the test as a condition of employment; that any statements can be used as evidence in an employment decision; the limitations imposed by the Act; his legal rights and remedies for violations of the Act; and
In addition, the maximum number of tests an examiner can give is five per day and no test shall be given for less than 90 minutes. The Act requires examiners to be licensed in the state in which they practice (if state law so requires) and to post $50,000 worth of professional liability coverage. Information obtained during a polygraph examination is confidential. The examiner can release information only to the employee, the employer, or to a court of competent jurisdiction. Employers can release the information only to the same persons and to governmental agencies in connection with criminal conduct.

Most of the controversy over the statute stems from the exemptions which it grants. Critics question whether the premise of the Act—that lie detectors are inaccurate—is at odds with allowing the tests in the situations where exemptions have been granted. To a certain degree, this argument is appealing. But it does not address the fact that the lie detector tests banned are the ones which are essentially inaccurate, and the tests which are longer and more accurate are the ones for which exemptions were granted. Congress included the exemptions, it seems, to bridge the gap between protecting employee’s privacy and the reasonable business requirements of the employer.

the rights of the employer. Finally, the employee must be allowed to review all the questions to be asked before the test is given. Employee Polygraph Protection Act of 1988, 29 U.S.C.A. § 2007(b)(2)(A)-(E) (1988). During the actual test, the examiner is not allowed to ask questions that had not previously been reviewed by the employee. Id. § 2007(b)(3). Finally, during the post-test phase, before any employment action is taken, the employer must interview the employee based upon the results of the test, provide the employee with a written copy of any opinion or conclusion gleaned from the test, and further provide the employee with a written copy of the questions asked during the test.

58. Id. § 2007(c). The Act further details that the examiner can base any conclusions only on admissions by the employee during the test and interpretations of the charts. Furthermore, the examiner is not allowed to render any employment recommendation based upon his findings and must keep all records, opinions, charts, questions and other matters relating to the test for at least three years.

59. Id. § 2008. “Information” is not defined in the Act. It is possible to interpret that “information” does not include inferences drawn by the examiner as to the subject’s truthfulness. Thus, the examiner’s opinion as to the subject’s veracity can be freely dispersed. This, however, would not further the Act’s goal of protecting employees who take polygraph exams and the Act is not likely to be interpreted in this manner.

60. See, e.g., 134 CONG. REC., supra note 26, at S1697-99, where Senator Quayle argues that the exemptions represent a double standard. See also St. Louis Post-Dispatch, September 18, 1988, at F1, col. 5, where a polygraph supporter rhetorically asks “If they’re so bad, how come the Government can use them?”

61. 134 CONG. REC., supra note 26, at S1697-99. Senator Quayle notes that he did not oppose the bill because of any belief in the validity of the polygraph but because he felt it was not an appropriate area for federal legislation. He argues that if polygraphs are unreliable for one group of people, they should be unreliable for all. See also Post Dispatch, supra note 60, at F1, col. 5.
The first exemption, and the one which sparked the most controversy, is the exemption for governmental employees. The Act specifically states that it does not cover all federal, state and local governments.62 This provision has been derided as another point where Congress placed itself above the law.63 However, a closer examination shows that this is not necessarily the case. One reason is that the committee which reported the bill, Senate Labor and Human Resources, does not have jurisdiction over public employees.64 The main reason, however, is that the polygraphs which the government gives are long exams covering a wide range of topics so that the subject is tested fairly.65 It has been shown repeatedly that this type of test generates much more accurate results than the short exams employers give in pre-employment screening.66 Another reason is that the legitimate concerns of the government often override concerns about employee rights to privacy.67 Finally, the subject may assert constitutional rights, such as the right against self-incrimination and the right against unreasonable searches, when the government gives the tests.68 Thus, the government may not ask many objectionable questions which private employers could ask prior to the ban on lie detectors.

The second exemption denies any ban on lie detector tests given to employees working in National Defense and Security positions.69 These include not only employees of the Department of Defense, Central Intelligence Agency, and other defense agencies but also to employees of private contractors who work on national defense projects for the government.70 The reason for this exemption is the overriding concern of national security in relation to the employees' privacy. It is worthy of note, however, that the same constitutional protections afforded to governmental employees may be applicable in this exemption, in that the government is giving the test.71 The Act also provides for exemptions to the ban on lie detector

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64. Policy decisions of whether to extend the protection of the Act to public sector employees are left to committees with both jurisdiction and expertise. 1988 U.S. CODE CONG. & ADMIN. NEWS 751.
65. The government does not use "quickie" polygraph examinations. See, e.g., 134 Cong. Rec., supra note 26, at S1703-04, where Senator Kennedy explains that the Defense Intelligence Agency exams last between four and eight hours as opposed to the 15-minute exams often given in the private sector.
66. See supra notes 24-26 and accompanying text.
67. See infra notes 94-103 and accompanying text.
68. See 134 Cong. Rec., supra note 26, at S1703; see also Hermann, supra note 6, at 126-49; Hurd, supra note 6, at 541-48; Nagel, supra note 6, at 70-73; Toomey, supra note 6, at 376-85; Wiseman, supra note 9, at 33-55.
70. Id.
71. See supra note 67.
tests for Federal Bureau of Investigation contractors, Security Services, and for drug manufacturers and distributors.\textsuperscript{72}

The final major exemption is the limited exemption granted to businesses for ongoing investigations.\textsuperscript{73} This exemption considers the legitimate interests of a business in preventing theft. For the exemption to apply, there must be an ongoing investigation into an economic loss sustained by a business.\textsuperscript{74} Further, the employer must show the subject employee had access to the subject property and that there is a reasonable suspicion that the employee was involved in the theft.\textsuperscript{75} Finally, the employer must present a signed statement to the employee before the test is given which details the incident being investigated, identifies loss, states that the employee had access to the property and shows why reasonable suspicion is cast on the employee.\textsuperscript{76}

Thus, if an employer can reasonably identify an employee who may be involved in an incident of economic loss, and takes the proper procedural steps, the employer can use a polygraph test as one indication of the subject's involvement in the crime. This situation, when a business has suffered an economic loss, is one in which most businesses feel the use of the polygraph is necessary.\textsuperscript{77} Businesses can use the results of a polygraph examination as evidence, but not the sole evidence of the subject's involvement in the crime. It is also interesting to note that under the ongoing investigation exemption, unlike the government exemptions, the employer may use only a polygraph machine and no other lie detection device.\textsuperscript{78}

\textsuperscript{72} Employee Polygraph Protection Act of 1988, 29 U.S.C.A. §§ 2006(c)(e)(f) (1988). These exemptions were granted because the Congress felt that the needs of the industry outweighed the rights of employees. The FBI exemption includes the Bureau itself and its contractors. The exemption for Security Services covers all businesses whose primary business purpose consists of providing armored car personnel and the like, whose function is to protect facilities which have a significant impact on the safety of people, public water supplies, toxic chemicals, public transportation or currency. The drug exemption covers employers who manufacture and distribute drugs or controlled substances listed in Schedule I, II, III or IV of § 202 of 21 U.S.C. 812 (1986). The exemption, however, only applies to prospective employees who would have direct access to the substances or to a current employee if there is an ongoing investigation and the employee had access to the subject matter of the investigation. \textit{Id.}


\textsuperscript{74} \textit{Id.} § 2006(d)(1).

\textsuperscript{75} \textit{Id.} § 2006(d)(2)-(3).

\textsuperscript{76} \textit{Id.} § 2006(d)(4).

\textsuperscript{77} See Hurd, \textit{supra} note 6, at 533-34 citing a study in which 90 percent of the business using polygraphs used them in connection with the investigation of a specific economic loss.

\textsuperscript{78} Actually the only times the word "polygraph" appears in the Act is in the exemption provisions and when the manner of interrogation are discussed, Employee Polygraph Protection Act of 1988 29 U.S.C.A. §§ 2005, 2006 (1988). The prohibition, therefore, covers all forms of tests designed to determine a subject's
appears that Congress believed that it could detail acceptable procedures only for the polygraph and thus created a near fatal ban on the use of other lie detection devices in private employment. This exemption tries to strike a middle ground between the extremes of competing interests. The employee’s right to privacy cannot be violated by the administration of a polygraph exam unless there has been an economic loss to the business and such loss is reasonably attributable to the employee.

This middle ground appears to be fairly well-conceived. It avoids the unfairness of the “quickie” examination given during pre-employment screening, which employees often view as an infallible measurement of the subject’s guilt or innocence, even though the results from this test have been proven less reliable than longer polygraph exams. But the Act also leaves open the possibility of using the longer, more reliable polygraph test when the employer needs it most—after a theft has occurred—as long as the results are not used as the sole criterion for dismissal. Those who oppose polygraph examinations on purely civil libertarian grounds 79 undoubtedly will not be satisfied with the Act, since it does not create a total ban. On the contrary, polygraph examiners and those who believe in the machine’s accuracy 80 will also be unhappy, since the Act limits the right to perform polygraph examinations in private employment. But, based upon the legitimate needs of both sides, a balanced approach as enunciated in the Act is probably the best position to take.

There are at least two areas of interest the Act does not address. The first concerns situations, apart from purely economic loss, in which an employer might legitimately use a polygraph exam. An example is found in Ising v. Barnes Hospital Corp. 81 where an at-will employee was asked to take a polygraph examination to determine if she was responsible for various acts of harassment and violence against her supervisor. The employee refused to sign a consent form prior to taking the exam and subsequently was dismissed. The court ruled that the dismissal was valid because Missouri did not have a statute concerning polygraph regulation. 82 Under the Employee Polygraph Protection Act, this situation would not trigger the ongoing investigation exemption allowing the employer to give a polygraph exam because there was no economic loss. It would appear, however, that the policy reasons for the exemption—the legitimate concerns of a business

veracity. Id. §§ 2001(3)-(4). In fact, Senator Quayle offered an amendment which would have allowed an exception for other “scientifically valid” tests, but the amendment was defeated. 134 Cong. Rec., supra note 26, at S1699.

79. For a discussion of civil libertarian objections to the polygraph, see Tiner & O’Grady, supra note 18, at 85-113; Wise, supra note 3, at 30-54.

80. For arguments on the polygraph’s validity, see Horvath & Reid, supra note 10, at 276-81; Nagel, supra note 6, at 51.


82. Id., at 625-26.
to protect itself—would apply in a situation of supervisor harassment as well as for economic loss and that, therefore, a polygraph examination similarly controlled might be applicable in situations such as these. Congress may not have wanted to extend the exemption beyond the situation where an economic loss occurred, simply because economic loss is an objective measure of harm to the business which is easy to identify, whereas other damage less objectively measured could lead to abuse.

The second situation not addressed in the statute is a time limitation. Studies have shown that the longer the time lapse between the occurrence of an incident and the time of the test, the more likely the possibility of an incorrect polygraph result. This is due, at least in part, to the psychological reaction which, over time, makes one believe that what he thinks is true actually is true. The longer the exam is delayed, the more the subject believes certain things to be true and the chances are more likely that a guilty party can pass a polygraph test. One possible reason that this was not addressed is that the policy of the Act is to avoid false negatives from polygraphs—that is, innocent people being labeled as guilty—and a time lapse increases only false positives or guilty people being labeled as innocent. Therefore, a time limitation may not further the purpose of the Act. As a practical measure, a maximum limit on the time an employer can invoke the ongoing investigation exemption should have been set, if only for the same reasons as a general statute of limitations—the barring of stale claims.

III

Many consequences will flow from the passage of the Act; some are predictable, others are not. The first consequence, obviously, will be a decrease in the number of polygraph examinations and commensurate decrease in the number of licensed polygraphers who can continue making their living giving exams. Since the vast majority of polygraphs given were during the now banned pre-employment screening, it is likely that

83. See, e.g., J. Reid & F. Inbau, Truth and Deception, The Polygraph ("Lie-Detector") Technique 228 (2d ed. 1977).
84. See id.
85. See, e.g., 134 Cong. Rec., supra note 26, at S1644, where Senator Hatch states that over 320,000 Americans are falsely branded as liars each year. See also id. at S1799 where Senator Kennedy echoes the thoughts of Senator Hatch.
86. See supra notes 83 and 84 and accompanying text.
87. See Post Dispatch, supra note 60, at F1, col. 5 where a polygraph operator states, "Look in the phone book now and there's about 15 (polygraph) companies. Next year we'll be lucky if there's seven. Somebody's not going to make it."
88. The Act does not define what type of an investigation is required, nor how much effort is necessary before an employer can request a polygraph. However, since the polygraph had been used previously as the sole method of investigation, the fact that other efforts may be required before the polygraph can be used could be enough to make employers avoid the use of the polygraph.
many polygraph companies will fail. Given that employers are the responsible parties under the act, it is likely that most employers will cease using polygraphs during pre-employment screening. The number of businesses that will discontinue using polygraphs entirely is harder to predict. The costs of pursuing the investigation into a specific incident of thievery as required by the Act can be high, and these costs could force employers to turn to methods other than polygraph tests to protect their business interests. Further, states which already have strict statutes on the use of polygraphs will not be affected, since the Act does not preempt statutes whose provisions are more restrictive.

Beyond these, however, the consequences are less clear. Prior to the passage of the Act, the courts faced a steady stream of litigation in one of two forms—either governmental or non-governmental suits. An analysis of both types of litigation shows that this volume of litigation is unlikely to subside to any meaningful degree. First, suits involving the government are unlikely to decrease, and may even increase, because of the Act’s federal, state and local government exemption. However, a constitutional challenge to the use of polygraphs may make polygraphs invalid for the government as well. Such a challenge is likely to be based on self-incrimination, unreasonable search and seizure, as well as the public employee’s right to privacy.

89. One person believes that since businesses will not want to concern themselves with investigations, an entire shift would be fired when some money was stolen instead of only the person labeled as guilty by the polygraph. Thus, he claims, more people will lose their jobs, not fewer. Post Dispatch, supra note 60, at F1, col 5. Other possible methods of employer protection include background checks, reference checks and other traditional employment screening methods.


91. See, e.g., 1988 U.S. CODE CONG. & ADMIN. NEWS 733.

92. Suits involving the government generally involved claims based in firings for failing or refusing to take a polygraph test. The claim usually was a violation of constitutional rights. See, e.g., Anderson v. City of Philadelphia, 845 F.2d 1216 (3d Cir. 1988).

93. Non-governmental actions were generally brought on a wrongful discharge basis - either as being contrary to an express statute or as a public policy exception to the traditional employee-at-will doctrine that an employee can be fired for any reason or no reason at all. See, e.g., Ising v. Barnes Hosp., 674 S.W.2d 623 (Mo. Ct. App. 1984) (arguing unsuccessfully that the firing was contrary to public policy); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (holding the firing to be a violation of a definitive statute).


95. U.S. CONST. amend V.

96. The constitutional right to privacy was established in Roe v. Wade, 410 U.S. 113 (1973).

97. U.S. CONST. amend IV.
The Third Circuit faced these issues squarely in Anderson v. City of Philadelphia,98 where the court held that there was no constitutional violation when a police department gave a prospective officer a polygraph test. The court ruled that it was not wrongful for the department to dismiss the officer for failing the exam.99 But a contrary result was reached in Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation,100 where the Texas Supreme Court held that the mandatory polygraph policy of the Texas Department of Mental Health and Mental Retardation was offensive to the Texas Constitution (provisions of which are similar to the United States Constitution).101 The court decided that the mandatory policy was an unreasonable invasion of the Department employees' privacy and that no overriding state interest compelled the policy, rendering it unconstitutional.102 The fact that Anderson dealt with police officers while Texas Mental Health dealt with mental health workers distinguishes the cases, insofar as there is a stronger public policy argument when dealing with police.

The ban on private employers' use of polygraphs can provide a basis for courts to decide that the government may not use them either, except in cases where the interests of the government far outweigh the interest advanced in not giving the examinations. The fact that the Texas Mental Health case was referred to on the floor of the Senate103 as a major reason why the government should be excluded from the Act enhances this conclusion. Courts may be more likely to view polygraph tests given to government employees as impinging on privacy, in that the Senate believed the Constitution would protect these employees and consequently excluded them from coverage under the Act.

The second major source of litigation has been private employee actions based upon dismissals for either failing a polygraph examination or for refusing to take an exam.104 Significantly, few, if any, reported cases deal with the situation where an employee is not hired after taking a pre-employment screening test.105 Thus, the largest polygraph use, pre-employment screening, was responsible for the fewest number of lawsuits regarding polygraphs. Since the major litigable issue—specific incident situations—have not been banned, it is likely that there will not be a significant decrease in the number of lawsuits brought. However, because the steps

98. 845 F.2d 1216 (3d Cir. 1988).
99. Id. at 1218-19.
100. 746 S.W.2d 203 (Tex. 1987).
101. Id.
102. Id. at 204-6.
103. See 134 CONG. REC., supra note 26, at S1641 (statement of Senator Kennedy).
104. See supra note 93.
105. No reported cases were found which dealt with polygraphs in pre-employment screening.
an employer must take before requesting a polygraph examination are spelled out in the Act, an employer can more readily determine whether his request for an exam will be legal and possibly avoid a lawsuit. But nonetheless, the Act contains several requirements that an employee can claim his employer did not fulfill. For example, employees may challenge whether there was the requisite "reasonable suspicion," whether the incident in question actually occurred, and whether they had proper notice — notice both as to what the incident was and notice of their legal rights.

Finally, polygraph examiners may be a likely source of a constitutional challenge to the Act itself, who would gain by barring its enforcement. While the results of such a suit are uncertain, some guidance can be gleaned from the constitutional challenge to an ordinance banning polygraph tests of minors in *Amato v. County of Suffolk.*

In *Amato*, the plaintiff claimed the law violated due process because it was too vague, and was unreasonable, arbitrary and capricious. He advanced three arguments asserting the unreasonableness of the law, all of which the court rejected. The first argument was that only the polygraph examiner, and not the employer, would be subject to criminal sanctions. The court rejected this contention, stating that the legislature perceived that minors were particularly vulnerable to polygraph tests and that punishing the examiner was neither arbitrary nor unreasonable. The second argument was that the legitimate business interest of employers applied equally to those over and under the age of twenty-one, thus barring the tests only for minors was arbitrary. The court rejected this contention, again citing the legislature's power and duty to protect minors. Finally, plaintiff argued that the law was unreasonable since criminal investigations and certain governmental units were exempt. In rejecting this argument, the court stated that governmental interests outweighed those of minors.


107. See Post Dispatch, supra note 60, at F1, col. 5 reporting that suit has already been filed in California federal court challenging the constitutionality of the statute. The suit was brought by Chris Gugas, a long-time supporter of the polygraph test and polygraph examiner. It is also possible that a suit could be brought by an employee challenging some of the exemptions granted by the statute on a constitutional privacy claim. However, constitutional protections are not enforceable against private employers. For an argument that corporations are actually engaging in state actions, and hence should be subject to the same constitutional limitations, see Friedman, *Corporate Power, Government by Private Limitations,* see Friedman, *Corporate Power, Government by Private Groups, and the Law,* 57 COLUM. L. REV. 155, 176-79 (1957).

110. Id. at 154.
111. Id. at 155-56.
112. Id. at 156.
113. Id.
The Employee Polygraph Protection Act covers employees of all ages, therefore arguments concerning age restrictions need not be discussed. However, the other two arguments rejected in *Amato* will probably be advanced by those seeking to overturn the Act; changing, of course, the contention that it is arbitrary to punish only the examiners for violations to a contention that it is arbitrary to punish only employers for violations. These contentions are likely to be overruled, in that the Act is a fairly well-balanced solution to the problems created by the clashing of conflicting views, and the government has a legitimate concern in banning some lie detector tests.

**CONCLUSION**

The Employee Polygraph Protection Act charts a middle ground between the legitimate business concerns of employers and the rights of employees to their privacy. The law is likely to decrease the number of polygraphs administered during pre-employment screening, as well as decrease the number of polygraphers who can make a living plying their trade. The ongoing investigation exemption is likely to generate a great deal of litigation. In addition, constitutional challenges, both to the Act itself and to the exemption for public employees, are likely to keep the area interesting.

_Peter C. Johnson_

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114. *Id.*