

Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Competence

The only California statute that regulates private sector polygraph test use by employers is section 432.2 of the California Labor Code. This comment examines section 432.2 and its ineffectiveness as a limitation on test use intrusiveness and test result inaccuracy. The comment then proposes legislation to restrict existing employer abuse and to enhance the competency of polygraph examiners.

INTRODUCTION

Sarah Student interviewed for a job with Retail Incorporated, a business establishment in California. During the interview, the hiring agent for Retail requested that Student take a polygraph test but stressed that submission to the examination was not a prerequisite to employment.¹ Unwilling to create an impression of dishonesty and in need of a job, Student reluctantly agreed to take the test.² The administrator of the examination was Nick Novice, a 22-year-old polygraph examiner who previously had

¹ California law prohibits an employer from demanding that a job applicant submit to a polygraph test. *See* note 12 *infra*. Retail was within the bounds of California law since Retail's agent only requested that Student submit to the test.

² The fear of creating an impression of dishonesty with the employer is not limited to pre-employment examination situations such as the one illustrated by the hypothetical. Employment polygraph tests are given in three different contexts: specific examinations of current employees for particular incidences of theft or wrong-doing; periodic re-examination of current employees; and pre-employment screening of job applicants. Craver, *The Inquisitorial Process in Private Employment*, 63 *CORNELL L. REV.* 1, 28 (1977). Under any of these test situations, the person refusing to take the test might appear to be dishonest.

conducted only ten polygraph examinations.³ In response to Novice's questions during the test, Student informed Novice of her use of marijuana, her sexual preferences, and her childhood behavior. Retail did not hire Student.⁴

This hypothetical illustrates two primary criticisms of polygraph use in employment contexts.⁵ First, these tests are intrusive.⁶ During an examination, an examinee cannot prevent the recordation of his or her physical responses to the test questions.⁷ Thus, while the polygraph device is operating the examinee is effectively unable to refuse to answer any particular question. Second, polygraph test results are not reliable.⁸ This is because interpreting a test record is a highly subjective task, de-

³ See notes 54-65 and accompanying text *infra*.

⁴ This hypothetical typifies a situation where a prospective employee is not hired after submitting to a polygraph examination. This hypothetical purposely does not address whether Retail's failure to hire Student was directly related to the results of the polygraph test. However, assuming that Retail did not hire Student because of the polygraph test, she has no apparent remedy against Retail without some evidence of racial, gender-based, or other discrimination by Retail, or without some applicable union or employee contract. *Hearings on Polygraph Control and Civil Liberties Protection Act Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. 263 (1977-78)* (statement of David F. Linowes) [hereinafter cited as *Hearings*].

⁵ Organized labor has strongly criticized polygraph testing in the employment context. Through union efforts, many labor contracts now expressly prohibit the use of polygraph tests under any circumstances. More importantly, labor unions have successfully lobbied many state legislatures for enactment of various polygraph test prohibitions. Craver, *supra* note 2, at 28-29; Note, *Lie Detectors in Private Employment: A Proposal for Balancing Interests*, 33 GEO. WASH. L. REV. 932, 939-40 (1965). See note 11 *infra*.

⁶ See Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 153 (1971).

For purposes of this comment, the term "intrusion" refers to a general interference with individual rights, such as the right to decide "when and under what conditions . . . thoughts, speech, and acts should be revealed to others." *Hearings on Psychological Testing Procedures and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 185 (1965)*. As so used, "intrusion" is to be distinguished from the invasion of privacy defined by Prosser as "intrusion upon . . . physical solitude or seclusion." W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 117, at 807 (4th ed. 1971).

⁷ *Hearings, supra* note 4, at 263 (statement of David F. Linowes).

⁸ Hermann, *supra* note 6, at 88 n.55; Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 727 (1961).

manding both adequate examiner training and sensitivity to the test subject.⁹ Many examiners lack these qualifications.¹⁰

In response to these criticisms, many states provide legislation which restricts the use of polygraph tests by employers.¹¹ The

⁹ Examiner competence and the use of proper investigation and examination techniques are essential for accurate polygraph data analysis. Due to the subjective nature of determining truthfulness during the examination, of these two factors, competence of the examiner is the most important. Moenssens, *Polygraph Test Results Meet Standards for Admissibility as Evidence*, in *LEGAL ADMISSIBILITY OF THE POLYGRAPH* 14, 14-15 (N. Ansley ed. 1975).

Additionally, sensitivity to the subject's physiological and psychological abnormalities is crucial for accurate test analysis. For example, psychopathic personalities often lack measurable feelings of guilt when lying. Skolnick, *supra* note 8, at 705. Moreover, an examinee's emotional strain or tension at the time of the test affects test results. *Id.* at 705-06.

¹⁰ *Hearings, supra* note 4, at 249 (statement of John H. F. Shattuck and Trudy Hayden). Most polygraph examiners fail to meet the minimum training qualification standards set by their own profession. *Id.*

¹¹ Thirty-three states now either restrict the use of polygraph tests in employment situations, require competency-based licensing of polygraph examiners, or both. States regulating the use include: Alaska (ALASKA STAT. § 23.10.037 (1972)); California (CAL. LAB. CODE § 432.2 (West 1971)); Connecticut (CONN. GEN. STAT. § 31-51g (1977)); Delaware (DEL. CODE ANN. tit. 19, § 704 (1979)); Hawaii (HAWAII REV. STAT. §§ 378-21 to -22 (1976)); Idaho (IDAHO CODE §§ 44-903 to -904 (1977)); Maine (ME. REV. STAT. ANN. tit. 32, § 7166 (Cum. Supp. 1980)); Maryland (MD. ANN. CODE art. 100, § 95 (1979)); Massachusetts (MASS. GEN. LAWS ANN. ch. 149, § 19B (West Cum. Supp. 1981)); Michigan (MICH. COMP. LAWS § 37.2205(a) (Supp. 1981)); Montana (MONT. REV. CODES ANN. § 41-119 (Cum. Supp. 1977)); New Jersey (N.J. STAT. ANN. § 2A:170-90.1 (West 1971)); Oregon (OR. REV. STAT. §§ 659.225 to -227 (1979)); Pennsylvania (18 PA. CONS. STAT. ANN. § 7321 (Purdon 1973)); Rhode Island (R.I. GEN. LAWS §§ 28-6.1-1 to -2 (1979)); Washington (WASH. REV. CODE §§ 49.44.120-.130 (Cum. Supp. 1981).

States requiring licensing of polygraph examiners include: Alabama (ALA. CODE tit. 34, §§ 25-1 to -36 (1977 & Supp. 1981)); Arizona (ARIZ. REV. STAT. ANN. §§ 32.2701-.2715 (1976 & Cum. Supp. 1981)); Arkansas (ARK. STAT. ANN. §§ 71-2201 to -2225 (1979)); Florida (FLA. STAT. ANN. §§ 493.561-.569 (West 1981)); Georgia (GA. CODE §§ 84-5001 to 5016 (1975)); Illinois (ILL. REV. STAT. ch. 111, §§ 2401 to 2432 (1978 & Cum. Supp. 1981) (An act to provide for licensing and regulating detection and deception examiners, and to make an appropriation in connection therewith, at § 1)); Kentucky (KY. REV. STAT. §§ 329.010-.990 (1977 & Cum. Supp. 1981)); Maine (ME. REV. STAT. ANN. tit. 32, §§ 7151-7169 (Cum. Supp. 1981)); Michigan (MICH. COMP. LAWS §§ 338.1701-.1729 (1970 & Supp. 1981)); Mississippi (MISS. CODE ANN. §§ 73-29-1 to -47 (1973)); Nevada (NEV. REV. STAT. §§ 648.005-.210 (1979)); New Mexico (N.M. STAT. ANN. §§ 67-31A-1 to -11 (1974)); North Carolina (N.C. GEN. STAT. §§ 66.49.1-.8 (1975)); North Dakota (N.D. CENT. CODE §§ 43-31-01 to -17 (1978

California Labor Code contains a provision which partially serves this purpose.¹² Section 432.2 states that an employer may request but may not demand that an employee or potential employee submit to a polygraph examination.¹³

This comment examines the problems facing employees and job applicants in California who receive requests from employers to undergo polygraph tests. It suggests that Labor Code section 432.2 is an inadequate remedy to these problems. First, given the disparity of bargaining power between a job applicant and prospective employer, a request to submit to a polygraph examination is often in reality a disguised demand.¹⁴ Second, since section 432.2 does not establish minimum competency standards for examiners, it does nothing to reduce the risk of examiner incompetence.¹⁵ Finally, this comment proposes a revision of California law aimed at protecting employees and potential employees from the unfair use of polygraph testing by employers.¹⁶

I. INTRUSIVENESS AND POLYGRAPH TESTING

A. Intrusion

The intrusiveness of a polygraph examination is a direct result of the test's technical operation and underlying purpose. The examiner first connects the polygraph device to the examinee for the purpose of monitoring and recording the subject's heart rate,

& Supp. 1979)); Oklahoma (OKLA. STAT. tit. 59 §§ 1451-1476 (West Cum. Supp. 1980)); Oregon (OR. REV. STAT. §§ 703.050-.140 (1979)); South Carolina (S.C. CODE §§ 40-53-10 to -250 (1976 & Supp. 1980)); Utah (UTAH CODE ANN. §§ 34-37-1 to -14 (1974 & Supp. 1979)); Vermont (VT. STAT. ANN. tit. 26, §§ 2901-2910 (Supp. 1981)); Virginia (VA. CODE §§ 54-916 to -922 (1978)).

¹² CAL. LAB. CODE § 432.2 (West 1971) provides:

No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, counties, cities and counties, cities, districts, authorities, and agencies.

¹³ *Id.*

¹⁴ See text accompanying notes 31-34 *infra*.

¹⁵ See note 53 and accompanying text *infra*.

¹⁶ See text accompanying notes 36-50 and 66-89 *infra*.

respiration rate, skin resistance, and blood pressure.¹⁷ After connecting the device, the examiner poses questions to the examinee and at the same time watches the recordings for any change in the rates of the monitored physiological functions.¹⁸ In theory the examiner should be able to determine whether the degree of change in the physiological rates indicates truth or deception in the subject's responses.¹⁹ Intrusion occurs because the polygraph device continuously records the monitored physiological functions. Consequently, an examinee cannot prevent a response to a test question even by remaining silent.²⁰

Additionally, a polygraph test is intrusive because it affords an employer the opportunity to uncover areas of an individual's character outside the scope of most other background checks and personality tests.²¹ Resources, particularly time and money,

¹⁷ A blood pressure device similar to those used by physicians measures the subject's heart rate and blood pressure. A pneumograph, a tube fastened around the examinee's chest and abdomen, measures the examinee's rate of breathing by monitoring expansion of the chest and abdomen. Finally, electrodes fastened to the examinee's index and ring finger monitor the variations in flow of electrical current through the subject's body. J. REID & F. INBAU, *TRUTH AND DECEPTION* 5-6 (2d ed. 1977). The polygraph records all measurements on continuously moving graph paper. *Id.* at 6.

¹⁸ Before connecting the monitoring devices to the examinee, the examiner conducts a pre-test interview. During the interview, the examiner asks the examinee the same questions that will be asked during the actual test. This gives an examinee the opportunity to think about his or her responses. The examiner's questions are designed to elicit both verbal and non-verbal responses. *Id.* at 13. Generally, the questions have two forms, specific and so-called control questions. Specific inquiries draw out responses to matters relevant to the inquiry. In contrast, control questions deal with irrelevant matters but elicit responses for purposes of analytical comparison with responses to the specific questions. *Id.* at 28.

¹⁹ In theory, an examiner may detect lies because the act of "lying leads to conscious *conflict*; conflict induces *fear* or *anxiety*, which in turn results in clearly measurable physiological change." (emphasis in original). Skolnick, *supra* note 8, at 699-700. Professor Skolnick points out that it is not the lie detector device but the examiner who detects lies by interpreting the recordings made during the test. *Id.* at 699; D. LYKKEN, *A TREMOR IN THE BLOOD* 85 (1981); *Hearings, supra* note 4, at 249 (statement of John H. F. Shattuck and Trudy Hayden).

²⁰ See *Hearings, supra* note 4, at 263 (statement of David F. Linowes).

²¹ During a typical pre-employment examination, for example, an examiner asks the subject whether he or she ever stole anything, ever saw someone steal, or ever thought of stealing. Other questions may probe drug habits, arrest records, or even personal problems, fears, and feelings. *Hearings, supra* note 4,

generally are limited during background checks.²² Moreover, during a personality test, unlike during a polygraph examination, an examinee may refuse to answer a question without still rendering a response. These differences have led to suggestions that polygraph tests actually impinge upon an examinee's constitutional privacy.²³

Production and maintenance of polygraph test records aggravate the inherent problem of intrusiveness. For example, transcripts of a polygraph test may become part of an employee's personnel file.²⁴ This creates a danger of the information's transfer to subsequent employers.²⁵ Upon such an occurrence, a subsequent employer might discontinue its own inquiry into an individual's character due to information, whether correct or not, obtained during an earlier polygraph test.²⁶

at 249 (statement of John H. F. Shattuck and Trudy Hayden). If the subject hedges or demurs to any one question, he or she will look dishonest. As a consequence, there is no realistic limit to the scope of questions asked during a polygraph examination. *Id.* at 249-50.

²² See generally Hermann, *supra* note 6, at 87. Employers can obtain most information sought during a polygraph test through means of background checks and personality testing. However, the polygraph testing method is cheaper than searching available records of the individual or developing investigative reports concerning past criminal activity, work experience, or attitude. Consequently, even though the information obtained through a polygraph test is obtainable by use of background checks and personality testing, most employers would not seek this information if their only tools were these more traditional investigative methods.

²³ STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., PRIVACY, POLYGRAPHS, AND EMPLOYMENT 1 (Comm. Print. 1974) [hereinafter cited as SUBCOMM. ON CONSTITUTIONAL RIGHTS]. See generally Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964).

²⁴ Hermann, *supra* note 6, at 86.

²⁵ *Id.* See *Hearings*, *supra* note 4, at 264 (statement of David F. Linowes).

²⁶ Wheeler, *Problems and Issues in Recordkeeping*, in ON RECORD 3, 5-6 (S. Wheeler ed. 1969). Wheeler notes a transferred record often bears no resemblance to the person it purports to describe. *Id.* at 5.

In one reported instance, an employee transmitted information obtained during a polygraph test to a credit reporting agency. The information detailed the employee's previous use of marijuana. In an action under the Fair Credit Reporting Act, 15 U.S.C. §1681-1681t (1976 & Supp. III 1979), the federal district court held that both the employer and polygraph examiner were not credit reporting agencies within the meaning of the Act. Consequently, neither defendant was liable for defamation despite the plaintiff's loss of employment at another job as a result of the disclosure. *Peller v. Retail Credit Co.*, 359 F.

B. California Labor Code Section 432.2 and Coercive Requests

California Labor Code section 432.2 expressly prohibits an employer from requiring or demanding submission to a polygraph test as a condition of employment or continued employment.²⁷ However, this proscription does not prevent an employer from requesting a test of either an existing or prospective employee.²⁸ California law therefore permits voluntary polygraph tests in employment contexts regardless of the examination's intrusive nature.

Ironically, despite section 432.2's proscription against demands to undergo polygraph examinations and despite the intrusive characteristics associated with the test, employees and potential employees willingly accede to employer requests for test submission.²⁹ But, what appears to be examinee willingness actually may be the result of coercion by the employer.³⁰

Several factors suggest that employer requests actually coerce an individual into consenting to an examination. First, the employee or prospective employee may perceive the request as a demand.³¹ The individual may sense that, despite the prohibitions of section 432.2, acquiescence to the request is mandatory either to maintain or to obtain the job.³² Second, an individual commonly and perhaps rightfully fears that refusal to submit to the test will create an immediate impression of dishonesty.³³

Supp. 1235, 1237 (N.D. Ga. 1973).

²⁷ See note 12 *supra*.

²⁸ 43 Op. Cal. Att'y Gen. 25, 26 (1964).

²⁹ See note 43 *infra*.

³⁰ Craver, *supra* note 2, at 37. Professor Craver suggests that a lie detector test is so intrusive that consent to the examination would not be given unless the status of employment were in jeopardy. *Id.*

³¹ The California Attorney General, interpreting CAL. LAB. CODE § 432.2, commented that the statute establishes no clear criteria by which to distinguish a request from a demand. 43 Op. Cal. Att'y. Gen. 25, 27 (1964).

³² Hermann, *supra* note 6, at 77. If an employer requests a polygraph test the employer is not obligated to inform the potential examinee of the proscriptions of Labor Code § 432.2. Without this information the employee or prospective employee understandably feels compelled to consent to the test to satisfy the employer's wishes. As a practical matter, the individual cannot always refuse. For example, a prospective employee may have no available job alternatives. In such a case, economic necessity actually leaves the individual with no choice but to consent. *Id.*

³³ *Hearings, supra* note 4, at 264 (statement of David F. Linowes).

Possible consequences of such an impression include suspicion and distrust in the work environment or even loss of employment opportunity.³⁴

Section 432.2 therefore clearly is ineffective in restricting the intrusive qualities of polygraph testing in employment contexts. Moreover, the section will remain ineffective as long as there remains a potential for coerced rather than voluntary assent to test submission.

C. Remedies

At least two effective remedies exist to prevent or reduce the number of polygraph test intrusions and to correct the inadequacies of California Labor Code section 432.2.³⁵ The California legislature could prohibit all forms of polygraph test use in employment contexts. Alternatively, the legislature could continue to allow voluntary test submission but prohibit an employer from influencing an individual's decision whether or not to submit to an examination.

1. Total Prohibition

Total prohibition of employer directed polygraph testing pro-

³⁴ The California Legislature enacted CAL. LAB. CODE § 432.2 while observing that polygraph tests in employment contexts disrupt the work environment. *Review of 1963 Code Legislation*, 38 J. ST. B. CAL. 734, 734 (1963). Other consequences of refusal to submit to a polygraph examination may include loss of promotional opportunities, *Hearings, supra* note 4, at 264 (statement of David F. Linowes), or summary transfer to a less desirable position. *Id.* at 2 (statement of Sen. Birch Bayh).

³⁵ Aside from strengthening § 432.2 to prohibit or reduce requests for test submission, another possible remedy is affirming a tort action for invasion of privacy when an examinee submits to a test involuntarily. Bloustein, *supra* note 23, at 1003-07. According to Bloustein, polygraph test administrations threaten human dignity in a manner which should be actionable in tort as an invasion of privacy. *Id.* at 1003. Presently, however, the tort of invasion of privacy only includes four general categories: (1) intrusion upon seclusion or solitude, or into private affairs; (2) public disclosure of private facts; (3) false light in the public eye; and (4) appropriation of name or likeness. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). See Comment, *The Polygraph in Private Industry: Regulation or Elimination?* 15 BUFFALO L. REV. 655, 667 (1966).

Another possible alternative entails restricting the types of questions permitted during a polygraph examination. See, e.g., VA. CODE § 40.1-51.4:3 (1981) (prohibits requiring that examinees answer questions pertaining to sexual activities).

vides the most complete and effective remedy against test intrusions.³⁶ This remedy eliminates both the potential for coercive requests by employers and the potential harm from test record disclosure. Nevertheless, despite the effective nature of such a remedy, no state unconditionally prohibits polygraph tests in the employment context.³⁷

No state has adopted the prohibition remedy for several reasons. Most importantly, an absolute ban is undesirable for employees and impracticable for some employers. Under this restrictive solution, for example, employees are left without the option to suggest their own willingness to submit to a polygraph examination.³⁸ At times employees may benefit from indicating a willingness to be tested because volunteering for a test could signify honesty.³⁹ Furthermore, total prohibition would prevent test use by employers such as police departments and national security agencies whose job it is to protect the public health and welfare.⁴⁰ The vital nature of these services and the public's right to safety and well-being may outweigh the examinee's privacy interests.⁴¹

Therefore, an inherent undesirability surrounds the prospect of total prohibition of employer use of polygraph tests. In fact, attempts to enact this remedy have proven futile at both the

³⁶ Hermann, *supra* note 6, at 102.

³⁷ *Id.* at 98. The typical state prohibition precludes an employer from "requiring or demanding" or even "requesting or suggesting" submission to a polygraph examination. *Id.* at 97-98 & nn. 94 & 95.

³⁸ Presently, all states permit employees or prospective employees to suggest their own submission to a polygraph test. *Id.* at 98.

³⁹ For example, a driver for a local beer distributor lost his job after circumstantial evidence implicated the driver in several thefts. The driver insisted on a polygraph examination. After successfully passing the test, the employee named two other employees as possible suspects in the case. Appropriate authorities later convicted these suspects of the thefts. *Hearings, supra* note 4, at 378 (statement of Rep. Mendel J. Davis).

⁴⁰ Many police and national security agencies utilize polygraph tests. Some of the federal security agencies include the Central Intelligence Agency and the National Security Agency. D. Lykken, *supra* note 19, at 3.

⁴¹ Any fundamental right is not absolute. A state has the authority to restrict the right provided that a compelling state interest outweighs the right being regulated. *Roe v. Wade*, 410 U.S. 113, 131 (1972) (right to privacy held to outweigh state's interest in prohibiting abortion). Arguably, national security outweighs any privacy interest affected by polygraph test intrusion. *But see* Hermann, *supra* note 6, at 152-53.

state and federal levels.⁴² Moreover, considering the recent rapid increase in polygraph test use by employers,⁴³ absolute proscription appears unlikely in the future.

2. Preventing Employer Influence

A more moderate but still effective solution to reduce the potential for polygraph test intrusion entails preventing employers from coercing persons into acceding to test submission. Accomplishment of this task requires amendment of Labor Code section 432.2 to prohibit an employer from either "requesting" or "suggesting" a polygraph test. This amendment would not only reduce the potential for employer coercion,⁴⁴ it would also leave the option of volunteering for polygraph tests open to employees and job applicants.⁴⁵ Moreover, since six other states already maintain this restriction, precedent exists as a guide for this

⁴² CAL. LAB. CODE § 432.2 was initially an attempt to prohibit private sector polygraph testing in any context. The Assembly Committee on Industrial Relations designed the first draft of the statute to prohibit an employer not only from demanding or requiring polygraph tests, but also from permitting them. The committee later opted for the present less stringent statute. See note 12 *supra*, A.B. 927, Cal. Leg. Counsel Digest (1977-78 reg. sess.).

At the federal level, there have been several recent attempts to proscribe or at least limit employer use of polygraphs in the private sector where the employer's business affects interstate commerce. One bill would have prohibited employers from permitting, requiring, or requesting an examination of an existing or potential employee. H.R. 381, 97th Cong., 1st Sess. (1981). Three other bills would have limited certain employer practices by specifically proscribing any interrogation during the test into matters which occurred more than seven years before the examination date. These bills also would have proscribed any questioning into matters involving religious, political, or racial group affiliation, in addition to proscribing questioning regarding sexual preferences unless job related. H.R. 3108, 3185, & 3194, 97th Cong., 1st Sess. (1981).

⁴³ The volume of polygraph tests given in the private sector has doubled within the last five years. BUSINESS WEEK, Feb. 6, 1978, at 100. In addition, it recently has been estimated that between 200,000 and 500,000 polygraph test administrations occur annually. SUBCOMM. ON CONSTITUTIONAL RIGHTS, *supra* note 23, at 3. Of these tests, 20% are administered by the nation's largest companies. For example, Adolf Coors Brewery periodically requires all of its employees to undergo polygraph examinations while the 4700 McDonald's hamburger emporiums utilize the test in pre-employment contexts. Lykken, *supra* note 19, at 3. See Note, *The Working Man's Nemesis: The Polygraph*, 6 N.C. CENT. L.J. 94, 100-01 (1974).

⁴⁴ See notes 29-34 and accompanying text *supra*.

⁴⁵ See notes 38 & 39 and accompanying text *supra*.

amendment.⁴⁶

New Jersey is the most restrictive of those states that statutorily limit employer influence upon potential polygraph test examinees. That state prohibits employers from "influencing," "requesting," or "requiring" polygraph examinations as a condition of employment or continued employment.⁴⁷ By expressly prohibiting employer influence, the statute effectively prevents employers from disguising demands as requests while still affording potential examinees the option of suggesting their own submission to a test if the need arises.

However, even the New Jersey approach to employer influence warrants criticism. A statute like New Jersey's may not totally eliminate employer influence. For instance, an employee who is implicated in a theft or wrong-doing but who is innocent of those acts may submit to a test believing that submission is necessary to please the employer.⁴⁸

⁴⁶ States restricting employer influence include: Alaska (ALASKA STAT. § 23.10.037 (1972) (require, request, or suggest)); Connecticut (CONN. GEN. STAT. § 31-51g (West Cum. Supp. 1981) (request or require)); Delaware (DEL. CODE ANN. tit. 19, § 704 (1979) (require, request, or suggest)); Maine (ME. REV. STAT. ANN. tit. 32, § 7166 (Cum. Supp. 1980) (require, request, or suggest)); Massachusetts (MASS. GEN. LAWS. ANN. ch. 149, § 198 (West Cum. Supp. 1981) (subject or request)); New Jersey (N.J. STAT. ANN. § 2A:170-90.1 (West 1971) (influence, request, or require)).

⁴⁷ N.J. STAT. ANN. § 2A:170-90.1 (West 1971) provides: "Any person who as an employer shall influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment, is a disorderly person."

In the leading case of *State v. Community Distributors, Inc.*, 64 N.J. 479, 317 A.2d 697 (1972), the New Jersey Supreme Court held that § 2A:170-90.1 prevents an employer from suggesting a polygraph test under any circumstances. This case arose because three employees submitted to a polygraph examination at the request of the defendant, who was the owner and operator of a drug store. Each employee signed a written statement that the employer did not "influence, request or require" the taking of the test. After the dismissal of each employee, the state ignored the signed waiver and brought a successful action against the employer for violation of the statute. The municipal court's conviction of the defendant was affirmed on appeal. *State v. Community Distributors, Inc.*, 123 N.J. Super. 589, 598, 304 A.2d 213, 219 (1973). The employer was deemed a disorderly person and fined \$100. *Id.* Under New Jersey law, presently, disorderly person offenses are not crimes within the meaning of the state constitution. They carry a maximum penalty of six months in jail, a \$1000 fine, or both. N.J. STAT. ANN. § 2C:1-4(b) (West Supp. 1981).

⁴⁸ See, e.g., *State v. Community Distributors Inc.*, 64 N.J. 479, 317 A.2d 297 (1974), discussed in note 47 *supra*.

Thus, for a statute to prevent all employer influence, it must also prevent even the most subtle types of employer coercion. One solution is to require that the employer shoulder the burden of proof regarding the voluntary nature of examinee consent to the test.⁴⁹ This burden, which is both costly and time consuming to the employer in terms of litigation, might well deter employer influence altogether and would enhance the likelihood of eliminating most employer related polygraph examinations.⁵⁰

Preventing employers from influencing employees or potential employees into submitting to polygraph tests is therefore a viable approach to reduce test intrusiveness. But even with the enactment of this proscription, another problem of employment related polygraph testing still remains. Those individuals who voluntarily submit to a polygraph test continue to face the real and possibly more dangerous hazard of inaccurate results.

II. EXAMINER COMPETENCE

A. Competence of Examiners and Test Accuracy

Without complete prohibition of employer use of polygraph testing, there remains the need to assure test result accuracy. One method which may provide this assurance is state regulation of polygraph examiner competence.⁵¹ Twenty states presently regulate the competence of examiners in some statutory manner.⁵² California, however, maintains no state control over the qualifications of polygraph test administrators.⁵³

There are at least four reasons which justify state control over the qualifications of polygraph operators. First, the analytical determinations made during a polygraph test are highly subjective, requiring adequate training and skill to assure correct interpretation of the test data.⁵⁴ This is because the polygraph de-

⁴⁹ Hermann, *supra* note 6, at 98.

⁵⁰ *Id.*

⁵¹ See generally "Appendix" *infra* at page 132.

⁵² See note 11 *supra*.

⁵³ Ironically, CAL. LAB. CODE § 432.2 was enacted in recognition of the fact that tests by inexperienced examiners often result in false findings. *Review of 1963 Code Legislation*, *supra* note 34, at 734. Despite this recognition, the statute in no way regulates or even mentions polygraph examiners. See note 12 *supra*.

⁵⁴ See note 9 *supra*. Polygraph analysis requires the application of several disciplines including both physiology and psychology. It requires more personal

vice itself does not detect lies; rather, the examiner does so by interpreting the physiological changes recorded during the examination.⁵⁵ Moreover, outside stimuli can affect an examinee's physiological reactions during the test.⁵⁶ This adds to the analytical difficulty of the examiner's already arduous task.

Second, accuracy in polygraph test analysis requires complete cooperation by the examinee with the examiner.⁵⁷ Since polygraph tests are said to inundate the work environment with suspicion and distrust,⁵⁸ it is a plausible inference that these feelings detract from the willingness of an examinee to cooperate with the examiner in employment contexts. The inference then arises that reduced examinee cooperation results in enhanced difficulty in analyzing test data⁵⁹ and increases the need for greater examiner training and skill.

Third, pre-employment examinations pose particularly difficult problems of analysis in themselves. Accurate polygraph analysis requires data obtained from a specific area of inquiry.⁶⁰ Polygraph tests in criminal matters, for example, are highly specific in scope.⁶¹ But unlike criminal polygraph interrogations,

judgment by the examiner than fingerprint or breath-alcohol analysis. Skolnick, *supra* note 8, at 695. Moreover, in a study verifying the accuracy of polygraph examiner identification of truthful or deceptive responses, the results demonstrated that the less-experienced examiners made the most errors in analysis. Conversely, the most experienced examiner participating in the test had the highest consistency of accurate test data interpretation. F. Horvath & J. Reid, *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception*, reprinted in J. REID & F. INBAU, *supra* note 17, at 389, 392 app. A-1.

⁵⁵ See note 19 *supra*.

⁵⁶ See note 9 *supra*. A proper test environment should be noise-free to avoid upsetting the examinee's emotions or thoughts. An examination room should be similar to that used by a clinical psychologist. Skolnick, *supra* note 8, at 697.

⁵⁷ *Hearings*, *supra* note 4, at 2-3 (statement of Sen. Birch Bayh).

⁵⁸ *Review of 1963 Code Legislation*, *supra* note 34, at 734.

⁵⁹ Employer influence over an employee or prospective employee in the decision whether or not to submit to a polygraph examination is likely to produce feelings of resentment in the examinee. These feelings may affect the accuracy of test results. See *Hearings*, *supra* note 4, at 2-3 (statement of Sen. Birch Bayh).

⁶⁰ *Hermann*, *supra* note 6, at 85.

⁶¹ Criminal polygraph examinations involve inquiry into a specific crime or incident. *Hearings*, *supra* note 4, at 25 (statement of David T. Lykken). Hence, the relevant questions during the test focus on matters about which the examinee would most likely lie.

pre-employment examinations are broad probes into the examinee's past behavior for the purpose of making general predictions about future conduct.⁶² This sort of probing presents two analytic hurdles for the examiner to overcome. First, valid predictions of future conduct based upon general statements of past behavior are not always possible.⁶³ Second, broad rather than specific areas of inquiry are improper indicators for truth and deception determinations.⁶⁴

Finally, employers serve their own best interests by securing accurate test results. Employers continually rely upon the recommendations of polygraph examiners.⁶⁵ It therefore follows that employers protect themselves by engaging the services of competent test administrators.

In sum, competence in a polygraph examiner is a prerequisite to accurate results. A state therefore should assure at least a minimum level of competence in practicing examiners. One mean to this end is through state licensing requirements.

B. Remedy: State Licensing of Polygraph Examiners

This section proposes and discusses a model statute requiring state licensing of polygraph examiners.⁶⁶ This proposed statute does not exhaust the provisions which could be included in this type of legislation.⁶⁷ Nevertheless, the statute, which is outlined

⁶² Hermann, *supra* note 6, at 85.

⁶³ *Id.* Hermann notes that if a person stole some pencils or other petty items five years ago, this is not necessarily a valid indicator of the individual's present honesty. *Id.*

⁶⁴ *Id.*

⁶⁵ *Hearings, supra* note 4, at 250 (statement of John H. F. Shattuck and Trudy Hayden). In pre-employment screening examinations a polygraph examiner typically states a recommendation for or against a prospective employee's fitness for the job. The employer is not bound by the recommendation. However, many employers adopt the recommendations of the examiner without ever inquiring into the reasons behind the examiner's opinion. *Id.*

⁶⁶ See generally "Appendix" *infra* at page 132.

⁶⁷ See e.g., ARIZ. REV. STAT. ANN. § 32-2703 (1976) (minimum age of 18 years; no felony convictions); FLA. STAT. ANN. §§ 493.568 (West 1981) (insurance requirement), 493.573 (West 1981) (license posted in conspicuous place); ME. REV. STAT. tit. 32, § 7158 (Cum. Supp. 1980) (reciprocity to persons holding valid examiner license in other state or territory); OR. REV. STAT. §§ 703.060 (1979) (by analogy) (classifies licensees as either trainees or general administrators), 703.090(b) (1979) (must be citizen of United States); VA. CODE § 54-921 (1978) (submission of fingerprints).

in the Appendix, does include minimum criteria necessary to maintain a general level of examiner competence.

To operate effectively as a control upon examiner qualifications, a licensing statute requires strict but appropriate standards. In professions other than polygraphy, education and training are common competence considerations.⁶⁸ Many professions also require an applicant to pass a competency examination before obtaining a license.⁶⁹ Given the highly technical and subjective nature of polygraph analysis,⁷⁰ similar requirements are appropriate for licensing of polygraph examiners.

California presently has no minimum standards which an individual must meet before becoming a polygraph examiner.⁷¹ For example, any person who possesses a polygraph device may administer tests in California regardless of his or her educational background. This is a hazardous reality because employers often purchase polygraph examiner services on the basis of price rather than quality.⁷² In light of these factors, ten of the twenty states requiring licensing at this time mandate that all licensees either possess a baccalaureate degree or complete five years experience as an interrogator.⁷³ Similar requirements are not uncommon in other professions where competence is crucial.⁷⁴ Thus, some minimum educational requirement should be con-

⁶⁸ See, e.g., CAL. BUS. & PROF. CODES §§ 2736 (West Cum. Supp. 1981) (nursing); 5026 (West 1974) (accounting); 7332 (West Cum. Supp. 1981) (cosmetology); 10150.6 (West Cum. Supp. 1981) (real estate brokering).

⁶⁹ See, e.g., CAL. BUS. & PROF. CODE §§ 5050 (West 1974) (accounting); 6060, 6062 (West Cum. Supp. 1981) (law); 8020 (West 1975) (court reporting); 10153 (West Cum. Supp. 1981) (real estate brokering).

⁷⁰ See notes 9 & 54 *supra*.

⁷¹ See note 53 and accompanying text *supra*.

⁷² BUSINESS WEEK, *supra* note 43, at 104. Polygraph operators themselves admit that many of their clients shop for examiner services based on price and not quality. *Id.*

⁷³ Alabama (ALA. CODE tit. 34, § 25.21(5) (1977)); Arizona (ARIZ. REV. STAT. ANN. § 71-2207 (1976)); Georgia (GA. CODE § 84-5007 (1975)); Illinois (ILL. REV. STAT. ch. 111, § 2412(F) (1978 & Cum. Supp. 1981) (An Act to provide for licensing and regulating detection and deception examiners, and to make an appropriation in connection therewith, at § 1) (baccalaureate degree required regardless of interrogation experience)); Michigan (MICH. COMP. LAWS § 338.1710 (1970 & Cum. Supp. 1981)); Mississippi (MISS. CODE ANN. § 73-29-13 (1973)); Oklahoma (OKLA. STAT. tit. 59, § 1458 (West 1980)); Oregon (OR. REV. STAT. § 703.090(e) (1979)); South Carolina (S.C. CODE § 40-53-70 (1976)); Utah (UTAH CODE ANN. § 34-37-5(b) (1974)).

⁷⁴ See note 68 *supra*.

sidered appropriate in a polygraph examiner licensing statute which seeks to assure a minimum level of competence.⁷⁵ Allowing equivalent experience to entitle a licensee to a waiver of the educational requirement also remains an option which is open to any state enacting examiner licensing legislation.

Attendance of and graduation from an approved school of polygraphy is an additional but necessary educational mandate.⁷⁶ Sixteen states presently maintain this requirement.⁷⁷ At a minimum, graduation from an approved school of polygraphy insures some training in both appropriate interrogation techniques and the technical aspects of polygraph instrumentation.⁷⁸ Two of the sixteen states also require performance of a minimum number of actual test administrations as an intern before licensure.⁷⁹ This requirement serves the additional purpose of forcing polygraphy schools to incorporate this standard into their educational curricula.

A licensing statute also should require polygraph examiners to prove their competence. One method of doing this is through a

⁷⁵ See, e.g., "Appendix" § 3(a) *infra* at page 132.

⁷⁶ See, e.g., "Appendix" § 3(b) *infra* at page 132.

It has been suggested that the period of instruction prior to graduation from a school of polygraphy should be a minimum of six months. J. REID & F. INBAU, *supra* note 17, at 305.

⁷⁷ Alabama (ALA. CODE tit. 34, § 25.21(b) (1977)); Arizona (ARIZ. REV. STAT. ANN. § 32.2703 (1976)); Arkansas (ARK. STAT. ANN. § 71-2207 (1979)); Florida (FLA. STAT. ANN. § 493-571 (West 1981)); Georgia (GA. CODE § 84-5007(f) (1975)); Illinois (ILL. REV. STAT. ch. 111, § 2412(b) (1978 & Cum. Supp. 1981) (An Act to provide for licensing and regulating detection and deception examiners, and to make an appropriation in connection therewith, at § 1)); Kentucky (KY. REV. STAT. § 329.030 (1970 & Cum. Supp. 1981)); Maine (ME. REV. STAT. ANN. tit. 32, § 7155(D) (Cum. Supp. 1980)); Michigan (MICH. COMP. LAWS § 338.1710 (1970 & Cum. Supp. 1981)); Mississippi (MISS. CODE ANN. § 73-29-13(b) (1973)); Oklahoma (OKLA. STAT. tit. 59, § 1458 (West 1980)); Oregon (OR. REV. STAT. § 703.090(f) (1979)); South Carolina (S.C. CODE § 40-53-70 (1976)); Utah (UTAH CODE ANN. § 34-37-5-2(e) (1974)); Vermont (VT. STAT. ANN. tit. 26, § 2904 (1977)); Virginia (VA. CODE § 54-920 (1978)).

⁷⁸ To assure that each school of polygraphy provides the necessary training in interrogation techniques and in the machine's operation, schools should be approved by criteria established by the appointed administrator. See "Appendix" § 2(b) *infra* at page 132. For a list of suggested areas of instruction, see, e.g., J. REID & F. INBAU, *supra* note 17, at 305.

⁷⁹ Oregon (OR. REV. STAT. § 703.090(f) (1979) (200 tests)); Utah (UTAH CODE ANN. § 34-37-5(2)(d) (Supp. 1979) (100 tests)).

competency examination.⁶⁰ Thirteen states now require that polygraph examiners pass a competency test before licensure.⁶¹ Other professions commonly maintain similar requirements.⁶² Despite the inherent flaws of competency tests,⁶³ at a minimum these examinations provide an objective standard by which to protect the public from the unqualified practitioner.⁶⁴

Once licensed, competency among existing licensees may be maintained through appropriate renewal provisions in the statute.⁶⁵ Techniques change, improve, or become outdated.⁶⁶ Hence, a provision predicated license renewal upon a showing of continued education in the field of polygraphy will assure some knowledge of newly developed techniques.

Finally, there must be appropriate sanctions to make the stat-

⁶⁰ See, e.g., "Appendix" § 3(c) *infra* at page 132.

⁶¹ Alabama (ALA. CODE tit. 34 § 35-21(7) (1977)); Arizona (ARIZ. REV. STAT. ANN. § 32.2207 (1976)); Arkansas (ARK. STAT. ANN. § 71-2703 (1979)); Georgia (GA. CODE § 84-5007 (1975)); Illinois (ILL. REV. STAT. ch. 111, § 2412(e) (1978 & Cum. Supp. 1981) (An Act to provide for licensing and regulating detection and deception examiners, and to make an appropriation in connection therewith, at § 1)); Maine (ME. REV. STAT. ANN. tit. 32, § 7155(E) (Cum. Supp. 1980)); Michigan (MICH. COMP. LAWS § 338.1710 (1970 & Cum. Supp. 1981)); New Mexico (N.M. STAT. ANN. § 67-31A96(A)(2) (1974)); North Carolina (N.C. GEN. STAT § 66-49.3(e) (1975)); North Dakota (N.D. CENT. CODE § 43-31-07.5 (1978)); Oklahoma (OKLA. STAT. tit. 59, § 1458 (West 1980)); Oregon (OR. REV. STAT. § 703.090(g) (1979)); South Carolina (S.C. CODE § 40-53-70 (1976)).

⁶² See note 69 *supra*.

⁶³ Some inherent flaws associated with occupational competency testing include: (1) lack of standards set by legislatures by which licensing examinations can be developed; (2) lack of assurance that a test given to one group is comparable in coverage to a test given to another group; (3) a failure of tests to sample the crucial skills of the profession adequately; and (4) discrimination against ethnic groups. B. SCHIMBERG, B. KESSER & D. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 193-94, 195, 198, 201-09 (1973).

⁶⁴ *Id.* at 193.

⁶⁵ See, e.g., "Appendix" § 4 *infra* at page 133.

⁶⁶ The psychologic stress evaluator ("PSE") is a recent development in lie detection. The PSE records the examinee's voice. The recording is played back at varying speeds to facilitate detection of fine distinctions in voice change. An examiner interprets the changes to determine deception. Comment, *The Psychological Stress Evaluator: A Recent Development in Lie Detector Technology*, 7 U.C. DAVIS L. REV. 332, 340 (1974). Other developments include an examination seat which registers movement during the examination. Craver, *supra* note 2, at 30. Another device photographs pupil dilation during the test. *Id.*

ute enforceable.⁸⁷ Seventeen of the nineteen states that regulate polygraph examiner competence presently provide for misdemeanor penalties against violators.⁸⁸ Another possible sanction is a private cause of action with a provision for stipulated punitive damage recovery.⁸⁹ Either or both of these legal avenues are necessary ingredients to enhance the enforceability of any licensing statute.

In sum, state regulation of polygraph examiner competence is a necessary and effective means of protecting persons who submit to polygraph tests from the unwarranted and potentially harmful errors of incompetent examiners. A licensing statute such as the one in the Appendix of this comment would aid in achieving this protective goal. The model statute provides for education and training standards, a competency examination, license renewal provisions, and penalties for violation.

CONCLUSION

In light of both the intrusiveness of polygraph testing and its questionable reliability, protection of employees and job appli-

⁸⁷ See, e.g., "Appendix" §§ 5, 6 *infra* at page 133.

⁸⁸ Arizona (ARIZ. REV. STAT. ANN. § 32-2715 (1976) (fine from \$300 to \$1000, and/or six months in jail)); Arkansas (ARK. STAT. ANN. § 71-2224 (1979) (fine from \$100 to \$1000, and/or six months in jail)); Florida (FLA. STAT. ANN. § 493-576 (West 1977) (fine from \$100 to \$1000, and/or one year in jail)); Illinois (ILL. REV. STAT. ch. 111 § 2429 (1978 & Cum. Supp. 1981) (An Act to provide for licensing and regulating detection and deception examiners, and to make an appropriation in connection therewith, at § 1) (fine from \$25 to \$500, and/or six months in jail)); Kentucky (KY. REV. STAT. § 329.990 (1977) (fine from \$20 to \$500)); Maine (ME. REV. STAT. ANN. tit. 32, § 7167 (Cum. Supp. 1981) (misdemeanor penalty)); Michigan (MICH. COMP. LAWS § 338.1729 (1980) (misdemeanor penalty)); Mississippi (MISS. CODE ANN. § 73-29-45 (1973) (fine from \$100 to \$1000, and/or six months in jail)); Nevada (NEV. REV. STAT. § 648.210 (1979) (misdemeanor penalty)); New Mexico (N.M. STAT. ANN. § 67-31A-11 (1974) (misdemeanor penalty)); North Carolina (N.C. GEN. STAT. § 66-49.8 (1975) (misdemeanor penalty)); North Dakota (N.D. CENT. CODE § 43-31-17 (1978) (fine up to \$500, and/or thirty days in jail)); Oklahoma (OKLA. STAT. ANN. tit. 59 § 1474 (West Supp. 1980) (fine from \$100 to \$1000, and/or six months in jail)); Oregon (OR. REV. STAT. § 703.990 (1979) (fine up to \$1000)); South Carolina (S.C. CODE § 40-53-250 (1975) (fine from \$100 to \$1000, and/or six months in jail)); Utah (UTAH CODE ANN. § 34-37-13 (1974) (misdemeanor penalty)); Vermont (VT. STAT. ANN. tit. 26 § 2909 (Supp. 1981) (fine up to \$1000, and/or six months in jail)).

⁸⁹ See, e.g., "Appendix" § 6 *infra* at page 133. See generally Hermann, *supra* note 6, at 102.

cants from the hazards of test use calls for increased statutory regulation of polygraph testing in the employment context. Lack of examinee control over test question responses, unrestricted influence by employers over potential employees, and the consequences of inaccurate test results are all reasons to require more effective regulation. However, despite these hazards, existing California law inadequately restricts polygraph testing by employers and does not in any manner regulate the qualifications of polygraph examiners.

Therefore, California should enact legislation which will provide protection to employees and job applicants against the hazards of polygraph test use by employers. An appropriate statute should prohibit an employer from requesting polygraph tests of employees or job applicants under any circumstances while allowing individuals to volunteer for a test if they so choose. Moreover, appropriate legislation should require the licensing of polygraph examiners. An effective licensing statute should provide for minimum education and training requirements, passage of a competency examination, periodic license renewal, and sanctions for violation. It is only when both of these regulatory schemes are present that employees and prospective employees have adequate protection against the hazards of polygraph test use in the employment context.

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APPENDIX

Model Polygraph Examiner Licensing Statute§ 1 *Purpose:*

The purpose of this statute is to regulate the qualifications of polygraph examiners through state licensure.

§ 2 *Definitions:*

As used in this act:

- (a) "*Polygraph examiner*" shall mean any person who uses any device or instrument to test or question individuals for the purpose of determining truthfulness;⁹⁰
- (b) "*Administrator*" shall mean the individual to whom the legislature delegates the authority to enforce this act;⁹¹
- (c) "*Aggrieved person*" shall mean any individual who has been subjected to a polygraph examination conducted by any person failing to meet the minimum requirements of this act.

§ 3 *Qualifications for License:*

To receive a license as a polygraph examiner, a person is qualified who:

- (a) Has obtained a baccalaureate degree from a college or university accredited by the Association of Collegiate Registrars and Admissions Officers, or in lieu of such a degree has graduated from an accredited high school and has five years of investigative experience;⁹² and,
- (b) Has satisfactorily completed a course in polygraph administration approved by the Administrator;⁹³ and,
- (c) Has passed the Polygraph Examiners Competency

⁹⁰ This section is modeled after VA. CODE § 54-916(A) (1978).

⁹¹ A 1977 California Senate Bill proposed licensing of polygraph examiners. However, the bill died in committee. Under this proposal the administrator of the statute was to be the Director of Consumer Affairs. S.B. 236, Cal. Leg. Counsel Digest (1977-1978 reg. sess.)

⁹² This section is modeled after OR. REV. STAT. § 703.090(e) (1979).

⁹³ This section is modeled after ARIZ. REV. STAT. ANN. § 32-2703(4) (1976).

Examination established by the Administrator.⁹⁴

§ 4 *License Renewal:*

An examiner's license shall be valid for a period of two years and shall be renewed upon a showing approved by the Administrator that the license holder has completed ___ hours⁹⁵ of additional training during the tenure of the existing license. Training standards shall be established by the administrator.

§ 5 *Penalty:*

Any person who violates this statute shall be guilty of a misdemeanor and shall be punished by a fine not exceeding \$1000 and/or by imprisonment not exceeding one year.

§ 6 *Civil Remedy:*

Any aggrieved person may bring a civil action against the polygraph examiner in his or her own behalf or in behalf of himself or herself and others similarly situated. Upon a finding of liability, the award shall be for stipulated punitive damages.

⁹⁴ This section is similar to OR. REV. STAT. § 702.090(g) (1979).

⁹⁵ See, e.g., S.B. 236 § 8963(b)(1), Cal. Leg. Counsel Digest (1977-78 reg. sess.) (would have required proof of attendance of at least 24 hours of training seminars within the immediate two years prior to renewal).

