

# An “Unfair and Cruel Weapon”: Consequences of Modern-Day Polygraph Use in Federal Pre-Employment Screening

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I. Doug Williams’s Case and Its Precedents .....	718
II. Background of Polygraph Technology and Its Use in Employment.....	722
A. Polygraph Background and Basics .....	722
B. Banning the Test for Employment Screening.....	725
1. Background of the Ban: Unreliability.....	725
2. The Federal Government’s Exemption in the EPPA .....	726
3. Specific Issues in Expansion to CBP .....	730
III. Dangerous Implications Based on Unreliability .....	732
A. False Positives .....	733
B. Overconfidence.....	736
IV. Dangerous Implications Outside of Unreliability.....	739
A. Racial Concerns .....	740
B. Other Civil Rights Concerns .....	741
1. Relation of Questions to Job Responsibilities .....	741
2. Lack of Due Process Protections for What Can Become an Interrogation .....	744
Conclusion.....	747

*“I wish you well in this particularly important theater of the struggle against pseudoscience: the national security state has many unfair and cruel weapons in its arsenal, but that of junk science is one which can be fought and perhaps defeated by honest and forthright efforts like yours.”* –Letter from Aldrich Ames to Steven Aftergood at the Federation of American Scientists.<sup>1</sup>

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1. Letter from Aldrich Ames to Steven Aftergood (Nov. 28, 2000), <http://www.fas.org/sgp/othergov/polygraph/ames.html> [<https://perma.cc/38KS-4V87>].

On November 18, 2014, the federal government delivered a five-count indictment against former law enforcement officer Doug Williams.<sup>2</sup> Williams had led the Oklahoma City Police Department's Polygraph Section within the Internal Affairs Unit,<sup>3</sup> and had also served as a communications advisor for two U.S. presidents.<sup>4</sup> While his early career might have made him appear to be an ideal public servant, there was a twist: his time administering thousands of polygraph tests led him to believe that the tool was faulty. He left public service and embarked on a vocal campaign to bring down the federal government's continued use of the technology in employment screening. Part of this campaign became a source of livelihood for Williams: he offered instruction to prospective employees on how to pass the lie detector test, regardless of whether or not they were planning on telling the full truth about their pasts.<sup>5</sup>

After a two-day trial in June 2015, Williams pled guilty to all charges of mail fraud and witness tampering. He faced up to twenty years in prison and a \$250,000 fine, plus fees, for each count—100 years and more than one million dollars total—for his actions.<sup>6</sup> On September 23, 2015, a federal judge sentenced Williams to two years in prison.<sup>7</sup>

Mainstream media largely ignored this Western District of Oklahoma trial and its outcome. This Note argues that this trial, however, should not be ignored. Rather, the Williams case highlights the shadowy, under-addressed system of modern pre-employment polygraph screening in America. A threshold question here is why Williams had a customer base to begin with: the polygraph is oftentimes the final step of a federal pre-employment screening process, and prospective employees, even those with nothing to hide, fear a false positive that would disqualify them.

This Note hopes to begin a conversation that has been missing in the legal academy in recent years, namely whether the use of the polygraph for pre-employment screening is necessary or justifiable. This void in the legal literature

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2. Indictment at 22, *United States v. Williams*, No. CR 14-318 M (W.D. Okla. Nov. 13, 2014).

3. Deborah Carney, *The "Lie Detector" is BS! And I Have Proved It! By Doug Williams*, GOODREADS: DEBORAH CARNEY'S BLOG (Aug. 25, 2012, 2:50 PM), [https://www.goodreads.com/author\\_blog\\_posts/2903156-the-lie-detector-is-bs-and-i-have-proved-it-by-doug-williams](https://www.goodreads.com/author_blog_posts/2903156-the-lie-detector-is-bs-and-i-have-proved-it-by-doug-williams) [<https://perma.cc/2253-CACU>].

4. *Id.*

5. Christina Sterbenz, *This Ex-Cop Thinks Lie-Detector Tests are so Inaccurate he's Facing 100 Years in Prison for Starting a Website that Taught People How to Cheat Them*, BUSINESS INSIDER (May 18, 2015, 5:02 PM), <http://www.businessinsider.com/the-crazy-story-of-an-ex-cop-who-ran-a-website-that-taught-people-how-to-cheat-polygraphs-2015-5> [<https://web.archive.org/web/20171128021734/http://www.businessinsider.com/the-crazy-story-of-an-ex-cop-who-ran-a-website-that-taught-people-how-to-cheat-polygraphs-2015-5>].

6. *Id.*

7. Andrea Noble, *Former Oklahoma City Cop Gets Two Years in Prison for Polygraph Coaching*, THE WASHINGTON TIMES (Sept. 23, 2015), <http://www.washingtontimes.com/news/2015/sep/23/douglas-williams-former-oklahoma-city-cop-gets-two/> [<https://perma.cc/GSB7-RGPN>].

might reflect the incorrect assumption that polygraph use in this setting has declined or that its results have somehow become more accurate. Rather than focusing on the polygraph, recent legal scholarship has instead turned to functional magnetic resonance imaging (fMRI) and other new technological innovations, ignoring the reality that thousands of American workers continue to be turned away from employment prospects every year based on a screening tool developed in the 1800s.<sup>8</sup>

I proceed in four parts. In Part I, I discuss Doug Williams's prosecution and other similar cases to provide a backdrop for the services that Williams provided: namely, that there is a demand for lessons on how to beat the polygraph because of the use of the polygraph in pre-employment screening.

Part II describes how the polygraph works and summarizes studies assessing its unreliability. This unreliability was an important reason why Congress passed the Employee Polygraph Protection Act (EPPA) in 1988, which prohibited use of the polygraph in private pre-employment screening. The federal government, however, not only exempted itself from the Act, but also expanded use of pre-employment polygraph testing to Customs and Border Protection (CBP).

Part III exposes the dangerous implications of using the polygraph for pre-employment screening (or as a condition for ongoing employment) based on the technology's unreliability. First, while there is no right to public employment, there is an invisible community of job candidates not receiving employment offers at the onset, or being terminated later on, because they fail this test—even if they are completely innocent of any past misdeeds or wrongdoing. A corollary to this problem of the "false positive" is the false negative: individuals who pose security threats still pass the polygraph. Additionally, individuals in this latter group may remain undetected because passing the polygraph potentially provides government agents in a supervisory role with a sense of complacency as to their screening apparatus, and they might thereafter relax otherwise stricter oversight throughout the course of an employee's career.

Part IV considers how, outside of the reliability-based concerns discussed above, use of the polygraph in employment settings implicates other civil rights concerns. First, social science research suggests that the invisible community of false positives might be comprised largely of racial minorities, a contrary result to certain federal agencies' stated missions of diversity. Second, decades of social science research in the criminal justice context demonstrates that one's past is not necessarily determinative of one's future actions—but that even a conviction for a minor offense can inflict long-term, devastating impacts on an individual's job search. Finally, the coercive setting of polygraph examinations should also cause concern, particularly about the potential for false confessions, which is clearly contrary to the stated purpose for using a polygraph in the first place.

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8. See, e.g., Leo Kittay, *Admissibility of fMRI Lie Detection: The Cultural Bias Against "Mind Reading" Devices*, 72 BROOK. L. REV. 1351 (2007); Daniel D. Langleben & Jane Campbell Moriarty, *Using Brain Imaging for Lie Detection: Where Science, Law, and Policy Collide*, 19 PSYCHOL. PUB. POL'Y L. 222 (2013).

I conclude by summarizing the major issue that Williams's case brings up, but was not satisfactorily addressed during his trial or sentencing: as long as the polygraph is used by the federal government for pre-employment screening, individuals will seek out services such as those provided by Williams to prepare for this test. The result of this test is highly charged, as it often plays both judge and jury: a polygraph's reading is likely the final word on an employee's job prospects with no room for an explanation or alternate narrative. This is problematic because of how unreliable the polygraph is and also based on the fact that people posing serious security threats will be able to pass this test and enter employment. Furthermore, use of this test may have disparate racial impacts in agencies that are already struggling to diversify, and the production of false confessions is a noteworthy possibility. Use of the polygraph in pre-employment screening, therefore, has serious implications for those concerned with unfair employment practices; problems facing national security; disparate racial treatment; and other due process rights more generally.

### I. DOUG WILLIAMS'S CASE AND ITS PRECEDENTS

Doug Williams was a successful businessman who considered himself a man on a mission. As part of his vocal criticism of the government's use of the polygraph, Williams ran both AntiPolygraph.org and Polygraph.com. AntiPolygraph.org describes its mission as follows:

AntiPolygraph.org seeks the complete abolishment of polygraph "testing" from the American workplace. Now that the National Academy of Sciences has conducted an exhaustive study and found polygraph screening to be invalid, and even dangerous to national security, Congress should extend the protections of the 1988 Employee Polygraph Protection Act to all Americans.<sup>9</sup>

AntiPolygraph.org hosts a variety of toolkits, sets of information, and an online store. Its "Frequently Asked Questions" page includes basic questions about the polygraph ("How many questions are asked per series? How long is the spacing between questions?"); questions about abolishing the polygraph ("Why is AntiPolygraph.org dedicated to the abolishment of polygraph 'testing?'"); and questions about rights for test-takers ("I recently took a polygraph 'test,' and failed, despite having told the truth on all questions. How could this have happened?").<sup>10</sup> It also hosts a message board with action alerts along with the free electronic publication *The Lie Behind the Lie Detector*,<sup>11</sup> currently in its fourth digital edition.

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9. *Comprehensive Employee Polygraph Protection Act*, ANTI-POLYGRAPH.ORG, <https://antipolygraph.org/ceppa.shtml> [<https://perma.cc/9JB5-YCS9>] (last visited Feb. 16, 2018) (emphasis omitted).

10. *Polygraph FAQ*, ANTI-POLYGRAPH.ORG, <https://antipolygraph.org/faq.shtml> [<https://perma.cc/F7KT-3Q3Q>] (last visited Feb 16, 2018).

11. George W. Maschke & Gino J. Scalabrini, *The Lie Behind the Lie Detector*, ANTI-POLYGRAPH.ORG (4th ed. 2005), <https://antipolygraph.org/lie-behind-the-lie-detector.pdf> [<https://perma.cc/KNS5-G7N3>]; George Maschke, *An Attempted Entrapment*,

Williams has published various books, including *How to Sting the Polygraph*<sup>12</sup> and *From Cop to Crusader: My Fight against the Dangerous Myth of "Lie Detection."*<sup>13</sup>

Polygraph.com, which, at the time of this writing, is available in a drastically different form from its original,<sup>14</sup> presented itself as more of a personal business than AntiPolygraph.org. As part of the website's business model, Williams offered personal training sessions. According to the site, Williams's training consisted of three elements: 1) "special training in my 'enhanced mental imagery technique' which utilizes a form of hypnosis . . . ; 2) three realistic practice polygraph tests . . . [and] 3) an evaluation of your polygraph charts . . ."<sup>15</sup>

This individualized training was the focus of the government's sting operation. In its complaint describing this operation, the government alleged that Williams "did knowingly devise and intend to devise a scheme and artifice to defraud the Federal government, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises."<sup>16</sup>

While the government did not specifically point to where and how Williams perpetrated his scheme to defraud, it did describe in detail the undercover operations that led to the filing of charges. In the first case, for example, the agent informed Williams that he intended to lie to investigators about his involvement in an illegal operation. Williams backed away once he learned this information and

ANTIPOLYGRAPH.ORG: ANTIPOLYGRAPH.ORG NEWS (Nov. 3, 2013, 1:34 PM), <https://antipolygraph.org/blog/2013/11/03/an-attempted-entrapment/> [<https://perma.cc/3LVP398Y>]. George Maschke is the co-founder of AntiPolygraph.org. Maschke has been an outspoken critic of polygraphs as well and has documented what he has believed to be an attempted entrapment against him by the government. While the first four editions of *The Lie Behind the Lie Detector* were published between 2000 and 2005, there apparently have been no new editions since 2005.

12. DOUG WILLIAMS, HOW TO STING THE POLYGRAPH (2014). *How to Sting the Polygraph* has been revised over fifty times. The abstract of the book on Amazon.com includes the following: KNOWLEDGE IS POWER - BUT FAILING TO PREPARE IS JUST PREPARING TO FAIL! As long as the polygraph is used to frighten and intimidate people - and as long as truthful people are falsely accused of lying, I will provide this information so they can protect themselves. If you are going to take a polygraph test, you MUST have the KNOWLEDGE you need to be PROPERLY PREPARED TO PASS YOUR POLYGRAPH TEST! I will teach you how to be PROPERLY PREPARED TO PASS - NERVOUS OR NOT - NO MATTER WHAT! The manual is short and easy to understand - it tells you everything you need to know to pass your polygraph test. The DVD demonstrates how well my technique works by showing you what it looks like on an actual polygraph chart when you do what I tell you to do. JUST TELLING THE TRUTH ONLY WORKS ABOUT 50% OF THE TIME - SO TO PROTECT YOURSELF FROM BEING FALSELY ACCUSED OF LYING, YOU MUST LEARN HOW TO PASS! THE CHOICE IS YOURS - GET PREPARED OR GET SCREWED!

Doug Williams, Abstract of *How to Sting the Polygraph*, AMAZON (Oct. 14, 2014), <https://www.amazon.com/How-Sting-Polygraph-Doug-Williams/dp/1502865874> [<https://perma.cc/BJ99-3TJQ>].

13. Doug Williams, FROM COP TO CRUSADER: MY FIGHT AGAINST THE DANGEROUS MYTH OF "LIE DETECTION" (2014), <https://www.amazon.com/Cop-Crusader-against-dangerous-detection/dp/1935689738> [<https://perma.cc/Y5WY-66HU>].

14. This website was drastically changed after the delivery of the guilty verdict in Williams's case in May 2015. The Personal Training section of the site has since been removed.

15. POLYGRAPH.COM (Jan. 25, 2015) (archive of webpage on file with author).

16. Indictment, *supra* note 2, at 4.

considered not training him at all. He ultimately, however, met with the agent and “train[ed] [him] how to conceal material lies and false statements during [the] investigation . . . .”<sup>17</sup> Even if Williams’s actions here are considered to be extreme, the government presented no evidence that any of his *other* clients were so emphatically intent on (1) lying, and (2) ensuring that he knew they were planning on lying. This element—knowledge about the customer’s intent—is vital to the government’s case against Williams, but even in the drastic circumstances set up by the sting operation, Williams stated repeatedly that he was working under the assumption of truthfulness.<sup>18</sup>

Nonetheless, after the indictment was filed, Williams clearly understood that he was in trouble. He proceeded to amend his publications accordingly. As one example, right before Williams went to trial in May 2015, Polygraph.com stated as a condition of training “I will not tell you to lie. I will not train you if you tell me you plan to lie. And I will not listen to any confessions or any admissions of wrongdoing whatsoever!”<sup>19</sup>

The Obama administration had prosecuted identical behavior before. From 2011–2012, the government pursued charges against Chad Dixon.<sup>20</sup> Dixon, who was also charged under the mail fraud statute, owned and operated a small company called Polygraph Consultants of America. Unlike Doug Williams, Chad Dixon had no background in law enforcement. To the contrary, he was a little league coach who became involved with polygraph instruction when he could not find a job as an electrician to support his family. Dixon was actually inspired by Williams’s work.<sup>21</sup>

According to the government’s complaint,

[I]n addition to providing contact information for DIXON, [his] website promised prospective customers, “It makes no difference if your [sic] being truthful or bold face lying we will teach you how to produce truthfull [sic] charts guaranteed. Your personal instructor is an expert in teaching people just like you how to pass any polygraph exam. Equally important, there is no way anybody will be able to tell that you have been trained. The

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17. *Id.* at 11.

18. *Id.* at 8. See also George Maschke, Comment to *Feds Indict Another Person for Teaching People How to Beat Polygraph Tests*, TECHDIRT (Nov. 17, 2014, 1:35 PM), <https://www.techdirt.com/articles/20141115/16013429160/feds-indict-another-person-teaching-people-how-to-beat-polygraph-tests.shtml> [<https://perma.cc/XN6T-SRUT>]: “The only alleged crimes are those that the government itself orchestrated. Despite having seized all of Williams’ business records, including the names of thousands of customers, the indictment doesn’t allege any crime involving an actual customer. Instead the government had to engineer a crime for which to prosecute Williams.”

19. *Personal Training*, *supra* note 15 (archive of webpage on file with author).

20. Criminal Information at 8, *United States v. Dixon*, No. 1:12CR 521 (E.D. Va. Dec. 17, 2012).

21. Matt Zapotosky, *Indiana Man Accused of Teaching People to Beat Lie Detector Tests Faces Prison Time*, WASHINGTON POST (Aug. 31, 2013), [https://www.washingtonpost.com/local/indiana-man-accused-of-teaching-people-to-beat-lie-detector-tests-faces-prison-time/2013/08/31/a7cbe74a-08ea-11e3-9941-6711ed662e71\\_story.html?utm\\_term=.03f9a9997fc7](https://www.washingtonpost.com/local/indiana-man-accused-of-teaching-people-to-beat-lie-detector-tests-faces-prison-time/2013/08/31/a7cbe74a-08ea-11e3-9941-6711ed662e71_story.html?utm_term=.03f9a9997fc7).

end result is the same every time, and that’s you passing your examination guaranteed!”<sup>22</sup>

Similar to Williams, Dixon also was hired by an agent posing as a prospective Customs and Borders Protection (CBP) employee who was using drugs and had not disclosed this information on a preliminary examination.<sup>23</sup> Furthermore, the agent claimed that he had previously accepted bribes to smuggle contraband to inmates.<sup>24</sup> According to the complaint, Dixon “told [the agent] that if CBP learned of [the agent’s] undisclosed employment circumstances and resignation, [the agent] would not be hired by CBP.”<sup>25</sup> Also similar to Williams, Dixon ultimately chose to enter a guilty plea, telling the judge he regretted his actions. He was sentenced to eight months in prison.<sup>26</sup>

These prosecutions are a relatively recent phenomenon. The Obama administration, in the same vein as its overall crackdown on whistleblowers generally,<sup>27</sup> dramatically changed the way that polygraph instructors had historically been treated:

The federal government previously had treated such instructors only as nuisances, partly because the polygraph-beating techniques are unproven. Instructors have openly advertised and discussed their techniques online, in books and on national television. As many as 30 people or businesses across the country claim in Web advertisements that they can teach someone how to beat a polygraph test, according to U.S. government estimates.<sup>28</sup>

In recent years, the federal government decided to change its approach and begin treating such instructors not as “nuisances” but rather as criminals. Part II describes the unreliability of the polygraph and its history in pre-employment screening in order to explain why these “criminals” had a ready customer base.

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22. Criminal Information, *supra* note 20, at 2 (alterations in original).

23. *See id.* at 8–9.

24. *Id.* at 9.

25. *Id.* at 10.

26. Matthew Barakat, *Chad Dixon Gets 8 Months for Teaching How to Beat Lie Detectors*, THE HUFFINGTON POST (Sept. 6, 2013, 2:43 PM), [http://www.huffingtonpost.com/2013/09/06/chad-dixon-\\_n\\_3882052.html](http://www.huffingtonpost.com/2013/09/06/chad-dixon-_n_3882052.html) [[https://web.archive.org/web/20130914051122/http://www.huffingtonpost.com/2013/09/06/chad-dixon-\\_n\\_3882052.html](https://web.archive.org/web/20130914051122/http://www.huffingtonpost.com/2013/09/06/chad-dixon-_n_3882052.html)].

27. *See, e.g.*, Tim Shorrock, *Obama’s Crackdown on Whistleblowers*, THE NATION (Mar. 26, 2013), <https://www.thenation.com/article/obamas-crackdown-whistleblowers/> [<https://perma.cc/8X64-J8FK>].

28. Marisa Taylor, *In Federal Crackdown, Ex-Cop Indicted for Coaching to Beat Polygraphs*, MCCLATCHY WASHINGTON BUREAU (Nov. 14, 2014, 5:44 PM), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24776317.html> [<https://perma.cc/MS75-2QFL>]. While the prosecutions discussed in this article can be seen as in and of themselves concessions that countermeasures *do* work and therefore should not just be treated as nuisances, they also can and should be viewed as concessions that polygraphs themselves *do not* work—since the two logically operate hand in hand.

## II. BACKGROUND OF POLYGRAPH TECHNOLOGY AND ITS USE IN EMPLOYMENT

To understand why Williams and Dixon's customers sought them out in the first place, one must first understand a bit about how the polygraph works and its shifting role in pre-employment screening. After a brief overview of the history and workings of the technology itself, this Part summarizes the literature about the polygraph's unreliability and connects this literature to the motivation behind Congress's 1988 passage of the Employee Polygraph Protection Act. Shedding doubt on the rationales for the federal government's exemption from this Act, this Part then describes the most recent and drastic expansion of polygraph use in Customs and Border Protection to queue up questions about the Act's effectiveness.

*A. Polygraph Background and Basics*

Ever since the dawn of the modern-day polygraph in 1895,<sup>29</sup> the test has spawned both innumerable cultural references<sup>30</sup> and polarizing critiques.<sup>31</sup> While the most common concern is about the test's accuracy, other concerns include fears about juror abdication (the role of the juror becoming co-opted by machines) as well as concerns about civil rights infringements.<sup>32</sup> Searching for a definition of a polygraph is in and of itself indicative of some of these concerns. For example, even describing the polygraph as a "lie detection test" is subject to criticism. Some find it more accurately described as a "fear detector"<sup>33</sup> or, more generally, an emotion-detecting test.<sup>34</sup>

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29. One of the earliest examples of polygraph technology comes from Italy when, in 1895, Cesare Lombroso published a description of his blood monitoring experiments with criminals. Lombroso would fit a rubber glove to a tank of water and insert the suspect's hand. Changes in the water's height were thought to correspond to changes in the hand's blood volume while lying. See James R. Wygant, *Uses, Techniques, and Reliability of Polygraph Testing*, 42 AM. JUR. TRIALS 313 § 5 (1991). For a more general description of a variety of "truth verifiers" from ancient to modern times, see Richard H. Underwood, *Truth Verifiers: From the Hot Iron to the Lie Detector*, 84 KY. L.J. 597 (1996). Underwood also specifically traces the modern-day American history of the polygraph.

30. See *The Truth About Lie Detectors (aka Polygraph Tests)*, AM. PSYCHOL. ASS'N (Aug. 5, 2004), <http://www.apa.org/research/action/polygraph.aspx> [<https://web.archive.org/web/20180126165122/http://www.apa.org/research/action/polygraph.aspx>] [hereinafter "APA Report"] ("Lie detector tests have become a popular cultural icon — from crime dramas to comedies to advertisements — the picture of a polygraph pen wildly gyrating on a moving chart is readily recognized symbol.")

31. See, e.g., Wygant, *supra* note 29, at § 2 ("Polygraph testing has often been regarded either with mystical reverence or as though it were the work of the devil.")

32. *Id.*

33. See APA Report, *supra* note 30 ("A particular problem is that polygraph research has not separated placebo-like effects (the subject's belief in the efficacy of the procedure) from the actual relationship between deception and their physiological responses. One reason that polygraph tests may appear to be accurate is that subjects who believe that the test works and that they can be detected may confess or will be very anxious when questioned. If this view is correct, the lie detector might be better called a fear detector.")

34. Underwood, *supra* note 29, at 14.

It is important to note from the outset that “[s]ome confusion about polygraph test accuracy arises because [polygraph tests] are used for different purposes, and for each context somewhat different theory and research is applicable.”<sup>35</sup> Within the criminal justice system, for example, the result of polygraph tests might be sought in the pre-trial phase; during the trial itself; and after sentencing, such as by probation officers. Outside of the criminal justice context, and with limitations described *infra*, the result of a polygraph test might be sought after by prospective employers, to screen potential applicants, as an ongoing condition of employment, or both.

Of these various contexts, the pre-employment polygraph test is perhaps the most controversial use of this device. Its proponents contend that it is “an inexpensive method of verifying employee truthfulness,” and its opponents claim that human dignity and individual rights are lost in this quest.<sup>36</sup> Virtually “no research assesses the type of test and procedure used to screen individuals for jobs and security clearances.”<sup>37</sup> This lack of field research led the National Resource Council (NRC), which compiled a comprehensive report of polygraph technology in 2003, to conclude that agencies seeking to use polygraph testing for employee security screening face “an unacceptable choice” between “too many loyal employees falsely judged deceptive and too many major security threats left undetected.”<sup>38</sup>

The types of questions asked in a polygraph test vary by context. The “specific incident test” is administered to solicit information about a particular event, such as after an on-premises test. This type of test has been the subject of better-tested scientific techniques. The NRC’s 2003 report compiled fifty-seven studies that met the Committee’s quality criteria.<sup>39</sup> From these studies, the Council concluded that specific incident tests can “discriminate lying from truth telling at rates well above chance, though well below perfection.”<sup>40</sup> In contrast, for pre-employment screening, the questions must be generic because there is no specific event being investigated.<sup>41</sup> As a consequence, both examiner and examinee might have trouble determining what is considered lying unless very clear criteria are laid out.

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35. APA Report, *supra* note 30.

36. See *Validity and Construction of Statute Prohibiting Employers from Suggesting or Requiring Polygraph or Similar Tests as Condition of Employment or Continued Employment*, 23 A.L.R.4TH 187, 2 (1983).

37. APA Report, *supra* note 30. See also COMMITTEE TO REVIEW THE SCIENTIFIC EVIDENCE ON THE POLYGRAPH, NATIONAL RESOURCE COUNCIL, THE POLYGRAPH AND LIE DETECTION 3 (2003), <https://www.nap.edu/catalog/10420/the-polygraph-and-lie-detection> [<https://perma.cc/JG5M-TFSF>] [hereinafter NRC Report] (“Only one field study, which is flawed, provides evidence directly relevant to [. . .] preemployment screening.”).

38. NRC Report, *supra* note 37, at 219.

39. *Id.* at 3.

40. *Id.* at 214.

41. See *id.* at 1.

The exact polygraph test itself also varies based on the purpose of the investigation.<sup>42</sup> However, across the board, the test analyzes physiological responses to a structured, but unstandardized, series of questions<sup>43</sup> to measure deception. The polygraph typically tests three indicators of autonomic arousal: heart rate/blood pressure; respiration; and skin conductivity (also known as “electrodermal response”).<sup>44</sup> A polygraph examiner asks a series of yes/no questions to the examinee who is connected to sensors that transmit data on these physiological phenomena. Polygraph instruments write on chart paper under ink pens at a rate of six inches per minute.

The test itself works by comparing physiological measures when answering control questions to answering “relevant” questions.<sup>45</sup> A pattern of greater physiological response to relevant questions leads to a finding of deception. However, as will be discussed below, an examiner’s analysis of these physiological responses does not take into account a subject’s natural reactions to fear, anticipation, or anxiety generally.

In terms of the test’s credentials, the American Polygraph Association (APA) has set forth basic requirements for an APA-certified program. These include a minimum of 400 hours of in-person training conducted at a certified training facility that must be completed in ten to seventeen weeks, with ninety-five percent of instruction performed in the presence of a qualified faculty member.<sup>46</sup> Materials include test formats, questions, and the psychological and physiological underpinnings of polygraph testing. The APA sponsors weeklong seminars every

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42. For example, the most widely used test in incident investigations is the Control Question Test (CQT), which compares responses to “relevant” questions (e.g. “did you shoot your wife?”) with those of “control” questions. Control questions concern misdeeds that are similar to those being investigated, but refer to the subject’s past and are usually broad in scope; for example, “Have you ever betrayed anyone who trusted you?” *Id.* at 14, 23. Other types of test include the Guilty Knowledge Test (GKT), the Test for Espionage and Sabotage (TES), and others. *Id.* at 161, 260. Presently, there are basically two types of polygraph examinations used in the security clearance process today: (1) the Counterintelligence Polygraph examination (CI Polygraph), *id.* at 259, and (2) the Lifestyle Examination (Lifestyle Polygraph), *see id.* at 263.

43. APA Report, *supra* note 30.

44. *Id.* (“Most examiners today use computerized recording systems. Rate and depth of respiration are measured by pneumographs wrapped around a subject’s chest. Cardiovascular activity is assessed by a blood pressure cuff. Skin conductivity (called the galvanic skin or electrodermal response) is measured through electrodes attached to a subject’s fingertips.”) *See also* *Veazey v. Commc’ns & Cable of Chi., Inc.*, 194 F.3d 850, 854 n.3 (7th Cir. 1999) (describing the three principal components of the modern-day polygraph test).

45. Test formats include the Keeler relevant question test, the Reid control question test, the Backster time limit controls, and the Baxter zone comparison test. *See* *Wygant*, *supra* note 29, at 66–71.

46. American Polygraph Association, *APA Accredited Polygraph Programs*, POLYGRAPH.ORG, <http://www.polygraph.org/apa-accredited-polygraph-training-programs> [<https://perma.cc/Q24A-JSVX>] (last visited Feb. 16, 2018) (requirements include “a minimum of 400 hours that will be completed in not fewer than 10 nor more than 17 weeks and must be conducted at a qualified education and training facility; a week shall consist of at least four but not more than six consecutive days; a day is defined as at least six but not more than nine hours, excluding lunch and breaks; at least 95% of the instruction hours provided each week shall be done so in the presence of a faculty member qualified to provide such instruction”).

year for continuing education. Despite these certification measures, however, only about half of the states require a license to conduct examinations.<sup>47</sup>

This variability amongst states’ requirements is only one type of variability that the use of a polygraph brings up. The next Part describes how and why the test’s results are unreliable generally, and describes the variability in how how lawmakers across states and the federal government have historically responded to this problem.

### B. Banning the Test for Employment Screening

Polygraphs continue to be used in employment screening, despite the lack of scientific consensus about their reliability. Congress was well aware of this lack of scientific consensus when it passed the Employee Polygraph Protection Act in 1988, but it still exempted itself from the Act’s obligations.<sup>48</sup> While the reasons for Congress’s exemption seem to constitute a deferential approach to national security jurisdiction, this exemption undermines the Act’s effectiveness and casts doubt on the government’s patchwork policy regime in place regarding the polygraph’s continued use. Finally, the recent expansion of polygraph use to the CBP can serve as a case study in which, even accepting *arguendo* that polygraph use might be successful in screening out potentially-hazardous and imprudent employees, the other considerations that this Note addresses still weigh against its use in this area.

#### 1. Background of the Ban: Unreliability

The polygraph has enjoyed a shaky role in American crime-solving, and every generation of lawmakers and agency heads has grappled with it. For example:

In 1938, when lie detector tests administered in a murder-kidnapping case in Florida “proved” an innocent man was guilty, and “cleared” the person who later confessed, J.Edgar [sic] Hoover told his agents to “throw that box into Biscayne Bay.” Hoover completely banned “the box” from FBI investigations in 1964, but the Bureau brought it back and established a Polygraph Unit in 1978.<sup>49</sup>

Courts have debated the use of polygraph evidence for about a century. For example, the famous *Frye* standard for assessing validity of evidence in a trial takes its name from a case in which an early form of the polygraph was rejected as a device to measure truth-telling.<sup>50</sup>

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47. *Polygraph Issues & Warnings*, THEPOLYGRAPHEXAMINER.COM, [http://thepolygraphexaminer.com/polygraph\\_schools.htm](http://thepolygraphexaminer.com/polygraph_schools.htm) [<https://perma.cc/844F-B8QH>] (last visited Feb. 16, 2018).

48. United States Department of Labor, *Other Workplace Standards: Lie Detector Tests*, ELAWS–EMPLOYMENT LAW GUIDE, <https://www.dol.gov/compliance/guide/eppa.htm#who> [<https://perma.cc/JRW5-THFA>] (last visited Feb. 16, 2018).

49. Underwood, *supra* note 29, at 628 (footnotes omitted). Hoover’s “banning” of “the box” is not to be confused with “Ban the Box” campaigns, discussed *infra* at 120, 129.

50. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Numerous studies and reports have attacked the credibility of polygraphs, far too many to quote at length here. As the United States Supreme Court described in *U.S. v. Scheffer*, which held that a military rule banning polygraph evidence was not unconstitutional:

Some studies have concluded that polygraph tests overall are accurate and reliable. . . . Others have found that polygraph tests assess truthfulness significantly less accurately — that scientific field studies suggest the accuracy rate of the “control question technique” polygraph is “little better than could be obtained by the toss of a coin,” that is, 50 percent.<sup>51</sup>

Despite inconsistent study results and divergent opinions about the reliability of the polygraph, researchers agree that polygraph accuracy varies based on its decision threshold—that is, whether its main function is set at rooting out high security threats or protecting loyal employees.<sup>52</sup> No matter the decision threshold, however, in all of the lab tests that the NRC ran, there were many false positives and *still* undetected security threats.<sup>53</sup> The NRC also recognized that these lab rates were more accurate than actual field detection rates.<sup>54</sup> Lab studies, in other words, “suffer from lack of realism” because “the consequences associated with lying or being judged deceptive almost never mirror the seriousness of these actions in real-world settings in which the polygraph is used.”<sup>55</sup> Therefore, as discussed above, the actual “real-world” potential of using polygraphs to screen out spies or other threats to security has been described as “extremely low.”<sup>56</sup>

## 2. *The Federal Government’s Exemption in the EPPA*

It is largely because of this unreliability that the polygraph’s use in employment has been so controversial. Even before passage of the EPPA in 1988,<sup>57</sup> the polygraph’s use in employment screening had faced harsh criticism. Prior to congressional debate, several states had already passed their own statutes banning its use in employment screening, and state courts often upheld challenges to these statutes. The Minnesota Supreme Court, for example, in deciding a First

51. *United States v. Scheffer*, 520 U.S. 303, 310 (1998) (citations omitted).

52. *See* NRC Report, *supra* note 37, at 180 (“With a procedure of any given level of accuracy, however, the only way to reduce the frequency of one kind of error is by adjusting the decision threshold—but doing this always increases the frequency of the other kind of error. Thus, it is possible to increase the proportion of guilty individuals caught by a polygraph test (i.e., to reduce the frequency of false negatives), but only by increasing the proportion of innocent individuals whom the test cannot distinguish from guilty ones (i.e., frequency of false positives).”).

53. *See id.* at 186–190.

54. *Id.* at 3.

55. *Id.*

56. *Id.* at 5 (“The proportion of spies, terrorists, and other major national security threats among the employees subject to polygraph testing in the DOE laboratories and similar federal sites presumably is extremely low. Screening in populations with very low rates of the target transgressions (e.g., less than 1 in 1,000) requires diagnostics of extremely high accuracy, well beyond what can be expected from polygraph testing.”).

57. Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (1988).

Amendment challenge to Minnesota’s private-employment polygraph ban, found that the state had a number of legitimate interests for its statute. These included:

[E]ncouraging the maintenance of a harmonious atmosphere in employment relationships which may be disturbed by the coercion to take a polygraph or similar examination; protecting an employee’s expectation of privacy which he or she may have if the questions put during these examinations are personal, private, or confidential; discouraging practices which demean or appear to demean the dignity of an individual employee in a significant way; protecting employees from adverse inferences drawn if they refuse to take these tests; and avoiding the coercive impact present in the solicitation.<sup>58</sup>

As described above, the Minnesota Supreme Court focused on the coercive nature of the polygraph, the desire to maintain “harmonious relationships” in employment contexts, and other dignitary issues suffered by employees as rationales to uphold the state legislation. The court took only judicial notice of the lie detector’s unreliability as undermining the employer’s argument for permitting the polygraph test.<sup>59</sup> In the U.S. Senate’s report before passing the EPPA, on the other hand, the Act’s motivating rationales—including primarily, the scientific evidence demonstrating the technology’s faults—are stated explicitly:

The last decade has witnessed an explosive growth in “lie-detector” tests, particularly the polygraph test. Today over two million polygraph tests are administered annually. While the polygraph was originally developed as an adjunct to criminal investigations within the law enforcement community, the vast majority of tests today are used as a screening procedure in private sector employment. These screening tests, either preemployment or random post-employment, account for much of the recent increase in testing of employees, despite the growing consensus of the scientific community about the lack of scientific validity of these examinations. Testimony provided to the Committee by the American Medical Association concluded that the polygraph can provide evidence of deception or honesty in a percentage of people that is statistically only somewhat better than chance. Another witness calculated that a minimum of 400,000 honest workers are wrongfully labeled deceptive, and suffer adverse employment consequences each year.<sup>60</sup>

The Senate report, then, indicates that Congress was aware of the polygraph’s unreliability and the consequences of this unreliability in terms of the “adverse employment consequences” suffered by “honest workers.”<sup>61</sup> After the Bill went through minor revisions in the House and the Senate, the EPPA was passed unanimously by all conferees. Its stated purpose is “[t]o prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers

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58. State v. Century Camera, Inc., 309 N.W.2d 735, 743 (Minn. 1981).

59. See *id.* at 743 n.13.

60. S. REP. NO. 100-284, at 41 (1988).

61. See *id.*

involved in or affecting interstate commerce.”<sup>62</sup> The Act thus defines lie detectors broadly to include different kinds of voice technology, and forbids private sector employers from “directly or indirectly” requiring, requesting, suggesting, or causing prospective and current employees “to take or submit to any lie detector test,” or from using, accepting, referring to, or inquiring about the results of lie detector tests of employees or prospective employees.<sup>63</sup>

The Act enumerates various remedies for a violation, including, but not limited to, civil penalties up to \$10,000, and injunctive actions by the Secretary of Labor to restrain violations.<sup>64</sup> The Act has been successfully used to fight various high-level cases of employees who were discharged after refusing to submit to polygraph examinations.<sup>65</sup> Despite these successes, however, the Act is “in fact, [ ] subject to a number of important statutory exemptions and limitations that impact significantly the availability of the use of lie detector tests in the employment area.”<sup>66</sup> This is probably a result of the deliberative process—that is, the bargaining and compromising that took place in passing this bill: Senator Orrin Hatch, one of the original Bill cosponsors, called it “a unique bill” and “an equitable compromise . . . which addresses both the interests of employees and the needs of employers.”<sup>67</sup>

In terms of exemptions for private employers, the Act includes, for example, a “limited” exemption in the ban of polygraph use for ongoing investigations.<sup>68</sup> If an employer has suffered an economic loss or injury in her business, the employer may request a polygraph test of the employee only when the employee had access to the property and the employer has a reasonable suspicion that the employee was involved.<sup>69</sup> The exemptions as a whole illustrate that the EPPA represents both legislative compromise and political bargaining, with Congress expressing deference toward the use of the polygraph in certain private sector scenarios.

Aside from these carve-outs, however, the federal government broadly exempted itself from the law it was passing. Various members of Congress recognized this double standard. Georgia Representative George “Buddy” Darden, for example, found this curious: “[I]f this polygraph is such quackery or witchcraft, why do we not apply [the proposed law] fully across the board and give the same

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62. Employee Polygraph Protection Act of 1988 § 2001.

63. *Id.* §§ 2001(3), 2002(1)–(2).

64. *Id.* § 2005.

65. *See, e.g.,* Stehney v. Perry, 101 F.3d 925, 938 (3d Cir. 1996) (holding that the EPPA preempted New Jersey anti-polygraph statute and prohibited National Security Agency from discharging employee after she refused to submit to polygraph testing and had her security clearance revoked). *But see* Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1144 (8th Cir. 1998) (finding that hospital was political subdivision of county and therefore was exempt from the EPPA).

66. Joseph M. Pellicciotti, *The Employee Polygraph Act of 1988: A Focus on the Act's Exemptions and Limitations*, 51 LOY. L. REV. 911, 913 (2005) (describing rationales and legitimacy of the EPPA's exemptions for ongoing investigation, drug security, and security services).

67. 134 CONG. REC. 14,008 (1988) (statement of Sen. Hatch).

68. 29 U.S.C. § 2006(d).

69. *See* H.R. CONF. REP. NO. 100-659, at 13 (1988).

protection to everyone that we are giving to those employees within the private sector?”<sup>70</sup>

A quasi-answer to Representative Darden’s question can be indirectly located in the Bill’s legislative history. The House Report states:

By exempting public sector employers and private contractors engaged in intelligence and counterintelligence functions, the conferees recognize the functions performed by these employers are not within the jurisdiction of the committees which reported the legislation, and the policy decisions as to the proper or improper use of such tests are left to the committees of jurisdiction and expertise.<sup>71</sup>

It seems, then, that the Act’s exemptions for the intelligence and counterintelligence fields were based on concerns about jurisdiction and expertise. These concerns could potentially have been overridden, but it appears that the balance between “the interests of employees and the needs of employers” Senator Hatch described in extoling this Bill weighed in favor of deference to national security interests, even in 1986. Below, this Note posits that individuals posing serious security threats will still be able to pass a polygraph examination, rendering this explanation unsatisfying. However, the point here is that the government exempted itself from the EPPA based on a purported rationale of national security.

We can imagine that today this Bill, ripe with exemptions as it is, might not even have passed due to the increasing uproar over “insider threats” in the realm of national security.<sup>72</sup> Instead, polygraph use has apparently increased due to concerns about whistleblowers. For example, even though there is currently not publicly available information about Edward Snowden’s polygraph record, in the wake of Snowden’s defection from the National Security Agency (NSA), at least one article has reported that analysts have gone from being polygraphed once every five years to once every quarter.<sup>73</sup> The polygraph’s use for continued federal employment,

70. 134 Cong. Rec. 13,065 (1988) (statement of Rep. Darden).

71. H.R. CONF. REP. NO. 100-659, at 12.

72. On October 2011, President Obama issued Executive Order 13587 — Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information. This Executive Order established an Insider Threat Task Force, which includes the mandate to develop “a Government-wide policy for the deterrence, detection, and mitigation of insider threats.” Exec. Order No. 13,587, 76 Fed. Reg. 63811 (Oct. 7, 2011). The Insider Threat Program has been described as “an unprecedented government-wide crackdown under which millions of federal bureaucrats and contractors must watch out for ‘high-risk persons or behaviors’ among co-workers.” Jonathan S. Landay & Marisa Taylor, *Experts: Obama’s Plan to Predict Future Leakers Unproven, Unlikely to Work*, MCCLATCHY WASHINGTON BUREAU (July 9, 2013, 3:25 PM), [http://www.mcclatchydc.com/2013/07/09/196211/linchpin-for-obamas-plan-to-predict.html#.UdyJ-1Ocq\\_D](http://www.mcclatchydc.com/2013/07/09/196211/linchpin-for-obamas-plan-to-predict.html#.UdyJ-1Ocq_D) [<https://web.archive.org/web/20180207105335/http://www.mcclatchydc.com/news/special-reports/insider-threats/article24750850.html>]; see also Conor Friedersdorf, *Obama’s ‘Insider Threat Program’: A Parody of Liberal Faith in Bureaucrats*, THE ATLANTIC (Jul. 10, 2013), <https://www.theatlantic.com/politics/archive/2013/07/obamas-insider-threat-program-a-parody-of-liberal-faith-in-bureaucrats/277653/> [<https://perma.cc/29B3-XA5T>].

73. Daniel Drezner, *Tone-Deaf at the Listening Post: My Day at the National Security Agency Headquarters at Fort Meade*, FOREIGN POL’Y (Dec. 16, 2013, 8:39 PM), <http://foreignpolicy.com/2013/12/16/tone-deaf-at-the-listening-post/> [<https://perma.cc/ZZV4-CAG5>].

then, is still being justified by a notion that it enhances national security, without any evidence in support.

This, of course, is not the first or only time that the government has exempted itself from a law. The voluminous record of tax exemptions for government-owned property, as just one example, bears testament to this.<sup>74</sup> However, it seems strange that the government would have exempted itself in this case while concurrently promoting a policy choice based on the unreliability of the polygraph: even the stated importance of national security cannot make a polygraph more reliable. Furthermore, if another motivator of the Act was fear of misuse (specifically, overuse) by private agencies, why is the government exempt from this potential misuse? These questions underlie a discussion of dangerous implications in using polygraph examinations for pre-employment screening.

### 3. *Specific Issues in Expansion to CBP*

Despite the questionable accuracy of polygraph tests described above, Congress voted in 2010 to expand the government's use of these tests to Customs and Border Protection (CBP).<sup>75</sup> This expansion, however, should not be thought of as simply a quantitative expansion of the number of federal employees subjected to polygraph testing, but rather also as a qualitative shift in use of the technology. The use here, in other words, differs in material ways from the rationales for the exemptions as outlined in the EPPA.

The only carve-outs to the EPPA's prohibition in private employment are, supposedly, for jobs involving access to top secret or special access program information: "The conference agreement is designed to conform with the National Defense Authorization Act for Fiscal Years 1988 and 1989 (H.R. 1748), which restricts such testing to individuals whose duties involve access to top secret or special access program information."<sup>76</sup> As described above, the polygraph has been found to not provide an "acceptable" level of assurance to *actually* justify these rationales in and of themselves, but the point here is that the exceptions, at least, are limited.

The 2010 bill expanding polygraph testing, on the other hand, did not have these similar rationales in mind, but rather made the findings of "corruption" and "improper conduct" (instead of security threats) as motivators.<sup>77</sup> The Anti-Border Corruption Act, signed into law by President Obama in 2011,<sup>78</sup> found that "since

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74. See, e.g., *Sales Tax Exemption*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/ofm/tax/sales/#c> [<https://perma.cc/3VNA-PMHA>] (last visited Apr. 1, 2017).

75. See Maschke & Scalabrini, *supra* note 11, at 33 ("While in 1988, Congress ratified and President Ronald Reagan signed into law the Employee Polygraph Protection Act (EPPA) prohibiting most polygraph screening in the private sector, the Act expressly exempted federal, state, and local government. In the years since the OTA report, the reliance of Government on polygraphy has grown, rather than diminished, even as numerous spies have beaten the polygraph.").

76. H.R. CONF. REP. NO. 100-659, at 12.

77. See Anti-Border Corruption Act, Pub. L. No. 111-376, 124 Stat. 4104 (2011).

78. See *id.*

2003, 129 U.S. Customs and Border Protection officials have been arrested on corruption charges and, during 2009, 576 investigations were opened on allegations of improper conduct by U.S. Customs and Border Protection officials.”<sup>79</sup> Congress also found that CBP already had a polygraph testing regime in place, but that the requirement was being under-enforced, creating a major backlog.<sup>80</sup>

The CBP website describes the test as a “standardized polygraph exam,” the results of which “will be used in determining your suitability for employment with CBP”:

Some questions will concern the answers you gave on your application forms; others will deal with national security issues (e.g., foreign contacts, mishandling of classified information, and involvement in terrorist activity). All questions will be explained and reviewed with you prior to the actual examination. You will be given an opportunity to discuss any concerns or issues you may have about any question prior to the actual exam.<sup>81</sup>

The key word here is a prospective employee’s *suitability* for employment with the CBP. While an argument can be made that corruption in CBP is, indeed, a matter of national security (and that the expansion did not, then, qualitatively change or expand the EPPA’s exemptions), the CBP’s own internal categorization undercuts this argument. As the website itself describes, “suitability” and “security” are two different processes.<sup>82</sup> Suitability is the underlying one-size-fits-all pre-employment screening that *all* employees must pass: “an individual’s identifiable character traits and conduct that is sufficient to decide whether the individual’s employment or continued employment would or would not protect the integrity or promote the efficiency of the service.”<sup>83</sup> Security, on the other hand, involves clearances to work with top-secret programs and information: in other words, exactly the rationales

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79. *Id.*

80. *See id.* The Trump administration has further de-prioritized punishing CBP applicants for “past misdeeds.” By requesting 5,000 new CBP officers, President Trump has led CBP to consider waiving lie detector tests for applicants, two thirds of whom fail tests on a yearly basis. *Border Patrol May Loosen Lie-Detector Use in Hiring to Meet Trump’s Jobs Order*, GUARDIAN (Mar. 8, 2017, 6:37 PM), <https://www.theguardian.com/us-news/2017/mar/08/border-patrol-lie-detector-test-new-hires-trump-jobs-order> [https://perma.cc/T7B8-9TFD] (describing, also, that as of March 2017, CBP was considering “a six-month experiment with an alternative polygraph test that takes less time to administer”). That consideration has led to legislation allowing for this change in policy; such a measure has so far passed the House. *See* Maria Sacchetti, *House Passes Bill to Allow Some Border and Customs Job Applicants to Skip Polygraph Test*, WASHINGTON POST (June 7, 2017), [https://www.washingtonpost.com/local/social-issues/house-passes-bill-to-allow-some-border-and-customs-job-applicants-to-skip-polygraph-test/2017/06/07/59b2a9b8-4b99-11e7-9669-250d0b15f83b\\_story.html?utm\\_term=.6ce2fbb43ed](https://www.washingtonpost.com/local/social-issues/house-passes-bill-to-allow-some-border-and-customs-job-applicants-to-skip-polygraph-test/2017/06/07/59b2a9b8-4b99-11e7-9669-250d0b15f83b_story.html?utm_term=.6ce2fbb43ed) (describing the new bill, which would permit the CBP commissioner to waive the polygraph requirement for full-time state or local law enforcement officers who have passed the test in the past 10 years).

81. *Background Investigation Process and Polygraph Examination FAQs*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/careers/car/poly> (last visited Apr. 1, 2017).

82. *Id.*

83. *Id.*

promoted by the EPPA's already-existing private sector exceptions.<sup>84</sup> The use of the polygraph for CBP, then, is functioning very differently from how Congress envisioned polygraph use in the EPPA.

The consequences of the CBP screening exams have also functioned in accordance with a different set of standards. The screening exams have resulted in hundreds of prospective agents being turned away from these jobs.<sup>85</sup> Indeed, some of the applicants' histories can read like a parade of horrors. One article, for example, found CBP agents who had disclosed a wide variety of crimes, including bestiality, sexual molestation, and involvement in a hit-and-run.<sup>86</sup>

One might, understandably, be viscerally appalled by these crimes. As a result, one might conclude that this is exactly why the requirement for polygraph testing is, and should be, in place. One might even be tempted to advocate for more widespread pre-screening use of the polygraph based on these past bad deeds. However, even if, *arguendo*, there was an empirically higher rate of criminality amongst CBP agents than other federal agents and the general population, and even if one believes that the consequences, therefore, of a polygraph test which detects these past crimes is normatively positive, there are still serious reasons for concern in the CBP's expansion of polygraph testing, as just one case study of pre-employment testing by the federal government. These additional reasons for concern are discussed below.

### III. DANGEROUS IMPLICATIONS BASED ON UNRELIABILITY

Using the polygraph for pre-employment screening, or as an ongoing condition of employment, raises several dangerous implications based on the

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84. *Id.*

85. S. REP. NO. 111-338 (2010) makes a compelling case for the continued and even expanded use of applicant polygraph testing by CBP in the future as well:

In 2009, less than 15 percent of applicants for CBP jobs received polygraph examinations. Significantly, CBP reported to Congress that of those applicants undergoing polygraph examinations, 60% were found ineligible for employment, primarily due to prior drug use or a criminal history that the applicant had not previously disclosed. Less than 1 percent of CBP applicants who successfully completed an applicant polygraph examination subsequently were disqualified in their required single scope background investigation (SSBI). By contrast, 22% of applicants who were not subjected to applicant polygraph testing were subsequently disqualified in their SSBI. Further, given that SSBI's cost an average of \$3,200, the expanded use of applicant polygraph testing offers a more cost-effective and streamlined security process for CBP applicants. The numbers demonstrate that polygraph testing of applicants before the initiation of an SSBI has significant utility and offers a cheaper and faster method for effectively vetting candidates.

Charles N. Painter, *A Private Sector Polygraph Solution for the Anti-Border Corruption Act of 2010*, INSIDE HOMELAND SEC., [http://www.abchs.com/ihs/SUMMER2012/ihs\\_articles\\_2.php](http://www.abchs.com/ihs/SUMMER2012/ihs_articles_2.php) [[https://web.archive.org/web/20161226074126/http://www.abchs.com/ihs/SUMMER2012/ihs\\_articles\\_2.php/](https://web.archive.org/web/20161226074126/http://www.abchs.com/ihs/SUMMER2012/ihs_articles_2.php/)] (last visited Apr. 8, 2017).

86. Andrew Becker, *During Polygraphs, Border Agency Applicants Admit to Rape, Kidnapping*, CTR. FOR INVESTIGATIVE REPORTING (Apr. 4, 2013), <http://cironline.org/reports/during-polygraphs-border-agency-applicants-admit-rape-kidnapping-4325> [<https://web.archive.org/web/20170720054619/http://cironline.org/reports/during-polygraphs-border-agency-applicants-admit-rape-kidnapping-4325>].

unreliability described above. First, anyone concerned about unfair employment practices should raise an eyebrow at the large number, but invisible nature, of employees who are falsely labeled “deceptive” by the polygraph on an annual basis: the “false positives.” This invisible community of false positives is particularly disconcerting since polygraph testing tends to have an adverse effect on the most truthful, conscientious employees that one might intentionally *seek* for high security positions. Conversely, the polygraph’s effectiveness is undercut by the fact of existing “false negatives,” those who pass the polygraph despite having a criminal record or posing a security risk. Research suggests that using the polygraph for employment purposes might lead to a sense of overconfidence on the part of the government, thereby relaxing other standards of screening and detecting actual security threats (such as spies). This concern about undue confidence also underlies Supreme Court decision-making concerning the role of polygraph evidence in the courtroom. For all these reasons, using the polygraph for pre-employment screening or as an ongoing condition of employment should be reconsidered.

#### A. False Positives

One inevitable outcome of using the unreliable polygraph for employment screening is the invisible community of false positives. While there is no court-recognized right to public employment, the fact remains that there is a sizeable invisible community of people not receiving employment offers (with the government, at least) because they cannot pass this test but are not lying—regardless of how broadly we might define lying.<sup>87</sup> In the end, because of the way

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87. Nailing down the definition of a “lie” is a difficult task, and, for the most part, this task is outside the scope of this Note. It is both a philosophical and pragmatic inquiry: for example, many moral philosophers have studied the morality of lying. See Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346, 347 (Lewis White Beck ed., 1949) (arguing that lying is a moral wrong because it undermines the dignity of others). This inquiry takes place in a wide variety of social and professional settings: psychologists might be concerned about the pathology of lying to better treat patients; social workers might be concerned about discerning the “truth” from a child; lawyers might be concerned about their client taking a seat on the witness stand under threat of perjury. For all of these professions and so many more, then, the line between a “lie” and a “non-lie” is crucial. See, e.g., Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1275 (2007) (“Deception is usually considered a bad thing. We teach our children not to lie, we don’t like it when our politicians dissemble, and we root against the television character who misleads people. But we also officially permit deception in all sorts of situations, including sports (Boise State’s statue of liberty play in the 2007 Fiesta Bowl), negotiations between lawyers (puffing about the client’s case), and scientific research (from whence the term ‘placebo’).”). Some philosophers engage in conceptual analysis to define “lie.” Professor Don Fallis, for example, defines lies as “when you *assert* something that you believe to be false.” Don Fallis, *What is Lying?*, 106 J. PHIL. 29, 33 (2009). It is easy to see that this broad definition, however, encompasses some sort of intent to deceive. In other words, if a person says something and does the opposite, she is not necessarily *lying* when she first made the statement. Lying, instead, involves an intentionality to bring about a certain behavior, or a certain reliance, in one’s subject. Even within this definition:

It is probably more accurate to think of lies, collectively, as occupying positions on a nearly infinite gradient. That gradient, in turn, constitutes only a portion of a further, nearly infinite gradient necessary to locate the full variety of lies, false statements, fraudulent statements,

the EPPA was enacted, the FBI alone still polygraphs approximately 13,000 people a year for job screening, and as many as forty percent of special agent applicants do not get the job because of their polygraph test results.<sup>88</sup> These numbers should be extremely disconcerting for anyone who cares about unfair employment practices since many people screened out are (1) innocent by any definition or (2) “guilty” of something—but that “something” likely does not relate to his or her essential job duties.

As far as numbers within this “invisible community” are concerned, one study found that one in four applicants for police officer jobs were disqualified solely based on their polygraph results.<sup>89</sup> Federal agencies report a similar failure rate. According to a 1997 letter submitted to the Senate Judiciary Committee by Donald Kerr, then assistant director of the FBI’s Laboratory Division, twenty percent of the bureau’s job applicants who had passed an initial pre-employment polygraph examination were “determined to be withholding pertinent information” on lie detector tests. This problem does not affect pre-employment screening alone, but also affects screenings for continued employment. Indeed, the likelihood of receiving a deceptive test result at some point in an employee’s career increases when one is subjected to multiple polygraph examinations.<sup>90</sup> The more times that one is subjected to a polygraph examination, the more opportunities one has for the machine to show a “deceptive” result even just one fatal time. This is particularly relevant (and harrowing) for NSA employees today in light of recent reports that the Agency has increased its polygraph testing of employees twentyfold in recent years.<sup>91</sup>

In 2002, Mother Jones profiled a prospective Secret Service employee, Bill Roche, who had this exact experience of undergoing multiple polygraph examinations and failing just once.<sup>92</sup> In an article appropriately entitled “Lie Detector Roulette,” a confident Mr. Roche, who made detective while in his

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misleading statements, deceptive statements, and perjurious or other related sorts of statements.

R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1132–33 (2011).

88. Marisa Taylor, *FBI Turns Away Many Applicants Who Fail Lie-Detector Tests*, MCCLATCHY DC BUREAU (May 20, 2013, 12:00 AM), <http://www.mcclatchydc.com/news/special-reports/article24749254.html> [<https://perma.cc/TK48-MSZ4>]. Even more pertinent to this Note, a 2016 article reports that the FBI has been not only looking at failed polygraph results, but also looking for examinees who are allegedly making use of countermeasures. Jessica Schulberg, *The FBI Insists It Doesn’t Fire People over Polygraphs. This Man Says It Happened to Him.*, HUFFINGTON POST (Oct. 17, 2016, 10:00 PM), [https://www.huffingtonpost.com/entry/fbi-polygraphs-countermeasures\\_us\\_57ffe22ce4b0162c043ae621](https://www.huffingtonpost.com/entry/fbi-polygraphs-countermeasures_us_57ffe22ce4b0162c043ae621) [<https://perma.cc/S62R-SYTF>] (noting that “[i]nstead of disciplining employees for failing polygraphs, the FBI can accuse them of using countermeasures and punish them for that”).

89. See Brendan I. Koerner, *Lie Detector Roulette*, MOTHER JONES (Nov. 1, 2002, 4:00 AM), <http://www.motherjones.com/politics/2002/11/lie-detector-roulette> [<https://perma.cc/93AU-UQ8S>].

90. See Maschke & Scalabrini, *supra* note 11, at 38.

91. Drezner, *supra* note 73.

92. Koerner, *supra* note 89.

twenties in a suburban Bay Area police department, describes his application process to become a U.S. Secret Service Agent.<sup>93</sup> When he initially applied, "his interviewers lauded him as an excellent candidate."<sup>94</sup> He needed only to pass the polygraph, and this detail did not deter him or even cause him to be fearful: He had taken many tests while he was a police officer.

During the actual test, which took seven hours, the polygraph examiner continuously yelled at him and told him that his reactions were "not in the acceptable range." Mr. Roche reported that the more fervently he protested his innocence, the more confrontational the examiner became. Ultimately, his results were labeled "deceptive" and the Agency bounced him from the applicant pool.<sup>95</sup>

Williams's site, AntiPolygraph.org, includes many similar personal statements from special agents. One story is especially telling, since the Agent had originally began working for the FBI in 1994 when pre-employment polygraph testing was not used.<sup>96</sup> "Agent Smith," whose name was changed for inclusion on the site, successfully completed training and worked as a field agent in a large field office for a "number of years" before leaving to pursue other job opportunities. After a few years, he decided he wanted to return to work with the FBI, and applied for reinstatement. By this time, the FBI had begun implementing polygraph tests. The offer to return to work as a special agent was contingent upon his successful passing of the polygraph that was in place, by that point, for first-time applicants. He did not pass, and also failed a retest opportunity. Agent Smith then wrote four letters to various assistant directors, explaining that his anxiety over returning to work with the FBI, and his own understanding of the machine's variability, led to the "deceptive" result. His letters articulate one of the major concerns at issue in this sort of testing:

I told the truth during the polygraph exam. How can I prove it? How can I prove I did not lie? In many ways this situation is worse than being accused of a crime. If I were accused of a crime I would at least have a chance to face my accuser, present evidence and be judged by a jury of my peers. This is not the case with a polygraph. The machine is the accuser, the judge and the jury . . .<sup>97</sup>

Bill Roche and Agent Smith represent a larger, invisible community. This community is invisible because, at its most basic level, the public does not have an accurate count of how many people are being screened out of federal employment prospects. Additionally, even if the public had access to that denominator (individuals screened out of employment prospects annually based on a polygraph result), it also would not have an accurate count of how many people are completely

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Polygraph Statement of Special Agent Smith*, ANTI-POLYGRAPH.ORG, <https://antipolygraph.org/statements/statement-001.shtml> [<https://perma.cc/MST2-Z7GH>] (last visited Apr. 8, 2017).

97. *Id.* (alteration in original).

“innocent” (i.e. based on any definition of lying) or somewhere in the middle (i.e. perhaps omitting something from their lives, which may or may not be directly addressed by the question at hand).<sup>98</sup>

Additionally, as the NRC report points out, the public does not have an accurate count of how many competent individuals have been deterred from even *applying* for high-security positions because of the possibility of false positives: “[Overconfidence in polygraph testing] can lead to unnecessary loss of competent or highly skilled individuals because of suspicions cast on them as a result of false positive polygraph exams or because they *avoid* or leave employment in federal security organizations in the face of such prospects.”<sup>99</sup> In other words, there might be a deterrent effect at the front-end of employment: prospective employees who will avoid seeking out certain jobs solely because of the prospect of taking a polygraph examination.

This “invisible community” of false positives is particularly disconcerting since this demographic is comprised of exactly who one might *want* in powerful positions: truthful, conscientious people. The more conscientious one feels about being *found* guilty, the higher the likelihood that he or she will register a “deceptive” test result on a polygraph examination. The NRC report states that “there is evidence suggesting that . . . truthful examinees who are believed to be guilty or believed to have a high likelihood of being guilty may show emotional and physiological responses in polygraph test situations that mimic the responses that are expected of deceptive individuals.”<sup>100</sup> Accordingly, the federal government is missing out on the assets, ideas, and contributions of truthful employees based on its reliance on polygraph technology. This reliance, furthermore, is not simply misplaced: it might also be actually dangerous because of the ensuing potential for overconfidence in pre-screening strategies, described below.

### B. Overconfidence

The general concept of overconfidence is related to the idea of false *negatives*. Put simply, there are bound to be people who appear non-deceptive on an initial polygraph test, and then further background screenings or alternative methods of ensuring security are not carried out fully. The NRC report describes potential consequences of overconfidence in terms of the “false sense of security” promoted by the polygraph use:

Such overconfidence, when it affects counterintelligence and security policy choices, may create an unfounded, false sense that because employees have appeared nondeceptive on a polygraph, *security precautions can be relaxed*. Such overconfidence can create a false sense of security among policy makers, employees in sensitive positions, and the public that

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98. See R. George Wright, *supra* note 87 (describing the “nearly infinite gradient” of lies). Data, clearly, is hard to gather, in part based on the difficulty in defining this “nearly infinite gradient.”

99. See NRC Report, *supra* note 37, at 220 (emphasis added).

100. *Id.* at 3.

may in turn lead to *inappropriate relaxation of other methods of ensuring security*. It can waste public resources by devoting to the polygraph funds that would be better expended on developing or implementing alternative security procedures.<sup>101</sup>

Overconfidence can be illuminated with real cases, and the case of Aldrich Ames should be considered an exemplar. Ames was a CIA counter-intelligence officer who was charged with spying for the Soviet Union and, later, Russia. He had passed two CIA polygraph examinations between 1985 and 1994, in which he denied having committed espionage. One of these examinations, for example, did not yield any suspicious information about large cash transactions after he returned from his post abroad, including but not limited to a half million dollar cash deposit on a home.<sup>102</sup> It was only when the FBI utilized both electronic and physical surveillance that Ames and his wife pled guilty to being the mole that the FBI had been searching for. At this point, the investigation had been ongoing for nine years. The results of Ames's actions were "potentially devastating to the national security of the United States":

By turning over thousands of classified documents to the Soviets, Ames managed to shut down any effective intelligence gathering within the Soviet Union and Russia for almost a decade. Coupled with the espionage of the Walker family spy ring and another CIA employee, Edward Lee Howard, the United States intelligence community provided the national command authority little human intelligence about the Soviet Union or Russia. The results were potentially devastating to the national security of the United States.<sup>103</sup>

Ames's record with the clandestine unit of the FBI had been anything but perfect. He slept on the job, was "inattentive to security," (even, one time, leaving highly classified documents on a subway in New York), and was "derelict in filing required reports" in multiple subject areas.<sup>104</sup> However, "[l]ittle attention or corrective action was taken during his entire career."<sup>105</sup> The fact that Ames passed these polygraph tests while he was on the FBI's suspect list led to a relaxation of suspicion about him and a redirection to other suspects, which further prolonged

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101. *Id.* at 219–20 (emphasis added). *See also* Pellicciotti, *supra* note 66, at 941 ("Overconfidence can be brought about by the ready availability and use of lie detector testing and the potential that such ready use will result in undue over reliance on the part of agency officials. An undue over reliance on the use of lie detector testing can take the government's focus off of more effective security measures, and it can inefficiently allocate resources to activities where they are least effective and deny resources where they would be best used to enhance legitimate governmental functions.").

102. David M. Crane, *Divided We Stand: Counterintelligence Coordination Within the Intelligence Community of the United States*, 1995-DEC ARMY LAW. 26, 29 (1995).

103. *Id.* at 27. In the wake of Ames's conviction, the polygraph community heatedly debated whether or not his charts did, indeed, reveal deception or whether this was an inevitable consequence of unreliable technology. *See* Maschke & Scalabrini, *supra* note 11, at 36. This debate over whether or not the charts revealed deception, however, simply illustrates the subjective nature of reading polygraph charts

104. Crane, *supra* note 102, at 27.

105. *Id.*

the investigation. Even the CIA inspector general admitted, at the end of the investigation, “It is true that the spy was found, but the course to that conclusion could have been much more rapid and direct.”<sup>106</sup>

The Ames case is just one illustration of the fact that major security risks will still invariably remain undetected even with use of the most secure screening processes, and these security risks will invariably be able to pass “routine” as well as specific incident polygraph examinations. The community of scientists and statisticians who authored the comprehensive 2003 NRC Report was keenly aware of this proposition, and called upon it in declaring that polygraph testing for pre-employment screening led to an “unacceptable choice” between “too many loyal employees falsely judged deceptive and too many major security threats left undetected.”<sup>107</sup>

Case dicta is informative about a different aspect of overconfidence. Justice Thomas’s majority opinion in *Scheffer* describes some of the considerations that a state would contemplate when deciding whether or not to allow polygraph evidence in the courtroom:

Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent’s case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt.<sup>108</sup>

In other words, use of the polygraph in a courtroom can lead jurors to be overconfident in the results of the polygraph, and thus, to forsake their duties toward careful, unbiased consideration of other evidence. Furthermore, neither the judge nor the jury is likely to know about the accuracy and validity of a specific polygraph test administered in a particular situation, so courts “are wise to be reticent in allowing a ‘black box’ to replace the judgment of the trier of fact in such circumstances.”<sup>109</sup> This argument was one of the strongest rationales for Justice Thomas’s majority opinion in *Scheffer*.

It is worth noting that Justice Thomas’s majority opinion distinguishes the use of polygraph evidence in a criminal courtroom from polygraph evidence in pre-employment screening, writing that “[s]uch limited, out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial.”<sup>110</sup> It is not clear, however,

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106. *Id.* at 28. CIA Inspector General Frederick P. Hitz here was likely speaking about the lack of coordination between agencies, but this statement can be applied to various aspects of the faulty Ames investigation in general.

107. See NRC Report, *supra* note 37, at 6.

108. *United States v. Scheffer*, 523 U.S. 303, 313–14 (1998).

109. Stephen E. Fienberg, *To Tell the Truth: On the Probative Value of Polygraph Search Evidence*, 46 JURIMETRICS J. 107, 116 (2005).

110. *Scheffer*, 523 U.S. at 312 n.8.

that out of court uses obviously differ in character from use in a criminal trial: First, as described below, the test—even in the pre-employment context—has been used as an interrogation device, which carries potential criminal ramifications for disclosures. The role of the polygraph in these two contexts (pre-employment and criminal trials), then, might be more similar than what Justice Thomas assumed in *Scheffer*. As Agent Smith described in his anecdote on Polygraph.com, the polygrapher in pre-employment settings plays both judge and jury.<sup>111</sup> There is no concomitant trial to elicit further evidence, weigh credibility, and arrive at a different verdict. In the pre-employment setting, the polygraph’s result *is* the verdict.

Second, the consequences of pre-employment polygraph use might actually be more similar to the consequences of a criminal proceeding than Justice Thomas assumed. Both a “deceptive” polygraph result and a criminal sentence can carry long-term consequences, some of which are difficult to quantify. Is a defendant who faces, say, six months of probation for a misdemeanor marijuana offense necessarily worse-off than a thirty-year government employee whose lie detection test is found to be “deceptive” right before her pension would kick in? As described below, the collateral consequences of a criminal conviction, including being barred from or at least highly marked in employment prospects, might actually be quite similar to the consequences of a “deceptive” polygraph result.

Nonetheless, accepting Justice Thomas’s distinctions between the criminal courtroom and pre-employment screening for the sake of argument, the policy concerns he articulates (particularly regarding the co-opting of the fact-finder’s role in a trial) are at a minimum illustrative of polygraph reliability debates generally.

#### IV. DANGEROUS IMPLICATIONS OUTSIDE OF UNRELIABILITY

Dangerous implications of using the polygraph in pre-employment screenings exist outside of those directly derived from the test’s unreliability. Anyone concerned about policies that disparately impact racial minorities—in employment and beyond—should be concerned about social science research suggesting that the population most affected by polygraph testing is disproportionately comprised of minorities. Additionally, pre-employment polygraph testing implicates two other civil rights concerns, even for those who are not necessarily “falsely” labeled deceptive. First, the standard of judging a past act—that one’s disclosure about an unrelated misdeed from a remote time could be used as a justification for denying an employment opportunity in the present—is out of sync with recent successful “Ban the Box” movements demanding a right to privacy regarding one’s past actions for current, unrelated job functions. Secondly, anyone interested in the due process considerations animating *Miranda* protections should be similarly concerned about the coercive environment of polygraph testing.

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111. *Polygraph Statement of Special Agent Smith, supra* note 96.

*A. Racial Concerns*

The use of the polygraph test to screen potential employees is particularly alarming when considered against a backdrop of social science research. Recent psychology studies indicate that the invisible community of people screened out from job opportunities might be comprised of a disproportionate number of minorities. This research shows that for groups already socially stigmatized, polygraph tests might be even more inaccurate than for the general population:

Recently, research has confirmed experimentally that both stigma bearers and perceivers exhibit cardiovascular patterns of response associated with threat during performance situations that are not metabolically demanding. This research typically demonstrates these effects during task performance but not during baseline or resting periods, suggesting the possibility that physiological responses to relevant and comparison questions might be differentially affected on polygraph tests.<sup>112</sup>

In 1987 hearings before a Senate subcommittee convened to study polygraphs in the workplace, New York's attorney general reported receiving "complaints about a polygraph operator who consistently fails a much higher percentage of black subjects than white subjects."<sup>113</sup> Twenty years after his report, research points to the subjective nature of polygraph testing, as described earlier. Polygraph use, then, can become a site for enacting one's implicit racial biases. Implicit racial biases:

[T]ypically refer to unconscious anti-black bias in the form of negative stereotypes (beliefs) and attitudes (feelings) that are widely held, can conflict with conscious attitudes, and can predict a subset of real world behaviors. For instance, implicit racial biases can influence whether black individuals receive callback interviews and life-saving medical procedures, as well as whether individuals exhibit nonverbal discomfort when interacting with non-whites. Decades of research demonstrate that most Americans are unconsciously biased against black individuals.<sup>114</sup>

Aside from the subjectivity in *reading* polygraph results, recent research also confirms that certain members of racially stigmatized groups—particularly African Americans—may "exhibit heightened cardiovascular threat responses in situations in which negative stereotypes about racially stigmatized groups are likely to exist."<sup>115</sup> This phenomenon, deemed "stereotype threat" by social scientists, affects performance because "being negatively stereotyped redirect[s] cognitive resources away from the task at hand, leading to deficient performances."<sup>116</sup> Stereotype threat

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112. NRC Report, *supra* note 37, at 88 (citation omitted).

113. *Polygraphs in the Workplace: Hearing Before the S. Comm. on Labor and Human Resources*, 100th Cong. 3 (1987) (statement of Robert Abrams, Att'y Gen. of the State of N.Y.).

114. L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2962–63 (2015) (footnotes omitted); *see also* Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science*, 8 *ALA. CIV. RTS. & CIV. LIBERTIES L. REV.* 145 (2017)

115. NRC Report, *supra* note 37, at 88 (citation omitted).

116. Richardson, *supra* note 114, at 3.

has been examined recently to examine and help explain phenomena ranging from test-taking to police violence. The 2003 NRC Report about polygraph testing drew upon a 2000-2001 study, which found heightened blood pressure rates amongst African American participants during testing that measured their cognitive responses to difficult test items.<sup>117</sup> The Report concluded, “[t]he experimental situations in which these stigma studies have occurred bear a striking resemblance to polygraph testing situations, particularly employee screening tests.”<sup>118</sup>

The derivative effects of false positives, particularly their distorted effect on racial minorities, urge a careful reconsideration of the polygraph’s use in pre-employment screening.

### *B. Other Civil Rights Concerns*

Aside from the disproportionate impact that polygraph examinations likely have on minority populations, there are two additional civil rights concerns that should inform the use of polygraphs in employment settings. First, policymakers should consider whether information about one’s past should reasonably preclude the opportunity to participate in gainful employment in the future. Second, information obtained during the polygraph is often elicited in a testing environment that mirrors a custodial interrogation, but lacks the same protections. Therefore, one might expect a prevalence of false confessions in the pre-employment polygraph context, which is clearly contrary to the asserted purpose of utilizing the test to begin with.

#### *1. Relation of Questions to Job Responsibilities*

While most policymakers might outwardly agree that one’s past is not determinative of one’s future actions, the polygraph is inherently backward-looking. The NRC report noted that polygraph use in the employment context is “even more complicated because it involves inferences about future behavior on the basis of information about past behaviors that may be quite different (e.g., does past use of illegal drugs, or lying about such use on a polygraph test, predict future spying?).”<sup>119</sup>

The question of how related the prior offense is to the essential duties of a prospective job is, in and of itself, a debate that many states have taken up in “Ban the Box” campaigns. “Ban the Box” campaigns seek an end to the “criminal history” section on a job application, compelling disclosure only for related offenses; the “Box” in the campaign title refers to the checkbox for former convictions on an employment application.<sup>120</sup> Traditionally, this advocacy has been led by states, individual nonprofits, and community activists concerned with the high rate of

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117. NRC Report, *supra* note 37, at 88–89.

118. *Id.* at 88.

119. *Id.* at 2.

120. For examples of state-by-state Ban the Box campaigns, see *End Discrimination at Your Workplace, TAKE THE FAIR CHANCE PLEDGE!*, <http://bantheboxcampaign.org/> [<https://perma.cc/8SV3-VBQ7>] (last visited Mar. 23, 2016).

formerly incarcerated people not being able to secure any sort of employment after release. These campaigns achieved a major victory in November 2015, when President Obama announced that he would direct some federal agencies to “ban the box” or “delay inquiries into criminal history until later in the hiring process.”<sup>121</sup> Although President Obama’s order did not affect federal contractors, this step was important both symbolically and practically. It signified that the federal government, at that time, understood that one’s past actions are not determinative of one’s future actions, and promoted an understanding that one should not continue to be automatically punished for the past’s misdeeds (by being immediately screened out from a prospective job).<sup>122</sup>

The consequential disqualification from future job opportunities should be taken into account in any sort of balancing test to assess the government’s use of the polygraph. Criminology literature about “collateral consequences,” also called “invisible punishment,”<sup>123</sup> can be illuminating here. “[C]ollateral consequences of a criminal conviction” are described by the American Bar Association (ABA) as “legal sanctions and restrictions imposed upon people because of their criminal record.”<sup>124</sup> The ABA has undergone a large-scale project to document collateral consequences and organize them into a comprehensive inventory.<sup>125</sup> Another group, The National Employment Law Project, has found that approximately sixty-five million people in the United States have a criminal record, and an array of restrictions drastically limit the ability of these individuals to work.<sup>126</sup> Law schools, legal aid societies, other organizations, and elected representatives around the country are working to alleviate these burdens by, as one example, operating expungement clinics for minor offenses.<sup>127</sup> Federal judges are beginning to take note of collateral consequences as

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121. Press Release, The White House, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> [<https://perma.cc/X3QL-LQBY>].

122. At the time of this writing, there is no direct statement by the Trump administration regarding lie detectors, Ban the Box campaigns, or whistleblowers generally.

123. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15 (Marc Mauer & Meda Chesney-Lind eds., 2002).

124. NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/> [<https://web.archive.org/web/20171220223047/https://niccc.csjusticecenter.org/>] (last visited Apr. 4, 2017).

125. *Id.*

126. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/PUY3-FE2M>].

127. See, e.g., Kia Gregory, *Legal Volunteers Help Those Seeking a Clean Slate and a New Start*, PHILLY.COM (Nov. 21, 2011, 3:01 AM), [http://www.philly.com/philly/hp/news\\_update/20111121\\_Legal\\_volunteers\\_help\\_those\\_seeking\\_a\\_clean\\_slate\\_and\\_a\\_new\\_start.html](http://www.philly.com/philly/hp/news_update/20111121_Legal_volunteers_help_those_seeking_a_clean_slate_and_a_new_start.html) [<https://perma.cc/BM4J-X7RQ>] (describing the monthly clinics of the Philadelphia Criminal Record Expungement Project); Kamau High, *Baltimore NAACP Plans Expungement Clinics*, AFRO (May 27, 2015), <http://www.afro.com/baltimore-naacp-plans-expungement-clinics/> [<https://perma.cc/U482->

well. For example, in May 2015, federal judge John Gleeson attempted to expunge the criminal record of a woman he convicted of fraud over a decade earlier after learning the extent to which her record was interfering with her ability to sustain a long-term job.<sup>128</sup> Commentators believed that this was the first time a federal judge took such a step.

While this Note has been primarily concerned with the community of “false positives,” people who are “innocent” of wrongdoing by any definition, denial of employment opportunities based on one’s past history operates within larger societal racial structures. In other words, any push to include the use of the polygraph in pre-employment screening as part of a “Ban the Box” policy decision would relate directly to the same disparate racial and economic realities that animate other concerns quickly becoming prime focuses in mainstream American conversations. The Obama-era FBI, at least, was aware of conversations about the disparate racial impact of police violence and the resulting push to increase diversity in U.S. police forces.<sup>129</sup> The FBI has long struggled with diversity: of the bureau’s 13,455 agents, only 606 (4.5 percent) are African American, and only 6.8 percent are Hispanic.<sup>130</sup> Members of racial minorities facing the sort of psychological phenomena inherent in a polygraph examination, then, sit for their tests with this underrepresentation as a backdrop. The effects of this backdrop might manifest themselves through a *stereotype threat* expectation loop—the fear of not wanting to confirm the Bureau’s historic attitude and mistreatment of African American officers, which culminated in a 2001 class action settlement<sup>131</sup>—as well as through the effects of *tokenism* because of the small number of agents who identify as members of a minority group. Professor Pamela Braboy Jackson’s study on African American leaders, for example, found that racial rarity increases “token stress,”

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EQ7A]; *Expungement Clinic*, LAW STUDENTS IN COURT, <http://dclawstudents.org/expunge-dc/> [<https://perma.cc/9W63-CRR2>] (last visited Feb. 16, 2018).

128. Rob Wile, *For the First Time Anyone Knows of, a Judge has Expunged a Woman’s Criminal Record Because it was Ruining Her Career*, FUSION.NET (May 29, 2015, 2:23 PM), <http://fusion.net/for-the-first-time-anyone-knows-of-a-judge-has-expunge-1793848012> (describing Judge Gleeson’s decision to expunge the record of the mother of five known only as Jane Doe, who was found guilty in 2002 of faking injuries from a car accident to attempt to collect insurance money). Judge Gleeson’s ruling was later reversed by the Second Circuit, finding that the district court did not have subject matter jurisdiction over the petitioner’s motion. *See Doe v. United States*, 833 F.3d 192, 196 (2d Cir. 2016).

129. See, for example, the Obama Justice Department’s scathing report on Ferguson, Missouri, and the Ferguson Police Department’s treatment of African Americans. U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEP’T (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/72DW-FCVA>].

130. Sari Horwitz, *As U.S. Pushes Police to Diversify, FBI Struggles to Get Minorities in the Door*, WASHINGTON POST (March 12, 2015), [https://www.washingtonpost.com/world/national-security/as-us-pushes-police-to-diversify-fbi-struggles-to-get-minorities-in-the-door/2015/03/12/01bd5806-c753-11e4-b2a1-bed1aeca2816\\_story.html?utm\\_term=.4eb409cbcb48](https://www.washingtonpost.com/world/national-security/as-us-pushes-police-to-diversify-fbi-struggles-to-get-minorities-in-the-door/2015/03/12/01bd5806-c753-11e4-b2a1-bed1aeca2816_story.html?utm_term=.4eb409cbcb48).

131. *Id.*

including having to show greater competence in the job force, at the same time as experiencing a severe sense of isolation and other negative effects.<sup>132</sup>

Similar to certain criminal convictions, when one is denied a government job for failing the polygraph test, this is considered a “black mark” that will likely disqualify someone from federal employment for life.<sup>133</sup> Based on the reality of which groups are overrepresented in the criminal justice realm generally, social science research suggests that these life-long consequences will fall disproportionately on racial minorities in the pre-employment context as well.<sup>134</sup> These concerns should urge careful reconsideration of the use of the polygraph in pre-employment settings.

## 2. *Lack of Due Process Protections for What Can Become an Interrogation*

The polygraph’s coerciveness is another point of concern in its pre-employment screening use. Returning briefly to the past crimes of the CBP agents discussed above, one can find another disturbing aspect: their disclosure. The disclosures of these crimes seem irrational: why would somebody confess to these serious crimes when applying for a job? On the one hand, this seems to show that something procedurally is not working: the CBP website, after all, claims that all questions will be previewed with, and explained to, the examinee. Is this preview genuinely taking place if CBP agents are confessing to these sorts of crimes? Likely the answer depends on the examiner, whose individual technique, as described above, is highly variable.

There have already been documented examples of prospective employees who have been siphoned into the criminal justice system through admissions made in a polygraph examination. One prospective CBP officer in Arizona, for example, admitted during a pre-employment polygraph screening that he was the driver in a 2009 single-car crash that killed a passenger.<sup>135</sup> Another disclosed that he had fondled his best friend’s young sister and engaged in bestiality. He was then arrested on suspicion of sexual contact with a minor and three counts of bestiality. These are only the ones for which court records have been able to be obtained: CBP “has not made public how many cases have been forwarded for further investigation or prosecution or how many have led to convictions.”<sup>136</sup>

The point here is not at all that the first officer did not commit a wrong, or that he should not have been discovered by the police. The point, instead, is that these stories tell us something about just how coercive the environment of a polygraph examination is, resembling that of an interrogation more than any kind of stand-alone “test.” The polygraph examination’s environment is similar in several

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132. Pamela Braboy Jackson et al., *Composition of the Workplace and Psychological Well-Being: The Effects of Tokenism on America’s Black Elite*, 74 SOC. FORCES 543 (1995).

133. Koerner, *supra* note 89.

134. RODRIGUEZ & EMMELM, *supra* note 126, at 4.

135. Becker, *supra* note 86.

136. *Id.*

ways to the custodial interrogation that the Supreme Court in *Miranda v. Arizona* was concerned with.<sup>137</sup> First, the examination takes place in privacy, which “results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”<sup>138</sup> This gap in the public’s knowledge, then, is partially filled in by the stories that outspoken critics of the polygraph have provided: critics including Agent Smith, (whose story of attempting to transfer into special services was described above), and Doug Williams (who was, as described above, convicted of administering counter-measure instructions after years of administering the polygraph). In fact, Williams considered himself on a crusade to fill in those gaps in knowledge: to bring down the polygraph’s use by publicizing how the examination worked (especially to his paid clients, with whom he would conduct a “run-through” of a realistic testing environment). The crucial point here is that because there is very little information available about what exactly is happening to thousands of potential employees on an annual basis in their polygraph screening, these screenings are subject to less regulation, review, and consideration.

Second, in this private environment, the examinee is one-on-one with the examiner. One might initially respond to this by remarking that this factor is no different from a typical job interview itself. However, it is precisely this similitude that may lead to duplicity. It is not hard to imagine that prospective employees are unprepared for a line of questioning falling outside of essential job duties and qualifications for the position they are interviewing for, and are therefore unprepared for the moment that the examination turns into an interrogation. Because it is part of a job interview, the examinee will likely be more trusting of the examiner; she likely does not think of herself as a suspect. The one-on-one nature of the examination, which the *Miranda* court considered in crafting its watershed interrogation safeguard doctrine, does work here as well: the examiner has even more of an opportunity to craft a “friendly” persona in an environment that, initially, does *not* seem hostile. However, the “standard interrogation techniques” that informed the Supreme Court’s landmark *Miranda* decision are potentially utilized by polygraph examiners. An examiner might, for example, emphasize how badly he or she wants the examinee to get the job, similar to an investigator emphasizing that he or she is on the same team as a suspect in trying to solve a crime. An examiner might downplay the importance of the polygraph, similar to an investigator downplaying the importance of the suspect’s role in a crime.<sup>139</sup> Boise State University psychology professor and polygrapher Charles Honts explains,

The polygraph examiner is going to tell them that lying is worse than confessing. That’s not necessary [sic] true, but that’s what they say . . . .

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137. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

138. *Id.* at 448.

139. See *id.* at 450 n.12 (quoting *Leyra v. Denno*, 347 U.S. 556, 562, 582 (1954), where the interrogator-psychiatrist told the accused, “We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things [that] we aren’t really responsible for,” and again, “We know that morally you were just in anger. Morally, you are not to be condemned”).

They tell people: “We know people aren’t perfect. People make mistakes. But you won’t get the job if you lie.” Minimization and justification—it’s standard interrogation technique.<sup>140</sup>

Outside of these factors resembling the criminal interrogations discussed in *Miranda*, the pseudoscientific nature of the polygraph machine itself can elicit certain statements. During this interrogation, belief in the polygraph’s reliability and accuracy influences the outcome:

In this case, the polygraph test has a useful role independently of whether it can accurately detect deception: it is effective *if the examinee believes it can detect deception*. Admissions of this kind provide evidence of the value of the polygraph examination for investigative purposes, but they do not provide evidence that the polygraph test accurately detects deception.<sup>141</sup>

One is reminded of a classic scene from HBO’s “The Wire,” where a suspect on the verge of confessing is strapped to a “polygraph,” which turns out to be a copy machine.<sup>142</sup> It matters not what the machine is actually doing; it matters what the suspect believes the machine is capable of doing.

Even if one believes that the polygraph is faulty and inaccurate, an examiner can call upon other methodology to elicit results. One need only refer to Agent Smith’s experiences to understand that even examinees who do not believe in the polygraph’s infallibility are subjected to other interrogation techniques. These techniques do not take advantage of the examinee’s naiveté through a trick like that portrayed in “The Wire.” Instead, the examiner might push the examinee to a point of weakness through verbal and sometimes physical intimidation. Furthermore, Agent Smith’s experiences show that a polygraph examination can last for several hours, similar to the length of a criminal interrogation.

Based on these concerns, demonstrating the potential for coerciveness in the setting of a polygraph examination, one should be wary of the potential false confessions elicited through such an interrogation. One can understand, for example, how an examinee would try to please the examiner by guessing what he or she wants to hear, similar to a suspect in a criminal matter who wants an end to her custody and tries to guess what the “right” answer is. Confessions are elicited, criminologists explain, because examinees undergo a rational cost-benefit analysis of their options:

Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making—people make optimizing choices given the alternatives they consider. Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person’s attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The

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140. Quoted in Becker, *supra* note 86.

141. See NRC Report, *supra* note 37, at 22 (emphasis added).

142. *The Wire: More with Less* (HBO television broadcast Jan. 6, 2008).

techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike. Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess.<sup>143</sup>

Here, the "advantages that follow" a confession, according to an examinee, involve employment and all of its attendant benefits. The same psychological techniques used in criminal interrogation are also employed in polygraph examinations, and the same rational cost-benefit decision-making is utilized by an examinee. However, unlike the use of these techniques in the criminal justice system, use of these psychological techniques in a polygraph setting have not been discussed, and curtailed, by the United States Supreme Court. As discussed above, the results of these tests can be just as damaging to a prospective employee as a conviction for a minor crime, and a confession elicited might be false for the same reasons: it might be made only for the purpose of escaping the environment as quickly as possible. The government, as described above, took note of some of these risks in passing the EPPA. However, thousands of potential federal employees every year are still subjected to the interrogation of a polygraph examination, without judicial review or other safeguards.

#### CONCLUSION

The federal government might have succeeded in its prosecution, and eventual sentencing, of polygraph countermeasure instructor Doug Williams. However, the sentencing of one individual will not solve, or even alleviate, the larger issues raised by his case. Instead, Williams's sentencing carries with it several important questions regarding fair employment practices and national security. This Note has posed just some of these pressing questions.

First, the polygraph's unreliability, coupled with its definitive nature (i.e. that a finding of deception is more often than not the final verdict in an employee's job prospects or continuing employment), is a fatal combination. This fatal combination gives rise to an "invisible community" of federal employees turned away from employment prospects, and ongoing employees terminated from their jobs. This invisible community is not widely researched, but should be a source of serious concern, especially given the machine's unreliability and subjectiveness. Additionally, the use of the polygraph might lead to a sense of complacency and/or overconfidence on the part of the government since real security threats, such as Aldrich Ames, still pass the polygraph and continue on with their work undetected.

Furthermore, social science research suggests that this invisible community of barred prospective employees is disproportionately comprised of racial minorities,

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143. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U.L. REV. 979, 985 (1997).

who react to stereotype threat and other stigma-related expectancy feedback loops in their physiological reactions to stressful situations more often than white employees. Relatedly, policy considerations, such as those underscoring “Ban the Box” campaigns, urge reconsideration of polygraph use in pre-employment screening more generally. Specifically, one’s past is not determinative of one’s future actions. Additionally, since a polygraph test can quickly become an interrogation akin to one in a criminal setting, it is important to keep in mind that none of the safeguards that exist in the latter situation are required for the former. This helps explain why someone might confess to a crime or a bad act that is unrelated to the sought-after employment opportunity, but why these confessions might also be false.

For all of these reasons, using the polygraph as the “judge and juror” in the pre-employment setting is severely misguided. Now is the time to re-evaluate such use.