Inquisitorial Process in Private Employment

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THE INQUISITORIAL PROCESS
IN PRIVATE EMPLOYMENT

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INTRODUCTION

Employee misconduct has become a fundamental concern for most private employers in recent years. According to one estimate, American business is currently losing between $12 billion and $40 billion annually to internal employee crime.\(^1\) Increased on-the-job use of alcohol and drugs is seriously undermining occupational safety and production efficiency.\(^2\) In response to these problems, employers have significantly expanded utilization of such security techniques as employee interrogation, lie detector tests, searches of workers and their effects, and electronic surveillance of in-plant activities.\(^3\) These efforts have inevitably encroached upon the pri-

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\(^2\) See, e.g., D. Martindale & E. Martindale, \textit{The Social Dimensions of Mental Illness, Alcoholism [sic], and Drug Dependence} 221-22 (1971). \textit{See also} id. at 218-20, 262-56.

\(^3\) Industry expenditures for electronic security systems alone, which totaled $275 million in 1974, may reach $791 million by 1984. Johnson, \textit{supra} note 1, at 27.

Although this Article directly considers the impact of increased security techniques only upon present employees, the pernicious effect of such practices upon job applicants should also be recognized. "Prospective employees . . . increasingly are finding that employment is conditioned upon their submission to polygraph and psychological testing." Hermann, \textit{Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing}, 47 Wash. L. Rev. 73, 73 (1971). \textit{See also} Loftus, \textit{Employer's Duty to Know Deficiencies of Employees}, 16 Clev.-Mar. L. Rev. 143 (1967); Quindlen, \textit{Polygraph Tests for Jobs: Truth and Consequences}, N.Y. Times, Aug. 19, 1977, at B1, col. 1.

Pre-employment screening frequently involves expansive inquiry into at least four areas:
vacancy of employees, who find themselves increasingly subject to Orwellian regimens in their places of employment.

Although employer security measures frequently conflict with interests akin to constitutional rights, the absence of state involvement effectively precludes judicial intervention in most

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[First, questions about past dishonesty or criminal activity, detected or undetected, related or unrelated to work; second, questions about past work record and attitude toward the job for which application is being made, and underlying motives of the person seeking employment; third, questions about mental or physical problems, or about family difficulties which may affect work activity; and fourth, questions about accident experiences, personal habits, political activity, and personal association, any of which may be tangentially related to the likelihood of accident or indicate personal instability.]


Although non-employee job applicants are technically not covered by the mandatory collective bargaining obligations contained in the National Labor Relations Act (29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1970)), several employers and labor organizations have recently negotiated agreements providing some protection for such individuals. See A. Lemond & R. Fry, No Place to Hide 124-25 (1975).

4 For a description of the various lie detection devices currently in use or under development, see notes 119, 126-29 and accompanying text infra. For a description of the sophisticated surveillance equipment currently available, see notes 264-69 and accompanying text infra. See generally M. Brenton, The Privacy Invaders 61-74 (1964); S. Dash, The Eavesdroppers (1959); A. Westin, Privacy and Freedom 69-89, 450-52 (1967).


There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate— they could plug into your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

Id. at 4. See also A. Westin, supra note 4, at 59.

6 In recent years, organized labor has frequently argued for the extension to the employment setting of basic constitutional protections against unreasonable searches (see U.S. Const. amend. IV), compelled self-incrimination (see U.S. Const. amend. V), and denial of counsel (see U.S. Const. amend VI). See, e.g., Spelfogel, Surveillance and Interrogation in Plant Theft and Discipline Cases, N.Y.U. 21st Ann. Conf. on Labor 171, 172 (1969). Such an approach would impose upon arbitration proceedings all of the rules applicable to criminal trials. Arbitrators would be forced to exclude probative evidence if an employer failed to comply with technical constitutional requirements. The principles behind those requirements are certainly worthy of consideration by arbitrators. Strict adherence to those principles, however, is inappropriate in the relatively informal arbitration setting, where the primary goal is to ascertain the truth.

Some writers have argued that corporate entities should be subject to constitutional limitations since they are primarily creations of the states. See Berle, Constitutional Limita-
cases. Thus, workers who desire to challenge the reasonableness of particular searches or interrogations often resort to the arbitration process. A substantial body of arbitration case law has resulted from such disputes, to the point that there are now general areas of agreement among arbitrators as to the propriety of various security measures. This Article analyzes the arbitration process in the area of industrial security, and canvasses arbitration decisions dealing with each of the major security techniques used by employers today. It also examines federal statutes that proscribe certain employer security measures, including the National Labor Relations Act and the Omnibus Crime Control and Safe Streets Act of 1968. Throughout the Article, specific standards are suggested for rules governing the inquisitorial process in private employment.

I

The Arbitration Process

Most collective bargaining agreements provide for grievance procedures whereby employees can assert complaints against particular management acts or practices. In most cases the grievance process will terminate in arbitration—a form of hearing in which management and labor submit their disputes to a neutral third party (the "arbitrator") for adjudication. The arbitration process

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8 See notes 11-25 and accompanying text infra.


12 Id. at 541-42.
is not a formal trial, although fundamental rules of procedural due process are normally followed. The arbitrator deals "not so much with legal rights as with equitable considerations and matters of policy."

Arbitration of disputes over employer security techniques thus involves not the rigid application of statutory and constitutional rules—although such rules may provide useful guidance—but the balancing of employer interests in industrial efficiency against employee interests in privacy and personal dignity. It is generally recognized that employers are "permitted by law and by contract to make such rules and regulations as are not inconsistent with the parties' collective bargaining agreement, and which are reasonably necessary for the smooth, efficient conduct of the business—even though at times they may impinge on the employee's personal privacy." Nevertheless, some management practices inevitably become so intrusive as to offend contemporary standards.

13 R. Gorman, supra note 11, at 543. As described by one arbitrator, "[t]he arbitration process is (or should be) a search for truth." John Deere Waterloo Tractor Works, 20 Lab. Arb. 583, 584 (1953) (Davey, Arb.).


15 Stone, supra note 14, at 11 (emphasis in original). "[T]he primary concern of the arbitrator in his procedural and substantive rulings is not adherence to rules as such, but advancement of what he believes to be good labor relations policy, and making a decision the parties can live with." Id. at 16.

16 The rules of evidence applicable to judicial proceedings are not strictly followed in the arbitral context. See Fleming, Some Problems of Evidence Before the Labor Arbitrator, 60 Mich. L. Rev. 133 (1961); Jones, Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes, 13 U.C.L.A. L. Rev. 1241, 1242-45 (1966). This does not mean that arbitrators eschew all evidentiary doctrines. The late Professor Shulman best summarized the basic philosophy of most arbitrators: "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant." Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1017 (1955). See also Jones, supra at 1253-56.

17 See note 6 supra.

18 See Edwards, supra note 14, at 169. "I do not know whether an accommodation between management's need to know what is going on in the plant and the workers' right to privacy and dignity can be reached, but everyone involved in labor relations will find these types of conflicts occurring more frequently as science advances." Burkey, Employee Surveillance: Are There Civil Rights for the Man on the Job?, N.Y.U. 21ST ANN. CONF. ON LABOR 199, 210 (1969).


20 The right to privacy holds tenaciously to life. It is a vulnerable right, con-
Accommodation of conflicting interests in this area may require consideration of matters beyond the facts of a particular case. A seemingly reasonable invasion of employee privacy, when viewed in the light of many other intrusions by the same employer, may point to a *cumulative* intrusive impact that is clearly unreasonable. On the other hand, the human rights concerns of individual employees must often be weighed against the job security of all employees. Since employee defalcations precipitate approximately one-third of all business failures, the imposition of excessively rigid restrictions on security measures can lead to unemployment for wholly innocent workers.

The arbitration process faces several obstacles in attempting to deal with these issues on a national basis. First, arbitration is almost exclusively the creature of collective bargaining agreements, and is ordinarily not available to nonunion employees. Employees not protected by contractual limitations may generally be disciplined or discharged "for good cause, or bad cause, or no cause at all," unless such action by the employer contravenes some specific statutory proscription. Second, arbitration decisions have no binding impact beyond the particular case decided. Although arbitrators do find considerable persuasive authority in the decisions of their

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*Courtney, Electronic Eavesdropping, Wiretapping and Your Right to Privacy, 26 Fed. Com. B.J. 1, 58 (1973).*

*The intrusiveness of particular security measures is not simply a function of technological development. "[T]his is a well-worn cliche that machines are morally neutral, and it is only the men who use them who therefore bear the responsibility for distinguishing between right and wrong." A. Miller, The Assault on Privacy 23 (1971).*

*21 See A. Miller, supra note 20, at 207.*

*22 Spelfogel, supra note 6, at 171.*

*23 "Less than a third of unorganized employers provide any grievance machinery, and arbitration as a terminal point for such grievance machinery is so unusual that its presence is regarded as indeed a freak." Weyand, Present Status of Individual Employee Rights, N.Y.U. 22ND ANN. CONF. ON LABOR 171, 185 (1970).*

*24 Id. at 175. But see Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 Va. L. Rev. 481, 519-24 (1976) (unorganized employees should be statutorily provided with grievance-arbitration protection similar to that generally enjoyed by unionized workers).*

brethren, they are not bound to follow particular precedents. Despite these limitations, the arbitration process has provided the only major forum for weighing employer and employee interests in the security area, and has developed an analytical framework—adaptable in almost every employment context—for dealing with each of the major security techniques in use today.

II

INTERROGATION

A. Fundamental Obligation of Employees To Answer Employer Questions

Employees occupying special positions of trust with regard to security matters are generally obliged to provide all pertinent information sought by their master. Thus, an individual employed as a plant guard may properly be disciplined if he refuses, in response to employer inquiries, to supply information regarding inappropriate conduct by rank-and-file workers. Similarly, an employee who is paid by his company to divulge information pertaining to internal thefts may be punished if he declines to identify discovered thieves, even where disclosure might subject the informant to personal danger. Even if not specially involved in security matters, however, workers must normally supply information properly sought by their employer pursuant to a reasonable investigation of thefts or other instances of employee misconduct.

Furthermore, the mere fact that a worker finds it distasteful to inform on a fellow employee does not excuse a refusal to coop-

26 See e.g., Lockheed Aircraft Corp., 27 Lab. Arb. 709 (1956) (Maggs, Arb.).
27 See Eisen Mercantile, Inc., 58 Lab. Arb. 340 (1972) (Madden, Arb.). But cf. Illinois Bell Tel. Co., 63 Lab. Arb. 968, 979 (1974) (Dolnick, Arb.) (employee obliged to cooperate with company orders provided no danger to his health or safety involved). It has also been recognized that a storekeeper entrusted with the responsibility of requisitioning company supplies may be discharged for failing to inform his master immediately about employee depredations of which he has knowledge. C & P Tel. Co., 51 Lab. Arb. 457 (1968) (Seibel, Arb.).
28 "Where an employer has suffered a loss by reason of theft, it has the right to make a reasonable investigation, and its employees have the obligation to cooperate in that investigation. For an employee to refuse to answer questions would constitute insubordination." Skaggs-Stone, Inc., 40 Lab. Arb. 1273, 1279 (1963) (Koven, Arb.). See Colgate-Palmolive Co., 50 Lab. Arb. 441, 443 (1968) (Koven, Arb.); Simoniz Co., 44 Lab. Arb. 658, 663 (1964) (McGury, Arb.).
erate.\textsuperscript{30} Arbitrators have even upheld the discipline of an employee who failed to cooperate fully in an investigation at least partially intended to implicate the interviewee himself.\textsuperscript{31} Moreover, in determining what relief to grant to a wronged grievant, some arbitrators may adversely consider the grievant's failure to cooperate in reasonable employer investigations.\textsuperscript{32}

Employers do not, however, have carte blanche to question employees on all subjects. Arbitrators should be careful to recognize that a company has the right to require employee cooperation only with respect to matters clearly relevant to the employer-employee relationship.\textsuperscript{33} In addition to this fundamental restriction upon an employer's investigative prerogative,\textsuperscript{34} other legal and contractual limitations must be considered.

B. Limitations on Employer Interrogation

1. Coercive Questioning Under the National Labor Relations Act

Section 7 of the National Labor Relations Act (NLRA)\textsuperscript{35} guarantees employees "the right to self-organization, to form, join,

\textsuperscript{30} See Simoniz Co., 44 Lab. Arb. 658 (1964) (McGury, Arb.):

The grievant may have acted as he did to avoid being an informer. This again is a human and understandable motive, but it is also inconsistent with his status as a trusted employee. The assumed desire not to help convict a fellow-employee of wrongdoing, which had already adversely affected all concerned, is not to be given precedence over the grievant's duty to his employer who was not guilty of wrongdoing and who was making a legitimate and necessary inquiry.

\textit{Id.} at 663. See also note 47 \textit{infra}.


\textsuperscript{34} The requirement that questioning be business-related does not mean that employers must have a reasonable belief that an employee possesses information relevant to suspected misconduct before they may interrogate that employee. An employer should be able to make general inquiries of its employees on company matters without being required to show grounds for suspicion in each case.

or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Act prohibits employers from engaging in any conduct that restrains or coerces employees in the exercise of these rights. Violations of the NLRA therefore arise when management officials question workers about protected activities, except in those instances where the inquiry is either clearly innocuous or is part of an ordinary response to a conversation initiated by the employee. Similarly, management questions regarding the union sympathies of workers are generally precluded.

In certain limited and exceptional circumstances, however, employers may permissibly ask employees about matters that fall within the purview of section 7. When a labor organization asserts that a majority of the workers in an appropriate bargaining unit has designated it as the desired bargaining agent and requests that the company voluntarily extend recognition to it, the employer may poll its employees to verify the union's

36 Id. § 157 (1970).
37 Section 8(a)(1) of the NLRA (29 U.S.C. § 158(a)(1) (1970)) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . ."
42 Alternatively, the employer may do nothing when faced with such a recognition demand, thereby forcing the labor organization to petition the Labor Board for a secret-ballot representation election. See Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974). On the other hand, if an employer elects to utilize independent means,
claim. Also, to prepare a defense to an unfair labor practice complaint, an employer may interrogate employees pursuant to its investigation of the relevant facts, provided it complies with the strict safeguards required by the Labor Board.

Although these limitations and exceptions are important, they are applicable only in those cases involving the potential invasion of such as an objective poll, to verify the union's assertion of majority support, it may thereby obligate itself to extend voluntary recognition to the union if the evidence clearly establishes the truth of the union's claim. See, e.g., Sullivan Elec. Co., 199 N.L.R.B. 809, 81 L.R.R.M. 1313 (1972), enforced, 479 F.2d 1270 (6th Cir. 1973); Pacific Abrasive Supply Co., 182 N.L.R.B. 329, 74 L.R.R.M. 1113 (1970); Snow & Sons, 134 N.L.R.B. 709, 49 L.R.R.M. 1228 (1961), enforced, 308 F.2d 687 (9th Cir. 1962). Cf. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 n.10 (1974) (Court does not reach question of whether union has burden of asking for election upon employer's refusal to recognize union's majority where employer breaches agreement to determine majority status by means other than a Board election).

Note, however, that the National Labor Relations Board requires strict adherence to specific rules to ensure the full protection of employee rights. Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.


The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. Johnnie's Poultry Co., 146 N.L.R.B. 770, 775, 55 L.R.R.M. 1403, 1406 (1964), enforcement denied on other grounds, 344 F.2d 617 (8th Cir. 1965). See also UAW v. NLRB, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968); Montgomery Ward & Co. v. NLRB, 377 F.2d 452, 455-56 (6th Cir. 1967); NLRB v. Neuhoff Bros. Packers, 375 F.2d 372, 377-78 (5th Cir. 1967). An employee has a protected right to refrain from voluntarily providing evidence against a fellow employee in an unfair labor practice proceeding. See Retail Store Employees Local 876, 219 N.L.R.B. 1188, 90 L.R.R.M. 1113 (1975).

Preparatory questioning of employees is frequently conducted by the company's attorney, who must exercise great care to avoid the imposition of vicarious unfair labor practice liability on his client. It is possible for the attorney to minimize unnecessary exposure by preparing a written affidavit specifically describing the required safeguards. The affidavit can then be read to and by the prospective interviewee and executed by that person before a notary public.
section 7 rights. Since most employee interrogations relate to theft or misconduct rather than union organizational activity, the NLRA restrictions are normally not applicable to security interviews.

2. Applicability of Self-Incrimination Principles

The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Although employment disciplinary matters are technically not "criminal cases," many arbitrators have concluded that the basic policies enunciated in the self-incrimination clause are at least partially applicable to the employment setting. Fifth amendment considerations bear on two separate issues that recur in arbitration: the admissibility of employee confessions and the consequences of a worker's refusal to answer employer questions.

a. Admissibility of Employee Confessions. Employment security interviews can be very uncomfortable experiences even for workers who have not participated in any misconduct. The slightest insinuation that the interviewee is suspected of wrongdoing can precipitate substantial apprehension. Under such circumstances, it is quite possible that a wholly innocent employee will expressly or impliedly indicate culpability in an effort to appear cooperative to management inquisitors who control his employment destiny. For this

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45 Where a worker has been disciplined for refusing to answer questions about activity protected under the NLRA, an arbitrator should refuse to sustain the penalty due to an absence of "just cause." This is one instance in which the collective bargaining contract must be interpreted in concert with the fundamental policies enunciated in the Labor Act. Otherwise the matter would simply have to be relitigated before the Labor Board to the obvious detriment of all concerned. See Illinois Bell Tel. Co., 221 N.L.R.B. 989, 91 L.R.R.M. 1116 (1975); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).


47 Since the privilege only relates to self-incrimination, a wholly innocent employee would not have the right to rely upon it for the purpose of protecting other workers from the incrimination that might result from his statements.
reason, arbitrators will not accord probative value to all "admissions" obtained during such interrogations.\textsuperscript{48}

When a voluntary confession is offered as evidence, the weight accorded to it should be assessed in light of the circumstances under which it was obtained.\textsuperscript{49} If there is any indication that the "confession" was obtained by inducements or threats, it will receive no evidentiary weight.\textsuperscript{50} Similarly, if the surrounding circumstances were such as to induce inordinate anxiety in the worker's mind, arbitrators will normally give little, if any, credence to an admission.\textsuperscript{51} However, if an employee makes an admission in response to employer questioning that involved no improper inducements or unreasonable intimidation, the arbitrator should accord due deference to the disclosure.

Since a worker would not ordinarily contest the admissibility of a truly voluntary confession,\textsuperscript{52} a challenge to an admission should alert the arbitrator to possible undue influence or coercion. This problem is particularly acute where the confession constitutes the sole evidence of the employee's guilt. Nonetheless, as long as the arbitrator is convinced that the statement was willingly provided and is entirely credible, he may consider it sufficient in itself to support a finding of culpability.\textsuperscript{53}

\textsuperscript{48} The concern of the arbitrator with respect to the proffer of "confession" evidence, elicited unilaterally in a pre-grievance interrogation, should focus on its reliability, and, in egregious circumstances, on its allowability in terms of fair play and reasonable privacy. Generally, emotional strain created by accusation and the latent fear of the power of an employer to institute criminal prosecution irrespective of guilt or innocence, render this kind of evidence unreliable. Jones, \textit{supra} note 16, at 1295.

\textsuperscript{49} Safeway Stores, Inc., 55 Lab. Arb. 1195, 1202 (1971) (Jacobs, Arb.).

\textsuperscript{50} See, e.g., United States Steel Corp. 29 Lab. Arb. 272, 277 (1957) (Babb, Arb.); Kroger Co., 12 Lab. Arb. 1065, 1067 (1949) (Blair, Arb.).

\textsuperscript{51} See, e.g., Safeway Stores, Inc., 55 Lab. Arb. 1195, 1203-04 (1971) (Jacobs, Arb.); Thrifty Drug Stores Co., 50 Lab. Arb. 1253, 1262 (1968) (Jones, Arb.). See also Union Tank Car Co., 49 Lab. Arb. 383 (1967) (Crawford, Arb.). One arbitrator has indicated, however, that he does "not subscribe to the doctrine that purity must always envelop those engaged in attempting to ascertain the truth, or that subterfuge or pretence is always improper in a truth-seeking endeavor." Weirton Steel Co., 50 Lab. Arb. 103, 105 (1968) (Kates, Arb.).

\textsuperscript{52} The employee may, of course, challenge the propriety of the discipline imposed for the admitted misconduct; this issue, however, is fundamentally different from the question of guilt.

b. Effect of Employee Refusal To Answer Questions. When an employee refuses to respond to management inquiries concerning alleged misconduct, arbitrators generally will not allow the employee's silence to be used as evidence of his guilt.\(^5^4\) This is true even if the employer presents independent evidence of the worker's culpability. In general, the employer has the burden of establishing "just cause" in disciplinary cases by demonstrating to

\(^{54}\)In the criminal context, a defendant's refusal to answer police questions is rarely given probative value at trial. This avoids the possibility of offending the fifth amendment privilege against self-incrimination. See Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975). In the private employment setting, however, the constitutional restrictions applicable to governmental conduct have no binding effect. Although arbitrators may consider relevant fifth amendment principles when resolving disputes, they are not ordinarily obligated to do so. See Lucky Stores, Inc., 53 Lab. Arb. 1274, 1276 (1969) (Eaton, Arb.); Weirton Steel Co., 50 Lab. Arb. 103, 105-06 (1968) (Kates, Arb.); Simoniz Co., 44 Lab. Arb. 658, 662-63 (1964) (McGury, Arb.); Lockheed Aircraft Corp., 27 Lab. Arb. 709, 712-13 (1956) (Maggs, Arb.). But cf. Anchor Hocking Corp., 66 Lab. Arb. 480, 480 (1976) (Emerson, Arb.) (employee's discharge for stealing resulting from lunchbox search not permitted where employer did not give "Miranda" warnings). See generally R. Fleming, The Labor Arbitration Process 181-82 (1965); Scheiber, supra note 19, at 701. However, the possibility that a state statute might expressly require the application of some constitutional principles to private arbitration proceedings should not be ignored. See, e.g., Cal. Evid. Code § 910 (West 1966); see also Jones, supra note 16, at 1255 n.41.

Some commentators have urged caution in applying constitutional standards in the arbitral arena.

[T]here is undeniably a fundamental distinction between a criminal prosecution and an arbitration proceeding. Because our society has seen fit to require that every possible protection be extended to those accused of crime in order to insure that no one will be deprived of his liberty unjustly, it does not follow that an employee is entitled to protection in the same degree for the purpose of determining whether he is to be subjected to job discipline or even deprived of his job. Notwithstanding frequent resort to the euphemism, "economic capital punishment," . . . incarceration is punishment of greater severity than loss of work and its concomitant effects.


A few authorities have suggested that management inquisitors be required to provide pre-interrogation ("Miranda") warnings concerning an employee's "right" to remain silent. See Anchor Hocking Corp., 66 Lab. Arb. 480 (1976); Silard, supra at 224-25. See generally Miranda v. Arizona, 384 U.S. 436 (1966). Such warnings are not constitutionally required, however, and seem inappropriate in dealings between private parties. See In re Rosengart, 9 Misc. 2d 174, 169 N.Y.S.2d 837 (Sup. Ct. 1957), aff'd mem., 6 App. Div. 2d 1052, 179 N.Y.S.2d 659 (2d Dep't 1958) (denying employee's application for order nullifying arbitration proceeding in which he was not advised of right to counsel); Stone, supra note 14, at 12. Nevertheless, the fact that a warning was or was not given should be considered when determining the appropriate evidentiary weight to be accorded an employee's admission, particularly where professional security investigators elicited the proffered confession. See Safeway Stores, Inc., 55 Lab. Arb. 1195, 1201-02 (1971) (Jacobs, Arb.).
the satisfaction of the arbitrator that the grievant actually engaged in misconduct. In this regard, the arbitral rule is analogous to common-law principles that place the burden of proof on the party alleging the wrongdoing.

The same reasoning precludes an inference of guilt when an employee refuses to testify on his own behalf at an arbitration proceeding. Arbitrators recognize that a worker can have many good reasons for not taking the stand, totally unrelated to the fundamental issue of guilt. Of course, if the employee refuses to controvert substantial independent evidence of his guilt, the result will generally be a denial of his grievance.

Although an employee's refusal to answer investigative inquiries concerning his suspected misconduct may not be considered as evidence of his guilt, it is possible for such recalcitrance itself to constitute an independent ground for discipline. Many arbitrators have indicated that when an employee fails to cooperate with his employer during an investigation of industrial misconduct—even if the reticent worker is himself under suspicion—such conduct may itself warrant some punishment.

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56 I know of no principle, or decided case, upholding a company's right to compel an employee, under pain of discharge [for suspected misconduct], to admit or deny a rule violation or other offense. Such a principle would contradict all our Anglo-American principles, particularly the one that a man is presumed innocent until he is proved guilty, and that the burden of proof [regarding the suspected misconduct] is on the one alleging an offense.


If the grievant had previously responded to employer inquiries with answers inconsistent with those given at the arbitration hearing, those prior statements can be used before the arbitrator to impeach the grievant's testimony. See Southern Iron & Equip. Co., 65 Lab. Arb. 694 (1975) (Rutherford, Arb.).


58 Jones, supra note 16, at 1292. See National Carbide Co., 49 Lab. Arb. 692, 696 (1967) (Kesselman, Arb.): "Some people make poor witnesses because of their demeanor, their inability to be responsive to direct questions, the tendency to become rattled, etc." See also Publishers' Ass'n of New York City, 43 Lab. Arb. 400, 404 (1964) (Altieri, Arb.).


60 See notes 54-56 and accompanying text supra.

61 Employers have a right to absolute honesty, as well as a reasonable amount of
Since the fifth amendment's self-incrimination privilege is not directly applicable to the private industrial setting, workers do not enjoy the same protections vis-a-vis management investigative inquiries as they do with respect to interrogations by governmental law enforcers. Thus, as long as suspected misconduct relates solely to the employment environment and has no possible criminal ramifications, the employer has the right to require reasonable cooperation from its workers during an investigation. Employees who fail to cooperate in such a situation by intentionally refusing to respond to relevant management inquiries subject themselves to reasonable discipline.

A more delicate problem arises when the employee's answers to company questions might lead to criminal liability. Whenever possible, an employer should endeavor to honor a worker's invocation of his self-incrimination privilege if the prospect of resulting criminal prosecution is real. Nevertheless, if employer and employee cannot reach a mutually acceptable accommodation of their competing interests, management ought to have the right to demand, upon penalty of discipline, immediate answers to relevant investigative inquiries, provided (1) there is independent evidence reasonably implicating the employee in question and (2) the employer can demonstrate that the worker's recalcitrance will have a meaningfully adverse impact upon industrial production or disci-

cooperation, from their employees.

The Fifth Amendment does not guarantee that a person who invokes it . . . shall be continued in employment.


Termination would normally not constitute a reasonable penalty, except perhaps where the employee's refusal to cooperate demonstrably exacerbates the impact of the misconduct by preventing the early correction of an increasingly dangerous situation, or where the taciturn worker has a particularly dismal disciplinary record. See Tectum Corp., 37 Lab. Arb. 807, 811 (1961) (Aubrey, Arb.). See also Rexall Drug Co., 65 Lab. Arb. 1101, 1102, 1104 (1975) (Cohen, Arb.) (arbitrator cognizant of suspected employee's right to remain silent in face of possible criminal liability, but decides that total silence without express reliance on fifth amendment warrants imposition of some discipline).
pline. Although a suspension without pay, pending the resolution of the underlying criminal issues, might well be appropriate in such a situation, discharge should be permitted in only extreme circumstances, as when the unanswered suspicion has substantially and irreversibly devastated the employer-employee relationship.

3. Right of Employees to Representation During Questioning

In *NLRB v. J. Weingarten, Inc.* the United States Supreme Court interpreted the NLRA as providing employees with the right to union representation during at least some investigatory or disciplinary interviews. In addition, some collective bargaining agreements have been construed as expressly or implicitly affording workers similar representation rights in certain interrogation situations.

a. Right to Representation Under NLRA.

Although the Labor Board ruled in 1945 that employees had the right, under the NLRA, to union representation during certain management investigatory interviews, it subsequently issued a decision implicitly

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65 Even where the employer eventually fails to establish that the employee was involved in misconduct, some arbitrators will still uphold punishment previously imposed for that misconduct where the employee refused to cooperate with the employer's investigation. See note 32 and accompanying text *supra*. Such an approach makes little sense, however, where refusal to cooperate was not the reason for the original imposition of discipline. See *Gardner Denver Co.*, 51 Lab. Arb. 1019, 1022 (1958) (Ray, Arb.); *V.J. Tito, Jr.*, Inc., 48 Lab. Arb. 188, 190 (1967) (Summers, Arb.); West Va. Pulp & Paper Co., 10 Lab. Arb. 117, 118 (1947) (Guthrie, Arb.). A company might avoid this dilemma by specifying both the suspected offense and the refusal to cooperate as the basis for the punishment. Nonetheless, failure to establish the suspected misconduct would probably result in modification of the penalty.


67 Ross Gear & Tool Co., 63 N.L.R.B. 1012, 1033-34, 17 L.R.R.M. 36, 39 (1945). The Seventh Circuit denied enforcement of the Labor Board's decision, indicating that insubordination would be encouraged if employees could refuse to attend such management meetings if their union representative was not present. *NLRB v. Ross Gear & Tool Co.*, 158 F.2d 607, 613 (7th Cir. 1947).
rejecting this principle. In 1967, however, the NLRB revitalized the doctrine it had enunciated in 1945, and in Weingarten the Supreme Court expressly recognized the right of workers to have union representation during certain employer interrogation sessions.

Weingarten involved a retail store employee who was accused of dishonesty and summoned to an interview with a professional security investigator. The employee expressly requested that her union shop steward be present during the questioning, but this supplication was denied. She filed an unfair labor practice charge, and the NLRB determined that the employer had by its conduct violated section 8(a)(1) of the NLRA. Although the Fifth Circuit denied enforcement of the Labor Board's order, the Supreme Court reversed, holding that the denial of representation constituted illegal interference with the right of employees to act in concert—a right guaranteed under section 7 of the NLRA. Thus,
under certain circumstances, an employee has the protected right to union representation during management investigatory interviews. This right, however, is not absolute.

(i) When right to representation arises. An employee's right to union representation during an inquisitorial interview by management will arise only if the employee requests representation, and only if he reasonably believes that the investigation will result in disciplinary action. Even if a worker specifically asks for a union representative, therefore, it does not automatically follow that

420 U.S. at 256-57 (quoting Mobil Oil Corp., 196 N.L.R.B. 1052, 1052, 80 L.R.R.M. 1188, 1191 (1972)).

Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

420 U.S. at 262 (quoting American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).

Although this Article focuses upon unionized employees, there is no reason why nonunion employees should not enjoy an analogous "statutory" right to have fellow work-
such representation must be permitted. Although it is clear that the right to representation applies solely to confrontations where the worker reasonably fears adverse personnel action, the demarcation line is not as precise as might initially appear.

The Supreme Court and the Labor Board have both expressed the view that the NLRA representation prerogative is clearly not applicable to certain ordinary industrial situations.

We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.80

But suppose a supervisor instructs an employee to perform certain work and the employee indicates a reluctance to comply, precipitating a warning that failure to obey may be regarded as insubordination. It would appear that if discussion were to continue under such circumstances, the worker, upon request, would have the right to union representation.

A similar problem could easily develop from discussion pertaining to a managerial correction of an employee's work techniques. Even if the employer does not initially contemplate disciplinary action, the fact that the discussion occurred may subsequently be held against the worker if the allegedly inferior performance continued. In addition, if the employer utilizes a merit system, the employee may reasonably fear that such a conversation would have an "adverse impact" upon a future evaluation. Perhaps such hypothetical situations81 involve the kind of "ordinary" matters exempt from the Weingarten representation requirement, but until definitive NLRB guidelines are developed, considerable uncertainty will remain.82


81 For a discussion of similar problem areas, see Brodie, supra note 69, at 4-5.

82 If a worker were to misjudge the situation and refuse to participate in a managerial
It should finally be noted that even where a reasonable basis exists to believe that adverse personnel action might result from a particular employer-employee confrontation, management could still avoid application of the Weingarten representation doctrine by simply forgoing the confrontation and basing its disciplinary determination on independently obtained information. As long as the employer's action is not based upon the employee's assertion of a statutory right, the company can act without violating the NLRA.83

(ii) Function of union representative. Although the Weingarten Court affirmed the statutory right of an employee to union representation during certain investigatory interviews, it indicated that the role of the union agent would be quite limited.

The employer has no duty to bargain with the union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation."84

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If an employer exercises its option to terminate an investigatory interview rather than permit union representation for the worker being questioned, the labor representative might still endeavor to have management listen to the employee's side of the matter. The company might propose a meeting involving the affected worker, management, and the union itself, to discuss the situation before any disciplinary action is taken. If the company declines to participate, it might well be in violation of § 8(a)(5) of the NLRA (29 U.S.C. § 158(a)(5) (1970)) for refusing to bargain in good faith regarding employee working conditions. See 29 U.S.C. § 158(d) (1970). But cf. New England Tel. & Tel. Co., 95 L.R.R.M. 1550 (1977) (advice memorandum of NLRB General Counsel) (no violation of right to representation in discharge of worker where employer ceased contact with worker after he requested representation).

Thus, under the *Weingarten* rationale, the requested union representative can be an observer and can advise the interviewee of any relevant privileges he enjoys under the applicable collective bargaining agreement. In the absence of a contractual provision codifying an employee self-incrimination privilege, however, the labor representative cannot instruct the worker that he has the right to remain silent.

(iii) Right of employee to waive representation privilege. Since the right to union representation during an investigatory interview arises only in situations where the employee requests representation, the employee "may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative."  

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85 The observation function enables the labor organization to obtain important information at an early stage. This information might subsequently aid the union in fulfilling its representative function.

86 It is important to recognize that § 7 of the NLRA neither expressly nor impliedly provides an employee with a self-incrimination privilege, nor does *Weingarten* suggest such a right. The Labor Act merely requires that when an employer desires to question a worker under circumstances likely to result in discipline, it must either permit the presence of a union representative, if requested by the interviewee, or forgo the interrogation and rely upon independently obtained information. If a union representative is provided, therefore, the employer presumably has the right to insist that the employee answer relevant inquiries and, unless fifth amendment principles are expressly made applicable by contract, the company may properly discipline the worker for refusing to cooperate.

Since the fifth amendment is generally inapplicable, reliance upon a union agent's admonition to remain silent would probably not afford an employee any direct protection; such advice would necessarily exceed the scope of authority granted to the representative under *Weingarten*. If the union representative gives such advice in good faith, the adversely affected employee has no legal recourse. *Cf.* Lewis v. Greyhound Lines-East, 555 F.2d 1053 (D.C. Cir. 1977) (since no bad faith found, union did not breach duty of fair representation in telling employee that he was not entitled to representative at disciplinary meeting). If, however, the labor agent acts in bad faith or maliciously while performing his representative function, his union should clearly be subject to unfair labor practice liability or a civil suit by the aggrieved worker for breach of the statutory duty of fair representation. *Cf.* Brodie, *supra* note 69, at 47 (union's duty of fair representation should be expanded to cover interview situation). See also *Vaca v. Sipes*, 386 U.S. 171 (1967); *Conley v. Gibson*, 355 U.S. 41 (1957); *Local 12, United Rubber Workers*, 150 N.L.R.B. 312, 57 L.R.R.M. 1535 (1964), enforced, 368 F.2d 172 (2d Cir. 1966), cert. denied, 389 U.S. 837 (1967); *Miranda Fuel Co.*, 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), enforcement denied on other grounds, 326 F.2d 172 (2d Cir. 1963). See generally *Craver, Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 Hastings L.J. 1, 22-29 (1974).


Where a company initially denies an employee's request for representation, a subse-
In general, an employer is not obligated to advise a prospective interviewee, prior to any questioning, of his statutory right to representation. Only when employers seek information that may be protected under the NLRA are they required to provide employees with proper express notice of the right to representation.

In all other cases, an employer has an inherent right to conduct investigatory interviews pertaining to employment misconduct, and is not statutorily obligated to provide union representation for employees being questioned. Management has the discretion to proceed with its inquiries subject to a representation requirement only in those cases where the interviewee specifically requests representation. If a worker fails to exercise his NLRA privilege due to ignorance, his complaint should be directed not at his employer, but at his union.

Even though an employee has the general authority to waive his Weingarten representation privilege, such an individual waiver is not wholly operative where the investigatory interview is meaningfully converted into a "grievance"-adjustment discussion. It is conceivable, for example, that during the questioning of an interviewee, the company might suggest an appropriate penalty for the suspected misconduct, and the two parties might discuss the subsequent decision by the employee to participate in the meeting without his representative would probably be deemed a valid relinquishment of his Weingarten privilege. Cf. Michigan v. Mosley, 423 U.S. 96 (1975) (upholding admissibility of statements made to police by suspect who first exercised right to remain silent but later made inculpatory statements after again being informed of rights). Query: Under such circumstances, could the employee's action ever be regarded as truly "voluntary?"

A labor organization would be wise to advise all employees suspected of misconduct to seek representation for an investigatory interview, since the union representative can assist with a full development of the relevant facts and thus reduce the likelihood of improper discipline. The representative's participation may also obviate the need for a subsequent formal grievance proceeding. Moreover, the presence of a representative does not unduly restrict the company's freedom of action, since it still has the right to obtain the information it desires.

See Brodie, supra note 69, at 44. Despite the recent NLRB decision in Amax, Inc., 227 N.L.R.B. No. 154, 94 L.R.R.M. 1177 (Jan. 18, 1977), allowing unions to invoke representation rights on behalf of employees, it is doubtful that a labor organization can make a blanket request for representation on behalf of all workers any time discipline might result from a particular interview. However, a union can seek a contractual right to this effect through the collective bargaining process. See discussion accompanying notes 99-117 infra.
priety of the proposed discipline. Under such circumstances, the exclusivity doctrine expressed in section 9(a) of the NLRA might apply. This section provides that the majority-designated labor organization is the exclusive negotiating agent for all workers in the defined bargaining unit. Thus, in addition to the section 7 representation right recognized in Weingarten and exercised by the individual interviewee, there is an independent statutorily created representation prerogative within the exclusive dominion of the majority labor organization. If, even with the acquiescence of the interested employee, the employer attempts to adjust a "grievance" created during an investigatory interview without the presence of a union representative, the company might well find itself in violation of the NLRA.

(iv) Right of union to waive employee representation privilege. Although a majority labor organization undoubtedly has the right to relinquish its section 9(a) privilege to be present during grievance-adjustment discussions between employee and employer, it is not clear whether it has the authority to surrender contractually the section 7 right of employees to have union representation during investigatory interviews. However, it would probably constitute a refusal to bargain for an employer to insist upon such a waiver as a precondition to negotiating an agreement.

Recognizing the important individual interests often implicated as a result of investigatory interviews, one could certainly argue that a labor organization should not be permitted to negate the privilege of union representation through the bargaining

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92 Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


93 See Bethlehem Steel Co., 89 N.L.R.B. 341, 347-48, 25 L.R.R.M. 1564, 1568-69 (1950). An unfair labor practice could arise even if the company merely declines to accept the position of the complaining employee, since there is "nothing in the Act or its legislative history warranting an interpretation of the term 'adjustment' as used in the provisos to Section 9(a) which would exclude from the meaning of that term the rejection of a grievance." Id. at 348, 25 L.R.R.M. at 1569.

94 See Hughes Tool Co. v. NLRB, 147 F.2d 69, 73 (5th Cir. 1945). See also Note, supra note 68, at 349.

process. The representation right, however, does not exist wholly apart from the majority union. It is instead a privilege that enhances the relationship between that union and the workers it represents. Therefore, if the labor organization decides in good faith that the employees' interests would be best served by permitting investigatory interviews without the presence of union representatives, then the union should be able to relinquish the Weingarten rights of the workers in the bargaining unit. Such a waiver would not deprive organized workers of all meaningful protection, since they would almost certainly be afforded the substantial security of a grievance-arbitration system.

b. Contractual Right to Representation. The contractual right of employees to union representation during management investigatory interviews is an increasingly frequent subject of arbitration. Some of the cases involve specific provisions which must merely be construed by the arbitrator. More difficult problems arise when labor organizations contend that a representation right emanates implicitly from nonspecific clauses in collective bargaining agreements. However, before unions endeavor to obtain an express or implied contractual right to union representation during management investigative sessions, they should consider the advantages and disadvantages associated with such a privilege.

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98 At least 94% of the negotiated contracts in the United States provide for binding arbitration as the dispute resolution procedure. See [1970] LAB. REL. Y.B. (BNA) 38. See also Summers, supra note 24, at 499-508.

99 See generally Brodie, supra note 69, at 34-41.

100 To the extent that collective bargaining agreements either expressly or impliedly provide employees with representation rights during investigatory interviews, it should follow a fortiori that, as sole creations of the labor-management relationship, such rights can be waived by the union, as long as it acts in good faith. Similarly, where an optional right to representation is provided for individual workers, they too are empowered to forgo their privilege. See Erwin Mills, Inc., 43 Lab. Arb. 31, 32 (1963) (Strong, Arb.). To the extent that the presence of a union agent is contractually required at such meetings, however, an individual employee should not be permitted to relinquish the right, since to do so might cut against the interests of other bargaining unit members.
Increased union participation at the initial stages of a misconduct investigation will frequently prevent the imposition of unjust punishment before management has made a final decision on the matter. Similarly, it may ensure that contractual and statutory rights are not violated, and lead to a reduction in the number of issues litigated before either an arbitrator or the Labor Board.

In addition, the presence of a union agent probably reduces the coercive atmosphere inherent in inquisitorial sessions, although this result may not always inure to the benefit of suspected workers. If an interrogation conducted in the absence of a union representative elicits injurious admissions from the interviewee, the presiding neutral in a subsequent arbitration proceeding is likely to view the admissions with skepticism and accord them only minimal probative value. However, if a union steward is present when inculpatory disclosures are obtained, the employee in question will find it extremely difficult to challenge the veracity or voluntariness of his utterances. Furthermore, if the union steward at the meeting pleads for moderation, and the employer decides nevertheless to impose severe discipline, the labor organization will have problems during the formal stages of the grievance process convincing management that it acted precipitously and improperly.

Despite the possible disadvantages of the right to representation, some unions have negotiated specific contractual provisions requiring the presence of a union steward during all employee-management confrontations that could culminate in disciplinary action. Other less comprehensive provisions guarantee the sus-
pected employee a meeting with company officials in the presence of his union representative before a termination or suspension may be imposed.107

Even when no specific contractual provision mandates representation during investigatory interviews, there is an enlightened trend in favor of permitting suspected employees to have shop stewards present during meetings with management officials. Many arbitrators, faced with contractual language generally providing for union representation during grievance discussions, have liberally interpreted such language to cover investigative meetings in which the company expressly or impliedly makes accusations of misconduct. These arbitrators have concluded that once such circumstances are present, a sufficient “grievance” has arisen, due to the immediate threat to the worker’s employment security, to warrant application of the union representation requirement.108 Other arbitrators, however, have continued to follow a more traditional course, denying an employee union representation until discipline has been imposed and a formal grievance has been formulated.109 The more liberal interpretive approach is preferable, since it facilitates the early resolution of often volatile disciplinary issues and advances the national labor policy enunciated in Weingarten.

Some arbitrators who have been unwilling or unable to construe the representation rights of grievance provisions as extending to investigatory meetings have accomplished the same result through implication. Decisions have found a right to representation emanating from a general recognition clause,110 past practices


110 See Schlitz Brewing Co., 33 Lab. Arb. 57, 60 (1959) (Meyers, Arb.). But see E. I. du
of the parties,\textsuperscript{111} and even through the implied incorporation of the constitutional right to counsel.\textsuperscript{112} The \textit{Weingarten} Court approvingly cited these creative interpretive techniques: “Even where such a right [to representation] is not explicitly provided in the agreement a ‘well-established current of arbitral authority’ sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him.”\textsuperscript{113} With this language in mind, arbitrators will find with increasing frequency that the right to representation during investigatory confrontations with management is either expressly or impliedly incorporated in collective bargaining agreements.

Finally, brief mention should be made of the remedial ramifications of a violation of an employee’s contractual right to representation. When a proper request for the presence of a union steward during an investigatory interview is denied, the refusal of the aggrieved worker to participate in the management meeting ought not to constitute insubordination. The vital importance of the representation privilege warrants an exception to the usual rule that an employee must obey first and grieve later,\textsuperscript{114} since irreparable injury to the individual’s employment interests might otherwise result.\textsuperscript{115} Arbitrators should accord no evidentiary weight to statements elicited in a prior proceeding from an employee who had been improperly denied his right to union representation.\textsuperscript{116}


\textsuperscript{114}Lockheed Aircraft Corp., 62 Lab. Arb. 348, 350-51 (1974) (Williams, Arb.).


\textsuperscript{116}See Novo Indus. Corp., 41 Lab. Arb. 921, 924 (1963) (Gill, Arb.). However, it is appropriate to use prior statements to impeach the declarant’s credibility, where he gives testimony at the arbitration hearing inconsistent with the prior statements. \textit{See} note 56 \textit{supra}.  


\textsuperscript{114}Lockheed Aircraft Corp., 62 Lab. Arb. 348, 350-51 (1974) (Williams, Arb.).


\textsuperscript{116}See Novo Indus. Corp., 41 Lab. Arb. 921, 924 (1963) (Gill, Arb.). However, it is appropriate to use prior statements to impeach the declarant’s credibility, where he gives testimony at the arbitration hearing inconsistent with the prior statements. \textit{See} note 56 \textit{supra}.
Furthermore, although an employee necessarily acts at his own peril if he refuses to obey a company directive when no right to representation exists, arbitrators should consider the good faith of the worker in determining the appropriate penalty.

III

LIE DETECTION DEVICES

In recent years, as employee peculations have become an increasingly pervasive and costly problem for private industry, many employers have incorporated lie detection devices into their security arsenals. The scientific nature of the polygraph machine and its concomitant aura of infallibility have induced many management officials to accept it as a panacea for worker dishonesty. The security programs of many companies involve not only the examination of those actually suspected of particular defalcations, but also the general testing of job applicants and the regular reexamination of current employees.

In contrast to the growing infatuation of business leaders with such devices, organized labor has unequivocally condemned the utilization of polygraph equipment in the employment setting.

We object to the use of these devices not only because their claims to reliability are dubious, but because they infringe on the fundamental rights of American citizens to personal privacy. Neither the government nor private employers should be permitted to engage in this sort of police-state surveillance of the lives of individual citizens.

121 See A. Westin, supra note 4, at 147-51; Fleming, supra note 16, at 164; Note, Lie Detectors in Private Employment, supra note 3, at 936-38.
In opposing use of lie detectors, labor has sought both contractual restrictions and statutory prohibitions. By 1976, fifteen states had enacted legislation either prohibiting or substantially limiting the use of lie detectors in the employment environment. In addition, eighteen other states have statutes that require the licensing of polygraph operators. Despite these various statutory circumscriptions, however, scientists continue to develop purportedly accurate lie detection devices.

Although traditional lie detection methods such as polygraphs and truth serums have undergone significant tech-
nological and scientific development, the newer truth verification techniques have displayed the greatest inventiveness. During the late 1950's and early 1960's, the federal government devised a lie detection seat that can be used without the knowledge of the individual being examined. The device consists of "a seemingly 'normal' chair which has equipment built into it to register body heat, changes in limb volume, and nervous movements. Hidden cameras are also used in such covert polygraphing to measure changes in eye-pupil size as an indicator of stress during the interview."¹²⁸ One firm has developed a Psychological Stress Evaluator, which can purportedly determine veracity through the evaluation of voice samples.¹²⁹

The future may witness sensing devices implanted in the human body capable of transmitting data on psychological and physiological changes.¹³⁰ Such information could easily be applied to evaluate the veracity of statements made during an employment investigatory interview. Scientists may ultimately develop a machine capable of reading thoughts through the interpretation of cerebral impulses.¹³¹ Such technological advances could have a profound effect upon employees, and could give rise to exceedingly complex policy conflicts.

A. NLRA Considerations

The use of a lie detector by an employer to discover union sympathies or protected activities of employees clearly constitutes an unfair labor practice.¹³² This does not, however, preclude all utilization of such devices in the employment setting. An employer may, without precipitating a section 8(a)(1) violation, promulgate rules requiring employees to submit to polygraph examinations regarding employment misconduct.¹³³ It may even ask a known

¹²⁸ A. Westin, supra note 4, at 133-34 (footnote omitted).
¹²⁹ See Note, The Psychological Stress Evaluator: A Recent Development in Lie Detector Technology, 7 U. Cal. D.L. Rev. 332 (1974). The developers report an accuracy rate of from 91% to 100%, depending upon the type of interrogation involved. Id. at 346.
¹³⁰ See A. Miller, supra note 20, at 45-46.
¹³¹ See A. Westin, supra note 4, at 155-57.
Although an employer can use polygraph examinations to investigate employee misconduct without violating the NLRA, it nonetheless is obligated to negotiate with the labor organization before implementing such a program. The NLRB recently held that required lie detector testing is sufficiently related to "terms and conditions of employment" to constitute a mandatory subject for collective bargaining.\textsuperscript{139} Thus, a company's unilateral institution of such a security measure without any prior union negotiations is a violation of section 8(a)(5),\textsuperscript{140} unless there is a management prerogative clause in the collective bargaining agreement that could reasonably be construed to give the employer the authority to act unilaterally with respect to such a subject.\textsuperscript{141} However, if the union has a chance to negotiate over the matter and either fails to indicate a desire to discuss the suggested plan or reaches a bona fide impasse in the course of good faith bargaining, the company is legally entitled to implement its proposed program.\textsuperscript{142}

Along with the right to bargain regarding any management lie detection program, a labor organization may also have the author-


\textsuperscript{140} Cf. NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 865-66 (5th Cir. 1966) (union held entitled to bargain over application forms, answers to which could prompt unilateral changes in conditions of employment). See generally NLRB v. Katz, 369 U.S. 736 (1962).

\textsuperscript{141} Cf. LeRoy Mach. Co., 147 N.L.R.B. 1431, 1432, 56 L.R.R.M. 1369, 1370 (1964) (management prerogative clause entitled employer to impose physical examination requirement on employees with records of high absenteeism without first bargaining with union).


It has been suggested that a party might be able to utilize lie detection technology during negotiations. For example, a party could surreptitiously record a bargaining session and thereafter use a Psychological Stress Evaluator to evaluate the true position of its opponent. See Note, \textit{supra} note 129, at 337. Such tactics would undermine the entire collective bargaining process, however, and would almost certainly be considered a breach of the stealthy party's bargaining obligation under the Labor Act.
union adherent to submit to a lie detector test, as long as the motivation for the request is wholly unrelated to matters protected by the NLRA. Furthermore, if the employee declines to take the test, the Labor Act does not prevent management from discharging the worker because of his refusal to cooperate. On the other hand, if an employer is motivated by a desire to retaliate against an employee for engaging in some protected activity, the employer's action would constitute an unfair labor practice, and the Labor Board could rightfully ignore any other reasons offered to support management's conduct. If an employee agrees to a polygraph examination concerning unprotected activities, however, the employer may discharge him for failing the test, as long as the purported failure was not merely a pretense for the employer's anti-union sentiment.

notes 139-42 and accompanying text infra, regarding the obligation of an employer to negotiate over the implementation of such a policy.
135 See Shoppers Drug Mart, Inc., 226 N.L.R.B. No. 140, 94 L.R.R.M. 1223 (Nov. 10, 1976); American Oil Co., 189 N.L.R.B. 3, 4, 76 L.R.R.M. 1506, 1507-08 (1971). The NLRB General Counsel has refused to issue unfair labor practice complaints where workers were terminated for refusing to take polygraph tests, absent evidence of anti-union motivation on the part of management. See Case No. SR-211, 45 L.R.R.M. 1074 (1959); Case No. F-816, 43 L.R.R.M. 1377 (1958). If, however, the employee is disciplined for requesting union representation prior to the testing based on a reasonable belief that the polygraph interview could jeopardize his employment situation, the employer will be guilty of an unfair labor practice. See Dale Indus., Inc., 145 N.L.R.B. 1050, 1062-65, 55 L.R.R.M. 1115, 1116-17 (1964), rev'd on other grounds, 355 F.2d 851 (6th Cir. 1966). See generally notes 67-83 and accompanying text supra. See notes 178-98 and accompanying text infra, regarding the contractual right of employers to discipline employees who decline to submit to lie detector examinations.
137 See Falstaff Beer Distribs., 152 N.L.R.B. 1570, 1575-76, 59 L.R.R.M. 1442, 1442-43 (1965). Because most polygraph tests administered by employers are directed at misconduct totally unrelated to protected worker activity, the discharge of employees for failing such tests rarely constitutes an unfair labor practice. See generally notes 38-41 and accompanying text supra. In some cases, however, the worker's alleged misconduct may be inextricably intertwined with protected activity. In such cases, termination could well constitute a § 8(a)(1) violation, despite the good faith of the employer, since the discharge would have a chilling effect on the right of employees to engage in protected conduct. See NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22-24 (1964); Standard Oil Co., 91 N.L.R.B. 783, 790-91, 26 L.R.R.M. 1587, 1589 (1950); Mid-Continent Petroleum Corp., 54 N.L.R.B. 912, 932-34, 13 L.R.R.M. 228, 229 (1944).
ity to consent to the administration of polygraph tests. Under the exclusivity doctrine of section 9(a) of the NLRA, the rights of individual employees are generally subservient to the interests of the majority. Assuming that the union acts in complete good faith, it can probably negotiate an agreement giving the employer the authority to terminate anyone who refuses to take a polygraph examination. Such an agreement might be in the best interests of a majority of the employees if employee crime seriously threatens the company. It must also be recognized, however, that "where legitimate individual interests are submerged by the desires of the majority, there is a need for protection of individual rights through checks on majority rule." The Labor Board could endeavor to resolve this inherent conflict through modification and expansion of the fair representation doctrine. However, arbitration provides a preferable means for adjudicating these controversies, since the competing interests involved are best resolved on a case-by-case basis. Another possibility is to expand state and federal statutory protection of individual employees to supplement the limited authority of the NLRB.

B. Right of Employer To Rely Upon Results of Properly Administered Examination

A majority of American courts have refused to admit the results of polygraph tests on the ground that the techniques involved are not generally accepted by the appropriate scientific authorities. Although traditional rules of evidence do not apply in ar-

147 See note 86 supra.
148 See notes 191-96 and accompanying text infra.
149 See notes 197-98 and accompanying text infra.

A veritable plethora of articles have discussed the merits of excluding or admitting lie detector evidence. Some of the leading articles supporting exclusion are: Burkey, The Case
many arbitrators are similarly reluctant to consider polygraph results. Most arbitral opinions on the subject simply adopt the judicial rule without much meaningful discussion.

Recent studies, however, seriously challenge the validity of the polygraph exclusionary doctrine. Scientific tests of polygraph techniques consistently yield accuracy rates in excess of ninety-two percent. Moreover, a major portion of the “inaccurate” results involve “indeterminable” subjects who simply could not be evaluated.

Nevertheless, some writers argue that an employer should not rely on polygraph results because they are fundamentally inconclusive. The machine can only indicate the witness’ perception of...
the truth of his statements; it cannot verify the accuracy of initial perception nor reveal the tricks of memory. This criticism, however, is equally applicable to direct testimony. Lie detector evidence should be admitted as long as the factfinder is aware that it corroborates the honesty, but not the accuracy, of direct testimony.

Several courts have recently reconsidered the Draconian rule established by the early lie detector cases. If ascertaining truth is the principal function of adjudicatory bodies, courts must acknowledge the assistance that lie detectors can provide.

If the judicial system is to fulfill its duty of searching for truth and maintaining integrity, it must commence a war against perjury. The war cannot be won with weapons restricted to cross-examination, inferences from demeanor, and other relics from the crossbow era of Henry II. The arsenal against sophisticated witness mendacity must be equipped with the most advanced, accomplished, and effective scientific system devised to date. Unless we are interested in the preservation of institutionalized perjury, there is no tenable reason why qualified polygraphers should not be welcomed by courts confronting credibility questions . . . .

Concerned with the problem of perjury, and recognizing the significant improvements that have been made in lie detector technology, many courts have agreed to admit polygraph evidence.


159 Regarding the unusual severity of the traditional standard, see Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System, 26 HASTINGS L.J. 917, 937-41 (1975); Note, Lie Detectors in Private Employment, supra note 3, at 941; Note, supra note 129, at 343. Ballistics evidence, once held inadmissible along with lie detector evidence because of lack of sufficient scientific acceptance (see People v. Berkman, 307 Ill. 492, 139 N.E. 91 (1923)), has long since been accorded judicial acceptability. See, e.g., Goodall v. United States, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987 (1950).


161 Tarlow, supra note 159, at 920 (footnotes omitted).

Although the pace has been slow, labor arbitrators have moved in a similar direction. Conventional security measures have proven ineffective against modern, sophisticated methods of internal depredation.\textsuperscript{163} Traditional evidentiary rules are no better at resolving credibility conflicts in the arbitral forum than they are in courts of law.\textsuperscript{164} Increased awareness of these problems has prompted some arbitrators to consider polygraphic testimony as corroborative evidence in appropriate cases.\textsuperscript{165} My own view is that labor arbitrators should recognize polygraph evidence as a significant aid in resolving credibility disputes.\textsuperscript{166}

An arbitrator should not admit polygraph test results into evidence, however, unless one of two conditions is satisfied. The test must either have been knowingly taken by the subject under circumstances warranting compulsory examination, or the worker must have voluntarily agreed to undergo the particular examination in issue. When an employer claims that the test was taken voluntarily, the arbitrator should make sure that the employee willingly and deliberately consented to the examination.

The circumstances surrounding the employee's agreement to be tested determine the validity of his consent. For example, a general pre-employment consent form authorizing the employer to conduct polygraph tests whenever it deems it necessary should

\begin{itemize}
\item \textsuperscript{163} See Saveway Inwood Serv. Station, 44 Lab. Arb. 709, 710 (1965) (Kornblum, Arb.).
\item \textsuperscript{164} Anyone driven by the necessity of adjudging credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill at ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers. Jones, \textit{supra} note 16, at 1286.
\item \textsuperscript{166} The arbitration process is more conducive to the fair evaluation of such evidence than are courts, since arbitration proceedings rely on professional adjudicators rather than neophyte jurors who are more likely to be awed by polygraph evidence. See Bowman Transp., Inc., 59 Lab. Arb. 283, 291 (1972) (Murphy, Arb.).
\end{itemize}
never be accepted. Such a waiver is not truly voluntary, since a prospective employee is too likely to view it as a prerequisite of employment.\textsuperscript{167} Other documents granting relatively unlimited consent should also be rejected. A lie detector examination is so intrusive and so potentially damaging that one would not ordinarily grant blanket consent unless his employment status was in jeopardy.

The arbitrator should also take into account the alleged involvement of the witness in the defalcation under investigation. If the proffered test was administered to an impartial witness not implicated in the alleged misconduct, there is little reason to suspect the validity of consent to the examination. The results of the test should be considered for admission as evidence. In contrast, polygraph evidence obtained from either the grievant or another worker under suspicion should be treated more cautiously.\textsuperscript{168} The subject may have consented out of fear for his job,\textsuperscript{169} or he may have been under extreme social pressure from other employees.\textsuperscript{170} Where consent was extracted under such circumstances, the results of the test should not be admitted. The fundamental right of the subject to be free from such nonconsensual intrusions\textsuperscript{171} should take precedence over any evidentiary benefits that might be derived from the polygraph. Likewise, a worker's refusal to submit to a lie detector test would generally not constitute probative evidence of that worker's culpability for the misconduct under investi-

\textsuperscript{167} See Note, Lie Detectors in Private Employment, supra note 3, at 947-48. See also Lag Drug Co., 39 Lab. Arb. 1121, 1122-23 (1962) (Kelliher, Arb.) (individual waivers inconsistent with employer's obligation to deal with workers through representative labor organization).

\textsuperscript{168} If a prospective examinee reasonably believes that adverse consequences might result from a proposed polygraph examination, he is entitled to union representation during the pre-examination discussions and the administration of the test, provided that he asks for such representation. This right is provided under the NLRA (see notes 76-79, 135, and accompanying text supra) and some applicable contract principles (see notes 106-13 and accompanying text supra). But cf. Bethlehem Steel Corp., 55 Lab. Arb. 994, 995 (1970) (Seward, Arb.) (no right to union representation before employer administers test for intoxication). The presence of a union representative during the critical pre-examination period may prove important because it significantly increases the likelihood of a determination that the employee's consent to the test was properly elicited.


\textsuperscript{170} See B.F. Goodrich Tire Co., 36 Lab. Arb. 552, 558 (1961) (Ryder, Arb.).

\textsuperscript{171} See notes 178-79 and accompanying text infra.
Finally, the arbitrator must consider the qualifications of the expert administering the test. Polygraph examiners range from professionally competent individuals who rarely err to rank amateurs who are little more than charlatans. Obviously, the results of only an expertly administered test should be admissible. Moreover, given the present state of the art, no lie detector test should be regarded as conclusive proof of guilt.

Lie detector examinations can have a significant impact upon an adjudication independent of the test results themselves. The machines frequently have a psychological effect upon examinees, precipitating confessions of guilt. If the arbitrator is satisfied that such a confession was given voluntarily, he should consider it as evidence of culpability, provided that it was elicited during a proper polygraph test. Where the confession resulted from an improper, involuntary examination, however, it should be rejected outright to ensure that the company does not derive any benefit from its inappropriate conduct.


173 See F. Bailey, The Defense Never Rests 16-17 (1971). Reliability of polygraph testing would be greatly enhanced if state licensing requirements established meaningful minimum standards for qualified examiners. See note 125 and accompanying text supra.

174 See, e.g., Spiegel, Inc., 44 Lab. Arb. 405, 407-09 (1965) (Sembower, Arb.). "The machine and its component parts are only as good as the person performing the tests, and the value of the findings is the result of the experience, qualifications or inexperience of the operator of the machine." Burkey, Lie Detectors in Labor Relations, 19 Arb. J. 193, 205 (1964) (quoting South Center Dept Stores (1958) (Luskin, Arb.) (unpublished opinion)).


If an employer obtains polygraph results that appear to exculpate the accused, it is arguably obligated to divulge that information to the labor union representing the grievant, at least if requested to do so. See generally NLRB v. Acme Indus. Co., 385 U.S. 432 (1967); United States v. Hart, 344 F. Supp. 522, 523-24 (E.D.N.Y. 1971) (prosecution required to inform defense of polygraph results casting doubt on credibility of prosecution witnesses). See also Brady v. Maryland, 373 U.S. 83 (1965).

176 See Note, Lie Detectors in Private Employment, supra note 3, at 958.

177 Cf. United States v. McDevitt, 328 F.2d 282, 284 (6th Cir. 1964) (confession elicited during polygraph test admissible as long as it is voluntary).
C. Right of Employer To Require Lie Detector Examinations

1. Fundamental Considerations

Opponents of compulsory lie detector examinations in private industry argue that the practice violates each worker's basic right to human dignity and privacy. They contend that it involves an unconscionable intrusion into personal thoughts, attitudes, and beliefs. Polygraph critics also assert that compulsory interrogation would alter the nature of the adjudicative process from adversarial to inquisitorial.

Judicial procedure must be adversary and not inquisitorial. . . .

. . . Surely, there can be neither justice nor dignity in finding the innocent guilty and the guilty innocent. But in the administration of justice, truth is but a means, whereas dignity is an end. . . .

The issue before us is whether we are to abandon our traditional system of adversary litigation with emphasis upon dignity for "scientific" trial with emphasis upon truth.

Despite the obvious appeal of such a simplistic dichotomy, it must be realized that adjudicative procedures have been directly affected by the discovery and development of scientific techniques. Expert testimony relating to fingerprints, blood tests, and handwriting analyses is commonplace today, even though such evidence effectively requires the accused to provide evidence against himself. As the Supreme Court recognized in Breithaupt v. Abram, a case involving the involuntary extraction of blood from a suspected drunken driver, there must necessarily come a time when "the interests of society in the scientific determination" of culpability outweigh "so slight an intrusion" into a person's body. There may similarly come a time where the substantial interests of an em-

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178 See A. Westin, supra note 4, at 237-39; Note, Lie Detectors in Private Employment, supra note 3, at 944-46; Note, supra note 1, at 106. See also Burkey, Privacy, Property and the Polygraph, 18 Lab. L.J. 79, 89 (1967); Markson, supra note 118, at 405-06.

179 See A. LeMond & R. Fry, supra note 3, at 130.

180 See Silving, supra note 172, at 687-702.

181 Id. at 687, 700, 702.


183 Id. at 439.
ployer will take precedence over the worker’s right of privacy.\textsuperscript{184}

In attempting to establish appropriate limitations upon a company’s right to require polygraph examinations, the arbitrator must consider the deleterious impact such procedures can have upon overall employer-employee relations. “Employees may view the tests as an indication of management suspicion and distrust. Such beliefs may create an atmosphere of hostility and an unfavorable working environment.”\textsuperscript{185} Failure to resolve a serious disciplinary matter, however, can have similarly destructive consequences. As one arbitrator has stated, “when suspicions are kindled it seems better to bring the matter to a head, one way or the other, rather than to risk the greater harm of misdirected doubts smoldering to char the esteem in which an innocent person might be held.”\textsuperscript{186}

In balancing the competing considerations, most arbitrators have taken the view that an employee’s refusal to submit to such an examination does not provide a reasonable basis for the imposition of discipline.\textsuperscript{187} A few arbitrators have decided to the contrary, however, in situations where there was sufficient independent evidence to create a reasonable suspicion that the employee had engaged in the misconduct under investigation.\textsuperscript{188} Although this latter position currently represents the minority sentiment, it is entirely defensible.

2. Suggested Approach

Although some arbitrators have indicated that a representative labor organization may, through collective negotiations, obligate an

\textsuperscript{184} Because fifth amendment principles are not binding upon the arbitration process (see notes 62-65 and accompanying text supra), the interest of an employer can take priority over the self-incrimination concerns of an individual worker in appropriate cases. See Note, \textit{Lie Detectors in Private Employment}, supra note 3, at 949-52.

\textsuperscript{185} Note, supra note 1, at 102 (footnote omitted). See Note, \textit{Lie Detectors in Private Employment}, supra note 3, at 938.

\textsuperscript{186} Attwood Corp., 48 Lab. Arb. 331, 334 (1967) (Keefe, Arb.).


employee to undergo lie detector tests, my view is that the vital individual rights involved are too substantial to permit union waiver. Since an employer's implementation of a lie detection program ordinarily constitutes a mandatory subject for collective bargaining within the purview of the NLRA, it is undoubtedly appropriate for a negotiated agreement to restrict the authority of a company to require such examinations. However, no contractual provision should be permitted to expand an employer's prerogative to require tests. A union should not be allowed to relinquish the basic personal rights of its members.

Mandatory lie detector examinations should be countenanced only when all of the following conditions exist: (1) serious employee misconduct is suspected, involving a substantial threat to production, discipline, or safety; (2) less drastic investigative techniques have been either unsuccessfully attempted or rejected as unworkable under the particular circumstances; (3) the employer has accumulated sufficient independent evidence to create a reasonable suspicion that the worker in question possesses relevant information that he has refused to disclose voluntarily. Even where a compulsory lie detector test is appropriate, the scope of inquiry should be as narrow as possible. Although the polygraph operator may have to ask personal questions not directly related to the present employment context for the purpose of calibrating the machine, none of the responses to such questions should be disclosed to management officials or other parties. Only answers di-

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190 See notes 139-41 and accompanying text supra.
191 Cf. NLRB v. Magnavox Co., 415 U.S. 322 (1974) (employees' collective bargaining agent may not waive their rights to form, join, or assist labor organizations). Where a collective bargaining agreement appears to enlarge management's right to compel polygraph tests, an arbitrator can effectively neutralize the provision by deciding that the "just cause" section of the contract prohibits disciplining employees who refuse to submit to unwarranted compulsory examinations. See Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973).
192 Cf. Pilgrim Liquor, Inc., 66 Lab. Arb. 19, 23 (1975) (Fleischli, Arb.) (employer required to show impossibility of less drastic means before requiring employees to sign fidelity bonds). See also A. Westin, supra note 4, at 372.
rectly related to the specific misconduct necessitating the examination should be divulged, and only to appropriate persons.\footnote{194} The protections proposed herein should be meaningfully enforced by both arbitrators, through the decisional process, and legislatures, through the enactment of appropriate statutory restrictions. Whenever an employer has disciplined a worker for refusing to submit to an unwarranted lie detector examination, the arbitrator should nullify the penalty; such reasonable employee conduct should not be considered “just cause” for the imposition of discipline.\footnote{195} Furthermore, no information obtained from an improper test should be admitted into evidence.\footnote{196}

State legislatures should prohibit all pre-employment lie detector examinations and all employer-solicited polygraph tests of a general or recurring nature. Such tests are inherently coercive and offer little information useful for security purposes.\footnote{197} State enactments should provide for appropriate civil and criminal redress for improper testing, but should encourage resort to the labor arbitration process by requiring exhaustion of available arbitral procedures as a prerequisite to civil action. An arbitrator’s resolution of the matter should be considered conclusive unless clearly erroneous or procedurally defective. Finally, states should

\footnote{194} The examinee should be informed of the proposed questions before the test so that inappropriate inquiries can be challenged and withdrawn prior to the examinations. See Note, Pinocchio’s New Nose, 48 N.Y.U. L. Rev. 339, 355 (1973). The subject should, upon request, be provided with the detailed conclusions of the polygraph examiner. \textit{Cf.} NLRB v. Detroit Edison Co., 4 Lab. L. Rep. (82 Lab. Cas.) ¶ 10,062 (6th Cir. 1977) (union entitled to results of psychological tests used by employer to determine promotions).

\footnote{195} \textit{Cf.} Meat Cutters Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817, 820 (5th Cir. 1973) (agreement not specifying particular grounds for discharge held to leave interpretation of “proper cause” to arbitrator).

\footnote{196} State statutes covering this area should specifically preclude the admission of improperly obtained test results before any public or private adjudicatory tribunal; otherwise, arbitrators might consider such evidence even if obtained in violation of state law. See Daystrom Furniture Co., 65 Lab. Arb. 1157, 1160-62 (undated) (Laughlin, Arb.).

\footnote{197} Pre-employment testing that is not clearly “job related” could provide a rejected minority group applicant with a cause of action for employment discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e (1970)). \textit{Cf.} Green v. Missouri Pac. R.R., 523 F.2d 1290, 1293-99 (8th Cir. 1975) (proof that employment practice disqualified blacks at substantially higher rate than whites established prima facie case of discrimination); Gregory v. Litton Sys., Inc., 472 F.2d 631, 632 (9th Cir. 1972) (requirement that each job applicant reveal arrest record held to discriminate against blacks). See also Albemarl Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). \textit{But see} 2 \textit{EMPL. PRAC. GUIDE} ¶ 6519 (Oct. 29, 1974) (EEOC decision) (no racial discrimination in violation of Title VII where black worker discharged for failing polygraph test given equally to all employees).
extend the fundamental protections of the arbitration process to unorganized workers.198

IV

EMPLOYMENT SEARCHES

It is not uncommon for employers to present at arbitration proceedings evidence that has been obtained through a search of an employee’s person or effects. In some cases employers receive such evidence from police officers who have uncovered it during a search pursuant to a criminal investigation. In other cases, employers obtain evidence through searches conducted on company premises.

A. Searches Conducted by the Police

The most common issue presented to arbitrators confronted with evidence obtained from a police search is whether the admissibility of the evidence should hinge on the propriety of the search under the fourth amendment.199 Some arbitrators have concluded that the exclusionary rule, which precludes using impermissibly seized evidence in a criminal proceeding against the victim of the search,200 should logically be applied in arbitration hearings to prevent the admission of evidence obtained through police misconduct.

Although the Fourth Amendment applies to governmental action, and not the unlawful seizure of private papers by private persons,201 we are not confronted in the instant case with a private seizure . . . but rather a situation where a private em-

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198 See Summers, supra note 24, at 519-31.
199 U.S. CONST. amend. IV provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ployer seeks to justify its disciplinary action almost entirely upon a tainted transaction, in the form of an adjudicated unlawful search and seizure by governmental action. If equity is proper for the Arbitrator's consideration the "clean hands" maxim requires consideration, for equity will never assist the harsh assertion of legal rights. Moreover, the constitutional protection against unlawful search and seizure is of little value if evidence ordered suppressed may be recaptured by public authorities and used against an accused in a collateral proceeding . . . .

Arbitrators who apply the exclusionary rule evidently believe that its purpose is to protect the individual who is the victim of a wrongful search. Such is not the case. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." The sole issue for consideration, therefore, is whether excluding illegally seized evidence from arbitration proceedings has any deterrent effect.

In my view, arbitral exclusion of evidence obtained by improper police conduct does not deter employer excesses, since employers are not directly involved in police searches. Nor does exclusion act as an effective deterrent to unconstitutional behavior by the police, who are primarily concerned with the criminal prosecution of law violators—not private punishment for employee misconduct. If the threat of evidentiary exclusion in the criminal context does not deter police misconduct, then surely the remote prospect of exclusion from a private collateral proceeding will have no meaningful impact. It is for this very reason that the Supreme Court has never applied the exclusionary rule to civil adjudications.

Finally, the equities of the private employment setting require the admission of any probative and reliable evidence of employee misconduct that has not been obtained through wrongful employer


acts. The detection and punishment of employee misconduct is in the interests of both labor and management.\textsuperscript{206} Fundamental fairness requires that totally innocent parties not be penalized for the wrongful acts of others. To the extent that a worker is truly aggrieved by police misconduct, his proper remedy lies in exclusion of the evidence from any criminal prosecution and civil redress against those responsible for the illegal search.\textsuperscript{207}

B. Searches of Workers Entering or Leaving Company Premises

Although many industrial searches are intended to discover evidence pertaining to specific employee misconduct suspected by an employer, some inspections are primarily preventive rather than accusatory.\textsuperscript{208} Some companies, for example, conduct regular examinations of employees as they enter and leave the premises to prevent the introduction of contraband into the plant or the theft of company property.\textsuperscript{209}

Entrance and exit inspections may be analogized to international border searches. The Supreme Court has expressly recognized the inherent authority of a sovereign nation to conduct such examinations without complying with the probable cause requirement of the fourth amendment.\textsuperscript{210} Arbitrators have similarly acknowledged the right of employers to perform reasonable searches

\textsuperscript{206} "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." United States v. Janis, 428 U.S. 433, 448-49 (1976). "If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted." Id. at 454. See also Stone v. Powell, 428 U.S. 465, 485-89 (1976).

Arbitrators who reject the exclusionary rule, however, do so not on policy grounds, but on the ground that the fourth amendment is simply not applicable to arbitration. See Aldens, Inc., 61 Lab. Arb. 663, 664-66 (1973) (Dolnick, Arb.); Commodity Warehousing Corp., 60 Lab. Arb. 1260, 1262-63 (1973) (Doppelt, Arb.); Hennis Freight Lines, 44 Lab. Arb. 711, 713-14 (1964) (McGury, Arb.). See also notes 218-21 and accompanying text infra.


\textsuperscript{208} See Silard, supra note 54, at 221.

\textsuperscript{209} From my own observations, companies seem more likely to use exit inspections than entrance inspections, presumably because there is usually a greater potential for loss from employee theft than from the admittance of contraband into the employment environment.

of employees and their belongings as they enter\textsuperscript{211} or leave\textsuperscript{212} the work premises, particularly where there are bona fide reasons for the practice.\textsuperscript{213} Generally speaking, the security procedure must be one that is clearly established, fairly administered, and understood by all workers. If an arbitrator determines that an inspection rule has been arbitrarily applied,\textsuperscript{214} or has been promulgated in a manner which has not sufficiently apprised the workers of their obligations thereunder,\textsuperscript{215} he may order the rescission or modification of any disciplinary action taken against employees who failed to cooperate in the search.

If an employer's inspection program is not used to obtain information about statutorily protected activities of workers and is not applied in a discriminatory manner to inhibit the exercise of secured rights, the program should encounter no immediate problems under the NLRA.\textsuperscript{216} Since inspection programs usually have a significant impact upon fundamental working conditions, however, they probably constitute a mandatory subject for collective bargaining. An employer is thus obligated to afford the representative labor organization an opportunity to negotiate both over the proposed implementation of such a program\textsuperscript{217} and over any contractual limitations it deems appropriate. The same considerations apply to searches conducted on the general premises of a company.

C. Searches Conducted on General Employment Premises

The Supreme Court has unequivocally recognized that the constitutional prohibition against unreasonable searches does not


\textsuperscript{213} For example, an employer may wish to prevent employees from drinking alcohol while on the job (see Fruehauf Corp., 49 Lab. Arb. 89 (1967) (Daugherty, Arb.)), or to prevent the theft of company property (see Dow Chem. Co., 65 Lab. Arb. 1295 (1976) (Lipson, Arb.)).

\textsuperscript{214} See Anchor Hocking Corp., 66 Lab. Arb. 480, 481 (1976) (Emerson, Arb.). In conducting these searches, the employer must be circumspect. If the employer seeks an obviously excessive intrusion, the subject of the proposed search should have the right to decline without being exposed to the possibility of discipline.


\textsuperscript{216} See generally notes 36-41 and accompanying text supra.

\textsuperscript{217} See generally notes 139-42 and accompanying text supra.
apply to wholly private conduct: "[t]he Fourth Amendment . . . was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."218 Although some commentators have argued that the constitutional restriction should be judicially extended to cover institutionalized private intrusions performed on a regular basis by company security agents,219 courts have generally rejected such an approach,220 as have most labor arbitrators.221 Nevertheless, arbitration decisions have imposed some limitations upon the right of management to search employees and their private belongings.

The right of management to carry out employment searches under certain circumstances is generally acknowledged. As long as the employees are fully informed of their obligations under security rules, a company may even prescribe compliance with them as a condition of continued employment.222 Thus, where a carefully defined management rule required workers to permit inspections of large purses brought into the employment environment, the arbitrator sustained the discharge of an employee who refused to allow a search of her pocketbook.223 In addition, certain employee privileges may be made contingent upon the right of the employer to perform security inspections. For example, provision of locker space to workers can be conditioned on a management right to inspect locker contents at any time.224

Company rules requiring employees to submit themselves and their personal property to security examinations as a condition of employment should be unambiguous, and should be narrowly construed to avoid unnecessary and unanticipated intrusions upon

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219 See Note, supra note 218, at 614-17.
222 See R. Fleming, supra note 54, at 189.
224 See Thrifty Drug Stores Co., 64 Lab. Arb. 997 (1975) (Fellman, Arb.). At least one arbitrator has upheld locker searches under the employer's contractual right to provide a safe working environment and maintain efficient operations. Rocky Mountain Arsenal, 64 Lab. Arb. 894 (1975) (Murphy, Arb.). Such an interpretation seems faulty, however, since this contractual right does not confer unlimited search powers on the employer.
Before conducting a search of an employee or his personal effects, an employer should always try to obtain the worker's permission. This procedure can prevent many unnecessary confrontations. If an arbitrator is satisfied that an employee willingly acquiesced to an employment search, the fruits of that exercise should be admitted into evidence. The worker's consent should, however, be genuine—not the product of employer deception.

Even where worker consent is refused and there are no properly promulgated rules specifically authorizing an inspection, an employer may still be entitled to conduct an examination. "Many arbitrators would permit companies to use evidence obtained without the knowledge or consent of the employee if it is obtained from company property (e.g., a locker), even though the property is momentarily under the control of the employee." This is particularly true where management has sufficient information to create a reasonable suspicion that contraband or misappropriated company property is located in the employee's locker. If no such presupposition exists, however, the immediate proprietary interest of the worker in his personal belongings should take precedence over the employer's ownership right, and a search should not be permitted.

Some employers may claim, as part of their contractual right to maintain a safe and healthful work environment, the inherent

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225 See Carlson & Phillips, supra note 14, at 541. Arbitrators have sometimes limited permissible searches to those specifically covered by express company rules. See Scott Paper Co., 52 Lab. Arb. 57, 58-59 (1969) (Williams, Arb.). Such rulings are unnecessarily restrictive, in view of the inherent right of an employer to take necessary security precautions.


227 At least one arbitrator has upheld a consensual search that was actually procured through deception. See Weirton Steel Co., 50 Lab. Arb. 103, 104-05 (1968) (Kates, Arb.). See also note 51 supra. If an employee's acquiescence is procured by a material misrepresentation, however, an arbitrator should view the deceptive inducement as grounds for vitiating the consent.

228 To avoid the intimidating atmosphere indigenous to employment searches, an employer should have a union representative present during such procedures. Furthermore, if an employee requests the presence of a union steward during such an investigation, reasonably believing that it might culminate in adverse consequences, the logic of Weingarten should mandate protection under the NLRA. See notes 71-77 and accompanying text supra.

229 R. Fleming, supra note 54, at 189.


authority to make regular inspections of all lockers or similar company-owned receptacles. However, the inference of such a general power to conduct searches is inappropriate. Only where specific employment rules have been promulgated to regulate search procedures should regular inspections be permitted. Otherwise, searches should be allowed only where the employer can demonstrate a reasonable suspicion indicating the need for an inspection; and even then, the scope of the search—e.g., the number or location of lockers—should be judiciously defined.

An employer should have even less authority to examine a worker's belongings that are not situated in a company container. Management should clearly not be permitted to obtain evidence through nonconsensual searches of employees or of their personal property merely because they are located on plant premises. On the other hand, where serious misconduct is suspected and less intrusive investigative measures have not proved successful, a company should have the limited right to search an employee or his personal property situated on the business grounds, assuming that the employer has probable cause to believe that relevant evidence will be uncovered.

Once an arbitrator has determined that an employer has conducted an impermissible search, he must decide how that violation should be rectified. Some have argued that all improperly procured evidence should be excluded from arbitral consideration.

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232 See note 224 supra.
234 See R. Fleming, supra note 54, at 189. See also notes 208-15 and accompanying text supra.
235 See, e.g., Champion Spark Plug Co., 68 Lab. Arb. 702, 705-06 (1977) (Casselman, Arb.); Orgill Bros. & Co., 66 Lab. Arb. 307, 308-11 (1976) (Ross, Arb.). In Orgill, the arbitrator sustained the termination of the grievant for refusing to submit to a search where probable cause for the requested intrusion was clearly established. He indicated that any other result would have made it advantageous for an employee in such circumstances to refuse to cooperate. Id. at 311. See also Smith's Food King, 66 Lab. Arb. 619, 625 (1976) (Ross, Arb.).

Parties might avoid many of the problems associated with such employment searches by establishing a procedure in which the employer could seek a presearch authorization from an arbitrator based upon an ex parte demonstration of probable cause. This practice could easily be implemented where a permanent umpire system is in effect, but it might encounter difficulty where parties only utilize ad hoc arbitrators. A possible solution would be to authorize and specify a neutral to act in this capacity. This procedure would afford significant protection to both workers and their employer.

Such a per se application of the exclusionary rule, however, is unwarranted. An arbitration hearing is primarily a search for the truth, and it should not be utilized as a vehicle for punishing transgressing employers. It is best to seek an accommodation that does not permit the clearly guilty worker to escape punishment simply because of a management error, but that affords him a remedy for injury caused by an improper company intrusion.

Arbitrators should recognize an implied covenant in collective bargaining agreements acknowledging the fundamental right of employees to be free from unreasonable management encroachments. Where this covenant is breached, a reasonable award of monetary damages is appropriate. It may also be proper in some cases to modify the discipline imposed upon the aggrieved worker. However, where the employer acts in good faith on a mistaken belief in its authority to conduct the search in question, any information procured should be admitted into evidence. In such cases, exclusion of the evidence would serve no meaningful purpose, since any deterrent effect upon persons acting in good faith would clearly be de minimis. If the arbitral evidence establishes that the grievant is in fact guilty of such gross misconduct that it would be unreasonable to order his reinstatement, his termination should be sustained despite any employer misconduct. Suitable monetary relief should be separately awarded to remedy the improper search. Only where the employer-employee relationship has not been irreparably destroyed by the worker's misconduct should the arbitrator consider a modification of a discharge penalty because of an impermissible but good faith search.

Where an employer has obtained evidence through deliberate disregard for the fundamental rights of the affected employee, however, that evidence, and the direct fruits thereof, should not be considered in an arbitration hearing as part of the employer's

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237 See Comment, supra note 205, at 275; notes 21-31 and accompanying text supra.
238 See Comment, supra note 205, at 275.
239 Compared to a criminal court judge who is empowered only to determine the guilt or innocence of the criminal defendant, an arbitrator is in a unique position because he is authorized in the same proceeding to consider what relief should be ordered to alleviate a wrong perpetrated against the grievant by his accuser.
240 In the final analysis, any discipline imposed as a result of an improper search is a consequence of the employee's own prior misconduct, not the search itself. An award of monetary damages should therefore not take into account the financial loss sustained by the worker due to the discipline imposed on him.
241 See generally notes 200-06 and accompanying text supra.
case-in-chief against the worker. A company must not be permitted to benefit from its own intentional misconduct. Exclusion of the improperly obtained evidence is the only effective deterrent to similar action in the future. Suppression in such cases would also prevent the arbitration process from becoming unduly tainted by the admission of evidence procured in an unconscionable fashion.

V

SURREPTITIOUS SURVEILLANCE

In an effort to discover and deter internal depredations, private employers are continually seeking more efficient surveillance techniques. Supervisors and regular security personnel are engaging in furtive observation practices with increasing frequency. Employers are hiring undercover agents to infiltrate the work environment. Many companies are using sophisticated photographic and eavesdropping equipment enabling management to observe and overhear everything occurring in the plant. These procedures all create complex issues for both arbitrators and the Labor Board.

A. Furtive Supervisory Activities

"It is generally recognized that the employer may exercise reasonable managerial rights of supervision even though this may not be specifically set forth in the parties' agreement." In addition to this general supervisory authority, management has the right to conduct special surveillance of a specific worker on the basis of previously developed suspicions. If incriminating information is obtained, the employer can impose an appropriate penalty, and can use the evidence in a subsequent arbitration proceeding to support its disciplinary action.

The surreptitious nature of some surveillance techniques does not usually diminish their propriety. For example, arbitrators have considered evidence obtained by management officials hidden in

242 However, if the grievant presents direct testimony in his own behalf that is wholly inconsistent with the information derived from the improper search, the evidence procured from that search should be admitted by the arbitrator solely for the purpose of impeaching the grievant's testimony. See Walder v. United States, 347 U.S. 62 (1954).


locations from which they could observe the activities of suspect employees.\textsuperscript{245} One arbitrator has deemed it appropriate for supervisory personnel to conduct unannounced off-plant investigations of employees who were apparently over-extending their authorized lunch break.\textsuperscript{246}

Despite this expansive management authority to conduct surveillance, the NLRA prescribes some basic limitations. It is clear that employers may scrutinize unprotected work activities;\textsuperscript{247} if employers attempt to review protected endeavors, however, unfair labor practice liability is likely to result.\textsuperscript{248} A violation has also been found where an employer subjected workers to constant and prolonged surveillance following the workers' announcement that they were union organizers.\textsuperscript{249} The Labor Board has even sustained an unfair labor practice complaint where a company discharged a supervisor who refused to engage in impermissible surveillance.\textsuperscript{250} In exercising their pervasive supervisory authority, therefore, employers must be careful not to infringe upon the NLRA prerogatives of their workers.

B. Use of Undercover Informants

Employers frequently obtain crucial evidence from an alleged offender's fellow workers.\textsuperscript{251} A knowledgeable employee may voluntarily provide the information, or the company may actively seek


\textsuperscript{251} To avoid the friction that develops when employees testify against each other, many companies endeavor to obtain sufficient independent corroborative evidence to preclude having to call a rank-and-file member as a witness. See notes 260-63 and accompanying text infra.
such assistance as part of its overall security program. This practice ordinarily creates no difficulty for labor arbitrators, and NLRA problems are avoided as long as management solicits information that pertains only to improper work activities. However, if the company inquires about protected conduct of employees, unfair labor practice liability will usually result.

Some employers attempt to secure a direct source of information by hiring undercover security agents to pose as regular employees. Arbitrators generally recognize the right of management to utilize such tactics despite their unsavory aspects, and will usually give due consideration to evidence so derived. Although the practice may create a counterproductive mistrust among the employees, workers must learn to accept the notion that their purported comrades may well be management informants who will disclose any misconduct that comes to their attention. Furthermore, no NLRA problems will arise unless informants are encouraged to report upon the statutorily protected conduct of the workers.

Some employers utilize undercover spotters to review the work performance of their employees by posing as ordinary customers. Although this procedure may precipitate some paranoia among the workers, arbitrators regard it as an appropriate security technique. However, the tactic does create a rather unique dilemma


258 See, e.g., S. T. KERK, supra note 3, at 275-76.

for arbitrators. Since the usefulness of spotters depends upon their continued anonymity, employers are often hesitant to produce them as witnesses at arbitration hearings. Some arbitrators have deferred to such concerns by relying on written reports prepared by the spotters without requiring the testimony of the spotters themselves.\textsuperscript{260} Despite the grievant's inability to cross-examine, arbitrators have been willing to lend great credence to such reports, since they are usually produced by professional investigators who have no motive to lie.\textsuperscript{261} Although this position is not unreasonable, other means should be explored to protect the interests of management while simultaneously affording the accused employee the chance for meaningful cross-examination. A compromise approach might entail having the undercover investigator testify before only the arbitrator, subject to his inquiries.\textsuperscript{262} Alternatively, the spotter could testify as a witness at the hearing behind a screen which would preserve his anonymity.\textsuperscript{263} By carefully regulating the questions propounded, the arbitrator could prevent the unnecessary divulgence of professional investigative secrets.

C. \textit{Surreptitious Photographic and Eavesdropping Techniques}

1. \textit{In General}

In recent years, technological developments have significantly enhanced the ability to covertly observe and overhear the activities of others.\textsuperscript{264} Infrared devices permit photographs to be taken through solid walls.\textsuperscript{265} Miniature microphones and transmitters can

\begin{itemize}
\item \textsuperscript{263} See id. at 247-48; Carlson & Phillips, \textit{supra} note 14, at 537.
\item \textsuperscript{264} Concealable movie and still cameras are available that are completely automatic, that can be operated by remote control, and that are so sensitive to the presence of human beings that they take pictures only when people are near. Closed-circuit TV cameras have been reduced in size until today there is a camera smaller than an ordinary flashlight. It can easily be concealed in air ducts or lighting fixtures. Infrared light or electronic light simplifiers can be used to take pictures even in the dark.
\item \textsuperscript{265} A. \textsc{LeMonD} & R. \textsc{Fry}, \textit{supra} note 3, at xii.
\end{itemize}
be hidden in virtually any location. Directional microphones can pick up conversations conducted a considerable distance away, and microphone techniques permit eavesdropping even through thick walls. It is even possible to set up a system that monitors all of the discussions occurring in an entire building and, through the use of speech spectrography, to identify all of the seemingly anonymous speakers recorded.

Many private companies have decided to install such devices to counter industrial depredations and to supervise more effectively the work performance of their employees. Although most employers use the equipment for bona fide business purposes, the capacity for abuse must not be ignored. Labor organizations have vociferously opposed the use of concealed surveillance devices in the employment environment. On several occasions, unions have convinced management to stop using the devices, and in some industries strike threats have successfully persuaded employers not to install such equipment. Despite these efforts, however, employees are often covertly monitored.

Although authorities have appropriately recognized that an employer’s proprietary interests may justify using surveillance techniques in production areas, stockrooms, loading zones, and

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266 See A. Westin, supra note 4, at 73-74.
267 See id. at 76-77.
268 See id. at 75.
271 See, e.g., Johnson, supra note 1, at 30.
272 For example, several employers have installed hidden cameras and surreptitious listening devices in employee washrooms and lounges. One even hid a microphone in the toilet tissue container in the women’s lavatory. See E. Long, supra note 118, at 204, 207.
273 Ironically, however, labor unions have themselves frequently resorted to using such devices for their own purposes. See A. Westin, supra note 4, at 109.
274 See id. at 381-82. The fear of privacy invasions stemming from the use of sophisticated surveillance devices is not merely a recent phenomenon. See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). See also Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion, Brandeis, J.).
similar locations, they have logically favored reasonable limitations on surveillance in areas where employees are entitled to privacy.\textsuperscript{275} Areas such as lavatories and employee lounges should be free of all monitoring equipment, concealed or otherwise. Surveillance devices are inherently intrusive, whether or not they are openly visible or known to exist by all employees. When subjected to inappropriate surveillance, workers should receive compensatory damages, and exemplary damages for malicious employer conduct, in a tort action for invasion of privacy.\textsuperscript{276}

2. Limitations Under Federal Wiretap Law

Federal law provides some protection against unwarranted electronic and mechanical intrusions. Although Title III of the Omnibus Crime Control and Safe Streets Act of 1968\textsuperscript{277} ("Title III") does not cover photographic surveillance,\textsuperscript{278} it does proscribe most deliberate and surreptitious interceptions of wire and oral communications.\textsuperscript{279} "The Act was intended to deal with increasing


\textsuperscript{276} The use of tort doctrines in this area would provide some protection for unorganized employees, who usually have no access to the grievance-arbitration process. \textit{See note 23 supra.} Organized workers would also benefit from the added protection.


\textsuperscript{279} 18 U.S.C. § 2511(1) (1970) provides in pertinent part:

(1) Except as otherwise specifically provided in this chapter any person who—
(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
\ldots
(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; \ldots
\ldots
(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or
threats to privacy resulting from the growing use of sophisticated electronic devices . . . "

With two exceptions, Title III forbids the interception of telephonic communications by private employers. The first exception provides limited immunity for telephone companies.

It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

Although one view of this exemption might permit communication common carriers to monitor calls in the hope of preventing theft of company property, such an expansive interpretation is inappropriate. The exception should be construed narrowly to allow interceptions only where the carrier reasonably believes that particular telephone conversations will pertain to the theft or destruction of company property that is necessary to basic business functions. The mere prospect of discovering unknown pilferers does not fall within the exemption, since the statute restricts random monitor-

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

United States v. Carroll, 332 F. Supp. 1299, 1300 (D.D.C. 1971). Regarding the vacillating and usually ineffective efforts by the executive, legislative, and judicial branches of the federal and state governments to regulate electronic surveillance prior to Title III, see A. Westin, supra note 4, at 174-210, 330-64.

Where a privately operated, intra-company intercom system is involved, Title III would not be applicable since the definition of "wire communication" set forth in 18 U.S.C. § 2510(1) (1970) covers only a "communication made in whole or in part through the use of facilities . . . furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications." See United States v. Christman, 375 F. Supp. 1354, 1355 (N.D. Cal. 1974).

ing solely to "mechanical or service quality control checks." Nor should the provision "be construed as authorizing the use of monitoring by a communications common carrier as a tool to enforce intra-company rules." 283

The second statutory exemption available to private employers applies to both wire and oral communications.

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception .... 284

Although a management official will rarely be a party to a confidential conversation pertaining to employment misconduct, he may be able to obtain the consent of one of the parties before such a conversation between others begins. Interception of the conversation under these circumstances would not violate Title III. 285 Nevertheless, obtaining general consent forms from employees for this type of eavesdropping would be improper. Valid acquiescence should be limited to a particular discussion or at least a series of related communications.

Even if neither of the specific exemptions applies, management may still be able to intercept a non-telephonic verbal conversation without violating Title III. To be accorded statutory protection, an "oral communication" must be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 286 This requirement has been interpreted to mean that, in order to be shielded from eavesdropping, a party must (1) subjectively anticipate that his discussion will be confidential and (2)

283 Courtney, supra note 20, at 29.
285 See Smith v. Cincinnati Post & Times-Star, 475 F.2d 740, 741 (6th Cir. 1973). The employer has the burden of establishing that it had obtained the requisite consent prior to the conversation in question. See United States v. McCann, 465 F.2d 147, 162 (5th Cir. 1972), cert. denied, 412 U.S. 927 (1973). The fact that the consenting party believed that his acquiescence would enhance the likelihood that any punishment imposed upon him as a result of the misconduct in issue would thus be ameliorated would not ipso facto negate the validity of his consent. Cf. United States v. Osser, 483 F.2d 727, 730 (3d Cir.) (motive of potential government witness held not relevant if consent to wiretapping voluntary and uncoerced), cert. denied, 414 U.S. 1028 (1973).
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speak under circumstances warranting such a subjective expectation of privacy. If these two conditions precedent are not satisfied, an employer may covertly listen to a non-telephonic discussion without violating Title III.

If a company official intercepts a wire or oral communication in violation of Title III, he is subject to a criminal penalty. In addition, the parties to the intercepted conversation have two important remedies under the federal statute. First, they can institute civil proceedings against the offending official and his employer seeking

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
(b) punitive damages; and
(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

Second, under section 2515 of Title III, the aggrieved parties can force the suppression of any evidence obtained by their employer in violation of the statute. This suppression right applies to any governmental hearing—federal or state, legal or administrative. However, the exclusionary rule embodied in Title III generally does not apply in arbitration proceedings between private employers and employees. Section 2515 has no legal force in a non-

291 Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.
292 See id.
governmental forum, and the traditional position of arbitrators has been to allow the admission of surreptitiously obtained evidence. As one arbitrator succinctly stated, "the legality of the means by which information has been gathered is for other authorities to determine," and the fact that evidence is obtained by stealth does not preclude an arbitrator from relying on it to sustain an employee's discharge. My view is that this position is unduly permissive, and may serve to defeat public policy. Where evidence has been obtained in violation of Title III or state laws, arbitrators should endorse the objectives behind these statutes by excluding the illegally obtained information from arbitral consideration.

To ensure that private employers who violate Title III do not benefit from their overly intrusive behavior, Congress should amend section 2515 to cover nongovernmental adjudicatory proceedings. Furthermore, Congress should extend Title III to prohibit all surreptitious visual monitoring of employees under circumstances entitling them to a reasonable expectation of privacy.

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293 Arguably, labor arbitration proceedings are conducted under the authority of federal or state law and should thus be covered by § 2515. Some courts initially recognized that such hearings were authorized by the United States Arbitration Act (9 U.S.C. §§ 1-14 (1970)). See, e.g., Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298, 301-03 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957). But see Street Employees Local 1210 v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310, 311-14 (3d Cir. 1951). However, the Arbitration Act expressly provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1970). This exclusionary language apparently led the Supreme Court to believe that the Arbitration Act did not apply to labor arbitration hearings. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 466-69 (1957) (dissenting opinion, Frankfurter, J.) (majority opinion's "silent treatment" of the Act in dispute over agreement to arbitrate indicates belief that Act did not apply). See also R. Smith, L. Merrifield & D. Rothschild, Collective Bargaining and Labor Arbitration 122 (1970).

Many states do have statutes pertaining to such proceedings. See generally D. Ziskind, Labor Arbitration Under State Statutes (1943). Although this fact could be used to support the claim that the exclusionary doctrine specified in Title III should be applied to labor arbitration hearings, most courts would probably not accept this contention. The mere fact that state law provides these proceedings with legal authenticity does not a fortiori convert private adjudications into governmental action within the meaning of § 2515, since they are principally the creation of private collective bargaining agreements.


296 See note 291 supra.
3. Limitations Under the NLRA

The NLRA partially restricts the use of surveillance techniques by employers. Although employers may use eavesdropping\(^{297}\) and photographic\(^{298}\) devices to supervise work performance and to control employee misconduct, they may not monitor employees' protected conversations\(^{299}\) or spy upon protected organizational activities.\(^{300}\) Moreover, since the use of such surveillance devices has a significant impact upon working conditions, representative labor organizations have the right to negotiate limitations on such practices.\(^{301}\)

If the applicable collective bargaining agreement does not specifically restrict the use of surveillance mechanisms, an employer may nevertheless be able to use some monitoring devices under his inherent authority to supervise the employment environment. For example, an arbitrator has sustained the right of management to install a visible closed-circuit television system covering the production area, where two regular supervisors suffered from heart conditions that substantially impaired their ability to monitor business operations.\(^{302}\) Even in the absence of a recognized necessity, however, an employer may still be permitted to


\(^{301}\) See text accompanying notes 273-74 supra. See also note 139 supra; note 308 infra.

Although an employer might argue that a union should not be allowed to restrict its use of sophisticated supervisory devices due to the proscription of § 8(b)(1)(B) of the Labor Act (29 U.S.C. § 158(b)(1)(B) (1970)), this contention should be rejected. That provision prevents a labor organization from restraining an employer in the selection of its representatives for collective bargaining and the adjustment of grievances. Realistically it should be regarded as only protecting the right of management to designate human representatives. A mechanical surveillance device should certainly not be considered a "representative" within the meaning of that provision.

\(^{302}\) See Cooper Carton Corp., 61 Lab. Arb. 697 (1973) (Kelliher, Arb.).
maintain an observation system. Thus in one dispute the arbitrator sanctioned the right of management to install television cameras to improve the effectiveness of supervisory personnel.303 "The use of television to watch employees concerns the subject of supervision. A decision as to how employees are to be supervised and what are the proper methods of supervision is a normal function of Management."304 Although the union strenuously maintained that the system intruded upon worker privacy, the arbitrator rejected this contention.

It should be evident that an employee's actions during working hours are not private actions. Management is properly concerned with the employee's work performance, what he does on the job and whether he obeys the plant's rules and regulations. . . . Surely, such supervision cannot be said to interfere with an employee's right of privacy. . . . Regardless of the type of supervision (a camera, a supervisor, or both, [sic] the employee works with the knowledge that supervision may be watching him at any time. He has a much better chance of knowing when he is being watched where there is no camera. But this is a difference in degree, not a difference in kind.305

Occasionally a labor union may be able to prevent the use of monitoring equipment even though there is no contractual provision limiting such devices. Since the installation of an electronic monitoring system modifies existing employment conditions, a general contract provision requiring management to preserve all working conditions beneficial to the employees might preclude implementing such a plan. The right of workers to function without the presence of television cameras is arguably an advantageous condition of employment protected by this type of clause.306

In the absence of an express maintenance-of-conditions provision, a union might argue that the lack of electronic monitoring equipment constitutes an established past practice that has been incorporated by implication into the negotiated agreement.307

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303 FMC Corp., 46 Lab. Arb. 335 (1966) (Mittenthal, Arb.).
305 FMC Corp., 46 Lab. Arb. 335, 338 (emphasis in original).
307 Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is
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However, the fundamental right of a company to manage its business operations will normally take precedence over such a claim. An employer clearly has the right to increase the number of its supervisory personnel, regardless of established working conditions. That the added supervision comes from electronic devices rather than human overseers is unlikely to alter this analysis for most arbitrators. In both cases, lower levels of supervision in the past were not the result of mutual understandings between labor and management regarding working conditions.308

The situation differs somewhat, however, where surreptitious surveillance techniques are employed. When surveillance is overt, employees are at least able to gauge the degree of privacy they must forgo in the name of industrial efficiency. To the extent that workers waive their privacy rights in such an employment setting, they do so knowingly. This is not possible, however, where hidden microphones and cameras are employed. The use of these devices constitutes such an unconscionable affront to the personal dignity and privacy of the workers that arbitrators should not sanction their installation without express union acquiescence.

so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term.


308 There are . . . practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future.


Even though an employer's installation of an electronic surveillance system might not be a breach of the applicable collective bargaining agreement, if the company acts without giving the representative labor organization the opportunity to negotiate over the matter it might violate § 8(a)(5) of the NLRA (29 U.S.C. § 158(a)(5) (1970)) for failing to negotiate over a mandatory subject for bargaining. See NLRB v. Katz, 369 U.S. 736, 742-43 (1962). See also note 301 supra. However, the method of supervising the work environment is generally considered a basic managerial function. Therefore, if the contract contains a management prerogative clause recognizing the discretion of the employer to manage the business, there would probably not be a violation if the company merely instituted a mechanical monitoring system. Cf. LeRoy Machine Co., 147 N.L.R.B. 1431, 1432, 56 L.R.R.M. 1369, 1370 (1964) (union waived right to bargain on employee qualifications under management prerogative clause).
CONCLUSION

Several general principles emerge from the current framework of arbitral and statutory regulation of the inquisitorial process in private employment. Employers normally have the right to interrogate employees about matters related to suspected employment misconduct, provided that the questioning does not impinge upon worker rights protected under the NLRA. Arbitrators may not consider an employee's refusal to answer questions as evidence of guilt concerning the suspected wrongdoing, although the refusal itself may constitute an independent basis for discipline. Employees have no right to assistance from a union representative during the initial stages of an investigation unless such representation is required under the NLRA or the collective bargaining agreement and the employee does not waive the right. Employers may conduct business-related searches or surveillance within the plant, even though intrusive, as long as clearly defined rules govern these procedures, and as long as the investigative activity does not violate the collective bargaining agreement or worker rights protected under the NLRA.

Arbitrators will accord probative value to most evidence material to a grievance, provided that the evidence was obtained pursuant to lawful, good faith security techniques undertaken by an employer. Where the circumstances surrounding a search or interrogation suggest duress or trickery, however, arbitrators will give the evidence little weight. Evidence obtained through gross acts of coercion or deception, or pursuant to a clearly improper employer search or interrogation, will be excluded altogether.

Current arbitral guidelines represent an approach toward accommodating conflicting interests that is receptive to many factors. This approach should be extended to those remaining industrial security problems that continue to be governed by inflexible rules based on outmoded concepts. In each case, the need for industrial security and efficiency must be balanced against the intrusiveness of the security measure and the probative value of the evidence obtained. Legislators can assist in this process by enacting statutory protections for the individual rights that they deem most important. In the vast majority of cases, however, the arbitration process is the preferable forum for balancing conflicting private interests in the industrial context.

309 Note, however, that most arbitrators will not allow imposition of discipline for refusal to submit to a lie detector test. See note 187 and accompanying text supra.