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## The Legal Implications of Graphology

Julie A. Spohn

*Washington University School of Law*

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# THE LEGAL IMPLICATIONS OF GRAPHOLOGY

## I. INTRODUCTON

Graphology, “the alleged science of divining personality from handwriting,”<sup>1</sup> is for many American employers a tool for making various employment decisions. In recent years, American employers’ use of graphology in employment decisions has increased.<sup>2</sup> Today, about six thousand American companies report using graphology;<sup>3</sup> however, this

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1. Joe Nickell, *A Brief History of Graphology*, in *THE WRITE STUFF: EVALUATIONS OF GRAPHOLOGY, THE STUDY OF HANDWRITING ANALYSIS* 23, 23 (Barry L. Beyerstein & Dale F. Beyerstein eds., 1992). Writers sometimes use the term “graphology” interchangeably with “graphoanalysis” or “handwriting analysis.” However, “graphoanalysis” refers only to the type of graphology practiced by Graphoanalysts, a trademarked name for graduates of Chicago’s International Graphoanalysis Society. *See id.* at 21-22. This Note uses the term “graphology” to refer to graphology in general and to distinguish graphology from the handwriting analysis that questioned document examiners use to identify handwriting in forgeries and other cases.

2. *See, e.g.*, Robert B. Fitzpatrick, *Handwriting Analysis and Employment Decisions*, *Empl. Testing* (Univ. Pub. Am.), Apr. 15, 1991 (noting that graphology has increased somewhat in recent years as a tool for making employment decisions); Ching Wah Chin, Note, *Protecting Employees and Neglecting Technology Assessment: The Employee Polygraph Protection Act of 1988*, 55 *BROOKLYN L. REV.* 1315, 1343-1344 n.125 (1990) (noting renewed interest in graphology as a tool for making employment decisions); Laura Castaneda, *Handwriting Tests Called Credible: Maryland Expert Cites Use in Hiring*, *WASH. POST*, July 9, 1985, at D02 (reporting American Handwriting Analysis Foundation research director Gloria Vadus’s claim that since the 1960s, the number of companies using graphology has increased 305% each year); Drew Fetherston, *CITY & CO. Consultant Reads Between the Lines*, *NEWSDAY*, Jan. 23, 1995, at CO3, available in 1995 WL 5097959 (reporting owner of Graphology Consulting Group in New York City as stating that her company has grown 40% in five years); Pamela Lewis, *Handwriting Analysis Adds Slant to Job Screening*, *PANTAGRAPH* (Bloomington, Ill.), Apr. 12, 1992, at C1, available in 1992 WL 5825775 (reporting gain in graphology’s and graphoanalysis’s popularity, especially with companies whose employees deal with the public and whose bottom lines depend on honest workers); Michael J. McCarthy, *Handwriting Analysis as Personnel Tool: Major Firms Begin Using It; Skeptics Scoff*, *WALL ST. J.*, Aug. 25, 1988, at 19 (Phoenix, Arizona graphology firm added over one hundred corporations as clients in 1988); Lea McLees, *All in the Strokes: Handwriting analysis Goes Mainstream*, *BOSTON GLOBE*, Aug. 20, 1987, at 85, available in 1987 WL 3977744 (“Handwriting analysis[] . . . is gradually moving into the mainstream—it is being used by consulting firms” and “Fortune 100 businesses . . .”); Loraine O’Connell, *Your Handwriting Is Not in the Stars, It’s in Your Handwriting: Some Think Your Scrawl Can Tell All*, *REC. N. N.J.*, May 4, 1992, at B01, available in 1992 WL 9428584 (reporting that graphology continues to gain popularity, especially among employers and professionals in service industry).

One article reports that graphology’s use is increasing particularly among small businesses, which usually lack human resources professionals. *See* Peggy Schmidt, *Lie-Detector Tests in a New Guise*, *N.Y. TIMES*, Oct. 1, 1989, at 29. However, numerous large and well-known businesses use graphology to make employment decisions. *See infra* note 5.

3. *See* Alessandra Bianchi, *The Character-Revealing Handwriting Analysis, Inc.*, Feb. 1, 1996, at 77, 77. One industrial psychologist cautions that there is currently little systematic and documented evidence on the prevalence of use. *See* Richard J. Klimoski, *Graphology and Personnel Selection*, in *THE WRITE STUFF*, *supra* note 1, at 232, 244. Nevertheless, he notes that many authors and managers believe that applying graphology to personnel work is a widespread practice. *See id.*

figure may be too low because many other companies use, but do not admit to using graphology.<sup>4</sup> Many large and prominent employers use graphology in employment decisions.<sup>5</sup> These and other employers use graphology to make hiring, promotion, and transferral decisions, among others.<sup>6</sup>

Part of the reason for graphology's growing popularity among employers is the Employee Polygraph Protection Act of 1988 ("EPPA").<sup>7</sup> Ever since Congress passed the EPPA, which prohibits private employers, in most cases, from subjecting job applicants or employees to lie detector tests,<sup>8</sup>

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4. Klimoski, *supra* note 3, at 244; see also Laurence Darmiento, *Handwriting Study Without Hocus-Pocus: Employers Use Valencia Analyst*, L.A. DAILY NEWS, Mar. 4, 1996, at SC2, available in 1996 WL 6549108 (owner of Los Angeles graphology firm reports that most companies do not like to admit using her services but prefer them to be a "secret weapon"; Melinda Fulmer, *The Write Stuff*, SAN ANTONIO BUS. J., May 5, 1995, at 1, available in 1995 WL 8229126 (San Antonio graphologist reports that few San Antonio companies using graphology admit to it); Shirley Leung, *Handwriting Can Spell Out Hiring Decisions*, BALT. SUN, Mar. 9, 1995, at 7B, available in 1995 WL 2423623 (Elaine Schindler, President of the Society of Handwriting Analysts in Silver Spring, Maryland, reports that many businesses do not want to admit to using graphology because of its reputation as a gimmick); O'Connell, *supra* note 2 (attributing U.S. employers' reluctance to acknowledge using graphology to its pseudoscientific nature).

5. See John Bacon, *The Handwriting Is on the Wall for Lie Detector Tests, and That May Be Good News for Graphologists*, GANNETT NEWS SERV., May 24, 1988, available in 1988 WL 2903690 (Boyden International, a senior executive head-hunting firm with offices in 15 cities and 26 countries, uses graphology to screen applicants); Laurie Corbin, *Debbie Berk Wants Your John Hancock*, BUS. NEWS N.J., June 26, 1996, at 9, available in 1996 WL 9563768 (Le Meridien Hotels in Boston and Westinghouse in Pittsburgh have used graphology); David L. Kurtz et al., *CEOs: A Handwriting Analysis*, BUS. HORIZONS, Jan. 1, 1989, at 41, 41-42 (reporting that such companies include, for example, Ford, General Electric, Mutual of Omaha, H & R Block, Firestone, and USX Corp.); McCarthy, *supra* note 2 (a Honeywell Inc. division uses graphology in job screening, and Bell Atlantic Corp. occasionally uses graphology in managers' self-improvement exercises); Sharon McDonnell, *Your Teacher Was Right About Penmanship; Writing Analysts Help Companies Screen out Undesirable Applicants*, NEWSDAY, Sept. 17, 1995, at 04 (graphology is "increasingly but unobtrusively" used by employers such as banks, brokerage firms, manufacturers, insurers, and temporary employment services, including one of Long Island's largest companies, Olsten Corp.); McLees, *supra* note 2, at 85 (Massachusetts graphoanalyst claims a national service corporation, insurance agencies, and a national magazine publisher as clients); Kathleen Murray, *Some Employers Analyze Penmanship for Insight on Potential Employees*, ORANGE COUNTY REG. (Cal.), Mar. 24, 1992, at E01, available in 1992 WL 6342568 (Xerox Corp. and the Westin South Coast Plaza have used graphology in employee screening); *The Power of the Written Word*, ECONOMIST, June 16, 1990, at 97, 97 (CIA uses graphology); Guy Webster, *Job Applicants' Fate Written in the Script*, ARIZ. REPUBLIC, Sept. 1, 1991, at F1, available in 1991 WL 6029852 (New York-based graphology firm claims ten Fortune 500 companies as clients).

6. See Nancy K. Austin, *Does Spirituality at Work Work? New Age Spiritualism in Management*, WORKING WOMAN, Mar. 1, 199, at 26, 26 (one company uses graphology as a tool in team building, promotion decisions, and conflict resolution); Fetherston, *supra* note 2, at C03 (banks and Fortune 500 companies ask New York City graphology consulting firm for hiring help and advice in setting up in-house work teams); Judith Markham Semas, *Spare Changes: Graphology Mesmerizing Some Bankers as Tool for Their Management Arsenal*, AM. BANKER, Mar. 28, 1996, at 17, available in 1996 WL 5562717 (one California bank uses graphology for applicant screening, building teamwork, counseling employees, and career planning and staff development).

7. 29 U.S.C. §§ 2001-2009 (1988).

8. See *id.* Graphology tests are not lie detector tests under the EPPA. See 29 C.F.R. § 801.2(d)(2) (1997).

employers have been desperately seeking other ways to evaluate the honesty and other characteristics of job applicants and employees.<sup>9</sup>

Because of courts' traditional hostility to graphology<sup>10</sup> and increasing concern with employment testing<sup>11</sup> and job applicant and employee privacy,<sup>12</sup> plaintiffs may pursue successful claims for harm resulting from employers' use of graphology in employment decisions.<sup>13</sup> In fact, there are strong arguments against using graphology in employment decisions at all. This Note explores the possible claims that plaintiffs may file against employers that use graphology in employment decisions and proposes abolishing the use of graphology in employment decisions.

## II. HISTORY OF GRAPHOLOGY

Graphology's roots are ancient.<sup>14</sup> In the nineteenth century, a circle of French clergy are believed to have generated the modern interest in graphology.<sup>15</sup> One of the group, Abbé Jean-Hippolyte Michon, established the term 'graphology',<sup>16</sup> founded the Society of Graphology in Paris in 1871,<sup>17</sup> and wrote several treatises on graphology.<sup>18</sup> In contrast to his

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9. See Fitzpatrick, *supra* note 2, at 753 (stating that since Congress passed the EPPA, employers have eagerly sought alternative screening methods like graphology); Fetherston, *supra* note 2, at C03 (stating that the EPPA has benefited graphology); O'Connell, *supra* note 2, at B01 (stating that since the EPPA, employers have been "desperate for any help they can get in selecting the right employees" and therefore have turned to graphology); Webster, *supra* note 5, at F1 (reporting New York-based graphology firm's claim that its business in pre-employment screening grew about 15% after the Act); *Workplace Honesty Testing Raises Validity, Privacy Questions*, 5 EMPL. L. & POL'Y DAILY (BNA), June 15, 1993 (quoting attorney Cliff Palessky as saying, "People are looking for a magic bullet after the lie detector was banned").

10. See *infra* note 23 and accompanying text.

11. See, e.g., Joseph W. Ambash, *Honesty, Personality and Psychological Testing in the Employment Context*, July 1990, available in 1990 WL 357776 ("the issue of employment testing is emerging as one of the significant frontier concerns in employment law"); Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L.J. 69, 93 (1994) (noting courts' emphasis on employee privacy when there is testing).

12. See, e.g., Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortuous and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1266 ("the right to privacy in the workplace is emerging as a major employment law issue in the 1990's"); Kurt H. Decker, *Employment Privacy Law for the 1990's*, 15 PEPP. L. REV. 551, 552 (1988) ("privacy will be the main theme for employment law in the 1990's").

13. See Decker, *supra* note 12, at 563 (recognizing that graphology may invade employees' privacy); Victoria McNamara, *Handwriting Analyst Sticks to the Script*, HOUS. BUS. J., Oct. 2, 1989, at 1, available in 1989 WL 2547426 (noting that lawyers have questioned the use of graphology in employment decisions).

14. See Nickell, *supra* note 1, at 27.

15. See *id.* at 25.

16. See *id.*

17. See *id.*

18. See *id.*

teacher's analytical approach to graphology, Michon's pupil Crepieux-Jamin developed a holistic approach.<sup>19</sup> Near the end of the nineteenth century, German researchers began to dominate the field of graphology.<sup>20</sup> In the United States, June Downey emerged as one of the earliest experimenters in graphology.<sup>21</sup> As early as 1965, American employers began to use graphology in personnel decisions.<sup>22</sup>

American courts have traditionally expressed hostility to graphology.<sup>23</sup>

19. See *id.* Crepieux-Jamin's holistic approach stressed that a writing specimen must be comprehended as a whole to which the various features and signs contribute in different degrees. *Id.*

20. See *id.* One German researcher, Wilhelm Freyer, asserted that handwriting is essentially "brain writing." *Id.* for criticism of the "handwriting is brainwriting" notion, see *infra* note 49.

21. See Nickell, *supra* note 1, at 27. See generally JUNE E. DOWNEY, GRAPHOLOGY AND THE PSYCHOLOGY OF HANDWRITING (1919); June E. Downey, *Character and Handwriting*, 16 PSYCHOL. BULL. 28 (1919); June E. Downey, *Judgments on the Sex of Handwriting*, 17 PSYCHOL. REV. 205 (1910).

22. See P.N. Thayer & J.A. Antoinette, *Graphology*, 2 INDUS. PSYCHOLOGIST 33 (1965) (reporting use of graphology in the insurance industry). See generally S.M. Zdep & H.B. Weaver, *The Graphoanalytic Approach to Selecting Life Insurance Salesmen*, 53 J. APPLIED PSYCHOL. 295 (1967).

23. For example, *Daniels v. Cummins*, 321 N.Y.S.2d 1009 (N.Y. Sup. Ct. 1971), involved a finding by a questioned document examiner that a testator's signature showed that she was not of sound mind. The court rejected this testimony, asserting, "[t]hese are medical, psychiatric findings and judgments . . . In pronouncing such gratuitous conclusions, [the expert] leaped into the occult, esoteric, pseudoscientific pursuit known as graphology[.]" *Id.* at 1014. The court approvingly quoted legal treatises rejecting graphology. See *id.* at 1014-16. Furthermore, the court stated:

To allow such testimony—or, if received in the absence of due objection—is to open the floodgates to speculative testimony devoid of genuine scientific foundation. The endeavors by courts and juries in fact finding processes would not be aided by granting judicial sanction to graphologists; on the contrary, they would be stultified and shunted into a mystical miasma.

*Id.* at 1016. The court went on to quote extensively the preeminent questioned document examiner Albert S. Osborn:

"If general human character qualities could be correctly inferred from all these variations, then what is called graphology would indeed be a science, but when the graphologist connects with a particular single quality a definite character value, the unscientific and ridiculous nature of the performance is readily seen. Writing does indicate manual skill and certain artistic qualities, or lack of them, but does not show honesty, or dishonesty, or disease and other important phases of human nature."

*Id.* at 1014-15 (quoting ALBERT S. OSBORN, QUESTIONED DOCUMENTS PROBLEMS 351 (1944)). The court also relied upon the views of Wilson R. Harrison, a director of the British Home Office Forensic Science Laboratory at Cardiff, where documents were examined:

"Even those graphologists who profess to be capable of telling so much about the personality and abilities of the writer from their examination of a few written characters, refuse to commit themselves about the sex of the writer even when pages of handwriting are put at their disposal. The uncharitable suggestion once made by the author that this is because their conclusions can in these particular instances be tested for accuracy, has resulted in a storm of abuse being rained on his head!"

*Id.* at 1015 (quoting WILSON R. HARRISON, FORGERY DETECTION: A PRACTICAL GUIDE 156 (1964)). The court also considered Osborn's definition of graphology "well worth noting:"

"'Graphologist' is the term which is generally restricted to the person who claims to be able to deduce from a specimen of handwriting—sometimes but a single signature—a host of information concerning the character and abilities of the writer. It cannot be denied that the activities of any person, be they speaking, writing, walking, etc., are governed entirely by his physical and mental

Indeed, testimony based on graphology is inadmissible virtually everywhere.<sup>24</sup> However, despite the hostility of scientists and the courts, there has been renewed interest in graphology as a tool for making employment decisions in the United States.<sup>25</sup> Employment testing in general is largely a product of the twentieth century's emphasis on efficiency and quantitative measurement.<sup>26</sup> One could view graphology as part of this twentieth-century development. Furthermore, employers use graphology as a hiring tool partly because it confers "what many people in the high-tech era consider a benefit: [it] void[s] the necessity to confront other people directly."<sup>27</sup>

Other historical developments account for employers' growing interest in graphology. For example, many employers use graphology to try to remediate employee dishonesty, an increasing problem for many private

make-up but, in the opinion of the author, this is no warrant for asserting that, from a tiny aspect of any one activity, anyone, no matter how gifted, has the ability to make an accurate appraisal of the mental and physical features which governed that particular activity selected under study."

*Id.* (quoting WILSON R. HARRISON, FORGERY DETECTION: A PRACTICAL GUIDE 189 (1964)). The court then applauded Harrison for putting graphology in its place:

"[H]andwriting experts' and 'graphologists' in general have enjoyed a very low status in the courts. The general and usually well-justified feeling has been that their findings are largely intuitive and that consequently there are often as many opinions as there are experts in the case."

*Id.* (quoting WILSON R. HARRISON, SUSPECT DOCUMENTS: THEIR SCIENTIFIC EXAMINATION 1 (1958)).

Another New York Supreme Court case, *Cameron v. Knapp*, 520 N.Y.S.2d 917, 917-18 (N.Y. Sup. Ct. 1987), cited *Daniels* for its denunciation of graphology. *Cameron* involved a handwriting expert who was prepared to testify that he could determine from analyzing a surgeon's handwriting whether the surgeon had shaky hands. *See id.* at 917. The *Cameron* court noted, "[c]ourts across this country have uniformly disapproved of attempts to have a handwriting 'expert' testify as to an individual's mental or physical condition based on a handwriting sample." *Id.* at 918. Citing the *Daniels* court's description of graphology as an occult and pseudoscientific pursuit, *see id.*, the *Cameron* court proceeded to a discussion of graphology's reliability. The court held that the plaintiff was unable to introduce any evidence that the results of graphology are generally accepted by the medical or scientific community as a reliable determinant of surgeons' fitness. *See id.* Furthermore, no courts have accepted the results of graphology when a party tried to use them to prove some fact about the handwriter's mental or physical condition. *See id.*

24. *See* D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U. PA. L. REV. 731, 734 n.13 (1989).

25. *See* Chin, *supra* note 2, at 1344 n.125.

26. David C. Yamada, *The Regulation of Pre-Employment Honesty Testing: Striking a Temporary (?) Balance Between Self-Regulation and Prohibition*, 39 WAYNE L. REV. 1549, 1563 (1993); *see also* Gershon Ben-Shakhar et al., *Can Graphology Predict Occupational Success? Two Empirical Studies and some Methodological Ruminations*, 71 J. APPLIED PSYCHOL. 645, 645 (1986) ("The increasing demand for better personnel selection, combined with the weakness of standard personality tests, has led many firms to turn to alternative prediction methods—most notably, graphology.").

27. Robert Ellis Smith, *Corporations That Fail the Fair Hiring Test*, 88 BUS. & SOC'Y REV. 29, 29 (1994).

sector employees.<sup>28</sup> Increasing turnover rates may also account for graphology's growing popularity among employers.<sup>29</sup> Limited in their use of polygraph examinations by the EPPA, employers have been searching for almost anything to help them in determining employee suitability.<sup>30</sup> From this standpoint, graphology is just another dubious technique that employers see as providing simple answers to difficult questions.<sup>31</sup> Current popular culture also provides a hospitable climate for graphology. The trendiness of "New Age" (a euphemism for "occult") practices in society generally<sup>32</sup> is reflected in graphology's use in the workplace.<sup>33</sup>

No one has litigated the issue of using graphology in employment decisions.<sup>34</sup> However, legislators have proposed bills in Oregon<sup>35</sup> and Rhode Island<sup>36</sup> outlawing it as a tool in employment screening. Furthermore,

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28. See Barbara Caron, *Starting Out—Help Wanted: Finding and Motivating Employees is Crucial in a Small Business*, WALL ST. J., May 22, 1995, at R10 (describing small Massachusetts business's requirement that all applicants undergo graphology because owner believes that 60% of job applicants lie).

29. "[A]s turnover costs grow (50 percent of new hires in the United States don't last six months in the jobs they are hired for), [graphology] seems to be gaining steam." *Write That Resume Right*, SAN DIEGO UNION-TRIB., January 29, 1996, at C1, available in 1996 WL 2139272; see also Bianchi, *supra* note 3, at 77 (business owner claims graphology has significantly reduced his turnover rate); Fulmer, *supra* note 4 (San Antonio graphologist claims that companies suffering high turnover rates are prime candidates for graphology services); Semas, *supra* note 6 (graphology providers claim that some users report turnover reduction since using their services).

30. See *supra* note 9 and accompanying text.

31. According to Dan Lacey, a Cincinnati-based workplace consultant, too many employers are looking for a simple answer to employee selection and "may grab onto handwriting analysis as the latest fad." Murray, *supra* note 5. He wonders what is next: "Will we be doing tarot-card readings on prospective hires?" *Id.*

32. "[T]he business world's embrace of new Age tactics simply echoes the search for spirituality that is sweeping the nation." Austin, *supra* note 6, at 27; see also Art Nauman, *Skepticism on Paranormal*, SACRAMENTO BEE, Feb. 5, 1989, at B1, available in 1989 WL 6361054 (lamenting growing popularity of occult practices and beliefs).

33. See generally Austin, *supra* note 6, for a discussion of mystical practices and their influence on management.

34. See *id.* at 26 (one company reports that while some job candidates are nervous about having their handwriting analyzed as part of the application process, none have refused to participate). For the views of commentators questioning the validity of consent to personality tests, and the relevance of their views to graphology, see *infra* notes 109-10 and accompanying text.

35. Former Oregon legislator Grattan Kerans sponsored bills trying to regulate graphology in employment decisions. See Darmiento, *supra* note 4. He remarked that the sensitivity companies have about using graphology is a real problem. See *id.* During the 1990 and 1991 Oregon Senate hearings on his bills, according to Kerans, companies would not confess to using graphology but tried hard behind the scenes to defeat the bills, which would have mandated disclosing use of graphology in employment decisions. See *id.*

36. Rhode Island's Lie Detector Statute provides: "No employer or agent of any employer shall either orally or in writing request, require, or subject any employee to any lie detector tests as a condition of employment or continued employment." R.I. GEN. LAWS § 28-6.1-1(a) (LEXIS through 1995 Jan. Sess.). However, employers may use "written examinations as defined in § 28-6.1-4 . . . as long as the results of the written examinations are not used to form the primary basis for an employment decision." *Id.* § 28-6.1-1(b). "Lie detector test" includes

representatives of the American Civil Liberties Union criticize firms that use graphology in employment decisions because they “strongly oppose all arbitrary pseudo-science employment practices.”<sup>37</sup>

### III. GENERAL PROBLEMS WITH GRAPHOLOGY

Numerous scientists and scholars have refused to endorse graphology.<sup>38</sup>

any . . . written examination which is operated or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual.

*Id.* § 28-6.1-4.

Representative Robert Brousseau introduced a bill amending section 28-6.1-1 to read as follows:

No employer or agent of any employer shall, either orally or in a writing request, require or subject any employee to any lie detector tests or other scientific evaluations as a condition of employment or continued employment. Provided, however that written examinations as defined in section 28-6.1-4 may be used as long as the results of such written examination are not used to form the primary basis for an employment decision.

H.R. 6422, Jan. Sess. (R.I. 1995). “Other scientific evaluations” presumably would include any tests that purported to be scientific, such as graphology.

37. Elsa C. Arnett, *Do Writing Analyses Get the Job Done?*, L.A. TIMES, Aug. 18, 1989, at 7, available in 1989 WL 2260342 (quoting Steven Brown, executive director of the Rhode Island ACLU). The Rhode Island ACLU received several complaints in 1989 about employers’ requiring handwriting samples from prospective employees. *See id.* Brown expects the complaints to increase as more companies use graphology. *See id.*

38. “Particularly vocal against the claims of graphologists has been the distinguished committee for the Scientific Investigation of Claims of the Paranormal—a scientific watchdog group including Carl Sagan, Isaac Asimov, and others.” Nickell, *supra* note 1, at 29 n.28. Paul Kurtz, the committee’s chairman, called employers’ use of graphology “very disturbing to [the Committee].” Arnett, *supra* note 37; *see also* Ben-Shakhar et al., *supra* note 26, at 646 (“In general, the methodologically tighter a study, the less impressive the graphologists’ performance.”); *Handwriting analysis*, ATLANTA J. & CONST., Jan. 23, 1991, at D04, available in 1991 WL 7766815 (George S. Pearl, certified questioned document examiner and handwriting expert, says graphology is no different from evaluating character through watching people eat: “If you pour a lot of catsup on your food and stab your meat, you might be a murderer.”); Leung, *supra* note 4 (noting that the American Psychological Association reports that it neither endorses nor opposes graphology); Lewis, *supra* note 2 (quoting John Binning, associate professor of psychology at Illinois State University and specialist in personnel selection, as stating that graphologists have no better luck than chance in personality prediction and that qualified applicants are being passed over because of such unproven screening practice); McCarthy, *supra* note 2 (quoting John Jones, a psychologist with London House, Inc., a personality-test company in Illinois, as stating that “[n]o body of research shows that handwriting consistently predicts job behavior[.]”); Stephen McGookin, *Graphology “A Waste of Money”*, FIN. TIMES, Nov. 19, 1993, at 12, available in 1993 WL 12121144 (quoting Donald McLoed, British corporate psychologist and former chief psychologist for the Civil Service Commission, as stating that companies using graphology as a means of predicting employee effectiveness “might as well throw a sheaf of application forms out the window and choose those that land face up.”); McLees, *supra* note 2 (quoting John McCarthy, a document examiner with the Florida Department of Law Enforcement in Tallahassee, s stating that graphology “has almost no practical use for determining personality[.]”); *Value of Handwriting Analysis Debated*, OTTAWA CITIZEN, July 9, 1988, at F6, available in 1988 WL 3696417 (British Columbia Civil Liberties Association spokesman Dale Beyerstein calls claim of being able to determine character traits from handwriting “totally unfounded” and equates graphology with “astrology and teacup reading[.]”);



Proving graphology's validity and reliability presents many problems.<sup>39</sup> This

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Webster, *supra* note 5 (quoting industrial psychology professor Richard Klimoski of Ohio State University as having said, "The better the studies [of graphology] have been, the less support they offer to proponents[.] . . . My reading of the evidence is that there is nothing there that's worth your time and money.").

39. See Thomas Gilovich & Kenneth Savitsky, *Like Goes With Like: The Role of Representativeness in Erroneous and Pseudoscientific Beliefs*, SKEPTICAL INQUIRER, Mar. 13, 1996, at 34, available in 1996 WL 9981429:

One reason for [graphology's popularity] is that graphologists, like astrologers, gain some surface plausibility or "face validity" for their claims by exploiting the tendency for people to employ the representativeness heuristic. Many of their claims have a superficial, "sensible" quality, rarely violating the principle that like goes with like. Consider, for instance, the "zonal theory" of graphology, which divides a person's handwriting into the upper, middle, and lower regions. A person's "intellectual," "practical," and "instinctual" qualities supposedly correspond to the different regions. Can you guess which is which? Could our "lower" instincts be reflected anywhere other than the lower region, or our "higher" intellect anywhere other than the top? . . .

What is ironic is that the very mechanism that many graphologists rely upon to argue for the persuasive value of their endeavor—that the character of the handwriting resembles the character of the person—is what ultimately betrays them: They call it "common sense"; we call it judgment by representativeness.

*Id.* (citation omitted).

Two other phenomena, to name but a few, weaken graphologists' arguments that graphology is valid and reliable. (For a discussion of validity and reliability relating to graphology, see *infra* notes 45-47 and accompanying text.) Like those who read horoscopes, those who review graphologists' reports of personality characteristics, because of the records' vagueness, tend to see at least some qualities they possess described in these reports. As Martin Gardner observes:

One of the major difficulties in all forms of character reading research is that no really precise methods have yet been devised for determining whether an analysis fits the person or not. Wide margins on a written letter, for example, are supposed to indicate "generosity." Is there anyone who would not feel such a trait applied to himself? People are generous in some ways and not in others. It is too vague a trait to be tested by any empirical method, and even good friends may disagree widely on whether it applies to a given individual. The same is true of most of the graphological traits. If you are told you have them, you can always look deep enough and find them—especially if you are convinced that the graphologist who made the analysis is an expert who is seldom wrong.

MARTIN GARDNER, FADS AND FALLACIES IN THE NAME OF SCIENCE 296-97 (1957). See also Tom Genoni, Jr., *How We Fool Ourselves: Anomalies of Perception and Interpretation*, SKEPTICAL INQUIRER, Mar. 1, 1995, at 7, available in 1995 WL 12544267 (reporting psychologist Barry Beyerstein's explanation of the phenomenon that Gardner describes).

The second phenomenon is that persons also tend to agree with the results of graphological analyses because "a golden rule in graphological counseling is to be positive"—that is, graphologists try to express writers' traits in terms that persons consider socially desirable. G.A. Dean et al., *Graphology and Human Judgment*, in THE WRITE STUFF, *supra* note 1, at 342, 371-72. For example, "to make people believe what you say, tell them they are *cautious, self-controlled, and thrifty* rather than *timid, inhibited, and stingy*." *Id.* The effect of socially desirable terms, as well as the effect of vague descriptions that Gardner describes, both render suspect graphologists' claims that graphology can accurately and consistently measure an individual's personality traits and abilities.

A third problem is that graphology, while purporting to measure job-related characteristics, takes personality characteristics out of context. Thus, it neglects situational factors critical to assessing job performance. Gershon Ben-Shakhar summarizes this problem:

The graphological enterprise . . . must face the difficulties attendant on the predicted variables, namely behavior and personality. Graphological analysis is an attempt to infer from how people behave in a single context what kind of people they really are. It relies on a supreme article of faith that the characteristics of such behavior, as they are expressed in handwriting features, are

is especially true in America, where there are thirty-two graphological societies, whose competing theories vie for predominance.<sup>40</sup> This division further complicates scientific analysis. In addition, evaluating graphology is hindered by the dearth of representative descriptive data on the actual practice of graphology in industry.<sup>41</sup> Many graphological consultants to employers usually have access to employee records other than handwriting samples.<sup>42</sup> This extra-script information could affect their assessments and predictions about job performance,<sup>43</sup> thereby making evidence favoring

indicative of the personality as a whole, and therefore of the entire range of an individual's behavior. This, however, is a strongly holographic notion of personality, and flies in the face of much of the evidence in the field. Although the person reading a graphological character analysis has a distinct sense that an integrated, whole personality has been put together, and that he or she now actually knows the person described, the sense of being now able to predict that person's behavior is not supported by the facts.

Ben-Shakhar et al., *supra* note 26, at 652 (citations omitted). Indeed, "Emotions affect how a person writes from day to day. A single sample may reflect an individual state or an overall trait." McLees, *supra* note 2 (quoting Dr. Michael Cunningham, assistant professor of psychology at the University of Louisville). Furthermore, "[p]ersonality is only one of the factors that influence non-verbal behavior." *Id.*

For example, if a graphologist deems one person an "extrovert" because of her handwriting, what does that mean? Does it necessarily mean that the person will be sufficiently outgoing in the workplace to excel at selling on commission, for example? Alternatively, could it mean that the writer is outgoing only in small groups of close friends? The same problem arises with "self-confidence": is it necessarily global?

Another problem, according to one personnel selection specialist, is that no one knows how effective graphology is in the workplace because the company never follows up on job candidates' performance after their rejection to check the predictions' accuracy. Lewis, *supra* note 2 (quoting John Binning). Binning adds that "[t]hose that get hired are never found so incompetent to be fired. They will rise to the point where their incompetence is recognized, and are either stuck in that position or pushed aside[.]" *Id.*

40. See *The Power of the Written Word*, *supra* note 5, at 78:

Graphology's claims would be more convincing were graphologists themselves able to agree. In fact graphologists of one school hurl insults at the charlatans of different graphological persuasions almost as eagerly as they rail against skeptics. The graphoanalysts of Chicago sneer at the graphologists of the East coast and vice versa. European graphologists sneer at American graphologists in general.

Also, one graphoanalyst (a person certified by the International Graphoanalysis Society of Chicago) testified that while graphology "borders on the occult, . . . graphoanalysis is much more scientific." *Carroll v. State*, 634 S.W.2d 99, 102 (Ark. 1982). The witness gave no further explanation of graphoanalysis or how it differs from graphology. *Id.*

41. See Klimoski, *supra* note 3, at 246. "It is not clear just when and where in the sequence of things the graphologist gets involved. Yet, this would seem to be important not only to the graphologist but also to evaluating the impact of his or her service." *Id.*

42. See *id.* (citing M. Susan Taylor & Kathryn L. Sackheim, *Graphology*, 33 PERSONNEL ADMINISTRATOR 71 (1988); E. Radar, *Hire-oglyphics*, U.S. AIR MAG., Jan. 1988, at 12, 12-15).

43. See *id.*; see also Ben-Shakhar et al., *supra* note 26, at 646 (citations omitted), discussing the problem of contamination:

[Contamination] refers to the confounding of graphological information with other sources of information. Contamination is most apparent when the handwritten text is a brief autobiography of the writer, as it typically is in personnel screening contexts. Clearly, such texts contain a great deal

graphology stronger than it would be under fairer circumstances. In fact, most commentators appear to believe that graphology's validity and reliability have not been scientifically established.<sup>44</sup>

A test's validity consists of its ability to measure what it is intended to measure. Graphology's validity, as used by employers supposedly to measure different levels of job performance, its validity depends on how well it measures job performance.<sup>45</sup> However, graphology has performed very poorly in tests of its validity.<sup>46</sup> Moreover, several commentators have found that graphology's reliability, or its consistency of measurement, is virtually nonexistent.<sup>47</sup>

Graphologists claim to be able to measure a myriad of traits through their analyses.<sup>48</sup> In denouncing graphologists' extravagant claims, commentators

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of information about the writer that is relevant for predicting job performance criteria (e.g., education, previous work record). Moreover, nonbiographical but spontaneous text is also contaminated, most notably by the writer's verbal abilities, such as vocabulary, articulateness, and clarity of expression. These are correlated with successful performance in many jobs. Because graphological validity refers to the form, rather than the content, of written material, the confounding of the two makes it difficult to assign the appropriate weight to the one versus the other.

Contamination is hard to eliminate, because many graphologists insist on analyzing only spontaneously produced text, claiming that copying a text changes the graphological characteristics of the written material. Graphologists insist that they attend only to the graphological features of the text, ignoring its contents. However, besides the a priori implausibility of this claim, studies typically find that nongraphologists who read the same texts achieve the same (low) validities as do graphologists, or even outperform them. Such results clearly shift the burden of proof (that their validities are not due to content) to the graphologists.

44. See *supra* notes 38-43 and *infra* notes 46-47 and 49-50.

45. There are several kinds of validity. For example, there is content validity, which refers to the degree to which the responses that a test or measure requires are a representative sample of the whole domain of behaviors that interest the researcher. Klimoski, *supra* note 3, at 240. In personnel selection, content validity refers to a test's ability to identify the key traits or qualities needed for job performance. *Id.* Additionally, there is construct validity, which refers to measuring some underlying theme, such as intelligence or honesty. *Id.* at 241. Furthermore, there is criterion-related validity shows that test scores are related to such things as job performance.

46. At best, there is only weak evidence for graphology's construct validity in personnel work. *Id.* at 253. Moreover, there is little convincing evidence of graphology's criterion-related validity in personnel work. *Id.* at 260. Finally, there is very little support for graphology's content validity as applied to personnel work. *Id.* at 263.

47. Based on a summary of 15 studies, research scientist Geoffrey A. Dean concludes that for a graphological consultation the relevant reliability is just about useless. Geoffrey A. Dean, *The Bottom Line: Effect Size, in THE WRITE STUFF*, *supra* note 1, at 269, 287. He asserts that "unless graphologists improve their reliability, graphology will remain unacceptable for use with individuals." *Id.*

48. See Bacon, *supra* note 5 (reporting that graphologists claim to judge empathy, drive, persistence, good work habits, emotional stability, self-image, dependability, general thought processes, a money-driven personality, creativity, a social knack, and favorite colors); Castaneda, *supra* note 2 (according to Maryland graphologist Gloria Vadus, graphology can help assess one's "intelligence, ego, libido, emotional state of mind, ability to relate to the environment, repression and inhibitions"); see also Mark Dowling, *Graphologist's Aim: "What's In a Name?"*, DENV. BUS. J., Apr. 2, 1990, at 1, available in 1990 WL 2693164 (Denver graphologist Curtis Casewit claims that graphology detects hopefulness and optimism, negativism, humility, attention to detail, confidence,

describe several specific problems with graphology. For example, many commentators argue that graphology is not a science at all. Beyerstein, for example, has argued that graphology has roots in sympathetic magic.<sup>49</sup> Furthermore, graphologists bandy about confusing and sometimes illiterate jargon,<sup>50</sup> which weakens their argument that graphology is a science.

Moreover, graphology's costs to employers outweigh its benefits. For example, graphology's wildly fluctuating costs<sup>51</sup> contradict proponents'

and possible conceit); William Keenan Jr., *Handwriting Analysis—What Can It Tell You?*, SALES & MKT. MGT., Apr. 1, 1990, at 44, 44-45, available in 1990 WL 2730981 (graphologist Ruth Brayer claims that analyzing signatures can reveal motivation by prestige, good listening and negotiating skills, entrepreneurship, preference for calculated risks, and being a team player); Phyllis Brasch Librach, *Handwriting Experts Try Personnel Work on the Job: Trends in the Workplace, Employers Decide You Really Are What You Write*, S.F. EXAMINER, Dec. 2, 1990, at J27, available in 1990 WL 7775343 (traits graphologists claim to detect include tenacity, stubbornness, speed, caution, organization, flexible thinking, working well with words, ability to make decisions without emotion, and drug addiction); Steve Liesman, *Handwriting: Neatness Not Everything*, ST. PETERSBURG TIMES, Dec. 11, 1990, at 1E, available in 1990 WL 8092880 (according to graphologist Willa Smith, handwriting can reveal independence, sensitivity, defiance, wanting to be involved with other people, wanting to stand out, and ambition); Vince Maietta, *A Cursive Curse: Handwriting Analysis Goes Corporate*, BUS. J.-PHOENIX & VALLEY OF THE SUN, July 11, 1988, at 1, available in 1988 WL 2429413 (Phoenix graphologist Mark Hopper reports that graphology can reveal a predisposition to drug use); McCarthy, *supra* note 2 (Texas graphologist helps trucking companies identify accident-prone drivers); McDonnell, *supra* note 5 ("Drive, problem-solving ability, communication and management skills, honesty, creativity, stress and energy levels, and adaptability are some of the traits graphology can measure"); McLees, *supra* note 2 (graphologists claim ability to discern writers' emotional makeup, intellectual processes, degree of imagination, energy styles, sensitivity, and autonomy); Murray, *supra* note 5 (graphologists claim that they can detect if someone is abusing drugs—"marijuana is the easiest to detect"—and often alcohol); *Put It In Writing*, POST-STANDARD (Syracuse, N.Y.), June 27, 1994, at C1, available in 1994 WL 5619438 (reports at one firm include a rundown of traits such as "enthusiasm, self-starting ability, organizational skills, open-mindedness, ego, communication skills, confidence, empathy, conflict avoidance and fear of failure").

49. See generally Barry L. Beyerstein, *The Origins of Graphology in Sympathetic Magic*, in THE WRITE STUFF, *supra* note 1, at 163.

50. See *id.* at 171. Beyerstein notes that one graphologist's book "bristles with the pseudoscientist's love of neologisms[] . . . and misappropriation of scientific sounding but vacuously applied terms." *Id.* Imprecision and illiteracy is also evident in assertions such as "[h]andwriting comes from the brain - 80 percent of it is from the subconscious, and only 20 percent comes from the conscious[.]" Liesman, *supra* note 48 (quoting Tampa graphologist Willa Smith). But see SIGMUND FREUD, THE QUESTION OF LAY ANALYSIS 21-22 (James Strachey trans., W.W. Norton & Co. 1969) (1926), for Freud's answer to the questioner who thinks that one's "id" is

the so-called subconscious that people talk about so much nowadays[:] The other names are of no use. And do not try to give me literature instead of science. If someone talks of subconsciousness, I cannot tell whether he means the term topographically—to indicate something lying in the mind beneath consciousness—or qualitatively—to indicate another consciousness, a subterranean one, as it were. He is probably not clear about any of it.

Votaries of graphologists often utter the slogan "handwriting is brainwriting," which they apparently view as a talisman. Barry L. Beyerstein has debunked the myths underlying this view; see generally Barry L. Beyerstein, *Handwriting Is Brainwriting. So What?*, in THE WRITE STUFF, *supra* note 1, at 397.

51. See, e.g., Klimoski, *supra* note 3, at 245 (noting that prices for graphological reports vary considerably, sometimes reaching \$2,000); see also Austin, *supra* note 6, at 26 (one company spends

claims that using graphology in employment decisions offers employers many potential savings.<sup>52</sup> Further, graphology's costs outweigh its benefits in the context of negligent hiring claims.<sup>53</sup> Because most negligent hiring suits involve employee violence,<sup>54</sup> and because handwriting analysis is not designed to predict violence,<sup>55</sup> employers have little incentive to use graphological analysis to prevent negligent hiring claims. Furthermore, if graphologists promise to generate psychological profiles of job applicants through graphology, then they may be expected to meet the same standards of professional skill as a psychologist or a psychiatrist.<sup>56</sup> In other words, they may be compelled in court to defend the scientific validity of their results compared to traditional psychological analysis.<sup>57</sup> Because of the difficulty inherent in proving graphology's scientific validity and reliability, graphologists will be unable to successfully defend their practice. In this case, employers have no reason to use graphologists' services and no reason to believe that graphology will reduce the number of poorly behaved employees. Therefore, graphology's costs exceed its benefits in light of negligent hiring claims.

This discussion indicates a lack of persuasive reasons to use graphology in employment decisions.<sup>58</sup> As one company president notes, "[s]ometimes it works out, sometimes it doesn't. . . . The most important thing is still

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"several thousand" dollars each year on graphology): Bianchi, *supra* note 3, at 77 (Louisville graphology business charges \$250 for a report); Corbin, *supra* note 5, at 9 (president of Morristown, New Jersey firm charges up to \$1,000 for full reports); Darmiento, *supra* note 4, at 5C2 (Los Angeles graphologist charges \$250 for full report); Dowling, *supra* note 48, at 1 (Denver graphologist charges \$75 per individual analysis); Fetherston, *supra* note 2, at C03 (stating that owner of Graphology consulting Group in New York City charges \$150-\$450 for reports, depending on depth); Fulmer, *supra* note 4, at 1 (one San Antonio graphology consulting firm charges \$55 for each personal profile); Leung, *supra* note 4, at 7B (Maryland graphologist charges \$75 for each analysis).

52. See Fitzpatrick, *supra* note 2: "[T]he assertion that the low cost factor provides an affordable option for testing prospective employees, especially for small businesses, may not always hold true."

53. See *Avoiding Negligent Hiring*, IND. EMPL. RTS. NEWSL., July 31, 1990, at d10, d10 (criminal law professor Norman Bates discourages use of graphology as a hiring tool, even with regard to negligent hiring, which requires many background checks).

54. See Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 361 (1996).

55. Apparently, graphologists usually use graphology to determine traits other than violent tendencies. See, e.g., Joyce Lain Kennedy, *Experts Concerned About the Accuracy of Employment Tests*, SEATTLE TIMES, Feb. 26, 1989, at F12, available in 1989 WL 2912045 ("The handwriting analysts . . . predict honesty and industry, or lack of either."); *supra* note 48. But see *infra* note 63 (a few graphologists claim to be able to detect criminal tendencies).

56. See John D. Reagh, *Legal Implications of Graphology in the United States*, in THE WRITE STUFF, *supra* note 1, at 465, 473.

57. See *id.* at 473-74.

58. "It is astounding that sophisticated companies—the same companies that insist on detailed fact finding before making a major marketing or investment decision—will rely on the unexamined views of a graphologist . . . in the crucial decisions about hiring employees." Smith, *supra* note 27, at 32.

chemistry.”<sup>59</sup> Because graphology’s validity and reliability remain unproven, graphology cannot provide employers with a trustworthy means for determining whether an employee has the right “chemistry” for a particular job and coworkers. Further, employers are often confronted with legal action resulting from using graphology in hiring decisions.

#### IV. POSSIBLE CAUSES OF ACTION RELATING TO GRAPHOLOGY IN EMPLOYMENT DECISIONS

##### A. Defamation

A job applicant or employee subjected to graphology as part of an employment decision can sue the potential or actual employer and the graphologist for defamation. Defamation consists of any false written or spoken statement that is made to a third person and tends to expose a person to public hatred, contempt, or ridicule, or causes that person to be shunned or avoided or to be injured in her business or occupation.<sup>60</sup> As a result, under a defamation theory, a job applicant or employee can sue a graphologist for making a statement to a third party (the employer) or can sue an employer for disclosing information from a graphological report to another person. A defamation claim would be tenable only if the information injured the job applicant or employee in her business or occupation<sup>61</sup>—for example, negatively affected an employment decision. Because employers use graphology in so many different employment decisions,<sup>62</sup> defamation claims regarding graphological analyses can be available to a variety of plaintiffs. Furthermore, because so many statements that graphologists collect tend to expose a person to contempt, hatred, or ridicule,<sup>63</sup> there may be ample

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59. See Murray, *supra* note 5 (quoting Rick Muth, president of Orco Block Co. in Orange County, California).

60. See Reagh, *supra* note 56, at 467.

61. See *supra* note 60 and accompanying text.

62. See *supra* note 6.

63. Beyerstein, *supra* note 49, at 187, reports:

All of [graphologists’ claims to determine sexual orientation and practices from handwriting analysis] would be but a humorous example of human gullibility if there were not such dire consequences that could befall those labeled in such a cavalier fashion. A Vancouver graphologist recently offered to help weed out—surreptitiously, of course—the practicing (and potential!) pederasts in the local teaching ranks. He claimed 100 percent accuracy for a method that he would not even disclose to me. More shocking yet, he actually received a favorable hearing from several school district bureaucrats ...! Increasingly, we also find graphologists making irresponsible attributions of dishonesty and violent tendencies based on nothing more than ... magical correspondences[.]

Beyerstein proceeds to summarize—and reject—psychologists’ claims that they can identify a range of criminal tendencies. *Id.* at 187-90. Virginia Beach graphologist Jack Donavan declares,

opportunities for job applicants and employees to pursue defamation claims against employers using graphology and graphologists.

The plaintiff in a defamation case involving graphology must consider whether the graphologist had a qualified privilege to report her information to the employer. Courts frequently hold that a qualified privilege may protect a communication that defames a job applicant's or employee's character.<sup>64</sup> To qualify for the privilege, the person making the defamatory statement must have either a pecuniary interest or a duty to speak to the employer.<sup>65</sup> Even though the statement is false, it will be privileged unless the defendant acted with knowledge of its falsity or with reckless disregard of whether it was false.<sup>66</sup> Courts recognize that outside consultants such as graphological firms and individual graphologists are protected by a qualified privilege to report the findings the employer hired them to make.<sup>67</sup>

Nevertheless, the graphologist's qualified privilege may be lost under four circumstances: 1) the graphologist disbelieved the statement; 2) the graphologist had no reasonable basis for believing that the statement was true; 3) the statement was irrelevant or exceeded the scope of the situation; or 4) the statement was excessively publicized.<sup>68</sup> Each of these possibilities merits discussion.

Because employers who use graphology and graphologists rely on the graphological analysis, it is unlikely that a job applicant or employee can sue the employer or graphologist because she disbelieved a statement related to graphology. Therefore, a potential plaintiff will have better luck with the second possibility, lack of reasonable basis for believing the statement was true. Because graphology's validity and reliability have not been proven,<sup>69</sup> plaintiffs can recover because the employer and the graphologist had no reasonable grounds for believing the statement based on graphology. Indeed,

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without explanation, "Pedophiles will share all the same handwriting characteristics to a certain degree.]" Alexis Smith, *Datagraph Inc.: Reading Between the Lines*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), Dec. 4, 1995, at 10, available in 1995 WL 13039437. Joe Nickell remarks that graphologists' alleged ability to distinguish criminals from noncriminals by their handwriting may merely be predicated on socioeconomic status: "Criminals tend to come from lower socioeconomic classes than noncriminals, and socioeconomic class does seem to be reflected in handwriting, perhaps as a function of better education and more emphasis on good handwriting in the upper as opposed to the lower ranges of the socio-economic class structure." Joe Nickell, *Handwriting Identification Science and Graphological Analysis Contrasted*, in *THE WRITE STUFF*, *supra* note 1, at 42, 46 (quoting TERRENCE HINES, *PSEUDOSCIENCE AND THE PARANORMAL* 296 (1988)).

64. See Reagh, *supra* note 56, at 468.

65. See *id.*

66. See *id.*

67. See *id.* (citing *Thibodeaux v. Southwest Louisiana Hosp. Ass'n*, 488 So.2d 743, 748 (La. Ct. app. 1986)).

68. See *id.*

69. See *supra* notes 45-47 and accompanying text.

because graphology's validity and reliability have not been proven, a court may conclude, like many commentators, that the results of graphological analysis as a whole are unrelated to job performance.<sup>70</sup>

However, if a court is unwilling to accept this wholesale approach, the plaintiff nevertheless could succeed on a claim that some of the graphologist's statements were irrelevant to the job or exceeded the scope of the situation. Because graphologists claim to reveal almost everything about a person's personality,<sup>71</sup> and may include nearly everything in a shortened analysis or full report, myriad findings that a graphologist makes can qualify as irrelevant or exceeding the scope of the situation.<sup>72</sup>

Finally, job applicants or employees may be able to recover if the statements were excessively publicized.<sup>73</sup> Under an excessive publication argument, a graphologist could be liable if she unreasonably publishes defamatory matter concerning a job applicant's handwriting sample to persons uninvolved in making the employment decision.

Although consent is a defense to a defamation claim,<sup>74</sup> this claim sometimes will be unavailable because graphologists sometimes analyze handwriting without the plaintiff's knowledge.<sup>75</sup> Furthermore, even if a

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70. *Put It in Writing*, *supra* note 48 (Robert Gatewood, chairman of the department of management at the University of Georgia in Athens, states that there is no evidence that graphology scores are related to future job performance); *see also* Ben-Shakhar et al., *supra* note 26, at 651 ("certainly our results fail to support a correspondence between graphological signs and professional suitability"); Klimoski, *supra* note 3, at 262 (noting that persons may challenge graphology's relevance to personnel decisions).

71. Indeed, graphologist Fred Dudink gushes, "[i]t is the closest thing there is to understanding the human person the way God does, far superior to any psychological test[.]" Kathryn Rem, *Does a Signature Give Clues to the Signer's Personality?*, STATE J.-REG. (Springfield, Ill.), Apr. 28, 1996, at 19, available in 1996 WL 9991416. Kansas graphologist Paula Leighton calls graphology "beyond words," noting with approval, "[y]ou could even go into people's sex lives. It's a great self-monitoring tool and a way to monitor others. It's much deeper than you'd think." Judy Thomas, *To Experts, Writing Reveals What Makes Bill, Bob and Pat Run*, COM. APPEAL (Memphis, Tenn.), Apr. 25, 1996, at C3, available in 1996 WL 9903888.

72. It is highly likely that a graphologist will make such findings. "[G]raphologists with no experience or expertise in personnel matters may nonetheless offer services of this type. While a number of certification programs for graphologists exist, there is no evidence that these do in fact insure competence in consulting for organizations." Klimoski, *supra* note 3, at 264. The risk of many graphologists' incompetence in making employment decisions creates a danger that graphologists will make findings that are irrelevant or that exceed the scope of the employment situation.

73. One with a qualified privilege to publish defamatory matter abuses that privilege if she knowingly publishes the matter to a person to whom its publication is not otherwise privileged, unless she reasonably believes that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged. RESTATEMENT (SECOND) OF TORTS § 604 (1977).

74. *See id.* § 583.

75. However, in most cases in the United States, employers tell applicants in writing that they may be undergoing graphology as part of the employment screening process. McDonnell, *supra* note 5. Even a graphologist, Rose Matousek, considers it unethical not to tell the candidate that the employer



plaintiff gives her consent to disclosure, a court may find that consent invalid.<sup>76</sup>

### B. Discrimination

Job applicants and employees may successfully bring claims under federal antidiscrimination laws.<sup>77</sup> Because graphological analyses can inadvertently cause discrimination based on sex, race, national origin, or physical handicap, plaintiffs may raise successful Title VII or Americans with Disabilities Act claims.

Because graphology may reveal the writer's race or national origin,<sup>78</sup> employers cannot avoid discrimination claims through the use of graphology. Also, because most graphologists insist on knowing the writer's sex,<sup>79</sup> and because this knowledge may affect the graphologists' evaluations, employers cannot avoid discrimination claims by using graphology.<sup>80</sup>

Because of the problems with professionally validating graphology, employers may be unable to prove that pre-employment graphology with a discriminatory impact is sufficiently job-related to survive a Title VII

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is analyzing her handwriting. O'Connell, *supra* note 2.

76. See *infra* notes 109-10 and accompanying text.

77. See Reagh, *supra* note 56, at 469-71; McCarthy, *supra* note 2 (quoting employment law specialist August Bequai as stating that employees may claim discrimination in the context of graphology in employment decisions).

78. "[S]tyle characteristics . . . may be used to determine the nationality of the writer or, more correctly, the country where he was taught to write." W.R. HARRISON, *SUSPECT DOCUMENTS: THEIR SCIENTIFIC EXAMINATION* 289 (2d ed. 1966). See also Klimoski, *supra* note 3, at 261 (citing Richard J. Klimoski & Anat Rafaeli, *Inferring Personal Qualities through Handwriting Analysis*, 56 J. OCCUPATIONAL PSYCHOL. 191 (1983)) (noting that most graphologists wish to know the writer's native language); Robert J. Muehlberger, *Class Characteristics of Hispanic Writing in the Southeastern United States*, 34 J. FORENSIC SCI. 371 (1989)) ("The general character of handwriting is influenced by the system of writing studied during an individual's formative period of life, the amount and quality of family tutelage, and how handwriting is used by a person during his or her everyday endeavors"); *The Power of the Written Word*, *supra* note 5, at 97 (noting that because each country has its own graphological features, some graphologists like to know the author's original nationality). One graphologist claimed that she determined from one man's handwriting that his cultural upbringing caused his reticence. Victoria Giraud, *Graphologist Reads In and Between Lines*, L.A. DAILY NEWS, Feb. 5, 1996, at T03, available in 1996 WL 6545627.

79. See Beyerstein, *supra* note 49, at 186 (graphologists decline to guess subjects' gender); Shakhar et al., *supra* note 26, at 652 (citation omitted) ("It is noteworthy that most graphologists decline to predict the sex of the writer from handwriting, although even lay people can diagnose writer's sex from handwriting correctly about 70% of the time. . . . Could the graphologists simply be reluctant to predict so readily verifiable—or falsifiable—a variable?"); Klimoski, *supra* note 3, at 261 (citing Richard J. Klimoski & Anat Rafaeli, *Inferring Personal Qualities through Handwriting Analysis*, 56 J. OCCUPATIONAL PSYCHOL. 191 (1983)) (noting that most graphologists wish to know the writer's gender). But see O'Connell, *supra* note 2 (graphologist Jan Leach teaches students that graphology cannot tell them a person's age or gender).

80. See Fitzpatrick, *supra* note 2.

challenge. In *Albermarle Paper Co. v. Moody*,<sup>81</sup> the Supreme Court held that pre-employment tests which are discriminatory in effect will survive a Title VII challenge if sufficiently job-related, where “job-related” is shown “by professionally acceptable methods to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are evaluated.”<sup>82</sup> By “professionally acceptable methods”—that is, standard studies of validity and reliability—graphology has neither been proven to be significantly correlated with nor predictive of job performance.<sup>83</sup> Therefore, if a plaintiff can prove a discriminatory effect, an employers’ use of graphology will likely fail a Title VII discrimination claim.

However, because there seems to be little evidence that knowledge of gender or national origin affects graphologists’ trait ratings or recommendations,<sup>84</sup> plaintiffs may be unable to prove the discriminatory impact needed for a Title VII claim. Some plaintiffs might have a more promising claim under the Americans with Disabilities Act of 1990 (“ADA”).<sup>85</sup>

### C. The ADA

Because graphology may discriminate against job applicants and employees with physical and emotional handicaps<sup>86</sup> and learning disabilities, plaintiffs may bring successful ADA claims. Title I of the ADA protects “qualified individuals with disabilities”<sup>87</sup> from unlawful discrimination.<sup>88</sup>

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81. 422 U.S. 405 (1975).

82. *Id.* at 431 (quoting EEOC Guidelines, 29 C.F.R. § 1607.4(e) (1996)).

83. *See supra* notes 45-47 and accompanying text.

84. *See Klimoski, supra* note 3, at 261.

85. 42 U.S.C. §§ 12101-12213 (1994).

86. In two separate experiments, Rhode Island psychologist Marc Seifer was able to distinguish persons with schizophrenia and severe epilepsy from controls matched for social class, intelligence, and personal history. *The Power of the Written Word, supra* note 5, at 97. New York graphologist Patricia Siegel repeated his findings for epileptics. *Id.* Additionally, Russian neurologist Alexander Luria suggested that brain-damaged patients’ handwriting can help to reveal which part of their brains has been harmed. *Id.* Other graphologists claim to be able to detect other medical conditions from a person’s handwriting.

87. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (1994).

88. Discrimination includes

using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity[.]

*Id.* § 12112(b)(6).

Furthermore, the ADA considers a test discriminatory when it does not measure what it purports to measure. Tests are discriminatory when the results reflect a person's impaired sensory, manual, or speaking ability rather than whatever the test purports to measure.<sup>89</sup> Additionally, the ADA prohibits most pre-employment inquiries about whether the job applicant has a disability.<sup>90</sup> The only pre-employment inquiries allowed are those that are job-related.<sup>91</sup>

A plaintiff could plausibly argue that graphology violates the ADA because it screens out or tends to screen out an individual with a disability and is not job-related or is not consistent with business necessity. Graphology screens out or tends to screen out individuals with physical disabilities and learning disabilities. For example, graphology screens out or tends to screen out persons with learning disabilities that reveal themselves in handwriting.<sup>92</sup> Graphology also screens out or tends to screen out persons with physical disabilities.<sup>93</sup> However, the employer could argue that graphology is job-related. This argument has some merit because graphology purports to measure qualities related to job performance, such as ambition, extroversion, and honesty.<sup>94</sup> Nevertheless, the employers' argument likely will fail under the ADA for several reasons. First, because the validity and reliability of graphology is unproven,<sup>95</sup> it is not job-related.<sup>96</sup> Second, because a person's impaired sensory ability or impaired manual skills can affect the results of graphology, graphology is discriminatory under the ADA. Third, because graphology may reveal physical or mental disabilities, a court may hold it to be a pre-employment inquiry about a disability, which is prohibited under the ADA. Fourth, even if a court finds that graphology is for some reason job-related, it will likely find graphology not consistent with business necessity.<sup>97</sup>

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89. *See id.* § 12112(b)(7).

90. *See id.* § 12112(d)(2)(A).

91. *See id.* § 12112(d)(2)(B).

92. *See, e.g.,* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 48-50, 51-53 (4th ed. 1994) (providing examples of mental disorders that manifest themselves in a person's handwriting).

93. For examples of disabilities that may be evident from handwriting, *see supra* note 86.

94. *See generally supra* note 48.

95. *See supra* notes 45-47 and accompanying text.

96. *See Klimoski, supra* note 3, at 262 (noting that plaintiffs may challenge graphology's relevance to personnel decisions).

97. *See id.* at 262:

[I]t would seem that an organization should have some persuasive reasons to use any non-traditional (for the U.S.) approach as a basis for selection. And, if it does make use of one, it will need to have the data to back up any claims of "business necessity."

The last point may be a key to user acceptance. Personal preferences or national values notwithstanding, it is likely that acceptance of graphology as part of a personnel selection program, like in any other case (e.g., honesty testing, drug testing), will be strongly influenced by evidence that it is needed (there are not more conventional alternatives), and that it is effective

Tests other than graphology are available for assessing characteristics considered relevant to job performance.<sup>98</sup> Given their traditional disdain for graphology,<sup>99</sup> courts will likely find that it is unnecessary for businesses to use graphology in employment decisions.

#### *D. State Antidiscrimination Laws*

Job applicants and employees may also be successful bringing claims under state antidiscrimination laws. For example, fair employment practice ("FEP") statutes, which prohibit discrimination based on race, national origin, sex, religion, or handicap, may permit a claim attacking graphology's use in employment decisions.<sup>100</sup> Because graphology may detect handicaps,<sup>101</sup> plaintiffs may sue employers under FEP statutes. Job applicants or employees may also sue under statutes that prohibit discrimination on the basis of sexual orientation. Because some graphologists claim to have the ability to determine homosexuality from someone's handwriting,<sup>102</sup> it is possible that such a statement will be used to discriminate against a job applicant or employee.

#### *E. Invasion of Privacy*

The common law tort of invasion of privacy is the predominant remedial action used by employees who have suffered an intrusion into their privacy.<sup>103</sup> Traditionally, there have been four common law invasion of privacy causes of action: 1) unreasonable intrusion upon the seclusion of another; 2) appropriation of name or likeness; 3) unreasonable publicity of private facts; and 4) publicity that unreasonably places a person in a false light before the public.<sup>104</sup> Because appropriation of name or likeness is irrelevant with regard to the use of graphology in employment decisions, this Note considers only the other three claims.

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(there is convincing evidence that decisions based on graphology are related to job behaviors or performance). Based on the published literature reviewed above, such a case cannot be made.

98. Indeed, when graphology was compared with 15 other techniques for predicting work performance, such as cognitive tests, assessment centers, peer ratings, interviews, and personality tests, graphology was outperformed by almost everything; only predictions based on age were worse. Dean, *supra* note 46, at 294-96.

99. See *supra* note 23 and accompanying text.

100. See Black, *supra* note 11, at 101 (arguing this point in the context of personality tests).

101. See *supra* note 86.

102. See Beyerstein, *supra* note 49, at 187 (summarizing graphologists' views on detecting sexual orientation from handwriting).

103. See Cavico, *supra* note 12, at 1266.

104. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

A plaintiff may be able to sue because an employer's use of graphology unreasonably intruded upon her seclusion. Graphology could be considered under this claim because an unreasonable intrusion upon one's seclusion need not be physical.<sup>105</sup> The employee would have to prove that the employer's intrusion would be "highly offensive to a reasonable person."<sup>106</sup> An employer's use of a graphologist to scrutinize the handwriting of job applicants and employees would be highly offensive to a reasonable person. "The surreptitious use of script samples would seem to violate most Americans' sense of propriety and fair play."<sup>107</sup>

As with defamation claims, a plaintiff may be able to sue for invasion of privacy if an employer or graphologist unreasonably publicizes private facts like the results of graphological analysis. Unreasonable publication most likely would include distributing graphology results to persons uninvolved in the employment decision.

Although valid consent can be a defense to an invasion of privacy action, in some cases this defense will be unavailable because sometimes job applicants and employees do not know that graphologists will study their handwriting.<sup>108</sup> Furthermore, even if the applicant or employee gives consent, a court may find it invalid. Employers' requests for consent may subject potential or current employees to economic coercion and confront them with "the Hobson's choice of [either] taking the test or not even being considered for the job."<sup>109</sup> Voluntariness of consent to graphology is dubious because of the employers' overwhelming bargaining power over employees and the built-in coercion factor.<sup>110</sup>

Although legislatures and courts have not extended the right of privacy to prohibit personality testing of public employees,<sup>111</sup> they have recognized that employers' questions cannot be unreasonably intrusive and must be job-related.<sup>112</sup> In *Luck v. Southern Pacific Transportation Co.*,<sup>113</sup> the Court of Appeals of California held that any intrusion must be justified by a

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105. *See id.* § 652B.

106. *See id.*

107. Klimoski, *supra* note 3, at 262.

108. *See* Smith, *supra* note 63 (business owner did not tell applicants about his using graphology in employment decisions).

109. Yvonne Koontz Sening, Note, *Heads or Tails: The Employee Polygraph Protection Act*, 39 CATH. U. L. REV. 235, 240 (footnote omitted) (quoting Comment, *The Polygraph and Pre-Employment Screening*, 13 HOUS. L. REV. 551, 560 (1976)). Although this statement was made in the context of polygraph examinations, it also applies to graphology.

110. *See id.* at n.42 (citing 134 CONG. REC. 1800 (daily ed. Mar. 3, 1988) (statement of Sen. Kerry)) (noting this argument as applied to polygraph examinations).

111. Black, *supra* note 11, at 92.

112. *See id.*

113. 218 Cal. App. 3d 1 (Cal. Ct. App. 1990).

compelling state interest.<sup>114</sup> Similarly, in *McKenna v. Fargo*,<sup>115</sup> a federal district court noted that an intrusion upon privacy via personality tests is justified if the state has a compelling interest.<sup>116</sup> The court added that personality test questions asking about a person's sexual, religious, and social attitudes implicate a constitutional right to privacy when there is state action.<sup>117</sup>

In reviewing privacy violations, courts assess whether the plaintiff had an objective rather than a subjective expectation of privacy.<sup>118</sup> Whether a court finds an objective expectation of privacy turns on the particular circumstances of the case and whether the recognition of a privacy right will adversely affect other legitimate social interests, such as maintaining a safe, healthy, and productive workforce and protecting the integrity of its premises.<sup>119</sup>

Currently, ten states include right to privacy provisions in their constitutions.<sup>120</sup> California's constitution, for instance, provides that privacy is an inalienable right enjoyed by all people. This privacy provision is directed at four principal mischiefs: 1) the overbroad collection of unnecessary personal information by government and business interests; 2) the retention of such information; 3) the improper use of information properly obtained; and 4) the lack of reasonable checks on existing records' accuracy.<sup>121</sup>

Because graphologists may use graphological analyses to reveal characteristics that are not specifically job-related, graphology allows

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114. *Id.* at 20. Ms. Luck was a computer programmer for a railroad, who claimed that the railroad invaded her privacy by requiring a urinalysis. *Id.* at 8. The Court of Appeals found that Ms. Luck had a reasonable expectation of privacy regarding her urine. *Id.* at 15-16. After finding California's constitutional privacy provisions applicable to private employers, the Court of Appeals found that Ms. Luck's job "did not have sufficient safety aspects to constitute a safety interest that might be balanced against the intrusion upon her privacy rights." *Id.* at 19, 23.

115. 451 F. Supp. 1355 (D.N.J. 1978), *aff'd without op.*, 601 F.2d 575 (3d Cir. 1979).

116. *See id.* at 1381. Jersey City required plaintiffs to take psychological tests as a condition of employment as firefighters. *Id.* at 1357. Plaintiffs sued the city, claiming that the test violated their constitutional right to privacy. *Id.* at 1378. The district court found that because the state's interest in having emotionally fit firefighters is of the highest order, the state could intrude upon the plaintiffs' privacy by requiring them to take the tests. *Id.* at 1381. The court noted that it allowed the tests because "[t]here is sufficient support to conclude that the psychological evaluation and hiring procedure taken as a whole is useful and effective in identifying applicants whose emotional make-up makes them high risk candidates for the job of fire fighting." *Id.* (footnote omitted).

117. *See id.* at 1380-81.

118. *See* Gary P. Scholick, *Issues of Workplace Privacy*, in LITIGATION, at 93, 115 (PLI Litig. & Admin. Practice course Handbook Series No. H4-5189, 1994).

119. *See id.*

120. *See* Black, *supra* note 11, at 94.

121. *See* Scholick, *supra* note 118, at 113 (citing *White v. Davis*, 13 Cal. 3d 757, 775 (1975)).

government and business interests to collect unnecessary personal information. Furthermore, because graphology allows these interests to collect unnecessary personal information, it allows them to retain this unnecessary personal information. Therefore, one could tenably argue that using graphology in employment decisions violates California's privacy law.

Plaintiffs also can sue employers and graphologists under federal and state information acts. Under the Privacy Act of 1974,<sup>122</sup> which requires that federal agencies allow employees to view their employment files and request amendment, plaintiffs may be able to sue for harm caused by graphology's use in employment decisions.<sup>123</sup> The Act allows federal agency employees protection from adverse employment decisions made on the basis of incorrect information.<sup>124</sup> The Act does not explicitly state whether an employee's record includes employment test results. However, the statute broadly defines "record" to include employment history.<sup>125</sup> One may interpret employment history to include the results of employment tests;<sup>126</sup> thus, a court may hold that the Act covers graphology results.

Additionally, state Information Practice Acts, which regulate the state government's collection, maintenance, use, and disclosure of personal information, could also support a cause of action for invasion of privacy. If the state government discloses graphology results to unauthorized individuals or maintains or disseminates the results for other than job-related purposes, or if the results of graphology are inaccurate, an employee may be able to have the personnel record amended.<sup>127</sup> However, no cases have interpreted these acts to include employment testing.<sup>128</sup> Therefore, it is very unclear whether courts would uphold a claim under an Information Practice Act with regard to graphology. An employee would be wise to pursue other claims first.

## V. PROPOSAL

Through analogy to polygraphs, personality tests, and honesty tests, courts might find graphology prohibited under certain state statutes. However, plaintiffs' chance for success is minimal under current state statutes. Because suing under current state statutes is unsatisfactory, and

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122. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (1974) (codified as amended at 5 U.S.C. § 552a (1976)).

123. See Black, *supra* note 11, at 105 (arguing this point with regard to personality tests).

124. See *id.* at 105-06.

125. 88 Stat. at 1897.

126. See Black, *supra* note 11, at 105-06 (arguing this point with regard to personality tests).

127. See *id.* at 101 (arguing this point with regard to personality tests).

128. See *id.*

because of other factors militating against allowing graphology in employment decisions, this Note proposes a statute banning graphology's use in employment decisions nationwide.

Because graphology allegedly reveals honesty or dishonesty,<sup>129</sup> it could be considered a substitute for a polygraph examination and therefore might be outlawed under some state laws forbidding polygraphs.<sup>130</sup> In fact, a few state anti-polygraph statutes appear to forbid graphology because they restrict employers' use of written examinations to test honesty. For example, Massachusetts prohibits employers from demanding or requesting a job applicant or employee to take "a lie detector test,"<sup>131</sup> where "lie detector test" means

any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual.<sup>132</sup>

Because graphology involves written examinations whose results examiners often use to detect deception, to verify truthfulness, or to render a diagnostic opinion regarding a person's honesty,<sup>133</sup> a plaintiff might successfully argue that the Massachusetts statute forbids employers from requiring graphology as a condition of employment.

Plaintiffs will have a more difficult case under Rhode Island law, which prohibits employers from using "written examinations"<sup>134</sup> only when "the results of the written examinations are . . . used to form the primary basis for the employment decision."<sup>135</sup> Because graphology is not a mainstream employment selection tool, many employers may not use it as the primary basis for their employment decisions.<sup>136</sup> If this is the case, then many

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129. See, e.g., Carton, *supra* note 28 (employer uses graphology as part of screening process to detect liars).

130. Kurt H. Decker develops this theory with regard to paper-and-pencil honesty questionnaires. See generally Kurt H. Decker, *Honesty Tests—A new Form of Polygraph?*, 4 HOFSTRA LAB. L.J. 141 (1986). See also Smith, *supra* note 63 (employment attorney William M. Furr compares graphology to polygraph tests).

131. MASS. ANN. LAWS ch. 149, § 19B(2) (Law. Co-op., LEXIS through all 1996 legislation).

132. *Id.* § 19B(1).

133. See Klimoski, *supra* note 3, at 251 (noting that employers often ask graphologists to focus on determining honesty or dishonesty).

134. See *supra* note 36 for this term's scope under Rhode Island's Lie Detector Statute.

135. R.I. GEN. LAWS § 28-6.1-1(b) (LEXIS through 1996 Jan. Sess.).

136. "Indeed, even advocates of handwriting analysis acknowledge that graphology should not be relied on alone as an employment predictor but should be used simply to validate employers' decisions



plaintiffs may be without a cause of action under the Rhode Island anti-polygraph statute.

Minnesota law appears promising because it prohibits employees from soliciting or requiring “a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee.”<sup>137</sup> However, the court in *State v. Century Camera, Inc.*<sup>138</sup> construed this statute as forbidding only tests purporting to measure physiological changes.<sup>139</sup> Graphology does not purport to measure physiological changes, but rather personality traits. Therefore, a Minnesota court probably would find graphology’s use in employment decisions permissible under *Century Camera*.

Nevertheless, the Minnesota Supreme Court’s reading of the statute was arguably too narrow, considering the state interests Minnesota asserted in favor of the statute. In *Century Camera*, Minnesota listed several state interests that it intended the statute to serve:

encouraging the maintenance of a harmonious atmosphere in employment relationships which may be disturbed by the coercion to take a polygraph or similar examination; protecting an employee’s expectation of privacy which he or she may have if the questions put during these examinations are personal, private, or confidential; discouraging practices which demean or appear to demean the dignity of an individual employee in a significant way; protecting employees from adverse inferences drawn if they refuse to take these tests; and avoiding the coercive impact present in the solicitation [of the tests].<sup>140</sup>

If these were Minnesota’s concerns in enacting the statute, then a court could serve them by construing “any test purporting to test honesty” broadly to include tests other than those purporting to measure physiological changes.<sup>141</sup>

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after they have considered all of the relevant factors that indicate an individual’s qualities.” Fitzpatrick, *supra* note 2 (citing William Keenan, Jr., *Handwriting Analysis—What Can It Tell You*, 142 SALES & MARKETING MGT. 44 (1990)).

137. MINN. STAT. § 181.75(1) (LEXIS through 1996 Reg. Sess.).

138. 309 N.W.2d 735 (Minn. 1981).

139. The court stated:

The two techniques enumerated in section 181.75, the polygraph and the voice stress analysis, both purport to measure physiological changes. Accordingly, we construe “any test purporting to test honesty” to be limited to those tests and procedures which similarly purport to measure physiological changes. Thus, we exclude from the current prohibitions of section 181.75 written psychological questionnaires, personal judgments made by an employer or his or her agent, even if based in part on observations of physical behavior or demeanor, and all other gauges of honesty which do not purport to measure physiological changes.

*Id.* at 745 (footnote omitted).

140. *Id.* at 743.

141. For example, because a graphologist’s report may contain “personal, private, or confidential”

Several state statutes forbid employers from requiring employees to take polygraph examinations or "similar" tests.<sup>142</sup> Although one could argue that graphology is "similar" to polygraphs because employers often use graphology to test honesty, a court likely would reject this argument.<sup>143</sup>

Because courts have never held that written honesty tests violate a state's anti-polygraph statute without explicitly banning them,<sup>144</sup> it is likely that graphology, which is used partly as an honesty test, will not be banned under such statutes. Therefore, state statutes should explicitly ban the use of graphology in employment decisions.

The lack of a governing body or licensing procedure to establish and

information, graphology may intrude upon employee privacy. Moreover, the use of graphology allows employers to make job decisions based on a technique widely reputed to be a parlor trick. *See, e.g., supra* notes 38-39. Graphology thus "demean[s] . . . the dignity of an individual employee in a significant way[.]" *Century Camera*, 309 N.W.2d at 743. Additionally, allowing employers to use graphology subjects employees to "adverse inferences drawn if they refuse to take these tests[.]" *Id.* For example, Cognex, Inc. human resources director JoAnn Woodyard declares that although none of her employees must participate in handwriting analysis, refusal "says something about somebody—whether or not they are willing to keep an open mind and take risks." Diane E. Lewis, *Prospective Employers Looking for the Write Stuff; Most Hirers Seeking Clues in the Slants, Loops and Undotted I's of Applicants*, BOSTON GLOBE, Jan. 26, 1997, at F1, available in LEXIS, News Library. Finally, allowing employers to use graphology subjects employees to coercion. *See supra* notes 109-10. For these reasons, construing the Minnesota statute to prohibit graphology will serve Minnesota's purposes of preventing coercion, protecting employee privacy and dignity, and protecting employees from adverse inferences if they refuse to participate in graphology.

Kurt H. Decker wisely rejects the Minnesota Supreme Court's artificial distinction between physiological and psychological characteristics. Decker, *supra* note 130, at 150. He argues instead that courts should look to the tests' reliability: if polygraph tests are so unreliable as to cause their regulation, then honesty tests are likewise unreliable because no additional proof exists to justify their use. *See id.* According to Decker, the test's purpose and its result should be the determinative consideration in judging whether honesty tests are substitute polygraph tests. *See id.*

142. For example, California law provides: "No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment." CAL. LAB. CODE § 432.2(a) (Deering, LEXIS through 1996 Sess.). A Delaware statute contains similar language restricting employers from requiring "a polygraph, lie detector or similar test or examination[.]" DEL. CODE ANN. tit. 19, § 704(b) (Michie, LEXIS through 1996 Reg. Sess.), where "lie detector" includes, but is not limited to, "any electromechanical device which records or analyzes vocally produced sound frequency variations associated with stress for the purpose of determining the truth of any oral statement." *Id.* § 704(e). Idaho prohibits requiring an employee to take "a polygraph test or any form of a so-called lie detector test." IDAHO CODE § 44-903 (LEXIS through 1996 Reg. Sess.). Iowa restricts employers from requiring polygraph examinations, where "polygraph examination" means "any procedure which involves the use of instrumentation or a mechanical or electrical device to enable or assist the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding either of these, and includes a lie detector or similar test." IOWA CODE § 730.4(1) (LEXIS through all 1996 legislation). Nevada restricts employers from requiring "any lie detector test[.]" NEV. REV. STAT. ANN. § 613.480(1) (Michie, LEXIS through 1995 Sess.).

143. State courts may follow Congress' exclusion of graphology under the EPPA. Furthermore, many state courts might adopt Minnesota's distinction between physiological and psychological tests.

144. *See* Ambash, *supra* note 11.

maintain professional graphological standards<sup>145</sup> is further evidence that graphology requires government regulation or prohibition.<sup>146</sup> Furthermore, because companies continue to use graphology in crucial business decision areas despite studies contradicting graphology's validity,<sup>147</sup> the government should intervene.<sup>148</sup>

Similar themes recur throughout this Note. For example, graphology's validity and reliability remain unproven; graphology is unreasonable; graphology is not job-related. Because of these conclusions, employers cannot tenably defend themselves in defamation, discrimination, or invasion of privacy suits. Why, then, not enact a nationwide ban on the use of graphology in employment decisions? Why force job applicants or employees to endure the trouble and expense—not to mention the fear of retaliation when going up against the employer—inherent in lawsuits, when the employer has no plausible case? Indeed, justice and efficiency call for a nationwide ban on employers' use of graphology.

This Note proposes the following statute:

#### ANTI-GRAPHOLOGY STATUTE

No employer or its agent, public or private, shall, as a condition of employment or continued employment, request, require, or demand that a job applicant or employee undergo graphology, regardless of any expression of consent by the job applicant or employee.

#### DEFINITIONS:

Graphology includes any practice which involves determining personality traits or abilities from a person's handwriting. The term includes the type of graphology known as graphoanalysis. It does not include handwriting analysis performed solely to determine a person's identity, such as an examiner's conduct in forgery cases.

As an anti-graphology measure, this statute is superior to Representative

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145. See Fitzpatrick, *supra* note 2 (citing Lauren Sinai & Laura Mazucca, *Written Tests Not Always Valid: Lawyers*, BUS. INS., Sept. 19, 1988, at 19). See also Anat Rafaeli & Amos Drory, *Graphological Assessments for Personnel Selection: Concerns and Suggestions for Research*, 66 PERCEPTUAL & MOTOR SKILLS 743, 748 (1988): "One major problem is that there is no clear definition of what constitutes 'knowledge' or 'experience' with graphology."

146. See Klimoski, *supra* note 3, at 364: "[T]here are very few barriers to entry into the field of graphology. Any number of individuals may claim to have expertise in this area. More specifically, it would seem that, as is the case in most fields, competency in one domain [graphology] will not ensure the same in another one [personnel selection]." See also *supra* note 72.

147. See Kurtz et al., *supra* note 5, at 41.

148. See Decker, *supra* note 12, at 579 ("Statutory regulation at the federal and state level will increasingly prove to be the most substantive means to confront [invasion of employee privacy].").

Brousseau's Rhode Island bill.<sup>149</sup> Representative Brousseau attempted to broaden the Rhode Island anti-polygraph statute to forbid employers' requiring lie detector tests or "other scientific evaluations" as a condition of employment or of continued employment.<sup>150</sup> The Brousseau bill suffered from vague language, specifically, its attempted prohibition of "scientific evaluations."<sup>151</sup> The "scientific evaluations" language in the Brousseau bill is troubling because a court could construe it to include all purportedly scientific evaluations, even those boasting proven validity and reliability. Furthermore, the term "scientific evaluations" is undefined in the bill.

In contrast, the Anti-Graphology Statute is appropriately narrow. Its definition of graphology explicitly excludes "handwriting analysis performed solely to determine a person's identity, such as examiners conduct in forgery cases." This explicit exclusion is necessary because writers often use the terms "graphology" and "handwriting analysis" interchangeably, thus possibly confusing judges, juries, commentators, and legislators.<sup>152</sup> By explicitly banning only graphology, the Anti-Graphology Statute is limited to a practice whose validity and reliability remains unproven and whose potential for harm, because of a lack of uniform standards and regulation, is great.

*Julie A. Spohn*

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149. *See supra* note 36.

150. *Id.*

151. *Id.*

152. *See supra* note 1.

