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To Cloak the Within: Protecting Employees from Personality Testing

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"A man is what he thinks about all day long."[1]

INTRODUCTION

"An x-ray of personality."[2] An MRI scan of the soul. Medical technology has advanced to the point that we can literally see inside the body's machinery; devices can tell us where, precisely, a bone is broken, an artery is blocked, a tumor has bloomed. We may often want a similar view into the workings of the contents of people's minds, not just their bodies. We want to see the metaphorical breaks, blockages, and tumors lurking within the brain's gray matter. Perhaps the advances in technology that provide windows into a person's physical side lull us into thinking that we have similar tools for looking into the psychological side.

Employers increasingly want to examine the personalities of applicants and employees, but the testing of individuals can inflict distinct privacy harms that are not always justified by employers' needs. Sociological scholarship supports our need to protect our personalities from widespread view. However, existing laws insufficiently protect our personalities and should be adapted to protect the picking of individuals' minds.

News accounts note that employers increasingly test and investigate applicants to sift through them.[3] Employers have long been interested in one's past, both at work (were you a reliable employee?) and

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1. THE BOOK OF POSITIVE QUOTATIONS 345 (John Cook et al. eds., Fairview Press 2d ed. 1997) (quoting Ralph Waldo Emerson).

2. *Epilogue* to ANNIE MURPHY PAUL, THE CULT OF PERSONALITY 221 (2004).

3. *See* Alan M. Goldstein & Shoshanah D. Epstein, *Personality Testing in Employment: Useful Business Tool or Civil Rights Violation?*, 24 LAB. LAW. 243 (2008); *see also* Sarah Kershaw, *My Other Family Is the Office*, N.Y. TIMES, Dec. 4, 2008, at E1 (citing an organizational psychologist who states that personality tests are given to millions of employees each year); Toby Manthey, *Tests Tag Workers' Good, Bad Traits*, ARK. DEMOCRAT-GAZETTE, Oct. 26, 2008, at B1; Samantha Maziarz Christmann, *Employee Screening Turns into Constant Scrutiny*, BUFF. NEWS, Aug. 5, 2009, at A1.

outside of work (do you have a criminal record?). Increasingly, though, employers investigate how you think—not just when you are at work, but also when you are not. Nearly one in five of the Fortune 1,000 firms use personality testing to screen candidates.[4]

Traditional background or reference checks seek to discover what an employee or applicant has *done*. In contrast, personality testing seeks to discern who an employee *is*: how that employee thinks and what that employee feels. With the results of a personality test, an employer may well believe that it can predict how that employee will behave and perform,[5] and use that information to either screen out or screen in candidates.[6]

Employers may give such tests pass–fail power over a candidate, such that the score on the test overrides any other information in an applicant's record. For instance, in 2011 the Chicago Public Schools (CPS) system used a "soft skills" personality test to screen teachers and initially excluded anyone who scored below a set floor.[7] Thus, a candidate's results could eliminate him from contention even when the candidate's other credentials, such as recommendations from those who had witnessed the candidate's live teaching, were excellent.[8] After complaints, the school system decided not use the test as a sole screener.[9]

Recently, some employees have begun to resist this sort of testing. Metrolink, which runs a southern California commuter rail service, sought to require its conductors and engineers to take a "personality inventory" designed to reveal an applicant's "work tendencies, habits and personality traits."[10] Union leaders representing the workers objected, criticizing the test as invalid and irrelevant to the ability of a trained, experienced employee to safely operate a train and arguing

4. Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19, 27 (2007).

5. *But see* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1403 (2000) (noting that in the context of gathering information about consumers, "research in economics, psychology, and information theory suggests that the relationship between data and behavior is much more complicated").

6. *See* Sprague, *supra* note 4, at 27.

7. Rosalind Rossi, *Critics: CPS Test for Teacher Applicants Leads to "Blacklisting,"* CHI. SUN-TIMES (July 22, 2011, 12:49 PM), http://www.suntimes.com/news/education/6620153-418/critics-cps-test-for-teacher-applicants-leads-to-blackisting.html. The test, called "TeacherFit," had questions that sought to investigate "personality or attitude" attributes that were intended to measure the "soft skills" that teachers use, including "student focus, planning and organizing, results-focus, perseverance and self-initiative." *Id.*

8. *Id.*

9. *Id.*

10. Rich Connell, *Metrolink Workers Object to Personality Testing*, L.A. TIMES (Apr. 1, 2010), http://articles.latimes.com/2010/apr/01/local/la-me-metrolink-tests1-2010apr01.

that forcing current employees to take the tests could result in arbitrary dismissals.[11] The conductors and engineers threatened to boycott the tests.[12]

Despite the popularity of personality assessments with employers, however, we have no MRI scan for the soul. Furthermore, from a privacy perspective, these personality tests may inflict distinct harms. First, the inquisition of the testing itself may intrude on the individual's solitude. Second, the information disclosed may reveal, or purport to reveal, too much of the individual's private being. An accurate test may disclose more of the individual's internal life than the employer's needs can justify. An inaccurate test may lead an observer to view the person as someone she is not. Either way, the disclosure of the test's results can inflict harm.

Technology leads to the risk of additional harm. The information acquired—accurate or otherwise—may be published, disseminated, and passed around to others or even entities not in existence at the time of the test. Technology makes such information highly mobile. What once would have been kept in a file folder, perhaps in a locked cabinet, can be stored digitally and transferred electronically, whether on purpose or accidentally. Test results could be forwarded to another employer or an insurance company, or even posted on the Internet for all to see. Thus, a global database of personality test results that could be searched, mined, and processed through algorithms is not farfetched.

Erving Goffman, a twentieth-century sociologist, observed that we have "territories of the self,"[13] which are "preserves" with boundaries over which we can exercise some control.[14] To develop as persons, we develop "situational personalities," revealing some territories to some individuals, and some territories to others.[15] In particular, individuals

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11. *Id.* The plan for psychological screening arose after a Metrolink train ran a red light and crashed into a freight train. *Id.* The following investigation revealed that the train's engineer had violated safety rules, had sent and received hundreds of text messages while working, and had even "sneaked young rail fans onto locomotives and apparently let at least one sit at the controls," notwithstanding the fact that the engineer had received favorable evaluations. *Id.*

12. *Id.*

13. ERVING GOFFMAN, *The Territories of the Self*, *in* RELATIONS IN PUBLIC 28, 40–41 (1971) [hereinafter GOFFMAN, *The Territories of the Self*].

14. *See* Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 OHIO ST. L.J. 671, 691 (1996) (citing GOFFMAN, *The Territories of the Self*, *supra* note 13, at 28–29).

15. *See* Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1013 (2009) (describing a "dignity-focused" view of privacy) (citing ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959) [hereinafter GOFFMAN, THE PRESENTATION OF SELF]).

will seek to conceal stigmatizing aspects of themselves if they can.[16] Personality testing can intrude upon those territories of the self that an individual is entitled to shield from third parties' eyes. Employers who impose such tests may intrude upon areas of the self that they are not entitled to see and may observe—or believe they observe—attributes that are unduly stigmatizing to the employee without a sufficient business need to do so. If the employers disseminate test results, the disclosure may pigeonhole, or even stigmatize, the test-takers in the eyes of far more individuals than the takers ever anticipated.

Furthermore, the tests likely do not sufficiently meet employers' needs to justify these harms. The lauded tests may not be reliable; that is, the same test given twice to the same person may yield different results. In addition, such assessments may not have great validity.[17] First, the tests (or the interpretation of their results) may not accurately assess the traits sought by the employer. Second, regardless of the test's ability to accurately assess a particular trait, the employer may not have accurately identified the traits needed to succeed at the job.[18]

This Article begins by discussing employers' use of personal information of employees and potential employees.[19] Part III follows with a discussion of the possible consequences of employee personality testing and the potential impact on privacy from a sociological perspective.[20] Part IV describes the existing legal structures that may restrict employee personality testing, as well as the shortcomings of these structures.[21] Finally, Part V proposes a possible solution to both fulfill employers' needs to learn about relevant private information about their employees and to preserve individuals' privacy and their territories of the self.[22]

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16. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963) [hereinafter GOFFMAN, STIGMA]. A stigmatizing attribute is one that is "deeply discrediting." *Id.*

17. *See* Irving B. Weiner & Gregory J. Meyer, *Personality Assessment with the Rorschach Inkblot Method*, *in* OXFORD HANDBOOK OF PERSONALITY ASSESSMENT 277, 286 (James N. Butcher ed., 2009).

18. Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 368 (1997) ("[T]he predictive value of pre-employment screening depends upon linking the selection plan with an accurate assessment of the qualifications relevant to successful job performance.").

19. *See infra* notes 23–129 and accompanying text.

20. *See infra* notes 130–92 and accompanying text.

21. *See infra* notes 193–294 and accompanying text.

22. *See infra* notes 295–323 and accompanying text.

II. From Background Checks to Personality Exams

Employers can convincingly argue that they need to investigate their applicants and even current employees. First, employees, as human capital, are vital to productivity. Companies lose millions of dollars each year from poor hiring and promotion choices.[23] And individuals are not always truthful about themselves and their backgrounds. Background checks of an applicant's claims can reveal a great deal of dissembling. Some surveys indicate that almost half of job applicants lie about their work history and education.[24] Accordingly, employers cannot simply take résumés at face value.

Furthermore, in addition to risk, responsibility follows the hiring of an employee. Under the doctrine of respondeat superior, an employer can be found liable for a number of the employee's acts conducted within the job's scope.[25] Under negligent hiring doctrines, an employer may even find itself responsible for criminal acts of an employee conducted outside the job's scope.[26] Employee background checks and testing make sense to many; any employer would like to avoid the problems that FedEx Corp. faced when it was accused of hiring a sex offender who later was charged with molesting a boy

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23. Lisa Daniel, *Use Personality Tests Legally and Effectively*, Staffing Mgmt. (Jan. 4, 2005), http://www.shrm.org/Publications/StaffingManagementMagazine/EditorialContent/Pages/0504_cover.aspx (estimating that a company with 200 employees and a $30 million payroll could expect to lose $1 million a year to bad hires).

24. Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 Hofstra Lab. & Emp. L.J. 395, 397–98 (2008).

25. *See* Restatement (Third) of Agency § 2.04 (2006) (defining the doctrine of respondeat superior).

26. The *Restatement (Second) of Agency* provides as follows:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
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> . . . .
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> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
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> (c) in the supervision of the activity; or
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> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213 (1958); *see also* Bates v. Doria, 502 N.E.2d 454, 458 (Ill. App. Ct. 1986) ("An employer does have a duty to refrain from hiring or retaining an employee who is a threat to third persons to whom the employee is exposed, and such a cause of action arises in favor of a person who is injured as the proximate result of the employer's negligence in hiring or retaining the employee." (citation omitted)); Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982) ("An employer will only be held responsible for the torts of its employees beyond the scope of the employment where it knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons.").

while on the job.[27] Employers are also justifiably concerned that an employee may create a hostile work environment by abusing the company's Internet access or email systems, which could lead to liability under Title VII of the Civil Rights Act of 1964.[28]

A. Background Checks—Assessing Past Behavior

Liability concerns have led employers to use various kinds of background checks on both applicants and current employees. Some of these checks examine not only on-the-job behavior, but also off-hours behavior. Accordingly, employers may test for the use of impairing substances, search criminal and other public records, order credit reports, and verify claims of salary and position. An employer may even acquire reports of an employee's or applicant's behavior as a consumer or on a social network.

Employers are justifiably interested in their employees' or applicants' off-hours behavior that could impact on-the-job performance, especially if that behavior is illegal or can impair workplace safety. Most typically, employers fear that an employee's use of illegal substances will impair that employee's job performance, and that fear may well be justifiable.[29] Accordingly, employers have long tested for marijuana, other illegal drugs, or alcohol.[30]

Inquiries into past conduct can advance beyond substance testing, though. Employers commonly search through criminal records; a recent study reported that nearly ninety percent of companies said that they conducted criminal background checks on some or all of their employees.[31] Criminal records may comprise any or all of conviction, parole, or arrest records. With the digitization of such records, even

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27. *See* John Christoffersen, *Privacy, Reliability Issues Put Background Checks on Trial*, PITT. POST GAZETTE, Dec. 30, 2005, at E1. FedEx claimed that it did do a background check on the charged employee but that the check did not reveal his prior crime. *Id.*

28. Robert Sprague, *From Taylorism to the Omnipticon: Expanding Employee Surveillance Beyond the Workplace*, 25 J. MARSHALL J. COMPUTER & INFO. L. 1, 4 (2007).

29. For instance, a railway employer has a clear, defensible interest in learning whether those operating heavy transportation equipment have taken illegal substances, even if the employee ingested them before coming to work. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (upholding drug and alcohol tests of employees who had been involved in a train accident as reasonable under the Fourth Amendment). In addition, the Supreme Court recently ruled that any constitutional right to information privacy does not preclude the federal government from requiring federal contract employees with long-term access to federal facilities from submitting to a background check that inquires into alcohol and illegal drug use. NASA v. Nelson, 131 S. Ct. 746, 759–60 (2011).

30. *See, e.g.*, KENNETH D. TUNNELL, PISSING ON DEMAND: WORKPLACE DRUG TESTING AND THE RISE OF THE DETOX INDUSTRY 6–8 (2004).

31. Erica Goode, *Internet Lets a Criminal Past Catch Up Quicker*, N.Y. TIMES, Apr. 29, 2011, at A17.

old conviction records may now be available for the employer's scrutiny and may well skew the employer's evaluation of the candidate.[32]

Criminal records are only a small subset of public records that a background check may scan and snatch. Many civil records assembled by governments are available for employers to peruse as well. For instance, federal governmental entities maintain nearly 2,000 databases of information culled from individuals for one or another regulatory purpose, including census data, military and prison records, and tax returns.[33] State governmental entities likewise maintain data they have acquired, including court documents, public employee salaries, and tax records.[34] Individuals may not know that the information that they reveal to a governmental agency for one purpose—for instance, to obtain a license or secure a divorce—may then be available to a future employer for an entirely different purpose. Register for a license and the registration's information can become incorporated into a database, information that the governmental entity can then make available—perhaps for a fee—to interested parties.

Credit reports, another type of background check, may report results not only from governmental databases but other records as well, including bank and loan records. According to one measure, sixty percent of employers use credit reports in making employment decisions.[35] A credit report may reveal not only past addresses and em-

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32. For instance, in testimony before Congress, a member of the National Employment Law Project stated that seventy-three percent of private employers conduct some kind of criminal background check on applicants. *Collateral Consequences of Criminal Convictions: Barriers to Reentry for Formerly Incarcerated: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 33 (2010) (testimony of Maurice Emsellem, National Employment Law Project). Some states, however, limit employers' use of criminal records in their decision making; limits on public employers are more common. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-904(E) (2010); KAN. STAT. ANN. § 22-4710 (2007); KY. REV. STAT. ANN. § 335B.020, .070 (repl. vol. 2011); LA. REV. STAT. ANN. § 37:2950 (2007); N.Y. EXEC. LAW § 296(15) (McKinney 2010 & Supp. 2012); N.Y. CORRECT. LAW §§ 750–754 (McKinney 2010 & Supp. 2012); *see also Overview of State Laws that Ban Discrimination by Employers*, LEGAL ACTION CENTER, http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf (last visited on Aug. 9, 2011).

33. Lee Tien, *Privacy, Technology, and Data Mining*, 30 OHIO N.U. L. REV. 389, 389 (2004); *see also* 13 U.S.C. § 8 (2006); 26 U.S.C. § 6107(b); 28 C.F.R. § 512.15 (2010); 32 C.F.R. § 70.8(b)(9)(i); A. Michael Froomkin, *Government Data Breaches*, 24 BERKELEY TECH. L.J. 1019, 1022–23 (2009) (noting several types of government repositories of personal data that are at risk for security breaches).

34. *See* Kelsey M. Swanson, Comment, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579, 1583–601 (2009) (describing various categories of personally identifiable information collected by states and that information's availability under freedom of information laws).

35. *Background Checking: The Implications of Credit Background Checks on the Decision to Hire*, SHRM.ORG (Sept. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckingImplications.aspx (slide six of sixteen).

ployers, but also outstanding debts, charge cards, and bankruptcies.[36] A report will also flag delinquencies, a matter of particular concern given the increasing rates of default on charge cards, auto loans, and mortgages that arose in the "Great Recession."[37] Responding to that concern, some states have enacted legislation to limit employers' use of credit reports when hiring.[38]

Another type of common background check verifies an applicant's past position and salary. Employers share information about their employees' salaries, job titles, and work histories with companies that specialize in amassing that information so that they can sell it to other employers seeking to check up on an applicant.[39]

In addition to information about criminal and public records, credit transactions, and employment income, background checks can also reveal even more personal information about a given individual. Technology has allowed data miners to amass an amazing amount of detailed material on individuals' behavior. For instance, Acxiom Corp., a background screening and marketing company, boasts that it maintains "a comprehensive database consisting of more than 126 million households and 190 million individuals" with a wide variety of demographic, behavioral, and purchase-related information[40] assem-

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36. For a discussion of the disclosures that the federal Fair Credit Reporting Act permits, see *infra* notes 243–57 and accompanying text.

37. *See* Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1 (noting an increase in mortgage defaults and charge-off rates by credit card companies).

38. In 2010, Oregon enacted the Job Applicant Fairness Act, which prohibits most employers from using credit reports to screen applicants. *See* S.B. 1045, 75th Leg. Assemb., Spec. Sess. (Or. 2010). In testimony before the Act passed, one of the big three consumer reporting agencies, TransUnion, acknowledged that it did not have evidence that an employee's credit history correlated with subsequent job performance, casting doubts on its validity. *Testimony on Oregon's Job Applicant Fairness Act*, VIMEO, http://www.vimeo.com/24479508 (last visited Apr. 6, 2012). Furthermore, many of the credit reports have inaccuracies that can seriously impair the target's ability to get credit and, one might infer, employment. *Mistakes Do Happen: A Look at Errors in Consumer Reports*, OSPIRG, http://www.ospirgstudents.org/reports/consumer/consumer-reports/mistakes-do-happen-a-look-at-errors-in-consumer-credit-reports#iddoxk3nG-I1IHCs7z6Cf9BQ (last visited Jan. 26, 2012) (concluding that seventy-nine percent of the credit reports sampled had some kind of error and that twenty-five percent had an error serious enough to be disqualifying). Thus, like personality tests, credit checks may suffer from both kinds of invalidity, neither accurately measuring the traits they purport to measure nor identifying traits that advance the goals sought.

39. For instance, TALX Corp., owned by Equifax, one of the nation's three biggest consumer reporting agencies, collects such information for more than 50,000 clients who use the service to verify an applicant's previous employment and pay. Pamela Yip, *It's Not Spying . . . Firm Compiles Info on Your Job History, Pay for Companies that Need to Check on You*, DALL. MORNING NEWS, Mar. 19, 2008, at 2D.

40. *Infobase Consumer List*, ACXIOM, http://www.acxiom.com/Site-Assets/Factsheet/FACTSHEET-infobase-consumer-list (last visited Jan. 26, 2012). At one time, Acxiom published a

bled from the digital breadcrumbs we dribble each day with each transaction. Such firms offer interested employers the ability to gain a window into the off-hours behavior of an applicant or employee.

B. Personality Assessments—Predicting Future Behavior

These sorts of background checks gather information about an individual's past behavior in order to predict future behavior. In contrast, personality tests try to penetrate the mind's internal processes to predict future behavior. Mental health professionals have sought to define the term "personality" and to assess it using a plethora of tests, but this Article discusses a few of the most common. The use of such tests by mental health professionals differs distinctly, however, from the use of such tests by employers.

The earliest modern personality tests arose in the field of psychotherapy, which developed these tests to help treat troubled individuals, to provide both therapist and patient with information about the malfunctioning of the patient's mind.[41] Thus, personality assessments were intended to be part of a comprehensive clinical work-up. However, when mental health specialists became interested in testing personalities, employers, especially in the post-World War II era, began

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brochure that advertised that one of its databases contained the following types of personal information:

> name; address; phone number; occupation; date of birth; latitudinal/longitudinal coordinates; gender; ethnicity; age; income; net worth; political party; height and weight; education; marital status; whether subject wears corrective lenses; whether subject rents or owns dwelling; years of residence; value of home; mortgage amount and interest rate; home loan to value ratio; date home was built and date purchased; square footage of home and lot; whether home is located in a census tract where more than 50 percent of households are non-white; adult age ranges in household; number of adults in household; children's age ranges in household; number of children in household; number of generations in household; total number of occupants in household; whether there is a "working woman" in household; which credit cards subject owns; range of new credit; where subject likes to shop; model and make of automobile (including a "lifestyle indicator" designation based on the type of car); blue book value of vehicle; whether subject has a history of buying new cars; whether subject buys items through mail order and in what dollar amounts; whether subject owns a cat or a dog; whether subject donates to charities; whether subject owns real estate investments; whether subject has stock/bond investments; whether subject is a military veteran; whether subject likes to gamble, sew, garden, watch television, hunt, jog, sail, diet, play video games, drink wine, or read the Bible; and whether subject's overall "lifestyle composite" classifies him/her as a "Traditionalist," "Connoisseur," "Chiphead" (like computers and science), or member of the "Intelligentsia."

Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 Nw. U. L. Rev. 63, 75–76 (2003).

41. *See Introduction* to Paul, *supra* note 2, at xii.

to need to sort through large numbers of applicants to find appropriate personnel.[42]

What, however, does the term "personality" mean? In contrast to behavior, which is an actual example of a person's conduct, personality cannot be observed, measured, or tested directly. Rather, "[p]ersonality is an abstraction or hypothetical construction from or about behavior."[43] One observes another's behavior and infers from those observations a distinct personality. Furthermore, though not fixed at any point in time, personality has some stability over time and across different situations and "exerts itself pervasively."[44]

Personality may be viewed as comprising constituent traits,[45] any one of which may cause a particular behavior. A trait refers to a "distinguishable, relatively enduring way in which one individual varies from others."[46] Put another way, traits are "predispositions that exert fairly generalized effects on behavior."[47] Some psychologists see traits as the road to insight into the personality; by inferring various traits from observed behavior and then measuring them, we can chart dimensions for traits that can be used to compare persons and groups.[48] A trait, like a personality, has some stability over time and across different situations.[49] Nonetheless, traits alone may not determine behavior; rather, behavior can arise from "the interaction of trait and situational variables."[50] For instance, someone may generally be shy, but in a particular situation (such as a party among close friends) that individual may shed her shyness.

Employers may administer personality tests themselves, through their human resources department, or through a third-party consult-

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42. James N. Butcher, *Personality Assessment from the Nineteenth to the Early Twenty-first Century: Past Achievements and Contemporary Challenges*, 6 ANN. REV. CLINICAL PSYCHOL. 1, 5–6 (2010) (describing the use of personality assessments to select individuals for Special Forces military duty).

43. WALTER MISCHEL, PERSONALITY AND ASSESSMENT 4 (1968).

44. *Id.* at 9.

45. *Id.* at 6.

46. *Id.* at 5 (citation omitted). Mischel notes that some personality theorists consider traits as constructs that psychologists have created, while others define traits as actual states in persons from which a psychologist infers an underlying attribute. *Id.*

47. *Id.* at 6.

48. *Id.* at 5–6.

49. MISCHEL, *supra* note 43, at 5–6; Paul T. Costa, Jr. & Robert R. McCrae, *The Five-Factor Model and the NEO Inventories*, *in* OXFORD HANDBOOK OF PERSONALITY ASSESSMENT, *supra* note 17, at 299, 300–01 (describing traits as not immutable but nonetheless "highly stable over periods of years and decades, especially after age 30"); Susan C. South et al., *Behavior Genetic Perspectives and Clinical Personality Assessment*, *in* OXFORD HANDBOOK OF PERSONALITY ASSESSMENT, *supra* note 17, at 25, 28 ("[V]ery distinctive personality traits show similar heritabilities, with remarkable regularity.").

50. ANNE ANASTASI & SUSANA URBINA, PSYCHOLOGICAL TESTING 380 (7th ed. 1997).

ant. A preferred practice is to use an industrial–organizational psychologist.[51] Among the most popular tests used to assess candidates' personalities are the Minnesota Multiphasic Personality Inventory (MMPI), the Myers-Briggs Type Indicator, the Rorschach Test, and the Thematic Apperception Test.[52] The MMPI and the Myers-Briggs Type Indicator are personality inventories that seek to categorize individuals on a number of scales.[53] The MMPI does this by asking a series of true–false questions,[54] while the Myers-Briggs Type Indicator requires test-takers to choose from two possible answers to each of a series of questions. In contrast, the Rorschach Test and the Thematic Apperception Test use pictures that an examiner uses to discern certain personality characteristics.[55]

Personality tests may be objective or projective.[56] In an objective test, the target may choose from only a limited number of possible responses. The MMPI, a popular objective test, consists of 566 true–false questions that assess clinical psychopathology.[57] This test has been given to countless job applicants and serves as the foundation for many more tests that employers use to sort people.[58] A psychologist and a neuropsychiatrist at the University of Minnesota mental hospital developed the MMPI in an attempt to address the lack of any accepted way to sort the mentally ill into categories.[59] The developers identified hospital patients with clear disorders, and then assembled a comparison group of presumably healthy individuals from the hospital's visitors, primarily friends and family members of patients.[60] The visitors reflected the local population's demographics: nearly all Protestant, many of Scandinavian ancestry.[61] The test developers administered a collection of true–false questions to both groups; those answers given by the majority of the control group became the "normal" answers, while those given by a majority of those who suffered from a particular mental illness became indicators of

51. *See* Daniel, *supra* note 23.

52. *Introduction* to PAUL, *supra* note 2, at xii–xiii.

53. ANASTASI & URBINA, *supra* note 50, at 352, 449.

54. Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. C.R. L.J. 79, 127–28 (2006).

55. *See infra* notes 71–78 and accompanying text.

56. ANASTASI & URBINA, *supra* note 50, at 350, 411, 419.

57. Randy Borum & Harley V. Stock, *Detection of Deception in Law Enforcement Applicants: A Preliminary Investigation*, 17 LAW & HUM. BEHAV. 157, 161 (1993).

58. PAUL, *supra* note 2, at 63.

59. *Id.* at 48, 53–54.

60. *Id.* at 51.

61. *Id.* at 51–52.

that illness.[62] This process yielded eight separate measures, known as the Clinical Scales.[63]

Another popular objective personality test is the Myers-Briggs Type Indicator.[64] The Myers-Briggs Type Indicator asks targets 100 questions, each of which offer two descriptive words and phrases from which the target must select, leading to the target being assigned to one of sixteen personality types, identified with DNA-like four letter strings of markers.[65] Each marker represents one of a pair of opposites on a particular axis: introverted-extroverted, sensing-intuiting, thinking-feeling, and judging-perceiving.[66] Like the MMPI, the Myers-Briggs Type Indicator was not designed for recruiting or selection.[67] Rather, the developer, Isabel Myers, had no formal psychological training, but nonetheless sought to create a test that would reveal aspects of an individual's personality type from their answers to binary questions, information that she hoped would help the individual become more self-aware.[68]

In contrast to an objective test, in which a target may choose only from a limited number of responses, a projective technique permits a virtually "unlimited variety of possible responses."[69] In a projective test, an examiner provides a relatively unstructured task to a target and then tries to discern themes that arise from the words the target uses in response to that task.[70] Possibly the most famous of these is the Rorschach Inkblot test, which comprises ten inkblots; the assessor evaluates the target's reactions to each inkblot using a rubric called the "Comprehensive System."[71] The results can help a clinician make a differential diagnosis; however, they do not precisely identify the particular symptoms of a mental condition.[72] Herman Rorschach, a Swiss physician, developed the famed inkblots while a resident at a

62. *Id.* at 52.

63. Andrew C. Cox et al., *The MMPI-2: History, Interpretation, and Clinical Issues*, *in* OXFORD HANDBOOK OF PERSONALITY ASSESSMENT, *supra* note 17, at 250, 251. These scales consisted of the following: Hypochondriasis, Depression, Hysteria, Psychopathic Deviate, Paranoia, Psychasthenia, Schizophrenia, and Hypomania. *Id.*

64. PAUL, *supra* note 2, at 125.

65. *See MBTI Basics*, MYERS & BRIGGS FOUND., http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics (last visited Jan. 26, 2012).

66. PAUL, *supra* note 2, at 111.

67. *See id.* at 110–16.

68. ANASTASI & URBINA, *supra* note 50, at 449; *Introduction* to PAUL, *supra* note 2, at xiii; PAUL, *supra* note 2, at 110–11.

69. ANASTASI & URBINA, *supra* note 50, at 411.

70. *Id.*; Butcher, *supra* note 42, at 7.

71. ANASTASI & URBINA, *supra* note 50, at 411–12; PAUL, *supra* note 2, at 34.

72. Weiner & Meyer, *supra* note 17, at 278–79.

mental hospital.[73] Since refined, the test remains highly popular among clinicians.[74]

Where the Rorschach Test uses inkblots, another projective test, the Thematic Apperception Test, uses pictures; the assessor shows nineteen different images to the target, then asks the target to describe a story about each one.[75] A therapist then evaluates all of the target's answers, looking for "thema" among them.[76] Henry Murray developed the test while heading up a Harvard University clinic dedicated to studying hypnosis and abnormal psychology.[77] As originally developed, the test's results were not to be used in isolation, but rather with other tests and the observations of other examiners—a time-intensive process.[78]

These tests, both objective and projective, are thought to yield a picture of the target's personality as a whole. In contrast, subsets of psychological tests seek to measure discrete traits within a personality. For instance, one such subset, "honesty" or "integrity" tests, seeks to identify those individuals who might be more likely to steal, fake sickness, or otherwise dissemble on the job.[79] A similar category of tests, polygraph tests, seeks to determine a candidate's honesty by measuring the candidate's physiological responses to questions.[80]

Mental health professionals' use of these tests differs sharply from employers' use. Therapists seek to treat, while employers, as a general rule, seek to make employment decisions. Tests designed to reveal to a therapist the internal contours of a person's psyche might not be appropriate to reveal to an employer the best use of which to make a person.

Furthermore, the two groups may well differ in terms of the emphasis they give test results. An employer may not have the skills that a psychotherapist has to interpret the tests. An employer may not understand the limits to, and possible flaws of, such a test, but rather believe that it reveals whether or not the applicant or employee will serve the employer ably. That belief may lead employers to treat per-

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73. PAUL, *supra* note 2, at 18–19.

74. In one survey, forty percent of clinicians stated that they "frequently" or "always" used the test, while eighty percent said they did so at least occasionally. PAUL, *supra* note 2, at 35.

75. ANASTASI & URBINA, *supra* note 50, at 419; Butcher, *supra* note 42, at 8.

76. PAUL, *supra* note 2, at 85.

77. *Id.* at 78–79.

78. *Id.* at 85.

79. U.S. CONG. OFFICE OF TECH. ASSESSMENT, THE USE OF INTEGRITY TESTS FOR PRE-EMPLOYMENT SCREENING 1 (1990) [hereinafter INTEGRITY TESTS].

80. *See* 29 U.S.C. § 2001(4) (2006) (defining "polygraph" for the purposes of the Employee Polygraph Protection Act); *see also infra* notes 219–22 and accompanying text.

sonality tests as having pass-or-fail impact. Alex Frankel, the author of *Punching In: The Unauthorized Adventures of a Front-Line Employee*, spent almost two years applying for and working at front-line jobs for some major companies in the service and retail industries, such as Enterprise Rent-a-Car and Home Depot.[81] Frankel reported that he applied online at Home Depot and, after failing to advance, called a local outlet to talk to a real person, who told him that the computer would not even forward his résumé due to his test results.[82] Similarly in 2011, the CPS system initially used a projective test called TeacherFit as a "high stakes" test, the results of which could completely eliminate an applicant from contention no matter how strong the rest of the applicant's record was.[83]

In contrast, not only will a mental health professional likely understand the strengths and weaknesses of a particular test, but she will also likely use a personality test's results as one tool among several to treat a patient. Employers may instead use such tests to single-handedly screen candidates in a thumbs-up, thumbs-down manner.

In sum, personality tests have arisen to try to determine an individual's personality, whether as a whole or as a composition of constituent traits. Both mental health professionals and employers use these tests, among the most popular of which are the MMPI, the Myers-Briggs Personality Inventory, the Rorschach Test, and the Thematic Apperception Test. Employers have sought to use these tests for a purpose sharply different from their use by mental health professionals and often for purposes—and with consequences—never intended by the tests' original developers.

C. Reliability and Validity Problems with Employer-Given Personality Tests

Employers have clear reasons for wanting to learn the details of their employees' personalities, including maximizing productivity and minimizing risk. However, they probably are not getting what they seek, an MRI scan of the soul.[84] Not only have these tests received criticism from mental health professionals, but when they have been

81. ALEX FRANKEL, PUNCHING IN: THE UNAUTHORIZED ADVENTURES OF A FRONT-LINE EMPLOYEE 58–62, 79–117 (2007).

82. *Id.* at 58–60.

83. Rosalind Rossi, *Teacher Test Under Fire*, CHI. SUN-TIMES, July 21, 2011, at 2. After receiving substantial criticism for placing so much weight on the test, including from the deans of many teaching colleges, the school system decided not to give make-or-break power to the test's results. Rosalind Rossi, *CPS Flips, Drops Teacher Test*, CHI. SUN-TIMES, July 22, 2011, at 4.

84. *See Epilogue* to PAUL, *supra* note 2, at 221.

challenged in court by individuals who took them at an employer's insistence, courts have also expressed uneasiness with their credibility.

The evidence does not indicate that personality assessments produce reliable, valid assessments of the suitability of a particular target's personality for a particular employment position that requires particular skills. First, the tests may not even accurately identify the traits of a particular target, and different renditions of the test may produce different results, indicating fragile reliability. Furthermore, such tests' results only weakly correlate with observable behavior.[85] This may be because a target's behavior may be specific to a particular situation rather than driven by a particular trait.[86] Given the unstable reliability of personality assessments, Dr. Walter Mischel, a psychologist who has studied them, believes that while they might be suited for research on individual and group differences, they could not fairly support the assessment of specific individuals.[87] In short: "the practice of forensic psychological assessment falls short of its promise."[88]

In addition to demanding reliability, personality tests must be valid to achieve employers' aims; that is, the traits the test evaluates should actually correlate with improved job performance.[89] While one might naturally think of personality as being an inherent and stable aspect of a person that will closely impact job performance, particular personality traits may not necessarily correlate with job performance, and in fact the context of the particular job situation may influence performance more than the employee's personality.[90]

Each of the major personality assessments commonly used for employment purposes has flaws in reliability, validity, or both. For example, these tests can yield distended categories of false positives and false negatives.[91] One study of an MMPI-like test given to welfare applicants to identify substance abusers misidentified 44% as addicts,

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85. MISCHEL, *supra* note 43, at 34–37. The degree of correlation can vary considerably depending on several variables, including the length of the test, the group of people measured, and the homogeneity or heterogeneity of the subject sample, among others. *Id.* at 36–37.

86. "[T]he behaviors which are often construed as stable personality trait indicators actually are highly specific and depend on the details of the evoking situations and the response mode employed to measure them." *Id.* at 37.

87. *Id.* at 38.

88. Robert A. Nicholson & Steve Norwood, *The Quality of Forensic Psychological Assessments, Reports, and Testimony: Acknowledging the Gap Between Promise and Practice*, 24 LAW & HUM. BEHAV. 9, 40 (2000).

89. L. CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 7:03 (2006).

90. *Id.*; *see also* JEFFREY ROSEN, THE UNWANTED GAZE 132 (2000).

91. *See* PAUL, *supra* note 2, at 64.

notwithstanding the serious consequences of being tagged with a positive result.[92]

The Myers-Briggs Type Indicator has similar reliability problems. The type-casting—the four-character sequence—may not be sturdy, that is, it may have flimsy reliability. When one group of people took the test twice across a short span of time, only 47% earned the same type designation both times.[93] Tellingly, the test's own publisher urges that it should be used only to evaluate current employees, not to hire new ones.[94]

The projective tests have drawn similar criticism. Critics of the Rorschach Test contend that it has "essentially zero validity."[95] It may also lead clinicians to overpathologize people.[96] And as for the Thematic Apperception Test, "[e]ven when used in a uniform manner, the TAT has dubious validity and reliability, falling 'woefully short of professional and scientific test standards.'"[97] According to University of Ottawa psychologist John Hunsley, it does not effectively diagnose mental illness, in part because transitory moods and states may skew the results.[98] This lack of consistency in test results over time suggests a distressing lack of validity.

As discussed above, honesty or integrity tests are one subset of personality tests and have been widely popular with employers. But though we may often yearn for a valid and reliable lie detector, so far, none exists. The U.S. Congress Office of Technology Assessment (OTA) has questioned the use of honesty testing to screen employees and applicants.[99] Such tests have poor validity, producing significant

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92. *Id.*

93. *Id.* at 133. The National Research Council commissioned an evaluation of performance-enhancing techniques, including the Myers-Briggs Type Indicator. The report, published in 1991, noted that a variety of samples have found that 24% to 61% of test-takers receive the same Myers-Briggs type when re-examined at intervals ranging from 5 weeks to 6 years. IN THE MIND'S EYE: ENHANCING HUMAN PERFORMANCE 96–97 (Daniel Druckman & Robert Bjork eds., 1991) [hereinafter IN THE MIND'S EYE]; *see also* PAUL, *supra* note 2, at 133. As Annie Murphy Paul notes, "That means, of course, that 39 to 76 percent are assigned a *different* type." PAUL, *supra* note 2, at 133. The report's authors reason that the rate of changes "suggest caution in classifying people in these ways and then making decisions that would influence their careers or personal lives." IN THE MIND'S EYE, *supra*, at 97. Another study concluded that only 47% of those tested fell within the same four-part type the second time they took the test as the first time. PAUL, *supra* note 2, at 133. Paul remarks that "there is no evidence that [the test's] sixteen distinct types have any more validity than the twelve signs of the zodiac." *Id.* at 134.

94. Julian Kesner, *This Is Getting Personal*, DAILY NEWS, Aug. 28, 2005, at 22.

95. PAUL, *supra* note 2, at 37.

96. Butcher, *supra* note 42, at 11.

97. PAUL, *supra* note 2, at 97.

98. John Hunsley et al., *Controversial and Questionable Assessment Techniques*, *in* SCIENCE AND PSEUDOSCIENCE IN CLINICAL PSYCHOLOGY 39, 53 (Scott O. Lilienfeld et al. eds., 2003).

99. INTEGRITY TESTS, *supra* note 79, at 3, 32–33, 53.

numbers of both false positives and false negatives: of those test-takers classified as dishonest by the test, the proportion who were not subsequently caught committing theft ranged from 73% to 97%, while between 1% and 6% of test-takers "passing" the tests were later found to have stolen from their employers—a significantly better rate, but still worrisome when applied to a large number of test-takers.[100] Overall, the misclassification rate of the tests studied ranged from 18% to 63%.[101]

The validity flaws may arise from the tendency of these tests to rely on self-reporting by the target—that is, relying on both the honest and the dishonest answering honestly.[102] The OTA's report also warned against independent confirmation of the validity of honesty tests, notwithstanding the assertions by test publishers that the tests are valid.[103] The OTA noted that usually those interpreting the tests are not trained in psychology and therefore they may treat the test results inappropriately and at odds with the test's original purpose.[104]

The concerns of mental health experts with respect to the limits of these tests have carried into the courts, which have expressed uneasiness with the validity of these personality tests. For example, in *In re Vey* the New Jersey Supreme Court evaluated the claim of a police officer applicant who had been rejected based on the results of her performance on the MMPI.[105] The court reversed the merit board's rejection and remanded the case, noting that the record failed to show that the personality traits her evaluation ascribed to her predicted job performance.[106]

Courts and other reviewing authorities are alert to test invalidity appearing in the form of false positives. For instance, Massachusetts's

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100. *Id.* at 10–12.

101. *Id.* at 11.

102. *Id.* at 33–34, 48.

103. *Id.* at 8, 39, 49. The American Psychological Association Task Force on Dishonesty and Theft in Employment Settings strongly discouraged the use of such tests as well, but warned against the possible unintended consequences of banning them: "to do so would only invite alternative forms of pre-employment screening that would be less open, scientific, and controllable." LEWIS R. GOLDBERG ET AL., AM. PSYCHOLOGICAL ASS'N, QUESTIONNAIRES USED IN THE PREDICTION OF TRUSTWORTHINESS IN PRE-EMPLOYMENT SELECTION DECISIONS: AN A.P.A. TASK FORCE REPORT 26 (1991).

104. INTEGRITY TESTS, *supra* note 79, at 40–42.

105. *In re* Vey, 591 A.2d 1333, 1333–34 (N.J. 1991).

106. *Id.* at 1336–38. On remand, the merit board decided yet again that the plaintiff should be disqualified based on the results of the psychological test, and on appeal from that decision the New Jersey Supreme Court upheld the disqualification. *In re* Vey, 639 A.2d 718, 718–19 (N.J. 1994) (per curiam). The dissenting justices in the latter case pointed out that "the record contains no scientific reliability to the validation undertaken by the [employer]." *Id.* at 722 (O'Hern, J., dissenting).

Civil Service Commission concluded that seven police job applicants who were rejected by the Boston Police Department must be reconsidered.[107] The Commission found fault with the department's psychiatric screening process, which rejected candidates for mental health problems that "probably did not exist."[108] Furthermore, even if the tests were to accurately identify categories of personality types (that is, to produce a minimum of false positives and false negatives), the evidence does not sufficiently show that they accurately predict the effectiveness of the target's performance on the job.[109]

The very act of testing, as opposed to the quality of the tests' results, has also been challenged in court. Lawsuits against public employers have alleged that a personality test invades a constitutionally protected interest in privacy; a significant portion of such suits involves plaintiffs who sought to be either police officers or fire fighters.[110] However, notwithstanding the flimsy evidence of validity, the trend may be toward increasing such testing. After a mass slaying by a part-time sheriff's deputy in Wisconsin in 2007, the Wisconsin legislature considered a bill that would require pre-employment testing of all such employees.[111] In Oregon, police chiefs sought to change state law to allow them to administer polygraph tests to potential employees.[112]

D. Employers' Misguided Justifications for Personality Assessments

More and more employers use personality tests in addition to background checks to help them determine whom to hire, even though the tests may not be reliable. Furthermore, the tests may not be valid; they may not accurately assess the traits they purport to measure, and the traits measured may not in fact correlate well with those de-

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107. Maria Cramer, *Police, State Spar on Hiring*, BOS. GLOBE, Dec. 4, 2009, at A1 (quoting one expert, M.L. Dantzker, as saying that "[t]here is no standardized acceptance of what protocols to use" in administering the tests).

108. *Id.*

109. PAUL, *supra* note 2, at 134.

110. *See, e.g.*, Thompson v. City of Arlington, 838 F. Supp. 1137 (N.D. Tex. 1993) (police officer); Redmond v. City of Overland Park, 672 F. Supp. 473 (D. Kan. 1987) (probationary police officer); McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978) (fire fighter), *aff'd*, 601 F.2d 575 (3d Cir. 1979). This is not surprising given that the pool of possible plaintiffs includes only those seeking governmental work and given the particular powers that police officers and firefighters can exercise.

111. Kevin Giles, *Shooting Spurs Officials to Seek Psych Tests for Deputies*, STAR TRIB., Dec. 17, 2007, at B7.

112. Maxine Bernstein, *Police Push to Polygraph Hires*, SUNDAY OREGONIAN, Jan. 28, 2007, at C1. The chiefs sought an exception to Oregon's law that prohibits the testing of employees or applicants through polygraphs, in part to help improve how police respond to people with mental illness—an increasingly frequent situation. *Id.*

manded by a particular job. Though employers may seek to justify these tests on the grounds of avoiding liability for employee behavior, case law does not bear out this fear.

If personality tests are neither substantially reliable nor valid, why do employers spend $400 million per year on them?[113] Employers have long sought to pigeonhole workers, getting the "best" talent for the job.[114] People are confusing and complex, but have a tremendous impact on the functioning of a workplace. Who can blame employers for wanting to get the most precise information that they can about the human capital that serves them? However, the tests simply do not deliver the sort of information that would allow employers to fulfill their goals, undercutting the justification for intruding on employees' privacy to try to inspect their personalities.

The tests may also be popular because they are inexpensive and can be administered to large numbers of applicants. Furthermore, employers can outsource the testing to a third-party vendor, who can take the burden of initially screening applicants for the employer. Employers may have turned to personality testing after the federal government outlawed the use of polygraph tests in most private sector employment situations.[115] However, many of the flaws in polygraph testing that led Congress to outlaw polygraph testing of job applicants may be present in personality tests.[116] Employers understandably want a quick and easy tool for looking inside an applicant's head, but the device they seek simply does not yet exist. As Annie Murphy Paul notes, "[M]any of the characteristics [the tests] claim to measure are broad, fuzzy categories covering many kinds of behavior," rather than discrete idiosyncrasies.[117]

Employers may also be primed to believe the puffery of test vendors, who warn of the potential consequences of failing to test. Testing companies market these personality tests to busy and liability-shy employers, as Paul notes, "often . . . with a dose of alarmism."[118] The subset of personality tests known as integrity tests has drawn skepticism from the American Psychological Association, which characterized some test publishers' promotional materials as "flagrantly

113. Jennifer Leonard Nevins, Comment, *Measuring the Mind: A Comparison of Personality Testing to Polygraph Testing in the Hiring Process*, 109 PENN ST. L. REV. 857, 858 (2005).

114. *See* ANASTASI & URBINA, *supra* note 50, at 3.

115. Nevins, *supra* note 113, at 859 (citing the Employee Polygraph Protection Act of 1988, Pub. L. 100-347, 102 Stat. 646 (codified at 29 U.S.C. §§ 2001–2009); *see also infra* notes 219–22 and accompanying text.

116. *See* Nevins, *supra* note 113, at 859–60.

117. PAUL, *supra* note 2, at 66–67.

118. *Id.* at 66.

hucksterish" and accused the publishers of making "wildly exaggerated" claims about the tests' abilities to reduce theft.[119]

Employers may argue that in addition to seeking to fit the right person to the job, they must use personality testing to avoid liability when a rogue employee commits a criminal act against another while on the job or harasses a co-worker. However, an employer who fails to use personality assessment or integrity testing will be unlikely to incur liability for the omission;[120] rather, liability tends to arise when an employer fails to conduct a background check into an employee's prior criminal history; that is, fails to find evidence of bad deeds rather than bad thoughts.[121]

Thus, the court in *Southern Bell Telephone & Telegraph Co. v. Sharara* concluded that employers do not have any "blanket requirement" to scan their employees with periodic psychological tests simply "to determine whether any employee has developed or is developing negative or antisocial propensities," at least where the employee has maintained a good work history.[122] Accordingly, an employer remains free from liability for failing to test or interview in lieu of testing where an employee has a good work history.[123] While the majority in *Sharara* focused on the employer's burden rather than the intrusion on the employee, in a special concurrence, one judge emphasized that an employer requiring "blanket" psychological testing without the employees' consent would implicate "serious First Amendment individual rights of privacy and other employee constitutional and civil rights."[124]

Even where an employer administers a personality test that yields negative results, an employer will likely not be liable for the employee's subsequent bad acts when the employee's behavior did not give the employer reason to believe the employee was a risk. For example, in *Mendoza v. City of Los Angeles*, a police officer's psychological evaluation, which included an MMPI test and a test for alcohol abuse, revealed that he might have abused alcohol.[125] However, the

119. GOLDBERG ET AL., *supra* note 103, at 20–21.

120. *See* S. Bell Tel. & Tel. Co. v. Sharara, 307 S.E.2d 129, 131–32 (Ga. Ct. App. 1983).

121. *See* HÉBERT, *supra* note 89, § 1:02.

122. *Sharara*, 307 S.E.2d at 131–32 (reversing the lower court's denial of the employer's motion for summary judgment). The customer sued his employer under a theory of negligent hiring, claiming that the employer should have subjected its employees to periodic personality tests to discern violent tendencies. *Id.* at 131.

123. *Id.*

124. *Id.* at 132 (Deen, J., concurring).

125. Mendoza v. City of L.A., 66 Cal. App. 4th 1333, 1337–38 (1998). The plaintiffs were the children of a woman who had been shot by an off-duty police officer who was drunk at the time. *Id.* at 1335. They argued that his employer, a municipality, was liable for their mother's death,

officer's peaceful work history, along with an expert's criticism that the test would "identify a large segment of false positives,"[126] led the court to conclude that the employer was not liable for employing the officer.[127] Similarly, a federal district court concluded that an employer could not be liable for negligence in hiring a salesman who subsequently initiated a violent confrontation with a motorist, notwithstanding that a pre-employment test had indicated that the employee was "a person of 'high aggression.'"[128] The court reasoned that the test results did not sufficiently notify the employer of any purported violent tendencies of the employee, at least where he had not displayed any such tendencies in the two years in which he had been employed.[129]

In sum, more and more employers use personality tests in addition to background checks to help them determine whom to hire. However, personality tests are not terribly reliable: results can vary from one testing episode to another and one evaluator to another. Furthermore, the tests may not accurately assess the traits they purport to measure, and the traits measured may not in fact correlate well with those demanded by a particular job. Liability fears do not justify personality tests either. Thus, the benefits do not justify the harms to privacy these tests can impose, harms discussed in the next Part.

III. The Harms to Privacy

Personality testing can harm individual privacy, first by intruding unnecessarily on the individual's solitude, and second by revealing intimate information, possibly stigmatizing the individual. By putting controls on employers' use of personality tests, the law can promote

supporting their claim with the psychological evaluation the employer had conducted prior to hiring the officer. *Id.* at 1337–38.

126. *Id.* at 1338. The court concluded that any signs that the employee may have been abusing alcohol did not suffice to establish proximate cause of the mother's death, given that the employee "had no history of past violence or excessive use of force." *Id.* at 1342.

127. *Id.*

128. Thatcher v. Brennan, 657 F. Supp. 6, 12 (S.D. Miss. 1986). In *Thatcher*, a federal district court granted summary judgment to an employer on a negligent hiring claim brought by a person assaulted by one of the employer's employees. *Id.* at 6–7. The employer had administered a personality inventory test and an adaptability test before hiring the employee, and the evaluators of the tests concluded that the employee was a "person of high aggression" and that the results "appear[ed] to reflect a young person undergoing a great deal of emotional and personal stress and turmoil." *Id.* at 11. The employer nonetheless hired the employee. The plaintiff argued that the test results tended to show either that the employee had a propensity for violence or that the employer knew about any such propensity for violence. However, the court rejected this argument, pointing out that in the two-year span between the evaluation and the assault, the employee had not had any incidents of violence. *Id.* at 11–12.

129. *Id.*

personal autonomy, preserve personality, and discourage irrational decision making.

Personality cannot be touched, bought, or sold. While behavior provides us with a concrete example of conduct—a deed, an act—personality cannot be observed, measured, or tested directly. Instead, one observes another's behavior and infers attributes of that person's personality from those observations. That gap between the behavior and our assessment leaves room for uncertainty. That gap allows us to protect our personality as our own, a matter of privacy.

In launching the modern recognition of privacy rights in America, Warren and Brandeis argued that each person has an "inviolate personality";[130] to Professor Edward Bloustein, this inviolate personality "defines man's essence as a unique and self-determining being."[131] The sociologist Erving Goffman also emphasized the concept of "personal identity," noting that "the core" of a person's being is "a general and central aspect of him, making him different through and through, not merely identifiably different, from those who are most like him."[132]

Goffman described individuals as having internal "territories of the self," defining a territory as a "field of things" or a "preserve" that an individual is entitled "to possess, control, use, or dispose of."[133] By limiting, or even prohibiting, personality testing for employment uses, we can allow individuals to preserve their internal territories of the self and avoid the stigmatizing effects of the release of testing information. A discussion of the specific threats to privacy that personality tests pose and the benefits of controlling the use of such tests follow.

A. Threats to the "Territories of the Self": Intrusion, Disclosure, and Stigma

Although each individual may have a stable collection of traits unique to that person, people reveal different aspects of their person-

130. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

131. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

132. GOFFMAN, STIGMA, *supra* note 16, at 56.

133. GOFFMAN, *The Territories of the Self*, *supra* note 13, at 28–29. As Joel Feinberg has said, "The root idea in the generic concept of privacy is that of a privileged territory or domain in which an individual person has the exclusive authority of determining whether another may enter, and if so, when and for how long, and under what conditions." 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 24 (1985); *see also* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 971–72 (1989).

alities in different contexts.[134] When in public, individuals need to create social facades to manage self and community.[135] They also need to be able to drop these facades in private; Goffman believed that each person needs a "backstage" area, a place where the "masks" that one wears for various appearances in social roles can be shed. [136] In the employment context, allowing employees to have a backstage area can free them to better perform their jobs, benefitting the employer.[137]

Though Goffman's work preceded modern information technology, recent empirical evidence supports this theory of territories and boundaries in digital arenas: we need to compartmentalize discrete areas of our lives, and we particularly need to be able to separate our work lives from our social ones, a need that serves human dignity.[138] Over half of the respondents in one study agreed with the statement, "Work life is completely separate from personal life, and what you do in one should not affect the other."[139] Along those lines, two-thirds of the respondents considered it "very inappropriate" for employers to demand access to employee's social networking sites, [140] emphasizing the boundaries that employees seek to maintain in the digital world.

If individuals are not permitted to maintain some boundaries, a gated-off backstage area, their personal growth may suffer. The following discussion explores two particular harms that may arise from employee personality testing that seeks to spotlight the "backstage" area of an employee's personality: the injury of the intrusion into that area and the sting from the revelation of stigmatizing or other sensitive information acquired from the intrusion.

1. Intrusion

The act of testing can, in and of itself, damage one's dignity by intruding into the inner territories of a person's personhood, one's inner life, reaching from the front stage to Goffman's backstage. The intrusion can break down the boundary between one's social persona (the publicly visible employee) and one's private self.

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134. *See* GOFFMAN, *The Territories of the Self*, *supra* note 13, at 31.

135. Cohen, *supra* note 5, at 1427 (citing GOFFMAN, THE PRESENTATION OF SELF, *supra* note 15, at 128–30).

136. *See* GOFFMAN, THE PRESENTATION OF SELF, *supra* note 15, at 110–12.

137. ROSEN, *supra* note 90, at 122–27 (2000) (citing GOFFMAN, THE PRESENTATION OF SELF, *supra* note 15, at 128–30).

138. Levin & Abril, *supra* note 15, at 1043–44.

139. *Id.*

140. *Id.*

With the help of technology, employers have been able to widen the gap in power between employer and employees by increasing the employers' abilities to observe employees, a transparency imbalance.[141] Some of this technology has allowed employers increasing access to an employee's behavior. For example, surveillance cameras can record employees' actions, Internet monitors can identify the websites that employees visit, and keystroke loggers can identify the words that employees commit to a screen.

When an employer (in contrast to a therapist) demands personality testing, the testing can be particularly intrusive, especially when paired with the target's eagerness to find employment.[142] That is, it can emphasize the power imbalance between the employer and an employee or hopeful applicant. Even as far back as the 1950s, personality tests of job applicants and employees have been criticized for their intrusiveness; William Whyte asked in *The Organization Man*, "[I]s the individual's innermost self any business of the organization's? . . . In return for the salary that The Organization gives the individual, it can ask for superlative work from him, but it should not ask for his psyche as well."[143]

Personality testing differs from this sort of surveillance in that it seeks to observe not just what an employee does, but how that employee thinks—processes that pertain not just to the employee's presence on the job, but the employee's being at all times: a surveillance of Whyte's "innermost self." This sort of surveillance enhances the employer's power over the employee. As Professor Daniel Solove points out, "The interrogator possesses extraordinary control over what information is elicited, how it is interpreted, and the impressions created by its revelations."[144] In her book *Nickel and Dimed: On (Not) Getting By in America*, author Barbara Ehrenreich noted the impact on dignity of an employer's personality testing: "It is unsettling, at the very least, to give a stranger access to things, like your self-doubts and your urine, that are otherwise shared only in medical or therapeutic situations."[145]

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141. For instance, a 2007 survey by the American Management Association revealed that 66% of the respondent employers monitored their employees Internet connections; 45% tracked content, keystrokes, and keyboard time; and 10% monitored social networking sites. *The Latest on Workplace Monitoring and Surveillance*, AM. MGMT. ASS'N (Mar. 13, 2008), http://www.amanet.org/training/articles/The-Latest-on-Workplace-Monitoring-and-Surveillance.aspx.

142. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 501 (2006).

143. WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN 201 (1956).

144. Solove, *supra* note 142, at 502.

145. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 209 (2001). Aside from questions of validity, though, the tests may invade privacy by asking the target to disclose not just information about past job performance, but also information about

Ironically, to expose deeply personal psychological information in a job interview might well be considered inappropriate, violating, in the words of the philosopher Thomas Nagel, the "conventions of restraint."[146] We would not read our diary aloud to an employer, and as Daniel Solove notes, we restrain ourselves from reading another's diary.[147] Nonetheless, an employer seeking psychological "truths" may be just as intrusive and deserving of the same opprobrium.

This intrusion, and the resulting impact, is independent from the test's reliability and validity; they occur whether or not a personality test accurately measures the target's traits. The effect of having to read and satisfy inquiries about one's innermost thoughts can itself damage dignity. The examiner's probe itself breaches the boundaries of the territories of the self.[148] In the words of Edward Bloustein, such probing violates the individual's "right to determine 'to what extent his thoughts, sentiments, emotions shall be communicated to others.'"[149] In contrast, protecting those boundaries from the insatiable interest of employers—and others—protects us from being judged out of context.[150]

The intrusion's harm exists unameliorated by a corresponding expectation of treatment or understanding, as would be true in a clinical context. Rather, the employer, as personality examiner, seeks the information for its own use, to serve its own purposes, without any resulting beneficial treatment.

2. *Disclosure and Stigma*

The target of a personality investigation may suffer more than just harm from the intrusion; she may also suffer fear that the test results will be disclosed. Disclosing any assessment of one's individual personality can itself be harmful; however, disclosing an undesirable trait can stigmatize the target.[151] The type of disclosure varies: the test administrator will release results to an employer's agent; that agent can

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beliefs and attitudes that may have nothing to do with the skills relevant to the job being filled. Simply being asked the question may be unacceptably intrusive. Barbara Ehrenreich identified such personality tests as among the "routine indignities" inflicted upon low-wage job applicants in *Nickel and Dimed*. *Id.*

146. THOMAS NAGEL, *Concealment and Exposure*, *in* CONCEALMENT AND EXPOSURE 3, 8 (2002).

147. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1045 (2003).

148. *See* GOFFMAN, *The Territories of the Self*, *supra* note 13, at 28.

149. Bloustein, *supra* note 131, at 971 (quoting Warren & Brandeis, *supra* note 130, at 198).

150. ROSEN, *supra* note 90, at 20.

151. *See* INTEGRITY TESTING, *supra* note 79, at 12 (noting the stigma of being labeled as someone "at high risk to commit dishonest acts").

disseminate the results to others in the organization; and the employer can potentially report the results to others, either immediately or over the course of time.

Regardless of how valid or reliable personality tests may be, employers use them because they believe them to reveal specific characteristics of the target's personality.[152] In addition to developing theories about "territories of the self," Erving Goffman studied stigma, defined as "an attribute that is deeply discrediting"[153] or even a "mark of evil"[154] in the eyes of observers. When others observe the stigma, the individual can suffer shame and humiliation.[155] "Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality."[156] Goffman emphasized the social and moral impact of this sort of embarrassment,[157] "a *special kind of visibility* and exposure."[158]

While stigmas are often physical, psychological stigmas exist as well. An example of a physical stigma might be a missing limb or a large and unsightly birthmark. However, a personality trait may also be stigmatizing if that trait is generally considered undesirable by others. Thus, when a personality test purports to reveal undesirable traits in the target—perhaps dishonesty or paranoia—those traits may bear features of stigma, leading the target to feel discredited, ashamed, and humiliated.[159] These injuries would be over and above the disclosure's more material consequences: the employer's employment decision based on the test's results.

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152. *See supra* notes 113–19 and accompanying text.

153. GOFFMAN, STIGMA, *supra* note 16, at 2–3.

154. Paul Creelan, *Vicissitudes of the Sacred: Erving Goffman and the Book of Job*, 13 THEORY & SOC'Y 663, 666 (1984).

155. *See* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 665 (1997).

156. ALAN F. WESTIN, PRIVACY AND FREEDOM 33 (1970).

157. Michael Schudson, *Embarrassment and Erving Goffman's Idea of Human Nature*, 13 THEORY & SOC'Y 633, 646 (1984) (agreeing with Goffman that "embarrassment is a profoundly important feature of human motivation and social structure," but cautioning against viewing human beings solely as "avoiders of embarrassment").

158. Massaro, *supra* note 155, at 666 (quoting FRANCIS J. BROUCEK, SHAME AND THE SELF 23 (1991)); *see also* Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 77 (2001) ("To be humiliated is to have one's 'significance,' that is, 'one's sense of having value in the eyes of others,' undermined. . . . Humiliation typically occurs in relationships of unequal power where the humiliator has power over the victim . . . ." (quoting Linda M. Hartling & Tracy Luchetta, *Humiliation: Assessing the Impact of Derision, Degradation, and Debasement*, 19 J. PRIMARY PREVENTION 259, 261 (1999))).

159. This assumes, of course, that the target knows of the test's results.

An individual may reveal such a trait through examples of behavior, such as when someone who is prone to paranoia complains without justification that government agents are stalking him. However, personality test results may reveal, or purport to reveal, a trait that has not appeared in any actual conduct of the target. For instance, a psychological test may suggest that someone is vindictive or prone to stealing. If the test has sterling validity, which is unlikely,[160] the target may in fact have that trait, at least in particular contexts. Nonetheless, the target may have effectively suppressed that trait overall or in the specific context of the workplace, such that the individual has managed his or her behavior despite the discrediting trait.[161] In such a case, the personality test serves as the sole window into the otherwise invisible trait.

Some psychological traits may not be negative in the abstract, but may nonetheless be inapt for the particular position. Thus, being tagged with that trait may discredit the target in the particular context. For instance, a particularly introverted person might make a poor salesman, and a particularly exuberant person might make a poor undertaker. In such an event, being tagged with the trait may still be stigmatizing because it conflicts with the job's particular demands. It may also pigeonhole the person, permanently labeling her with the trait, a virtual tattoo of sorts.

Furthermore, stigmatizing may occur even when a personality test cannot accurately pinpoint a person's particular personality traits. That is, a test may attribute a trait that the target does not actually have, yet the target may nonetheless suffer discrediting from the attribution. For instance, a test may indicate that the target tends to paranoia when in fact the target has quite realistic and stable relationships with others. Regardless, the suggestion that a person has the unpleasant trait of paranoia may be stigmatizing. The limits on a personality test's ability to discern the target's inner traits may not be obvious to the observer, who may well assume that the test is valid and that the target actually harbors the stigmatizing characteristic.

The individual's injury from disclosure can first arise when the test's administrator views the results; this person may be directly affiliated with the employer or may be a third party. It can re-arise when the test results become available to others beyond the first person to view them, inflicting additional harm. Given the ease with which electronic

160. *See supra* notes 84–112 and accompanying text.

161. *See* INTEGRITY TESTS, *supra* note 79, at 64 (noting that someone identified as being at high risk for dishonesty may be able to control her future behavior and "overcome" the existence of the trait).

data can be copied, transferred, and publicized, the modern employee or applicant can fear more than discrediting from only the initial examiner. The results of a test, regardless of accuracy and regardless of relevance, may be viewed by any number of future potential employers, to say nothing of future potential acquaintances. Electronic records may offer the illusion of transparency into the target's personality, information that may be of salacious interest to many. Digital data can also live in perpetuity, such that the target may always have to wonder whether the report of what purports to be the inner workings of his mind will be read by the next person met.

Should test providers and employers organize to do so, personality test results could become amalgamated into a searchable database, sort of a matchmaking site for employment, rather than matrimony—a mall through which employers could shop for the right fit. On first blush, this possibility may not seem something to fear, but given the sensitivity of personality information and its individual nature, such a database might make individuals feel truly exposed and dehumanized, the backstage area put under a spotlight for ruthless perusal.[162] Algorithms could assign people into personality categories much the way marketing companies do for shopping: instead of "Chiphead" or "Connoisseur,"[163] individuals might be tagged as "Dull but Diligent" or "Office Rabble-rouser." Individuals portrayed as having stigmatizing traits could end up blacklisted. In addition, given the shaky reliability and validity of most personality tests,[164] individual profiles could well be inaccurate, but nonetheless impervious to the protests of the profiled.

B. The Benefits of Controls on Testing

Privacy protections are tools conferred by law that can protect these territories of the self; such protection can promote individual autonomy, allowing people to develop free from the interfering effects of intrusion and disclosure.[165] Furthermore, cloaking the intricacies of a person's personality from the untrammeled gaze of others can protect

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162. *See* GOFFMAN, THE PRESENTATION OF SELF, *supra* note 15, at 112–13.

163. *See* McClurg, *supra* note 40, at 76 (describing the categories that the data aggregator Acxiom uses to describe consumers).

164. *See supra* notes 84–112 and accompanying text.

165. GOFFMAN, *The Territories of the Self*, *supra* note 13, at 28–29. Robert Post describes the boundaries as "defined by normative and social factors." Post, *supra* note 133, at 972. Jonathan Kahn has observed that Post has "elaborate[d] a spatial conception of privacy as normative and socially constructed. Such territories are contextual: their boundaries are socially determined and vary according to a wide variety of factors." Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 393 (2003).

those others as well because without access to the information they will not be able to misunderstand or misuse the information. In the employment environment, testing controls can benefit employers because they would be motivated to use better tools to find suitable employees.

Protecting the boundaries of the territories of the self promotes individual autonomy. While Erving Goffman wrote primarily about such territories in the context of individual face-to-face interactions, privacy scholars have extended the concept to individual-to-organization interactions, including employee-to-employer interactions.[166] Humans have a need to keep certain facts about themselves entirely private.[167] Potentially discrediting traits may well be among those facts, but individuals need these boundaries to protect benign information as well; individuals need for others to recognize that we each have a circumscribed existence.[168] A personality test administered at an employer's behest can breach those boundaries and present the individual as an inert thing to be examined, rather than an autonomous person to be respected.[169]

Individuals need autonomy to fully develop and maintain their own personalities.[170] Personhood requires the "freedom to define oneself" without "being coerced into a definitive identity by an outside force."[171] Just as individuals need the autonomy to create a backstage that is cordoned off from view, they also need the autonomy to determine for themselves what persons they will be.

The need for autonomy to develop personhood does not fade over time. Although we typically think of personality as being fixed, it is not static. As put by John Dewey, a person is constantly evolving: "something moving, changing, discrete, and above all initiating instead of final."[172] If we are fortunate, we flourish.

Testing may interfere with that development by animating the principle known as the observer-expectancy effect by which a tester may influence the target of a psychological test merely by observing that

166. Kim, *supra* note 14, at 691 n.101.

167. WESTIN, *supra* note 156, at 368.

168. *See* Kim, *supra* note 14, at 691.

169. F. ALLAN HANSON, TESTING TESTING: SOCIAL CONSEQUENCES OF THE EXAMINED LIFE 179 (1993).

170. Jeffrey Rosen, *The Eroded Self*, N.Y. TIMES MAG., Apr. 30, 2000, at 47, 66–67; *see also* WESTIN, *supra* note 156, at 13 (describing anthropological studies as showing that in virtually all societies, humans seek some privacy).

171. Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 153 (1991).

172. JOHN DEWEY, EXPERIENCE AND NATURE 215 (1929).

target.[173] The information that investigating, testing, and monitoring can yield may well be sufficiently sensitive that individuals start to mold their behavior to avoid negative reactions. If the test results indicate a negative quality, a stigmatizing trait, that result may itself cause the personality to change. Even if the target does not actually possess that trait, to learn that the trait has been ascribed to him may change the individual by altering his or her self-conception. [174]

Controls on testing can also reduce irrational decision making. Privacy preserves one's external image in the eyes of others and can curb others from making ill-informed choices based on limited, or even false, information. The lure of personality tests is understandable. Not only do they give the illusion of an MRI scan of the applicant's personality, they offer a shortcut for making complicated decisions that may involved many variables and people. Psychological tests may lull employers into believing that they have learned the "truth" about an applicant, the "real person" behind the mask. The test's results may provide the employer with an "aura of logic."[175] However, the intrusion may well not be justified by the benefits to the employer.[176]

Employers, or more specifically, the individuals making employment decisions for employers, are not immune to the cognitive biases that affect many of us and may make quick judgments out of context.[177] Daniel Solove warns that private information is particularly vulnerable to being misunderstood because "people have a limited attention span for learning the complete story."[178] In the context of personality tests, the person receiving a snapshot of the assessment of another's inner mind may well seize upon isolated or discrete facets of the assessment, highlighting a particular detail divorced from a larger and more complete picture of the person.[179] Below are two specific types of distorting effects, one known as the "devil's-horn effect," and the other the "availability bias." These biases may interfere with the employer's best interests, causing the employer to lose what would have been a valuable, productive employee.

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173. INTERPERSONAL EXPECTATIONS: THEORY, RESEARCH, AND APPLICATIONS 130 (Peter David Blanck ed., 1993).

174. GOFFMAN, STIGMA, *supra* note 16, at 32. Goffman notes that one who suddenly acquires a defect "may relatively quickly experience a change in apparent personality." *Id.* at 132.

175. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 490 (1986–1987).

176. *See supra* notes 84–112 and accompanying text.

177. J.D. Trout, *Paternalism and Cognitive Bias*, 24 LAW & PHIL. 393, 408 (2005) (arguing that governments may legitimately regulate to correct cognitive biases in some circumstances).

178. Solove, *supra* note 147, at 1036.

179. *See* ROSEN, *supra* note 90, at 10 ("[T]here is a growing danger that a part of our identity will be confused with the whole of our identity.").

The devil's-horn effect, one such cognitive bias, may lead an employer to emphasize one undesirable trait over other, more desirable traits.[180] The employer may view the employee as a person with a trait, rather than a person with one trait among many. An employer who reads of an applicant's answer to a question about whether, for example, the applicant believes in God[181] may allow that answer to obscure information about other traits of the individual that the employer may find more favorable. One plaintiff noted that this particular question troubled him as he was taking the MMPI for a position as a firefighter: he worried that he would not be hired if he answered no.[182]

The availability bias, another well-recognized bias, identifies another misuse of information, which occurs when one designates an easily remembered event as being representative. [183] That is, a highly colorful or recent event may anchor in one's memory and instill the belief that the event is more common than it actually is.[184] We may overemphasize the importance of available information, especially when it is presented vividly or is recent.[185] This tendency can cause us to misassess risk. For example, people are inclined to underestimate the risks of relatively unpublicized causes of death such as heart disease or stroke and likewise overestimate highly publicized ones such as accidents, homicides, or electrocutions.[186] Employers may suffer from the bias if they recall instances of employers being held liable for an employee's bad behavior when, as discussed above, the risk of liability for failing to conduct or act on a personality test's results is fairly low.[187] Or an employer may recall a single unfortunate hire over numerous successful ones. The marketing materials of personality test purveyors may play upon such visibilities.[188] Ideally, employers would assess the risk of employing someone with particular traits based on

180. *See id.* at 137–38 (referring to the effect of a past misdeed on the observer's evaluation of the target's character); *see also* Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1047 (1984) (describing how jurors can overestimate the tendency of an accused to act in accordance with prior behavior).

181. That question from the MMPI led to an applicant's lawsuit in *McKenna v. Fargo*, 451 F. Supp. 1355, 1365 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979).

182. *Id.*

183. Trout, *supra* note 177, at 399.

184. *See* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 457–58 (2003).

185. *See* Trout, *supra* note 177, at 399.

186. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 707 (1999).

187. *See supra* notes 120–29 and accompanying text.

188. *See supra* notes 118–19 and accompanying text.

empirical data tying improved or diminished employee performance to specific personality traits that were accurately identified, but so far such data is generally not available.

By cloaking personality information, disclosure protections can safeguard against these sorts of irrational judgments.[189] Now, not all judgments that employers may make based on personality tests will necessarily be irrational; as Professor Julie Cohen has pointed out, "[t]he need to judge others out of context is the logical product of rational self-interest" in some contexts.[190] But the shaky reliability and validity of such tests, discussed above, undercuts the rationality of making judgments based on them. Protecting employees' and applicants' privacy by restricting the use of such tests can not only foster their autonomy and allow them to develop their personalities, but may well help employers make decisions that will enhance rather than diminish productivity.

Finally, privacy safeguards may also benefit society at large. Privacy does not just protect individuals; by protecting individual privacy, we help society function in a predictable and personality-preserving way.[191] Privacy can serve "common, public, and collective purposes" in addition to individual purposes.[192]

In summary, personality tests can harmfully intrude on individuals coerced into taking them, and the results may stigmatize individuals by characterizing them, whether accurately or not, as having certain undesirable traits. Protecting individuals from such testing and disclosure can promote individual autonomy, which will allow the individuals to develop their personalities free from the unwarranted interference that such testing may cause. Furthermore, such protections need not be to an employer's detriment, but may in fact neutralize two cognitive biases that personality tests may foster: the devil's-horn effect and the availability bias. Employers would remain free to use testing tools that have the reliability and validity that personality tests do not have, allowing them to fulfill their needs without the harmful effects on privacy and personality.

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189. *See* Solove, *supra* note 147, at 1034.

190. Julie E. Cohen, *Privacy, Ideology, and Technology: A Response to Jeffrey Rosen*, 89 GEO. L.J. 2029, 2033–34 (2001).

191. ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 429 (enlarged ed. 1968) ("'Privacy' is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure.").

192. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 150 (2004) (quoting PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 221 (1995)).

IV. The Inadequate Patchwork of Existing Disparate Legal Structures

Personality testing in and of itself has drawn little topical legislation at either the state or the federal level. However, both federal and state law offer legal structures that bear on the investigation and surveillance of employees—structures that can apply to personality testing. The U.S. Constitution sometimes protects employees or potential employees of public employers. Among federal statutes that may apply are the Employee Polygraph Protection Act (EPPA),[193] the Americans with Disabilities Act (ADA),[194] and the Fair Credit Reporting Act (FCRA).[195] A state may also have constitutional provisions that protect privacy, and some states have enacted statutes designed to preserve some areas of privacy from employers. States also have common law privacy torts that may apply to personality testing. However, overall these privacy tools are uneven, patchy, and inadequate to fully protect individuals from intrusive personality testing.

A. Federal Protections

Federal law provides some constitutional protections for governmental employees. Federal statutes specify their beneficiaries, and those addressing polygraphs, disability discrimination, and credit reporting may protect employees from personality tests in some circumstances, or at least offer possible models for a new solution.

1. Federal Constitutional Protections

Federal privacy protections can arise under the U.S. Constitution's First Amendment and also under the Fourteenth Amendment and its

193. 29 U.S.C. §§ 2001–2009 (2006). The EPPA grants six categories of exemptions, one of which specifically declares that the Act does not apply to governmental employees. *Id.* § 2006(a). Other exemptions allow polygraph testing of experts and consultants who work in some capacity with U.S. governmental entities related to national security, *id.* § 2006(b), employers who provide security services or are in businesses involving federally controlled substances, *id.* § 2006(e)–(f), and significantly, polygraphs administered in the course of an ongoing investigation of an economic loss or injury to the employer's business, *id.* § 2006(d). However, to benefit from the ongoing-investigation exemption, the employer must reasonably suspect that the examined employee was involved in the incident and must provide the employee with a written statement that provides specified details of the incident. *Id.* Where an exemption applies, the employer may not reveal the test's results beyond certain designated disclosures, which include the test-taker, the employer that requested the test, and courts and similar entities in accordance with a court order. *Id.* § 2008.

194. 42 U.S.C. §§ 12101–12213, *amended by* Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008).

195. 15 U.S.C. §§ 1681–1681x.

concept of personal liberty.[196] The First Amendment may constrain a government from testing that inquires into a person's beliefs.[197] In *Baird v. State Bar of Arizona*, the petitioner successfully challenged the denial of her application to the Arizona state bar on the grounds that she refused to disclose whether she had been a member of the Communist party or any other organization "that advocates overthrow of the United States Government by force or violence."[198] The Supreme Court reasoned that "[w]hen a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest."[199] The Court implicitly recognized the link between one's beliefs and one's interior being, a being the individual is entitled to shield from unjustifiable probing.

Aside from the First Amendment, the Fourteenth Amendment protects two kinds of privacy interests: the interest in "avoiding disclosure of personal matters" and the interest in "independence in making certain kinds of important decisions."[200] The disclosure protection may restrict public (though not private) employers in their use of personality tests, given the potential for stigma. The decisions indicate that courts give great weight to the employer's asserted interests. However, although those interests may outweigh the employee's resistance to the test's intrusion, some courts nonetheless respect the concern that the employer will disclose the results and caution employers to keep the results of such tests confidential.

For example, in *Walls v. City of Petersburg*, the Fourth Circuit examined the employment test required of the plaintiff, a police department employee fired after refusing to fill out the test.[201] Arguing that the test invaded a constitutionally protected zone of privacy, the employee specifically objected to being questioned about her possible homosexuality, marital history, financial information, and the criminal records of family members.[202] The court concluded that while the plaintiff could not claim a privacy interest in information available from public records, such as her marriage and divorce background, she could claim a privacy interest in information about her personal

196. Other constitutional provisions, such as the Fourth Amendment, can pertain to privacy but are not discussed here.

197. *See* Baird v. State Bar of Ariz., 401 U.S. 1, 1 (1971).

198. *Id.* at 4–5.

199. *Id.* at 6–7.

200. Whalen v. Roe, 429 U.S. 589, 598–600 & n.23 (1977).

201. 895 F.2d 188, 190 (4th Cir. 1990).

202. *See id.* at 193–94.

finances.[203] Nonetheless, the court identified the employer's concerns with corruption among city employees as sufficiently compelling to outweigh those privacy interests.[204] In short, the intrusion into the employee's privacy was justified.

The *Walls* court specifically considered the danger of unauthorized disclosure of those test results that revealed nonpublic information, effectively recognizing that an employee has a constitutionally protected interest in the confidentiality of such information.[205] Nevertheless, the court concluded that this particular employer satisfactorily protected the information.[206] The employer kept the results in a private filing cabinet that was available to only four persons and was locked at night.[207] Significantly, the court suggested that a public employer that does not protect sensitive test results may face liability: "[I]f this type of information had been more widely distributed, our conclusions might have been different."[208] Furthermore, the court warned of advancing technology and cautioned that "we need to be ever diligent to guard against misuse."[209]

While *Walls* involved a more traditional employment test that inquired about behavior rather than personality, the privacy of psychological tests came under scrutiny in *McKenna v. Fargo*.[210] The *McKenna* court held that the psychological tests the defendant required of the plaintiffs, who sought employment as firefighters, intruded upon their constitutional right to privacy.[211] The required evaluation was comprised a number of traditional personality tests, including the MMPI, the Rorschach Test, and the Thematic Apperception Test.[212] No single test screened the candidates; rather, a trained clinical psychologist evaluated the results in conjunction with a personal interview with the candidates.[213] The court viewed the employer's reliance on psychological testing with overt skepticism: "Psychology is not yet the science that medicine is and tests are too

203. *Id.*

204. *Id.* at 194.

205. *Id.*

206. *Id.*

207. *Walls*, 895 F.2d at 194.

208. *Id.*

209. *Id.* at 194–95.

210. *See* 451 F. Supp. 1355 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979).

211. *Id.* at 1381.

212. *Id.* at 1359–60. In addition, the employer used the Edwards Personal Preference Schedule (a self-report inventory like the MMPI), the Incomplete Sentence Test, and the Draw-a-Person (or Human-Figure Drawing) Test. *Id.* at 1360–61.

213. *Id.* at 1362–63.

frequently used like talismanic formulas."[214] The court also recognized the particular harm such tests can cause:

> The evaluation looks deeply into an applicant's personality, much as a clinical psychologist would if requested to do so by an applicant. Fire-fighter candidates are called upon to reveal the essence of their experience of life, the collective stream of thoughts and feelings that arise from the ongoing dialogue which individuals carry on between the world and themselves in the privacy of their being. It involves a loss of the power individuals treasure to reveal or conceal their personality or their emotions as they see fit, from intimacy to solitude.[215]

Nonetheless the *McKenna* court, like the *Walls* court, concluded that the state's interest in "identifying applicants whose emotional make-up makes them high risk candidates for the job of fire fighting" justified the intrusion that the psychological evaluation posed.[216] In rejecting the plaintiffs' argument that the tests did not accurately evaluate the applicants' personalities, the court described the tests as having a margin of error that did not rise to the level of unreliability.[217] Again, just like the *Walls* court, the *McKenna* court was sensitive to the plaintiffs' fear that the defendants would disclose the test results; the court emphasized that the defendant should prevent the disclosure of the information gathered by the testing program and retain the data for only a limited period of time, destroying it thereafter.[218]

Thus, courts appear to recognize that the U.S. Constitution's privacy protections apply to the interests of employees in avoiding intrusive testing, but they are ready to allow a public employer's interest in the test results to outweigh the employee's concerns. Nonetheless, while allowing the testing itself, courts validate employees' concerns that someone else's eyes will fall upon the results.

2. *Federal Statutory Protections*

The U.S. Constitution, of course, pertains only to the staffing of governmental jobs and not to those in the private sector. Certain federal statutes, however, cover a much broader pool of employers. Congress's most decisive move against any sort of psychological test was to enact the Employee Polygraph Protection Act of 1988, which prohibits private employers engaged in interstate commerce from using

214. *Id.* at 1357.

215. *Id.* at 1380–81.

216. *McKenna*, 451 F. Supp. at 1381.

217. *Id.*

218. *Id.* at 1382.

polygraphs to screen job applicants.[219] The EPPA allows polygraph testing only for employment that entails certain security functions or access to controlled substances, or for qualified investigations into employment misconduct.[220] Personality tests resemble polygraph tests in that they, too, seek to delve beneath the surface of answers to questions to find out what the test-taker is "really" thinking (or has "really" done). However, Congress explicitly rejected an opportunity to pull "pencil and paper tests" into the EPPA's protections;[221] instead, it applies only where the test uses a mechanical or electrical device to measure the target's physiological responses to questions.[222]

A subsequent statute, the federal ADA, has led to vibrant debates about personality testing, employment, and discrimination. The ADA permits employers to test their employees and applicants but with several restrictions. The ADA marks a point in the timeline of the employment relationship: employers have more freedom to test applicants *after* the employer makes an offer.[223] As a general rule, the ADA allows employers to conduct medical examinations after the employer has offered employment, so long as the "examination or inquiry is shown to be job-related and consistent with business necessity."[224] However, before the employer extends an offer, it may not inquire of an applicant's possible disabilities, but may only ask whether the applicant can perform specific, essential, job-related functions.[225]

In applying the ADA to personality testing, courts have sought to distinguish personality traits, which do not receive protection from the ADA, from mental disorders, which do.[226] Commentary about the ADA by the Equal Employment Opportunity Commission (EEOC) indicates that the agency envisions a reasonably sharp distinction be-

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219. *See* 29 U.S.C. §§ 2001–2009 (2006).

220. *Id.* § 2006(e)–(f).

221. H.R. REP. NO. 100-659, at 11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 749, 750 ("The conferees also do not intend to include written or oral tests (commonly referred to as 'honesty' or 'paper and pencil' tests) within the definition of lie detector."). Wisconsin has likewise ruled that a paper honesty test did not fall within the prohibitions of the state's polygraph test act. Pluskota v. Roadrunner Freight Sys., Inc., 524 N.W.2d 904, 908 (Wis. Ct. App. 1994) (reasoning that the honesty test did not measure physiological responses of the test subject).

222. 29 U.S.C. § 2001(3) (defining "lie detector").

223. *See* 42 U.S.C. § 12112(d).

224. 42 U.S.C. § 12112(d)(4); *see also* Befort, *supra* note 18, at 386–87.

225. 29 C.F.R. §§ 1630.13(a), 1630.14(a) (2010).

226. Smith, *supra* note 54, at 105–06 (describing the difference as "socially constructed," rather than something that can be measured, and describing the courts' treatment as an approach of "I know it when I see it"); *see also* 29 C.F.R. app. § 1630.2(h) (stating that individuals with "common personality traits such as poor judgment or a quick temper" are not considered disabled "where these are not symptoms of a mental or psychological disorder").

tween personality testing and medical testing. In its Enforcement Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations,[227] the EEOC provides that employers may conduct psychological testing at the pre-offer stage so long as the tests do not rise to the level of a medical examination.[228] Thus, a test that is designed and used to measure only traits such as "honesty, preferences, and habits" is not a medical examination.[229] A psychological examination crosses into medical examination territory when it would provide evidence that would lead to identifying a mental disorder or impairment.[230]

However, these two categories—"psychological testing" and "medical examinations"—may deceptively appear to be discrete. One scholar has suggested that the difference between "personality traits" and "mental illness" is socially constructed, rather than based in empirical data.[231] Common personality traits, such as anxiety, can also be characteristics of a mental disability, and thus evidence of that trait may also evince a mental disorder.[232] Regardless of what mental health professionals may think, courts interpreting the ADA have followed the lead of the EEOC in distinguishing "mental illness" from "personality traits."[233]

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227. U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), *available at* http://www.eeoc.gov/policy/docs/preemp.html [hereinafter ADA Enforcement Guidance I]. The agency has also issued guidelines for post-hiring testing. U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html [hereinafter ADA Enforcement Guidance II]. For additional information, see Smith, *supra* note 54, at 130–32.

228. ADA Enforcement Guidance II, *supra* note 227.

229. *Id.*

230. *Id.*

231. Smith, *supra* note 54, at 105 ("[M]ental disability is not something separate and apart from personality, it simply represents extremes along a variety of cognitive and affective continua." (quoting SUSAN STEFAN, HOLLOW PROMISES: EMPLOYMENT DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES 63 (2002))).

232. *See* STEFAN, *supra* note 231, at 63 (noting that among characteristics of mental disability in the workplace that can be considered "common personality traits" are "the inability to tolerate stress, difficulties with interpersonal and social relationships, and periodic difficulties in focusing and concentration"); U.S. Equal Emp't Opportunity Comm'n, EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 3, 1997), *available at* http://www.eeoc.gov/policy/docs/psych.html [hereinafter ADA Enforcement Guidance III].

233. *See, e.g.*, Daley v. Koch, 892 F.2d 212, 214–15 (2d Cir. 1989) (concluding that a police applicant who was assessed as having "poor judgment, irresponsible behavior and poor impulse control" was nonetheless not regarded as disabled, affirming the dismissal of the applicant's Rehabilitation Act claim); Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) (concluding that an employee with acrophobia, or fear of heights, was not disabled for purposes of the Rehabilitation Act because it did not substantially limit his ability to work); Mickens v. Polk Cnty. Sch. Bd.,

Only one federal appellate circuit, the Seventh Circuit, has wrestled with the overlap between a personality test and a medical test for purposes of the ADA. In *Karraker v. Rent-A-Center, Inc.*, the plaintiffs, employees of the defendant, challenged the defendant's use of the MMPI in promoting employees.[234] At issue was whether the MMPI was prohibited as a "medical examination" under the ADA.[235] The defendant used a personality test that included a version of the MMPI test that comprised 502 questions, some of which required the applicant to declare as either true or false certain statements that appeared to move beyond personality into inquiries of mental distress. Among the suspect statements were "At times I have fits of laughing and crying that I cannot control" and "My soul sometimes leaves my body."[236]

The employer argued that the test was meant to identify personality traits, not to reveal mental illness.[237] However, the Seventh Circuit rejected that argument, concluding that the MMPI is a medical examination for purposes of the ADA.[238] The test's origins significantly influenced the court, which noted that the test was "designed, at least in part, to reveal mental illness."[239] The court emphasized that the MMPI not only measures personality traits but also "considers where an applicant falls on scales measuring traits such as depression, hypochondriasis, hysteria, paranoia, and mania. In fact, elevated scores on certain scales of the MMPI can be used in diagnoses of certain psychiatric disorders."[240]

If a personality test is a medical examination under the ADA, an employer may not use it to screen applicants before employing

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430 F. Supp. 2d 1265, 1274 (M.D. Fla. 2006) ("Emotional volatility or imbalance is not a disability . . . ."); Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566, 1580–81 (N.D. Ala. 1996) (concluding that the employer's request that an employee with a "bad attitude" seek personal counseling did not indicate that the employee was perceived as disabled); Clark v. Va. Bd. of Bar Exam'rs, 861 F. Supp. 512, 517 (E.D. Va. 1994) (mem.) (stating in dicta that a bar applicant's depression was not a disability because it did not substantially limit her ability to perform any major life activity, suggesting that depression is merely a "commonplace condition"); *see also* 29 C.F.R. app. § 1630.2(h) (2010) (interpreting "physical or mental impairment" and specifying that individuals with "common personality traits such as poor judgment or a quick temper" are not considered disabled).

234. 411 F.3d 831, 833–34 (7th Cir. 2005).

235. *Id.* at 835.

236. *Id.* at 833 & n.1. Questions on the Revised MMPI include "I like mechanics magazines" and "I have never indulged in any unusual sex practices." L. CAMILLE HÉBERT, EMPLOYEE PRIVACY LAW § 7:1 (2006 & Cumulative Supp. 2007).

237. *Karraker*, 411 F.3d at 835.

238. *Id.* at 837.

239. *Id.*

240. *Id.* at 833–34 (footnote omitted).

them.[241] Furthermore, after offering the applicant a job, the employer may only test the target if the employer shows that the personality test is "job-related and consistent with business necessity."[242]

In addition to the ADA, the federal Fair Credit Reporting Act may offer some protection in the guise of a source that may initially appear to be inapt. The report of an applicant's or employee's personality test may well fall within the FCRA, even if the test avoids matters of credit. The FCRA subjects consumer reporting agencies to a variety of accuracy and privacy restrictions, and commercial testing entities likely fall within that category.[243] The FCRA defines "consumer reporting agency" quite broadly, in part because it defines "consumer report," an essential term of the definition, quite broadly. A consumer report "means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, *character*, *general reputation*, *personal characteristics*, *or mode of living*" where that information is "used or expected to be used or collected" for, among other purposes, "the consumer's eligibility for" employment.[244] In turn, a "consumer reporting agency" includes "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties."[245] The broad definition of a consumer report includes information that bears on "personal characteristics," a term sufficiently broad to include psychological testing and medical examinations.[246] Thus, an institution that administers psychological tests to employees or applicants on behalf of employers will likely be a consumer reporting agency because it regularly assembles or evaluates information on consumers (test-takers) for the purpose of communicating information about a consumer's personal characteristics (his personality) for employment purposes.[247]

However, just because a test administrator might be a consumer reporting agency does not necessarily mean the test-taker will receive the FCRA's protections for consumer reports. The sources of information in the report determine its status; if the report contains absolutely nothing but "information solely as to transactions . . . between"

241. 29 C.F.R. § 1630.13(a) (2010).
242. 42 U.S.C. § 12112(d)(4)(A) (2006).
243. *See, e.g.*, 15 U.S.C. §§ 1681e, 1681h.
244. *Id.* § 1681a(d)(1) (emphasis added) (footnote omitted).
245. *Id.* § 1681a(f). The definition includes an interstate commerce nexus as well. *Id.*
246. *Id.* § 1681a(d)(1).
247. *See id.*

the employee and the test administrator, the report will likely be exempt from the definition of a consumer report, leaving the employee unprotected by the FCRA's disclosure restrictions.[248] In contrast, if the test inquires into the test-taker's experiences with others, or if the test report includes data from sources other than the test-taker, the test report should qualify as a consumer report and the FCRA's protections will ensue.[249]

In contrast to a third-party test administrator, an employer that conducts such tests itself would likely not be a consumer reporting agency unless it was itself in the business of furnishing consumer reports to third parties.[250] In that case, the FCRA would not prohibit the employer from disclosing the information revealed by the test and thus would not provide test-takers with any protection.

The FCRA has both virtues and vices for purposes of keeping private personality test information. For instance, the FCRA appears to allow the target to consent to the gathering and disclosure of the testing information by demanding that an employee or applicant grant her consent to the employer's obtaining the report.[251] However, nothing in the FCRA prevents an employer from conditioning an offer or continued employment on the target's consent, which indicates a false choice. Especially in times of high unemployment, an individual may well feel compelled to sacrifice privacy for a paycheck, regardless of whether the information sought is relevant to the work performed for that paycheck.

The FCRA also requires consumer reporting agencies to block some information it may learn about an applicant from the report provided to an employer.[252] For instance, recognizing that old information may be less relevant to an individual's eligibility for credit or employment, the FCRA designates most adverse information as obsolete after seven years.[253] With respect to criminal arrests, the FCRA

248. *Id.* § 1681a(d)(2)(A)(i). Furthermore, given that the definition of a consumer reporting agency depends upon the definition of a consumer report, an entity that issues only reports that contain nothing but "information solely as to transactions . . . between" employees and the test administrator, the entity will fall outside the FCRA's definition of a consumer reporting agency. *See id.* § 1681a(d)(1), (d)(2)(A)(i).

249. *See* 15 U.S.C. § 1681a(d)(2)(A)(i).

250. *See id.* § 1681a(f).

251. *Id.* § 1681b(b)(1)–(2). Employers that are investigating employee misconduct need not notify the target of the investigation ahead of time, so long as the investigation meets the criteria of the exception and the employer later provides the notice that the exception requires. *Id.* § 1681a(x).

252. *Id.* § 1681c(a).

253. *Id.* § 1681c(a)(2). Bankruptcy records, in contrast, may be included in someone's credit report for up to ten years. *Id.* § 1681c(a)(1).

prohibits the agency not only from disclosing the obsolete arrest record, but also the mere existence of an arrest record.[254]

However, whether personality test results would be considered "adverse" has not yet been litigated, so the obsolescence rule's effects are uncertain. Furthermore, the obsolescence rule is gouged by its exception that permits reports to include old information for employees who are expected to make $75,000 or more per year.[255] In this situation, the report from an employment or consumer-reporting agency could list everything that the agency could find out about the individual, including information—such as personality test results—from many decades ago.

The FCRA also requires an employer that intends to take an adverse action against an applicant or employee on the basis of a personality test's results to notify that individual prior to taking the adverse action.[256] Though the clear purpose of this notice provision is "to enable an employee applicant to receive his draft report and correct any . . . inaccurate information in the report before any decision or action is commenced,"[257] nothing requires an employer to delay a decision while the consumer tries to straighten out an inaccurate report. However, an employee or candidate may not readily be able to dispute the results of a personality test. Doing so might require the employee to submit the results to a qualified expert, a time-consuming task.

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254. *E.g.*, Serrano v. Sterling Testing Sys., Inc., 557 F. Supp. 2d 688, 691–92 (E.D. Pa. 2008) (concluding that such information is prohibited by either 15 U.S.C. § 1681c(a)(2), which pertains to arrest records, or 15 U.S.C § 1681c(a)(5), which pertains generally to any other adverse items of information). Nonetheless, criminal convictions—regardless of whether felony or misdemeanor—never become obsolete and may be reported in perpetuity. 15 U.S.C. § 1681c(a)(5).

255. 15 U.S.C. § 1681c(b)(3). Congress last raised this cap in 1996, when $75,000 would have been equivalent to more than $105,000 in today's dollars. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2406, 110 Stat. 3009 (1996). Accordingly, the breadth of the exception has extended to cover a great many jobs, including sales jobs based on commission where the employee could expect to accrue commissions or tips sufficient to boost the salary to more than $75,000.

256. The FCRA provides as follows:

> Except as provided in subparagraph (B), in using a consumer report for employment purposes, *before taking any adverse action based in whole or in part on the report*, the person intending to take such adverse action shall provide to the consumer to whom the report relates—
>
> (i) a copy of the report; and
>
> (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

15 U.S.C. § 1681b(b)(3)(A) (emphasis added) (footnote omitted).

257. Beverly v. Wal-Mart Stores, Inc., No. 3:07CV469, 2008 WL 149032, at *3 (E.D. Va. Jan. 11, 2008) (mem.); *see also* Johnson v. ADP Screening & Selection Servs., Inc., 768 F. Supp. 2d 979, 983–84 (D. Minn. 2011) (noting that, while "there must be some time between notice and action," a delay of fourteen days was "ample" and that "[n]othing in the FCRA requires an employer to consider any correction that a reporting agency might make").

In sum, personality testing is regulated by the Constitution and may be regulated by various federal statutes, but none of these protections clearly and consistently protect individuals from the intrusion of testing or the stigma that could arise from the disclosure of test results.

B. State Protections

1. State Constitutional Protections

While the Federal Constitution can restrain only public employers from disseminating psychological test results, a state constitution may apply to private employers in addition to public employers. For instance, in *Soroka v. Dayton Hudson Corp.*, the plaintiff challenged a private employer's personality test as violating the right to privacy granted by California's constitution.[258] The trial court concluded that the employer's use of a pre-employment test called "PsychScreen," a combination of the MMPI and another psychological inventory, violated the California constitution's privacy clause[259] by examining the applicant's religious beliefs and sexual orientation;[260] the employer settled the case. A psychologist offered evidence for the plaintiff that the test violated basic professional standards and that one test on which PyschScreen was based was designed for use only in hospital or clinical settings.[261] Furthermore, two of the employer's experts had previously opined that the MMPI was "virtually useless as a preemployment screening device" and suggested that PsychScreen had a

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258. Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 79 (Ct. App. 1991), *review granted*, 822 P.2d 1327 (Cal. 1992), *review dismissed*, 862 P.2d 148 (Cal. 1993). The plaintiffs also brought two state statutory claims that were rendered unnecessary by the court's ruling on the constitutional privacy claim. *Id.* at 86.

259. CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."). While California may have most clearly extended its constitutional privacy provision to cover private as well as governmental actors, other state constitutions explicitly protect privacy as well. *See* ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

260. *Soroka*, 1 Cal. Rptr. 2d at 86. The settlement mooted the appeal. Among the questions were the following: "I wish I were not bothered by thoughts about sex"; "A minister can cure disease by praying and putting his hand on your head"; and "I have often wished I were a girl." *Id.* at 80. The court concluded that a compelling-interest standard, rather than a reasonableness standard, was appropriate. *Id.* at 83–85. The court reasoned that the California constitutional provision required a nexus between the information gathered and the purpose for which the information is gathered. *Id.* at 85. "While [the employer] unquestionably has an interest in employing emotionally stable persons . . . , testing applicants about their religious beliefs and sexual orientation does not further this interest." *Id.*

261. *Id.* at 80.

sixty-one percent rate of false positives.[262] Thus, the test suffered from precisely the sort of validity problems discussed above.[263]

The appellate court's opinion was superseded when the litigants settled,[264] but the substance of that opinion illustrates how the court applied the state constitution to personality testing. Any invasion of job applicants' right to privacy, the court declared, must be justified by a compelling, not merely a reasonable, interest.[265] The court then concluded that the employer had failed to show that the objectionable questions on the personality test, pertaining to religion and sexual orientation, were related to the jobs the applicants sought.[266] The court decisively rejected as sufficient the employer's "generalized claims" that the test related to emotional fitness and that it had led to an "overall improvement" in the quality of the employees' performance.[267] In so doing, the court was demanding that the personality test have validity and that it correspond to measurable improvement in the goal sought; a "minimal and speculative" relationship cannot justify such testing.[268]

Thus, California's constitution can protect against the intrusion posed by a required personality test, one of the two privacy harms that personality tests can inflict. In addition, the provision may protect against the disclosure of a psychological evaluation's results, the other privacy harm. In *Pettus v. Cole*, an employee sued two psychiatrists and his employer after learning that the psychiatrists had provided the employer with information from his sessions that did not pertain directly to his employment.[269] A California appellate court reversed the trial court's judgment for the employer, ruling that the employee had stated a claim that the disclosures invaded his constitutional right to

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262. *Id.*

263. *See supra* notes 84–112 and accompanying text.

264. Soroka v. Dayton Hudson Corp., 822 P.2d 1327 (Cal. 1992).

265. *Soroka*, 1 Cal. Rptr. 2d at 84–85.

266. *Id.* at 86.

267. *Id.*

268. *Id.* at 86, 88–89.

269. Pettus v. Cole, 57 Cal. Rptr. 2d 46 (Ct. App. 1996). In *Pettus*, the employer required the employee to receive a psychological evaluation after the employee requested a short-term disability leave for a stress-related condition. Three psychiatrists evaluated the employee and confirmed the employee's need for leave. Two of the psychiatrists, however, disclosed in the evaluations additional information that the employee had revealed, including information about substance abuse that did not relate directly to the request for leave. The court determined that the employee had a legitimate and reasonable privacy interest in the information and rejected the psychiatrists' protests that the disclosure was justified by the employer's needs, concluding that the scope of the disclosure exceeded those needs.

privacy and concluding that the specific disclosures went beyond the scope of the employer's interest in the information.[270]

Nonetheless, state constitutions will not sufficiently protect the right of employees to be free from psychological testing; few other states have the sort of constitutional privacy protections that California does, nor has case law developed to alert employers and employees as to the boundaries of permissible testing.

2. *State Statutory Protections*

While California may regulate personality testing of employees through its constitution, other states have sought to protect employee privacy through statutory provisions. For instance, some states have legislated to bar employers from administering polygraph and other lie detector tests,[271] augmenting the federal Employee Polygraph Protection Act.[272] Some of these statutes bar not only polygraphs, but also any "similar test or examination," and arguably a personality test assessing one's honesty could be read to fall within such a category.[273] However, two such statutes have been construed to exclude honesty tests from the prohibition.[274] Many states also have their own credit reporting statutes that may, like the federal FCRA, be broad enough to pertain generally to background checking and specifically to personality testing. Unfortunately, the FCRA not only does not adequately protect against employee reports, including those reporting test results, but states likely cannot fill in the gap as the federal act preempts state laws with respect to the content of consumer reports.[275] Given that this preemption provision predates modern information technology and lightning-quick access to public records through the Internet, states have never had a true opportunity to regulate the dispersal and gathering of data about employees.

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270. *Id.* at 77.

271. *See, e.g.*, CAL. LAB. CODE § 432.2 (West 2011); DEL. CODE ANN. tit. 19, § 704 (1974 & repl. vol. 2005).

272. *See supra* notes 219–22 and accompanying text.

273. *See* HÉBERT, *supra* note 236, § 7:17.

274. State v. Century Camera, Inc., 309 N.W.2d 735, 745 (Minn. 1981) (construing Minnesota's polygraph statute as language extending to "any test purporting to test honesty to be limited to those tests and procedures which similarly purport to measure physiological changes in the subject tested" and rejecting the plaintiff's argument that the state's polygraph statute was unconstitutionally vague (internal quotation marks omitted)); Pluskota v. Roadrunner Freight Sys., Inc., 524 N.W.2d 904, 907 (Wis. Ct. App. 1994) (confining the reach of a Wisconsin statute to prohibit only tests measuring physiological responses, and not reaching pencil-and-paper tests).

275. 15 U.S.C § 1681t(b)(1). Only those statutes in place on September 30, 1996 survive the FCRA's preemption provision. *Id.* § 1681t(b)(1)(E).

State statutes may also bar employers from considering some employee conduct that occurs off-site and after work in making employment decisions. By far the most common of these statutes prohibit employers from discriminating against employees on the basis of tobacco use.[276] However, some state statutes extend broadly to protect an employee's use of lawful products in general,[277] and a few additional states advance protections beyond simple product consumption to off-duty conduct by employees generally.[278] New York may have the broadest provision—one that extends to an employee's off-hours political activity, legal use of consumable products, and legal recreational activities.[279] However, because such anti-discrimination statutes focus on behavior rather than on personality, they probably do not extend to cover an employee's possession of a particular personality trait.

3. Common Law Torts

Privacy statutes, whether state or federal, tend to address a specific topic—credit reports, polygraphs, or medical information, for instance—rather than provide blanket protection, and thus, they are not always able to anticipate and cover new forms of technology or privacy invasions. State common law, however, has more plasticity and thus offers a rich potential for curbing the profligate use and disclosure of sensitive personal information, including personality test re-

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276. WYO. STAT. ANN. § 27-9-105(a)(iv) (2011) (prohibiting employers from conditioning employment on the use of tobacco products); *see also* Marisa Anne Pagnattaro, *What Do You Do when You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 640–41 (2004).

277. *E.g.*, 820 ILL. COMP. STAT. 55/5(a) (2011); MONT. CODE ANN. § 39-2-313(2) (2011); TENN. CODE ANN. § 50-1-304(e) (repl. vol. 2008); *see also* Sprague, *supra* note 24, at 411–16.

278. CAL. LAB. CODE § 96(k) (West 2011) (granting the labor commissioner authority over claims "for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises"); COLO. REV. STAT. ANN. § 24-34-402.5 (West 2008) (exempting activity that "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee"); CONN. GEN. STAT. ANN. § 31-51q (2011) (limited to employees who exercise state or federal First Amendment rights); N.Y. LAB. LAW § 201-d(2) to -d(3) (McKinney 2009) (excluding any activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest"); *see also* Sprague, *supra* note 24, at 395. For further critical analysis of these lifestyle anti-discrimination statutes, see Jason Bosch, Note, *None of Your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact*, 76 S. CAL. L. REV. 639 (2003) (arguing that employers use their economic influence to unjustifiably control the autonomy of their employees).

279. *See* N.Y. LAB. LAW § 201-d(2). One New York court concluded that the firing by Wal-Mart of an employee for dating a co-worker could violate the provision. State v. Wal-Mart Stores, Inc., No. 80737/93, 1993 WL 649275, at *2 (N.Y. Sup. Ct. Dec. 16, 1993).

sults. The privacy torts can apply both to the intrusion posed by personality tests as well as the disclosure of test results.

The intrusion tort has three elements: (1) an intentional intrusion; (2) on a place of solitude; and (3) that is highly offensive to a reasonable person.[280] The harm arising from the intrusion of a psychological test has been recognized as supporting a common law privacy claim. In *Keno v. Station KYW-AM Infinity Broadcasting Corp.*, the plaintiff alleged that she had advised her employer of a diagnosis of bipolar disorder and that thereafter her employer discriminated against her, required her to undergo a psychiatric evaluation by a psychiatrist chosen by the employer in order to maintain her employment, required her to allow others access to her personal medical information, and then falsely indicated to other employees that she had sought a leave of absence.[281] The court denied the defendant's motion to dismiss her intrusion upon seclusion, false light, and public disclosure claims.[282] In upholding the intrusion claim, the court specifically noted the plaintiff's allegations that the employer interrogated her about her illness and medications, and forced her to undergo a psychiatric evaluation.[283]

Nonetheless, intrusion claims by employees have not fared particularly well.[284] The tort requires that the intrusion must be highly offensive to a reasonable person, an elevated bar to attain.[285] Thus, it may not protect employees from overly intrusive examinations, surveillance, or testing by employers that, while not shockingly offensive, nonetheless unreasonably crosses into a territory that should remain internal to the employee and subject to the employee's control. The ubiquity of personality and psychological testing may itself undermine a plaintiff's claim that the testing was highly offensive. For instance, in *Witherspoon v. Rent-A-Center, Inc.*, an employee sued after his employer required him to submit to a personality test as a condition for promotion.[286] The employee alleged that the test asked for religious,

280. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

281. Keno v. Station KYW-AM Infinity Broad. Corp., No. 04-2147, 2004 WL 2367824, at *1 (E.D. Pa. Oct. 20, 2004) (denying the employer's motion to dismiss).

282. *Id.* at *3–5.

283. *Id.* at *4.

284. *See* Pagnattaro, *supra* note 276, at 631–37 (describing employee intrusion claims as generally falling into one of the following four categories: "1) sexual-related information; 2) general non-work-related personal information, such as medical and financial information; 3) issues related to the use of technology; and 4) investigations in connection with workers' compensation and disability claims").

285. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

286. 173 F. Supp. 2d 239, 241 (D.N.J. 2001).

medical, and sexual information.[287] The employee's intentional infliction of emotional distress claim failed; the court reasoned that the fact that "standardized psychological testing of this type for management-level positions has been around for several decades, and thus cannot be 'utterly intolerable in a civilized society,'" an element of an emotional distress claim.[288]

As discussed above, the probing of one's personality impermissibly intrudes; separate and apart from that injury is the injury that arises when the tester or the employer discloses the information. An employer that discloses personal information about an employee's mental health may also be liable for the tort of public disclosure of private facts. This tort has four elements: (1) the defendant gives publicity to a matter; (2) that matter concerns the private life of another; (3) the matter publicized would be highly offensive to a reasonable person; and (4) the matter is not of legitimate concern to the public.[289]

The first element significantly limits its use to redress a tester's or employer's disclosure of a personality test's results: to incur liability, the employer must have publicized the matter to a certain number of people. Emailing the information to all of the employees of the employer may suffice.[290] However, disclosure to just a few of the employer's personnel may not. In *Childs v. Williams*, the plaintiff had been referred by her employer to a psychologist after she had suffered work-related stress arising from a conflict with her supervisor.[291] The psychologist provided the employee's supervisor with details of the employee's psychological tests, telling the employer that the employee suffered from "severe emotional disorders," "paranoid personality," and "obsessive compulsive personality";[292] the supervisor then shared the psychologist's letter with seven other members of management.[293] The employee's public disclosure claim failed because the psycholo-

287. *Id.* The employee also alleged that the defendant used the results of the test as a pretext to deny him a promotion on racial grounds. *Id.*; *see also* Gardiner v. Mercyhurst College, 942 F. Supp. 1055, 1059–60 (W.D. Pa. 1996) (rejecting the plaintiff's defamation claim, which arose from a psychologist's disclosure of information about his psychological testing on the grounds of qualified privilege); Lundy v. City of Calumet City, 567 N.E.2d 1101, 1102–03 (Ill. App. Ct. 1991) (rejecting an intentional infliction of emotional distress claim by police officers who were relieved of duty based on indeterminate psychological test results, reasoning that while the employer may have been insensitive in delivering the results, the conduct did not rise to a tortious level).

288. *Witherspoon*, 173 F. Supp. 2d at 242.

289. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

290. *See* Keno v. Station KYW-AM Infinity Broad. Corp., No. 04-2174, 2004 WL 2367824, at *4 (E.D. Pa. Oct. 20, 2004).

291. Childs v. Williams, 825 S.W.2d 4, 7 (Mo. Ct. App. 1992).

292. *Id.*

293. *Id.*

gist's disclosure reached only a limited number of eyes, those of the employer's management personnel.[294]

As with the intrusion tort, the "highly offensive" element may also block claims based on unreasonable disclosures that somehow fall short of that high water mark.

V. Potential Solutions

An ideal legal framework would have features of justification, test reliability and validity, confidentiality, and accountability. First, to justify testing, the rules should minimize any intrusion by allowing employers to examine only those aspects of an employee's or candidate's past behavior or current personality that pertain directly to the specific skills required by the job the employer seeks to fill. The examination's scope and the subsequent use of the information obtained by the examination could be curtailed by requiring employers to articulate a business necessity for the information that is proportional to the scope of the intrusion and the sensitivity of that information.

Second, when an employer has a legitimate interest in intruding on such territories, the employer should be able to use only those tests that have demonstrated reliability and validity. Thus, an employer should have to establish that a particular personality test that the employer uses is reliable—that is, the test consistently measures the specific personality traits that it purports to measure. The employer should further have to establish that the test is valid—that it accurately measures the traits it purports to measure. The employer should have empirical evidence that the test results correlate with enhanced performance in the particular employment position for which the target is a candidate.

Third, the framework should ensure that employers keep confidential both the fact that an individual took an exam and the exam's results. Finally, those who suffer harm to their privacy from a violation should be able to hold the employer accountable for the invasion through money damages and equitable remedies.

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294. *Id.* at 9. In addition, the court concluded that the plaintiff had waived her privacy rights by signing a release, rejecting the plaintiff's argument that the psychologist exceeded the scope of that release by providing the employer with highly sensitive and private medical information. *Id.* at 9–10. A similar claim, based on the U.S. Constitution, failed in *Thompson v. City of Arlington*, 838 F. Supp. 1137 (N.D. Tex. 1993). There, the court concluded that while the plaintiff-employee did have a constitutionally protected privacy interest in her mental health records, on balance the city's interest in having those records exceeded her interests in light of the power granted to police officers. *Id.* at 1146–47.

Many of the legal structures discussed above, including the EPPA and the ADA, have one or more features that could serve one or more of these purposes; none of them would on its own easily adapt to satisfactorily protect privacy.

A. Justification

Given that personality tests are not particularly reliable or valid and that the courts have recognized this in refusing to impose liability for an employer's failure to administer them, an employer's untested, unexamined claim that it needs information about an employee or applicant for legitimate business purposes should not, without more, justify personality testing. A search through an applicant's past deeds, as employers typically conduct through traditional background checks, differs from a search of an applicant's current state of mind. If an employer asserts a need to learn of an employee's or applicant's personality, that employer should have to detail a specific need and how the information sought will satisfy that need. Only then should the court balance the strength of the relationship between the information sought and the need against the potential damage to the employee's privacy of acquiring that information. As Professor Pauline Kim wrote, "[T]he more closely an employer's inquiries or practices trench on interests at the recognized core of individual privacy, the greater the need for some specific justification."[295] This inquiry should examine the particular nature of the employer's business and the position.[296] If, for instance, the position required only general skills that could be satisfied by employees with a range of personalities, the need for the information would be weak and would lose out to even a relatively weak level of intrusion. On the other hand, if the position could only be fulfilled adequately by someone with a specific personality, the employer's interest rises correspondingly and could justify more intrusion on the applicants.

An outright prohibition against the use of personality tests would arguably unfairly hobble employers with a legitimate business need to employ someone with a particular personality, or to avoid someone with a particular personality. A somewhat less draconian approach would be to set a general rule prohibiting personality tests, but allowing them in certain limited circumstances where the test could help an employer fill a legitimate need. The EPPA has this structure, and

295. Kim, *supra* note 14, at 706.

296. *Id.* at 707. So, for instance, Professor Kim notes that "a health club which employs fitness trainers has a legitimate interest in the health status and physical conditioning of its employees to an extent that the employer of clerical workers does not." *Id.*

polygraph tests and personality tests raise common concerns. Congress enacted the EPPA amid concerns that polygraphs were widely used but often inaccurate.[297] Furthermore, they can intrude significantly on privacy, much like personality tests.

The EPPA provides a general rule that bans the tests joined with a list of exceptions,[298] exceptions limited quite narrowly to polygraphs for certain national security related needs,[299] ongoing investigations,[300] and a couple of other specific situations.[301] These provisions capture the same sort of justification concern, with a narrow span, as that discussed above. The model law proposed in this Article would offer an exception where an employer has demonstrated a need for a particular type of personality or trait, and that need outweighs the individual's interest in maintaining the privacy of information related to that trait.

In addition, just as the EPPA sets requirements for a polygraph report, a model law could require a personality test examiner to exclude from the report any information or conclusions regarding any aspect of the individual that fall outside the specific need of the employer. This would tailor the results to fit just those needs claimed by the employer. However, a model law's ban on personality tests should extend to governmental employers as well as private ones; the EPPA applies only to the latter.

The ADA also has features that could be adapted to a model law. The ADA requires employers to justify medical tests before imposing them, a feature that could be adapted to personality tests and incorporated into a model personality protection law. As it stands, the ADA may already apply to personality tests;[302] however, a model personality test privacy law would explicitly require an employer to justify its need for not just any test, but the specific test that the employer seeks to use.

Short of enacting a separate law, the ADA could be amended to satisfy the justification feature by expanding the Act's definition of medical examinations. With respect to medical examinations, the

297. *See* 134 CONG. REC. 14,007 (1988) (statement of Senator Kennedy, speaking in support of the law, stating that polygraphs were "little more than a 20th century version of witchcraft").

298. 29 U.S.C. §§ 2002, 2006 (2006).

299. *Id.* § 2005(a)–(c).

300. *Id.* § 2006(d). In addition, the EPPA's exemption for ongoing investigations, intended to allow employers to administer polygraph tests to uncover illicit losses, has its own set of requirements. *Id.* § 2007.

301. *Id.* § 2006(e) (providing an exemption for security personnel); *id.* § 2006(f) (providing an exemption for certain investigations into controlled substance use).

302. *See infra* notes 303–06 and accompanying text.

ADA prohibits covered entities from conducting a medical examination or inquiring as to whether a job applicant has a disability pre-employment.[303] The ADA does permit the entity to make pre-employment inquiries—though not examinations—into "the ability of an applicant to perform job-related functions."[304] Once the employer has offered a job to the applicant, the ADA permits the employer to require a medical examination, subject to specific limitations.[305] For current employees, the employer must show that the examination or inquiry to be job related and consistent with the employer's business necessity.[306] These limitations help ensure that an employer probes into individuals' health status only when the needs of a particular job specifically justify it. Extended to personality tests, the ADA could similarly permit a personality test only where an employer can identify specific characteristics of a job that demand specific personality traits in order to be executed well.

B. Reliability and Validity

A comprehensive personality testing privacy law would also place limits on the persons who could administer tests and on the sorts of tests that could be administered, requiring that a test be both reliable and valid before required of an employee or applicant. The EPPA provides an example of testing requirements, when it is permitted. For instance, the EPPA's exception for ongoing investigations, intended to allow employers to administer polygraph tests to uncover illicit losses, has its own set of requirements.[307] These requirements both demand certain qualifications of the examiner,[308] including a license and professional liability insurance,[309] and limit the examiner's report to the specific purpose for which the report was sought.[310] Just as a polygraph examiner must meet specific requirements, a model personality test privacy law should require certain certifications for a personality test examiner. For instance, a test examiner might be required to have a degree in industrial–organizational psychology and

303. 42 U.S.C. § 12112(d)(2)(A).

304. *Id.* § 12112(d)(2)(B).

305. *Id.* § 12112(d)(3).

306. *Id.* § 12112(d)(4)(A). However, the ADA permits employers to conduct voluntary medical examinations that are part of an employee health program. *Id.* § 12112(d)(4)(B).

307. 29 U.S.C. § 2007.

308. *Id.* § 2007(c)(1).

309. *Id.*

310. *Id.* § 2007(c)(2)(A)(ii). Specifically, the report must not "contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test." *Id.*

administer a test that was limited to the specific need the employer has identified to justify the test.

Not only should the personality test examiner have to have credentials and expertise, but the test itself should have to be reliable and valid, supported by empirical data showing a strong link between test results and the particular qualifications of the job the employer sought to fill. The field of employment discrimination law has already developed the requirements of test validation; these could be adapted to personality tests.[311] For example, the EEOC provides specific guidelines to judge the validity of employment tests that may unfairly discriminate on the basis of a protected characteristic.[312] These guidelines permit an employer to justify a test with studies conducted by test publishers or distributers, though users remain responsible for ensuring that the information necessary to support validity exists and is available.[313] Adapted to personality tests, an employer could either validate the test itself or rely, with care, on validity studies conducted by a personality test's publisher. These credential, validity, and reliability requirements would protect privacy by keeping employers from haphazardly fishing for traits unconnected to the employer's needs and by promoting accurate results.

C. Confidentiality

A confidentiality requirement that prohibited employers from broadcasting test results would curb the harm of disclosure and the risks of stigmatizing individuals.[314] A model law could specifically prohibit employers from disclosing personality test results to any third

311. *See* 29 C.F.R. § 1607.3 (2011) (prohibiting selection procedures that have an adverse impact on "members of any race, sex, or ethnic group" unless the procedure has been appropriately validated); *id.* § 1607.5 (providing general standards for validity studies).

312. *See id.* pt. 1607.

313. *Id.* § 1607.7.

314. The Gramm-Leach-Bliley Act offers a model that could be incorporated into legislation directed at personality tests, providing as follows:

> Except as otherwise provided in this subchapter, a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). Thus, it restricts financial institutions from disclosing nonpublic personal information of customers when the customer has opted out of such disclosures. Furthermore, even when a financial institution makes a disclosure that is exempt from the nondisclosure provision, the receiver of the information must not redisclose the protected information to a third party unless the Act would permit the financial institution to have disclosed the information directly to a third party.

parties, ideally even corporate affiliates. Such a provision would discourage the creation of databases of personality inventories.

Here, too, the ADA offers a possible example. The ADA limits employers from publicizing the results of medical tests by requiring employers to treat them as confidential medical records.[315] A parallel provision, adapted to personality tests, would permit employers to test for the personality traits that they need from an applicant or employee without allowing them to sell or otherwise disclose the information to others. Such a designation would also bolster a state tort claim for breach of confidentiality by expressly tagging the information as confidential.

The FCRA may already apply to some personality tests but insufficiently protects confidentiality. As written, the FCRA already imposes restrictions on those who administer personality tests for the purpose of furnishing reports to employers; that is, third-party testers.[316] Furthermore, the FCRA's provisions that impose special confidentiality requirements for medical information should apply to information gleaned from personality tests.[317] If personality test results qualify as medical information, entities cannot share the information with affiliates,[318] so the designation in effect would restrict the employer from disseminating the information even to related entities. In addition, the FCRA limits the redisclosure of medical information;[319] extended to personality tests, employers would have to keep results confidential and could not provide them to third parties such as other employers.

Nonetheless, a model personality test privacy law would explicitly prohibit the release of test results, which would prevent the stigmatizing pigeonholing of individuals who are thought to have one or another trait. A stricter provision could require employers and test administrators to destroy the test results.

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315. 42 U.S.C. § 12112(d)(3)(B).

316. 15 U.S.C. § 1681a(f); *see also supra* notes 243–57 and accompanying text.

317. The FCRA's definition of medical information includes information that relates to "the past, present, or future physical, mental, or behavioral health or condition of an individual." 15 U.S.C. § 1681a(i)(1)(A). Information from a personality test should be considered information about the "mental[ ] or behavioral health or condition of an individual." *Id.*

318. Complicatedly enough, the FCRA excludes from the definition of "consumer report" certain communications of information among affiliates. *Id.* § 1681a(d)(2)(A)(ii), (iii). However, the provision then excludes medical information from the affiliate exclusions. *Id.* § 1681a(d)(3).

319. *Id.* § 1681b(g)(4).

D. Accountability

Most of the federal statutes that bear on privacy offer accountability; that is, public and private enforcement provisions. Ideally, a comprehensive personality test law would offer not only a private cause of action for those injured by a violation, but would also allow equitable relief, including injunctions. The EPPA has an exemplary provision that has all of these qualities.[320] The FCRA, in contrast, undermines accountability by withholding relief from individuals for many of its most critical protections.[321] When coupled with weak governmental enforcement, this feature effectively signals to the regulated that they can violate the law with impunity.[322]

E. State Reforms?

Many of these statutory reforms could take place at the state level, if not the federal, by state adaptation of a law with the four features discussed above. One concern, however, arises from the FCRA's preemption provisions that prevent states from regulating the content of a permissible consumer report—a term that, as discussed above, should encompass a report of a personality test issued by a third-party tester.[323]

Any of these tools could preserve dignity of individuals by helping them preserve the life of the mind from unjustified intrusion and control the disclosure and misuse of information about their inner selves. These could in turn help individuals to flourish with the knowledge of a protected "backstage." Furthermore, restricting employers from using personality tests need not hinder employers from finding the best candidates. Employers should not fear liability from omitting personality tests for their applicants. If a personality test exhibits both reliability and validity, it may be an appropriate selection tool. In that case an employer should have to justify the test's use by showing that the employer's needs outweigh any invasion of privacy suffered by the test-taker and that it will minimize unnecessary disclosure of the test's results. In addition, employers may use other selection tools to staff their positions; for instance, job performance tests that require an applicant to complete simulated tasks that mimic those required of the

320. 29 U.S.C. § 2005(c)(1).

321. *See, e.g.*, 15 U.S.C. 1681s-2(c).

322. *See* Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1, 6–14 (2008) (describing the FCRA's lack of effective remedies).

323. *See* 15 U.S.C. § 1681t(b)(1)(E) (preempting state laws that regulate the "subject matter" of 15 U.S.C. § 1681c, which defines the permissible content of consumer reports).

particular position may be much more likely to sift out unpromising candidates than a personality test.

VI. Conclusion

Erving Goffman developed his theories of "territories of the self" and stigma in the context of face-to-face interactions, but they have the power to illustrate the harms to privacy in the digital, Internet age. Much of our behavior is available to employers through background checks, interviews, social network searches, and data mining. However, information about our past acts differs qualitatively from information gained through personality tests, and such information deserves to be protected from employers' prying eyes. Such tests purport to reveal detailed information about the inner workings of one's way of thinking; however, not only are such tests unreliable, they often do not accurately assess what they claim to assess. Even when they do, the information they reveal may not be relevant to an employer's needs.

Individuals need to preserve their territories of the self for their own benefit; allowing employers to pick the brains of potential or current employees gives them too much power to intrude on the individuals' privacy and can also lead to pigeonholing, or even stigmatizing, individuals, thus cramping their development. Except where employers can demonstrate that a reliable, valid test is necessary to obtain an effective employee for a particular position, they should not be able to demand that applicants or employees subject themselves to personality tests. Current legal structures are insufficient to protect individuals from such prying; the federal statute that prohibits polygraph tests, with restricted exceptions, can serve as a model for a statute prohibiting personality testing. Rather than suffering, employers could benefit from improved screening practices that do not rely on unreliable or invalid tests, while individuals could preserve the privacy and integrity of some of their most sensitive personal information.