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Personality Tests for Prospective Jurors

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Notes

PERSONALITY TESTS FOR PROSPECTIVE JURORS

I. Concern About The Jury System

When we use the generic term "jury," it usually designates the distinctive mode of trying issues of fact in civil and criminal cases in countries where Anglo-American law prevails. While this institution was long commonly believed to be the result of the Magna Carta of 1215, its basis has also been ascribed to a Scandinavian institution, to Alfred the Great, and to a primitive mode of trial practiced in England known as compurgation.[1] In fact, the jury arose in the ancient inquisitions of the Carolingian kings,[2] dating from the ninth century, in which groups of disinterested citizens were required to give information under oath which was used to establish royal rights.[3] This Frankish institution was carried to the duchy of Normandy, and then to England in 1066 after the Battle of Senlac Hill, but was not utilized on a grand scale until about 1086. However, it was not until after the reign of Henry II (1154-89) that this mode of trial was used for the benefit of others than the crown. The bulk of criminal litigation, as such, was still decided by the traditional Anglo-Saxon methods: compurgation, wherein friends of the defendant exonerated him by swearing that he was an honorable man; ordeals involving various forms of torture to ascertain innocence; and the Norman method of trial by battle.[4] When Henry II ascended the throne, he brought with him a form of inquisition in which a person's guilt or innocence was determined by his neighbors. While the scope of the inquisition was first limited to controversies affecting real property, in time the inquisition was extended to other civil controversies.[5]

In 1166, Henry II took the preliminary steps to provide a jury trial in criminal cases by requiring twelve men to be present at every county court session to serve in much the same capacity as the present-day grand jury, *i.e.*, to identify parties who were suspected

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[1] 13 Encyclopaedia Britannica *Jury* 159 (1965).

[2] The Carolingians were a sovereign dynasty in western Europe. The name is derived from the fact that a number of their members were called Charles (Lat. *Carolus;* Ger. *Karl*); eight being so named between the beginning of the 8th and the end of the 9th centuries—the most famous among them being Charlemagne.

[3] 1 W. Holdsworth, A History of English Law 135-69 (1922) [hereinafter cited as Holdsworth].

[4] J. Goebel, Development of Legal Institutions 56 (1946).

[5] Holdsworth 298-350.

of having committed serious crimes. Prior to 1215 and Pope Innocent III's action of forbidding the participation of the priest in the ordeals, the person, or persons, named by the twelve men was subjected immediately to the ordeals, without the possibility of exoneration. Four years later, in 1219, Henry III decreed that the judgment of the neighbors, *i.e.*, the peer group, should be substituted for the ordeals. However, it was not until the mid-fourteenth century, under the leadership of Edward III, that the grand jury was servered from the petit or trial jury function.[6]

In contrast to our present day practice, the jurors of the fourteenth and fifteenth centuries, in both civil and criminal litigation, passed judgment on the basis of what they personally knew. In fact, it was not until the latter part of the seventeeth century that a jury's verdict had to be based exclusively on evidence presented to the court, rather than their personal insight and knowledge. While the verdicts at first did not require unanimity, the English judges from the late fourteenth century to the seventeenth century required unanimous verdicts, even if the judge had to insure the verdict by placing the jurors in jail. Furthermore, if the judge disagreed with the verdict, until the early seventeenth century, the recourse was to empanel the attaint jury to "try" the petit jury. The penalty for being adjudged of having lied by the attaint jury, or of having given a false verdict, was the forteiture of the petit juror's lands and goods to the king. While such a verdict by the attaint jury would result in a new trial in civil cases, the property-owner rules permitted a criminal verdict to stand, even though the same sanctions were imposed on similarly adjudged criminal jurors. It was soon realized that the attaint jury was reluctant to impose such sanctions on their fellow property owners; thus, the practice did not correspond to the procedure set forth in the statutes. To fill this gap in the procedure, the trial judges of the early 1800's began ordering new trials in civil cases where the judge believed the jury had improperly rendered a judgment. This practice was not followed in criminal litigation in England, but the early American practice was to order new trials in both civil and criminal litigation.[7]

It should be apparent from a study of American history why the American colonists adopted the practice of ordering new trials in both types of litigation, as well as insisting that their new constiution contain specific safeguards for the right to trial by jury. Since the drafting of the Constitution, with the guarantee of the basic right of a trial by jury, *i.e.*, that a jury of twelve men should reach a unanimous decision

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[6] *Id.*

[7] P. EDMUNDS, LAW AND CIVILIZATION 354-74 (1959).

with the assistance of the trial judge's comments on the law and the evidence, the state courts have altered the meaning of the concept of "trial by jury" as to the number, the unanimity requirement, and the judge's role in relation to the jury.[8]

Since the early 1900's, considerable attention has been directed to the contemporary judicial structure, its divergence from the past, as well as its present inadequacies. While part of the reproving may appear as little more than nostalgia for days past, an argument can be made that certain aspects of the earlier structure were at least idealistically better than our present system.[9] The more critical dissent, however, has been raised by legal scholars who challenge the underlying premise of the judicial procedures.[10]

Of those who have been vocal in their discontent, Judge Jerome Frank must stand as the most outspoken leader. In his works, Judge Frank implies that he would propose the elimination of the jury system entirely.[11] This proposal is based on an underlying bias, shared by other scholars, that jurors are generally unable to perform a duty which connotes omniscience.[12] This critique is an echo of earlier observations by various writers who observed that under particular circumstances the same individual, *e.g.*, a judge or juror, might decide the same issue of fact in either of two ways.[13] From these observations and those which Judge Frank experienced, it is suggested that the jury system is incapable of making rational determinations of the facts and their legal implications.[14] This theme has been amplified to the point that one scholar has suggested that "experience teaches that not every case is decided on the evidence. Prejudice may be a thirteenth juror that controls the decision."[15] In tones of bitterness, it has also been suggested that:

> Too long has the effete and sterile jury system been permitted to tug at the throat of the nation's judiciary as it sinks under the smothering deluge of the obloquy of those it was designed to serve. Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakespearean character been echoed, "Justice has fled to brutish beasts and men have lost their reason."[16]

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[8] Lukowsky, *The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence,* 55 KY. L.J. 121 (1966).

[9] *Id.*

[10] A. OSBORN, THE MIND OF THE JUROR 8, 15-16 (1937).

[11] J. FRANK, COURTS ON TRIAL ch. 8 & 9.

[12] *Id.* at 118-19.

[13] In COURTS ON TRIAL, Frank quotes Alexander Pope as having written, "The hungry judge soon the sentence signs, and wretches hang that jurymen may dine." *Id.* at 162.

[14] *Id.* at 118.

[15] A. OSBORN, *supra* note 10, at 92.

[16] Sebille, *Trial by Jury: An Inefficient Survival,* 10 A.B.A.J. 53, 55 (1924).

Realizing the validity of criticisms of the structure, and thereby recognizing the existence of a problem, a move was started which culminated in a publication proposing the establishment of minimum standards for jurors.[17] While this proposal has merit, the standards would still provide for a jury system which is believed by some to be inherently ineffective.[18] To those who so believe, the reality which must be faced is that of an alternative which would not only improve the system, but which in turn would not create problems of a similar magnitude, or at least which would not be subject to the same criticisms, *i.e.*, the general inability of human beings to judge their fellow man. The controversy is probably little more than begun; those who wish to continue the present system of jury selection with its complications and shortcomings, and those who wish to alter limited areas should be at least aware of the work which has been completed. Although a *complete* bibliography does not appear to be in print, and it is of course beyond the scope of this article to supply this material, the controversy has elicited the considered opinions of individuals in political science, philosophy, and law.[19]

In light of the controversy which has been raging, one is indeed puzzled by the amount of time consumed in even considering the possibility of examining the jury, and attempting to discover exactly what makes the jury decide as it does. Several years ago, a study was begun at the University of Chicago to observe the operation of juries in mock trials. The Chicago Jury Project, as it is commonly known, has manipulated both the facts and the composition of juries to study the effect of socio-economic factors on verdicts and decisions. At the same time, the Project spent considerable time, energy, and finances in an attempt to study the real world rather than the artificial findings of a laboratory. This work was done by use of scientific sampling techniques and questionnaires given to both judges and jurors. To date, two volumes have been published which supply insight into the phenomena of the jury trial.[20] In the near future, a third volume should be forthcoming which will examine the jury's handling of the defense of insanity, and an experimental sequence to test the impact of varying instructions on the law of insanity.[21]

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[17] A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 146-205 (1949).

[18] J. FRANK, *supra* note 11.

[19] For a reasonably complete bibliography compiled by Professor Dale Broeder for the Chicago Jury Project, *see Hearing Before the Subcomm. to Investigate the Administration of the Internal Security of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 63-81 (1955).

[20] H. KALVEN AND H. ZEIZEL, THE AMERICAN JURY (1966); H. KALVEN AND H. ZEIZEL, DELAY IN THE COURT (1959).

[21] H. KALVEN AND H. ZEIZEL, THE AMERICAN JURY vi (1966).

The other major effort published to date deals not with the jury per se, but with human perception as it relates to the individual's ability to judge objective facts. The effort has been directed at lawyers and the judicial structure to illustrate what experimental psychologists have known for some time: what people perceive, and what is transmitted to them are not necessarily the same.[22] While this is useful in terms of cross-examining a witness for impeachment, one must not overlook the fact that what we have in a jury trial is a person, *i.e.*, a witness, who attempts to communicate his imperfect perceptions to other individuals, *i.e.*, jurors, who in turn alter the perceptions which have been related to them. This is not to say that there is a conscious effort on the part of the witness or the jurors to change "the facts," but, rather, that these individuals qua individuals respond to unconscious selectivity and coloration. Likewise, this is not to imply that the jury structure is inherently "wrong," but merely to suggest that one should not be over simplistic in an analysis of the jury system, as earlier indicated by the leaders of the Chicago Jury Project.[23]

II. THE RIGHT TO AN IMPARTIAL JURY

In the past fifty years, the legal community, as well as the American society, has been confronted with what should have become commonplace: the guarantees for the preservation of the right to a trial by jury, as written into the United States Constitution,[24] as well as most state constitutions.[25] These guarantees mean something more than merely having a group of individuals listen to arguments. Whether the complaint is of a civil or criminal nature, the individual is entitled to an "impartial jury;" and while it would appear that such a standard would lend itself readily to application, this simple phrase has been overlooked or distorted to suit the needs of those who seek merely to protect their own immediate interests.

The appellate courts have been forced to look at this situation, and establish standards in addition to, or at least augmenting, the concept of an impartial jury. Some courts have merely stated that a trial by jury, any member of which is biased or prejudiced, is not a constitutional jury.[26] Others have attempted to clarify the word "impartial," by suggesting that it means not partial, not favoring one

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[22] J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT (1966).
[23] H. KALVEN AND H. ZEIZEL, *supra* note 21, at 492-99.
[24] U.S. CONST. art. III, § 2; U.S. CONST. amend. VI and VII.
[25] *See, e.g.*, KY. CONST. § 7 (1942).
[26] Sun Life Assur. Co. of Canada v. Cushman, 22 Wash. 2d 930, 158 P.2d 101 (1945); Brown v. State, 289 S.W. 392 (Tex. Crim. App. 1926).

party more than another, unprejudiced, disinterested, equitable, and just.[27] It should be obvious that those who would so clarify one term with another which is as nebulous have accomplished nothing, and thus little is gained from the definition. In an attempt to be more realistic about this matter, it has been suggested that bias or prejudice may arise from a variety of causes and depends so much on the facts and circumstances of the particular case that no definition or rule can be conclusive,[28] but the true inquiry in all cases is whether the juror will act with entire impartiality.[29] This proposition, while correcting some of the errors of the over-simplified conceptualization of the matter, however, ultimately reverts back to the same basic error of definitions.

Thus, while the courts and judicial advisors, *i.e.*, the attorneys, are unable to articulate what it is they mean, only a rough attempt has been made to expunge certain persons from the jury because of their bias or prejudice.[30] In the case of racial prejudice, the courts have indicated that a juror is incompetent if he is so prejudiced against the litigant's race or nationality that he cannot, for this reason, give the litigant a fair and impartial trial.[31] If the courts could stop at this point, there would appear to be an adequate basis for challenging the prospective jurors. However, the courts have held that where the juror merely has a general, unfavorable opinion of the litigant's race, which he, the juror, can swear will in no way influence his verdict, there is no basis for dismissal for cause.[32] The same general standard has been applied to the cases in which there is prejudice against a particular class of actions,[33] and where there is prejudice against a particular defense.[34] While one might abstract the human mind to have this general standard work in theory, it should be clear that what a person will swear to in regard to his bias or prejudice is as much a reflection of his willingness to admit the bias as it is a reflection of the attitude itself. Thus, while two persons may have the same degree of prejudice, one may swear the prejudice will not affect his decision, and will be included, while the other cannot, and will be excluded. It might be suggested that under these circumstances both

[27] Barker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942); Stockton v. State, 187 S.W.2d 86 (Tex. Crim. App. 1945); Burge v. State, 35 S.W.2d 735 (Tex. Crim. App. 1931).
[28] Ray v. People, 63 Col. 376, 167 P. 954 (1917).
[29] Sinclair Oil & Gas Co. v. Crane, 175 Okla. 1198, 51 P.2d 711 (1935).
[30] United States v. Smith, 200 F. Supp. 885 (D. Vt. 1962).
[31] State v. Russell, 47 Nev. 263, 220 P. 552 (1923).
[32] *Id.*
[33] Ruschenberg v. Southern Elec. Ry., 161 Mo. 70, 61 S.W. 626 (1900).
[34] Crain v. State, 394 S.W.2d 165 (Tex. Crim. App. 1964).

litigants would be better served by the individual who is willing to admit his bias.

The judicial system has now begun to understand that these previously established standards appear inadequate, and has begun to follow the advice of the sociologists who have suggested that a better criteria for an impartial jury would relate to a consideration of the ethnic groups represented.[35] Thus, where, in a criminal case, the defendant is a Mexican, the jury should have some members of the Mexican population present. The same would be true for Indians, Negroes, and other minority groups,[36] and presumably would be the case in civil as well as criminal litigation.[37] However, as we shall see, even this improvement of the ethnic-group classifications must give way to an understanding of the individual, within and without his "group."

III. JURIES AS PSYCHOLOGICAL UNITS

The problem before us is to realize the implications of placing several individuals in a jury box with instructions that they should listen to the evidence presented to them, and render a judgment as to the "facts." We must not overlook the significance of having formed an artifical group[38] which must act, in some sense, as an entity or unit. While each person may be a psychological unit, when placed in a group these individual units tend to merge or conform. At this point we are ready to turn to the area of social psychology for assistance in understanding the effects of the larger unit on the individual.

In a series of studies to ascertain the power of group pressure to induce conformity of judgment in the individual, S. E. Asch placed a "naive" subject into a pre-formed group. Unknown to this individual, the experimenter had already made arrangements for the remainder of the group to respond erroneously as he directed. When the new subject was admitted to the group, he was instructed that the purpose of the group was to make certain comparative judgments as to the lengths of various lines. The one naive subject was placed near the end of the row so that his judgment would be given only after the majority had given theirs. Thus, this individual found himself in a

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[35] *See, Constitutional Rights in Jury Selection*, TRIAL, Feb.-Mar. 1967, at 4, col. 2.

[36] Hernandez v. Texas, 347 U.S. 475 (1954).

[37] Butler v. Commonwealth, Dep't. of Highways, 387 S.W.2d 867 (Ky. 1965).

[38] As this term is used, it is designed to draw a distinction between groups which form out of natural selection, *e.g.*, a lunch group, which may differ from experimental study groups or juries.

situation where his correct judgment, on critical trials, would be in opposition to those given by a unanimous majority.[39]

During his first experiments, Asch found that of the 123 naive subjects who were tested on twelve critical judgments, 37 per cent of the total number of judgments were in error, *i.e.*, the judgments were in conformity with those of the unanimous majority. This result is contrasted with the control subjects, *i.e.*, those not subjected to the erroneous group pressure, who, judging alone, made virtually no errors.[40] It should be understood that significant individual differences in responses to this group pressure were found, ranging from complete independence of the majority by some to complete yielding on all critical trials by others.[41]

In another series of studies conducted by R. S. Crutchfield, the same general format was followed, except that the group pressure was not a face-to-face group, but a bogus "group" which was in fact the experimenter's control. This experimenter found that substantial amounts of yielding were produced by the group pressure, and the consensus would prevail even though it was manifestly wrong.[42] In one such series, the subjects were asked to make perceptual judgments about two figures, a star and a circle placed adjacent to one another. When the two figures were so placed, with the circle being one-third larger in area, the subjects were asked to indicate which of the two had the larger area. In a sample of military officers, 46 per cent agreed with the bogus group consensus that the star was the larger.[43]

To point out the extent to which one will conform, and the ultimate absurd results, R. D. Tuddenham employed the Crutchfield experimental design of the bogus group on a sample of college students. In this series, if the individual agreed with *all* of the group judgments, he would have depicted the United States in the following grotesque manner:

> The United States is largely populated by old people, 60 to 70 per cent being over 65 years of age. These oldsters must be almost all women, since male babies have a life expectancy of only 25 years. Though outlived by women, men tower over them in height, being eight or nine inches taller, on the average. The society is obviously preoccupied with eating, averaging six meals per day, this perhaps accounting for their agreement with the assertion, "I never seem to get hungry." Americans waste little time on sleep, averaging only four or five hours a night,

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[39] Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgment*, GROUPS, LEADERSHIP, AND MEN (H. Guetzkow ed. 1951).

[40] *Id.*

[41] D. KRECH, R. CRUTCHFIELD, & E. BALLACHEY, INDIVIDUAL IN SOCIETY 508 (1962) [hereinafter cited as KRECH, CRUTCHFIELD & BALLACHEY].

[42] Crutchfield, *Conformity and Character*, 10 AMER. PSYCHOL. 191-98 (1955).

[43] KRECH, CRUTCHFIELD & BALLACHEY 509.

> a pattern perhaps not unrelated to the statement that the average family includes five or six children. Nevertheless, there is no overpopulation problem, since the USA stretches 6,000 miles from San Franciso to New York. Although the economy is booming with an average wage of $5.00 per hour, rather negative and dysphoric attitudes characterize the group, as expressed in their soundly rejecting the proposition, "Any man who is able and willing to work hard has a good chance of succeeding," and in agreeing with such statements as, "Most people would be better off if they never went to school at all," "There's no use in doing things for people; they don't appreciate it," and "I cannot do anything well."[44]

Such is the weird but wonderful picture of the world of the yielder.[45]

This is not to suggest that all persons in a jury trial would respond as did the subjects in the experiments, but merely to say that *some* individuals will yield to massive group pressure. As a corollary to this proposition is the observation that some individuals will never yield to the group, while still others will yield, but only under certain circumstances. It is essential that we never fall into the error of believing that the group is the smallest unit, as each individual is potentially capable of changing the appearance and overt response of that larger unit. This seems to have been realized by the appellate courts in their insistence that a jury not be representative of a monolithic ethnic group.[46] Unfortunately, the courts have failed to look beyond the facade of this type classification system to note that just as ethnic groups differ from one another, so do the *members* of an ethnic group differ from one another. This form of classification, while it alters the structure, suffers the same weakness as the unaltered structure, *i.e.*, the *individual* has been overlooked for the benefit of the group classification.

Once we find our way back to the ephemeral "individual," we must realize that although we cannot explain the basic "Why" of his conduct, we can observe his overt behavior and make some predictions as to what his conduct will be in the future. For our purposes, the fundamental concern is with the individual's attitudes as they affect what he perceives, *infra*, and with his perceptions as they, in turn, affect what he does. In our contemporary world of communication, transportation, and computer technology, survival will increasingly depend on the interaction of various groups and their sub-groups. In a very practical way it does matter how these groups conceive *their* mode of life as well as their perception of *others', their* ways of doing things and

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[44] Tuddenham and Macbride, *The Yielding Experiment From the Subjects Point of View*, 27 J. PERS. 259, 260 (1959).

[45] KRECH, CRUTCHFIELD & BALLACHEY 513.

[46] *See* Swain v. Alabama, 380 U.S. 202 (1965).

others' ways, *their* attitude on various aspects of life and *others'* attitudes.[47]

Without attempting to discover where the person acquires an attitude, we must start by assuming that an *attitude* refers to a stand or position the individual will take which upholds and cherishes certain objects, issues, persons, groups, or institutions. "The referents of a person's attitudes may be a 'way of life'; economic, political or religious institutions; family, school, or government."[48] Having reached this juncture, we may say that this person is no longer neutral toward the referents of the attitude. He may experience feelings of being for or against, positively inclined or negatively disposed to some objects. This thing, *i.e.*, the attitude, is not a momentary aspect of his personality, but is of lasting quality so long as the attitude is operative.[49]

While it should be apparent that any such strong attitude will affect the individual's megalo-response, what may be more important is how weaker attitudes affect the micro-response. If we conceptualize a particular response, *e.g.*, an overt action, as being the function of the particular stimulus, we have indulged in an over-simplification of the human organism. A more exact model of behavior would be represented by the formula,

$$R=f(O, S_1, S_2, \ldots),$$

where R represents a particular response, O is the organism with its present attitudes and experiences, and S_1, S_2, . . . represent all the stimuli which make up the universe of stimuli.[50] Under laboratory conditions, this model appears to hold true for simple studies of attention. To our detriment, however, a juror's experiences in the court room or in life are not so limited. While an experimenter may control the number of stimuli being transmitted to a subject, and likewise control to an extent the number of possible responses, in the real world the laboratory formula must be rewritten to provide for a number of stimuli, personal factors and responses. When this is done, we must provide for at least a finite number (n) of possibilities, and the formula appears as

$$R_n=f(O_n, S_n).$$

This is done so that we may now understand the role of O_n, and attempt to ascertain why it is that the person responded to a particular situa-

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[47] C. SHERIF, M. SHERIF, & R. NEBERGALL, ATTITUDE AND ATTITUDE CHANGE 1 (1965).

[48] *Id.* at 4.

[49] *Id.* at 5.

[50] R. WOODWORTH & H. SCHLOSBERG, EXPERIMENTAL PSYCHOLOGY 73 (Rev. ed. 1964).

tion in a particular way. Simply stated, this means that while the individual is a compact unit, there are any number of possible psychological sets which might be considered if we were to determine what inter-relation exists between the various stimuli and the ultimate responses. At this point, we can then add to the model the axiom that what a person has previously experienced affects his present perception or attention.[51]

From this rather complicated model, we ultimately come to what is known, almost as common sense, that a person may be subjected to a number of facts and opinions, but based on what he has previously experienced, he will respond in different ways. It is essentially from this understanding that the Jury Project analyzed the effects of various occupations on a verdict or decision in civil and criminal cases. The same thing is done by every small-town lawyer who questions and challenges prospective jurors, not necessarily because of a known provable bias or prejudice, but because of an intuitive feeling based on the attorney's personal experience with that individual. Where it is not practical for the lawyer to know the prospective jurors, as where a lawyer from another community is brought into a "foreign area," this attorney is well advised to seek the assistance of co-counsel from the local bar. In yet another situation, *i.e.*, the large metropolitan areas, an attempt has been made by the courts and private enterprise to secure information about the individuals' names, addresses, and occupations prior to trial, and make it available to the attorneys.[52] In the only case which has questioned the use of these materials, the court indicated that so long as both attorneys had access to the information there is no objection.[53]

While such information as the individual's name, address, occupation, education, and knowledge of basic legal concepts, may be useful, it is now time that we investigate the possibility of securing information about the individual's personality which distinguishes him from others who might live in the same area, have the same educational background, a similar occupation, and the same awareness of legal concepts. At this point, we can only turn to psychological testing for assistance.[54] From the information we obtain from this source, we would be in a position not only to better equip the combatting attorneys with information about the individual jurors and how they might react to a particular witness or statement, but the attorneys would have a basis for understanding how the jury will respond. Like-

[51] J. HOCHBERG, PERCEPTION 34 (1965).
[52] *See* Note, *Jury Selection in California*, 5 STAN. L. REV. 247 (1953).
[53] Baugh v. Beatty, 91 Cal. App. 2d 786, 205 P.2d 671 (1949).
[54] *See* A. OSBORN, *supra* note 10, at 87-107.

wise, the courts would be better able to dismiss persons who are obviously incompetent because of their bias. Before our judicial system adopts such a program, however, it will need to know what kinds of information are available, how it is obtained, and the limitations of psychological testing in general.

IV. INTRODUCTION TO PSYCHOLOGICAL TESTING

In the last decade the American society, and to a lesser extent, the British and European societies, have been confronted with a myriad of tests to diagnose, treat, and assist in solving the individual's most complex personal problems. This phenomenon is the result of the efforts of the philosophical psychologist of the latter half of the nineteenth century who speculated and theorized that people were different. The need for precise techniques to assess mental differences between individuals was explicitly recognized by Sir Francis Galton, whose efforts established the framework for the establishment of psychological testing on a genuinely scientific basis.[55] The concept of measurable individual differences, coupled with the rise of experimental psychology, resulted in the inevitable conclusion that each person is in some way unique, but likewise similar to others of his culture. Persons such as E. H. Weber, G. Fechner, Wilhelm Wundt, and J. M. Cattell, gave psychology an empirical basis from which it was possible to say all persons are in fact different in their abilities.[56]

While working with the available materials on individuals' abilities to discriminate and judge tactile, visual, auditory and muscular stimuli, the early psychologist created a "mental test" for his particular study. With additional experimentation and reflection, it was thought that just as there were distinct differences in individuals' abilities to discriminate simple stimuli, so these individuals were probably different in other respects, *e.g.*, intelligence. This theme was picked up, amplified, and modified by such men as Alfred Binet, E. L. Thorndike, and Lewis Terman.[57] As a result of the efforts of these and others, there now appears to be no limit to the number of different intelligence tests available for the use of educators to study pre-school-aged children as well as the most advanced graduate students in universities.[58]

Since it was apparent that the experimental and educational psychologists could use their particular kinds of tests, the clinical psy-

[55] F. GALTON, INQUIRES INTO HUMAN FACULTY AND ITS DEVELOPMENT (1883).
[56] N. MUNN, PSYCHOLOGY 4-9 (4th ed. 1961).
[57] *Id.* at 109-50.
[58] *See* THE FOURTH MENTAL MEASUREMENT YEARBOOK (O.K. Buros ed. 1953).

chologists, in conjunction with members of the medical profession who called themselves psychoanalyists or psychiatrists—depending on the extent to which they followed the teachings of Sigmund Freud—considered the possibility of using some test to assess or "measure" a person's personality and his problems of adjustment. Just as with the earlier intelligence tests, the new personality tests lacked much in empirical norms and standards, but the shortage was quickly overcome by the development and wide use of several different personality tests or inventories.[59] While there has been criticism concerning the proper and improper use of the various tests, our educational institutions, mental health personnel, and business interests—private and governmental—continue to use the available tests to their advantage.[60] Although the use of these tests is widespread, it is of interest to note that they are not being employed within the legal structure. It is for this reason that the following material has been collected and systematized. We shall look at the general problem and procedure of test construction, the types of tests available, criticisms of the testing movement, usage of the tests within the confines of the jury system, and limitations which should be placed on the use of these tests.

V. CONSTRUCTION OF TESTS

Before any test can be created and used effectively, the tester must decide what he hopes to quantify or measure. If, for example, one wishes to determine how well a person comprehends what he reads, he probably would not create questions which deal exclusively with numbers. Conversely, a test of mathematical ability would not place emphasis on the person's ability to read abstract material not containing numbers. Just as each of the above examples requires the tester to determine what he wishes to measure, so the creator or author of a psychological test must specify what he wishes to quantify. Thus, while one would generally think that a test of intelligence would lend itself readily to any type of question, a useful and accurate test requires an analysis of what is called intelligence and the factors to be included in a generally accepted definition of this abstract.

For the psychologist concerned with drafting a personality inventory, the analysis must begin with a concept of a model of behavior or a theory of personality. If one cannot determine how to

[59] As of 1962, there were no less than five hundred personality tests and inventories, with prospects for even more in the following decade. W. FREEMAN, THEORY AND PRACTICE OF PSYCHOLOGICAL TESTING 555 (3d ed. 1962).

[60] A. ANASTASI, PSYCHOLOGICAL TESTING 4 (2d ed. 1961).

conceptualize behavior, it is useless to devise questions and evaluate the effectiveness of the questions. The psychologist is fortunate, however, as there are many academically accepted theories of personality from which to choose,[61] and while one may think in terms of a specific approach, some overlap appears inevitable.[62] It should be obvious that a psychologist should not begin the actual construction of a test until he has decided on his particular model of human behavior. From here the psychologist may then draft questions with reference to his particular model which will ultimately measure or quantify attitudes, personality factors, or performance. Once the question is drafted, it must be submitted to a sample of the population to empirically validate the accuracy of the question.[63] If, for example, the questions are designed to quantify racial prejudice, but when submitted to persons known to have the particular prejudice, the test results fail to identify the factor, the questions must be discarded or modified. It is at this point that the author of the test must face the questions of reliability and validity of his test.

Reliability for the tester is the consistency of the measure throughout a series of tests,[64] and indicates how much confidence may be placed in the measure. To ascertain this information, the author may use one of two methods, the *test-retest* or the *split-halves*.[65] The test-retest method, by far the simpler, requires the same test or series of questions to be asked a second time of the same person or group after a lapse of time. If the same results are obtained each time, the test is said to be reliable. On the other hand, if the split-halves method is used, the test is divided into two equal halves and given to the persons to be tested. If the questions are valid and quantify the same thing, the results of a reliable test would find substantially the same results for each half.[66] It must be remembered, however, that reliability, which may be conceptualized as separate from validity, is inseparably linked to the latter.

The concept of validity looks to the issue of whether the question or test does in fact quantify what it seeks to ascertain.[67] If the psychologist is concerned with the *construct validity* of the inventory,

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[61] *See generally* C. HALL AND G. LINDZEY, THEORIES OF PERSONALITY (1957).
[62] *Id.*
[63] L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 122 (2d ed. 1960).
[64] *Id.* at 126.
[65] *Id.* at 136.
[66] *Id.* at 137.
[67] Cattell, *Foundations of Personality Measurement Theory in Multivariate Experiments*, OBJECTIVE APPROACHES TO PERSONALITY ASSESSMENT 52 (B. Bass and I. Berg eds. 1958).

he is asking whether the test or question relates to his previously indicated model of behavior or personality theory.[68] On the other hand, if one is concerned with the issue of *concurrent validity*, statistical analysis must be conducted to determine whether the new series of questions quantifies the behavior as well as previously established tests.[69] Again there is considerable overlap of these two kinds of validity, but they may be conceptualized for the purpose of analysis.

At the same time, it must be realized that the question of construct validity may not be postponed until the questions are formulated. The process of drafting the questions involves a continuous analysis of how well the question delineates the underlying behavior. With this consideration, the tester must also evaluate the nature and quality of his proposed question with reference to other inventories which have proven themselves useful. Likewise, the tester scrutinizes each proposed question to estimate how reliable it will ultimately prove to be.

Once the tester is satisfied that his test is reliable and valid, by testing for both construct and concurrent validity, the decision remains as to whether it is a good test. Conceivably any test which arrives at this point might be given the desired label. However, it should be clear that a test which has met the preliminary requirements *and* is simple to administer is a better test than one which produces valid results but is awkward and time-consuming to administer. While substantial consideration must be given to the efforts required of one who administers the inventory, the ultimate purpose of any test will be to establish norms for the population by which individuals may be compared to one another. Thus, a test which is easier to administer will lend itself to this purpose.[70]

If a new test survives the procedure described, it remains to be selected and used by various individuals for their particular purposes. While it might appear to be a simple task to make the selection, the need for a qualified psychologist is present in each of the three major aspects of the testing situation: selection, administration and scoring, and interpretation.[71]

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[68] L. CRONBACH, *supra* note 63, at 105.
[69] *Id.* at 104.
[70] *Id.* at 147-56.
[71] The test may not be evaluated by name, author or other easy marks of identification. Although it requires no psychological expertise to consider such factors as cost, bulkiness, ease of transportation, and testing time required, such is needed to evaluate the technical merits of the test in terms of validity, reliability and norms. A. ANASTASI, *supra* note 60, at 47.

VI. TESTS CURRENTLY AVAILABLE

With this understanding of the construction, it is useful to now look at particular personality tests which are commonly used. Probably the best known, and one of the most thorough personality inventories is the Minnesota Multiphasic Personality Inventory (hereinafter referred to as the MMPI), first published in 1943 by S. R. Hathaway and J. C. McKinley. The inventory consists of 550 true-false questions, many of which were borrowed from earlier tests of personality; but other original items more pertinent to the areas typically examined by a thorough diagnostic interview in a psychiatric setting are also found. In all, the inventory covers questions from twenty-six categories, which are broken down into thirteen scores.[72]

The thirteen scores are plotted on a profile sheet that provides an automatic conversion of the raw score data to standard scores.[73] Primary significance is attached to scores in excess of 70 (60 being the average for the reference group), but as the cut-off is somewhat arbitrary, interpreters examine all peaks whether or not they cross the threshold.[74] The profile for the MMPI thus lends itself to complex configural interpretations. A significant limitation on the use of the MMPI arises out of the fact that it is primarily oriented toward matters of psychopathology and morbidity with its greatest validity being shown when applied to clinical and psychiatric problems, showing less utility in problems of normal behavior and everyday life.[75]

Examples of personality inventories more directly related to the functioning of normal individuals, thus compensating for the shortcoming of the MMPI, are the California Psychological Inventory (hereinafter referred to as the CPI), the California Test of Personality (hereinafter referred to as the CTP), the Minnesota Counseling Inventory (hereinafter referred to as the MCI), and the Sixteen Personality Factor Questionnaire (hereinafter referred to as the 16PFQ). The CPI, CTP, and the MCI are modeled from the MMPI, but are specifically designed for relatively normal high-school students, adults, and college students, respectively, while the 16PFQ originates from an independent source.

The CPI, the results of the efforts of H. G. Gough, first published in 1957 for high-school students, is a lengthy inventory covering fifteen

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[72] G. DAHLSTROM & S. WELCH, AN MMPI HANDBOOK 48-85. (1965).

[73] A standard score is a statistical term used to identify a raw score in its relation to the mean, *i.e.*, the arithmetical average.

[74] L. CRONBACH, *supra* note 63, at 471.

[75] *Id.* at 481-84.

traits such as sociability, tolerance, and intellectual efficiency, plus three control keys. The scoring keys were developed empirically, but certain of the scales have a low correlation with their criteria; *i.e.*, the concurrent validity is not as accurate as the MMPI. Interpretation is based primarily on an impressionistic psychological integration of the entire profile and while this test covers a broader range of behavior, the greatest criticism is the lack of well established norms.[76]

The CTP, the work of L. P. Thorpe, first published in 1953 for the public school system and adults, contains questions which yield percentile scores on personal adjustment and social adjustment. Such subscores as "sense of personal worth," "nervous symptoms," and "family relations" have skewed distributions, *i.e.*, the distribution does not conform to the normal bell-shaped curve, and is capable of giving meaningful information about patterns of adjustment only in rare cases. These scales are contrasted with others which have proven more useful.[77]

The third inventory, the MCI, the product of R. F. Berdie and W. L. Layton, is likewise for pre-adults. Most of the 413 true-false self-descriptive statements are rewritten MMPI items. Seven scales measure adjustment of such things as family and social relations, emotional stability, mood, and conformity. There are two control scales comparable to the first four scales on the MMPI. The scales have positive but very modest validity for separating, for example, pupils known to have poor family adjustment from those rated as having good adjustment, while the reliability appears to be more than adequate. However, this inventory, like so many others, comes up short for want of adequate norms.[78]

It should be apparent at this point that the most useful of the preceeding inventories is the MMPI. This is not to say, however, that the criticisms raised in the discussion of the other three inventories should render them totally useless. To the contrary, the CPI, CTP, and MCI are all useful for particular purposes. The key to this utility does not rest in the test alone, but in the skill and knowledge of the administrator as indicated *supra*.[79] The deficiencies which do exist, in addition, may be overcome with a concerted effort and analysis of the construction process.

A fourth inventory which should not go unmentioned is the 16PFQ, first published in 1956, by R. B. Cattell, D. R. Saunders, and G. Stice. This inventory, like the two proceeding ones, is designed to be used on

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[76] *Id.* at 495.
[77] *Id.*
[78] *Id.* at 496.
[79] A. ANASTASI, *supra* note 60, at 47.

normal individuals from sixteen years of age through adulthood. In his analysis and evaluation of this inventory, C. J. Adcock has suggested that this particular test is a major step forward in the area of psychological testing, since it is originally based on a comprehensive factor analysis, and a prodigious amount of statistical analysis has gone into it. As an indication of this test's acceptance, it is of interest that between its initial publication and 1959, the test had been translated into six foreign languages for use outside the English speaking world.[80]

VII. CRITICISMS OF TESTING

Up to this point, we have concerned ourselves with the history and construction of personality inventories with no consideration being given to the ramifications of the entire testing movement referred to in the introductory sentences. The problem now is to look at the inventions of the human mind to determine the If, When, and How. Most psychologists involved in the area of testing will readily agree that the elements of reliability, validity and suitable norms in the present tests could be vastly improved.[81] These considerations, however, should not be the basis for abandoning the testing movement. Likewise, the inadequacies of certain tests should not vitiate otherwise useful inventories. The problems which we must face are of a more subtle nature.

It was Mr. Justice Brandeis who prophesied the very kind of problem which now confronts us. Referring to "subtler and more far reaching means of invading privacy," Justice Brandeis predicted that "advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions."[82] "Can it be," he asked, "that the Constitution affords no protection against such invasions of individual security?"[83]
To this question he answered:

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his failing, and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions,

[80] THE FIFTH MENTAL MEASUREMENT YEARBOOK 196 (O.K. Buros ed. 1959). The scales for the test are as follows: (1) aloof v. warm-outgoing; (2) dull v. bright; (3) emotional v. mature; (4) submission v. dominant; (5) glum-silent v. enthusiastic; (6) casual v. conscientious; (7) timid v. adventurous; (8) tough v. sensitive; (9) trustful v. suspecting; (10) conventional v. eccentric; (11) simple v. sophisticated; (12) confident v. insecure; (13) conservative v. experimenting; (14) dependent v. self-sufficient; (15) lax v. controlled; (16) stable v. tense; and (17) a control scale.

[81] *Id.* at 196-98.

[82] Olmstead v. United States, 277 U.S. 438 (1928).

[83] *Id.* at 474.

> and their sensations. They conferred, as against the government, the right to be let alone—the most valued by civilized men. To protect that right, every individual unjustifiable instrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the fourth amendment.[84]

Clearly Mr. Justice Brandeis' words may not be taken to mean that psychological testing is unconstitutional, but the inference is raised that if the government should undertake such a course of action, serious constitutional questions would arise. This was significantly pointed out a few years ago when the Supreme Court was asked to decide whether a particular psychological test might be required as a condition of governmental employment.[85] The Court said the numerous questions asked in the test regarding religious beliefs and practices violated the first as well as the fourth amendment. It went further to say the government cannot, as a condition of employment, inquire into such matters.[86] One might argue then that a person who is required to take a personality test or inventory, for any governmental purpose, is encouraged to "fake" the examination, or expose to the government that which the fourth and fifth amendments protect.

While some would argue that the protection of the fourth amendment extends only to unreasonable searches and seizures, it may well be that the Supreme Court has clearly indicated an inclination to expand the protections of the fourth amendment in the direction of that suggested by Justices Holmes, Brandeis, Stone, and Butler.[87] Thus it has been suggested that an analogy may not be drawn between a physical and a psychological examination. As Monroe H. Freedman, Associate Professor of Law at George Washington University, indicated before a Senate hearing: "There is nothing unconstitutional about taking finger prints. It may well be unconstitutional to subject him to certain kinds of [psychological] questioning."[88]

In a recent study sponsored by the Special Committee of Science and Law of the New York City Bar Association, Professor Alan F. Westin of Columbia University investigated three areas of scientific technology and their possible legal implications. Professor Westin, after examining the mushrooming technology of surveillance, via wiretapping, personality testing, and central data collecting, issued a blunt warning: A broad range of legislative, judicial, executive, and private

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[84] *Id.* at 478.
[85] Torcaso v. Watkins, 367 U.S. 488 (1961).
[86] *Id.*
[87] Griswold v. Connecticut, 381 U.S. 479 (1965).
[88] *Hearings on Psychological Tests and Constitutional Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 178 (1965).

actions are needed now if the American Society is to protect privacy from the increasing pressures of scientific technology. We have only a few years of lead time left before the problem will outgrow our capacity to apply controls.[89] Dealing specifically with personality tests, Professor Westin indicated that the personality inventories which are now widely used by the government and industry go beyond the measurement of intelligence, skills, and attitudes to probe emotional states, chaaracter traits, social, religious, and political attitudes, and sexual adjustment.[90] Professor Westin perceives this type questioning as a definite invasion of privacy, even though in his study of 208 nationally known corporations, 47 percent were using various personality inventories: of those corporations not using the inventories, more than half believed that such tests did not invade privacy.[91] Clearly the private sector of the population has not considered the overall implications of its activity. For the companies using the psychological tests, and those which believed there was no invasion of privacy, the personality tests were seen as merely effective and efficient means of personnel selection. Westin, however, indicates that the use of psychological inventories is not the evil in and of itself, but that these tests must be viewed in a total picture.

Specifically, Westin is concerned with the move toward data surveillance. The report of the study indicates that the trend toward greatly increased collection of personnel data, exchange of information among the collectors, and consolidation of such personal information into central data banks represents by far the most serious threat to privacy in the coming decade.[92] This movement has already begun, for today we find an individual pouring a stream of personal data about himself into files from birth onward, and it is information which is becoming more and more available for public use.[93]

Professor Westin predicts that the next decade will see the growth of computerized central data banks containing enormous amounts of personal information such as birth and marriage records, school records, passport data, credit ratings, job experience, military records, medical and psychiatric reports, income and social security returns, ad infinitum. With the new laser-recording process, it is possible to put twenty pages of typed information about every man, woman, and

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[89] A. WESTIN, PRIVACY AND FREEDOM 365-99 (1967).
[90] *Id.* at 133-57.
[91] *Id.* at 136.
[92] *Id.* at 158-68.
[93] Miller, *The National Data Center and Personal Privacy*. 20 THE ATLANTIC, November 1967, at 53-57.

child in the United States on a single 4,800 foot reel of plastic computer tape. This tape may be easily stored and available for swift recall by any party having access to the tape.[94]

The question now is: What do we want to pay for progress?[95] Our society, for the most part, is based on a philosophy of work and education. Private enterprise is concerned with finding new and better ways of providing products and services. Most of this effort has resulted in advantages for the entire society.

Without attempting to evaluate the relative merits and demerits in terms of present and future advantages versus disadvantages, some framework must now be established whereby technology may continue while placing sufficient restraints on this progress to enable a thorough analysis and reflection to ascertain the relative merits. Specifically, we must look to psychology and psychological testing to assist us in finding better ways for individuals to maximize their personal potential, while restraining the movement which could ultimately destroy the very individualism it is designed to enhance. For example, it has been held that certain types of personality inventories may not be used as a requirement for governmental employment, since the questions on the test invade constitutionally protected zones. However, the psychologists responded to the criticism, and the limitation was met with new tests which were "culture free" to measure intelligence without discrimination against minority groups.[96] Realizing this fact, Professor Westin, speaking before the American Psychological Association convention in September, 1966, indicated that if this may be done there is no reason why it should not be possible to give such time and money as is necessary to develop a "privacy-respecting" personality inventory.[97] Thus, to the extent that the personality inventories do invade the constitutional protection of the fourth and fifth amendments, *new* tests may be required to overcome the objection. However, the problems of the central data banks may not be so easily solved, but a possible solution will be presented, *infra*, with specific reference to the proposed uses of psychological tests for jury selection.

VIII. PROSPOSAL AND SAFEGUARDS

Under our present system of jury selection, the trial judge is given

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[94] A. WESTIN, *supra* note 89, at 163-68.

[95] For an entertaining satire of the problems which could be created by a National Data Bank, *see* Elliott and Goulding, *The Day the Computers Got Waldon Ashenfelter*, 20 THE ATLANTIC, November 1967, at 58-61.

[96] *Tests Violate Privacy*, SCIENCE NEWSLETTER, September 17, 1966, at 198.

[97] *Id.*

considerable latitude in which he may deny an attorney the privilege of striking a particular juror for cause, if that juror will swear he can decide the case without permitting his prejudice to affect his decision-making processes. It should be clear from our earlier discussion that this is impossible for any juror to do if he has any prejudice or bias, but as the "law" provides it is possible, the trial judge may act accordingly. The advantage of using psychological tests on prospective jurors would be to have some quasi-scientific basis for understanding this *thing* we call a jury. If the tests were administered at the beginning of the term for which the jurors were asked to serve, the results could be compiled for all of these persons on the broadest possible array of situations. By so doing, an attorney could consult with the psychological experts to discover the nature of the person or persons to whom he is to present his case. Likewise, the attorney would not be placed in the awkward position of having to probe into the personal background of each prospective juror before the courtroom observers. This would benefit the court as it could speed cases on to trial without lengthy voir dire examinations, and the attorney would not be placed in a situation which antagonizes the jurors who remain as well as those who are struck for cause or under the peremptory challenge. In the event the court was unsure as to whether a particular juror should be seated, the attorney could present his argument to the court without an open confrontation with the court or the individual jurors.

This procedure of psychological testing would not be used as a conclusive basis for selecting the jury, but as an additional basis to expedite the judicial proceeding. Likewise, such a procedure would create substantive evidence which an attorney might use on appeal if there was a clear abuse of the trial judge's discretion in seating a particular juror: the appellate court would have something other than the mere dialogue of the courtroom on which to base its decision.

The obvious concern of appellate courts is to balance a litigant's right to have an impartial jury against the individual juror's right of privacy. As indicated earlier, if the tests are properly constructed there should be no constitutional objection to the procedure, unless there is an a prior assumption that any testing would be an invasion of the individual's privacy. The obvious answer to this is that psychological tests are not essential to a trained individual to understand others. As Freud once indicated:

> He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If the lips are silent, he chatters with his finger tips; betrayal oozes out of him at every pore.[98]

[98] III S. FREUD, COLLECTED PAPERS 78 (1933).

Why then should we use psychological tests? The answer lies in expedience for the attorneys, the trial court, and the appellate courts as the tests could quickly and inexpensively reveal what would otherwise require several individual psychologists or psychiatrists to discover. However, before the courts begin using psychological tests in jury selection, new tests must be devised which will better quantify that which they seek to measure. Analysis of personality theories, reliability, validity, and norms should be re-evaluated in addition to accepting Professor Westin's proposal that the tests be designed to be "privacy-respecting."

At the same time, emphasis should be placed on training lawyers and judges to understand the construction, scoring, and interpretation of the personality inventories. This is not to say that either the attorneys or the court should administer and interpret the test, but merely that these individuals be made to understand what a psychologist can and cannot say about human behavior. As indicated in the section dealing with test construction, a trained psychologist is needed to select, administer, evaluate, and interpret the scores. However, under the present system, a psychologist may be able to do his part, but for lack of understanding on the part of the legal system, the information cannot be used effectively.

The final requirement of this proposal is by no means the least significant, but goes to the most urgent problem created by the use of these or any other psychological tests. Professor Westin adequately stated the problems created by the possibility of a National Data Bank; the question now is to decide what to do about these "banks." It is suggested that under the proposal for the administration of psychological tests in the area of jury selection that the informational results of the test be limited to the individual psychologist who administers the tests, the judge, and the respective counsel. Once this is understood, sanctions of the nature of criminal prosecution, civil suits, and possible contempt of court action should be made available to a party if information of the results of his examination are made known to any other person or agency. These limitations are essential at this point as it is clear that we have reached a degree of sophistication in scientific technology and understanding of the human mind that we can no longer disregard the information which is available, but our *human-value system* requires that we retain sufficient control over the creative process so as to prevent its self-destruction.

C. David Emerson