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## "Just Say No" to Integrity Testing

Michael B. Metzger

Dan R. Dalton

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# “JUST SAY NO” TO INTEGRITY TESTING

*Michael B. Metzger\**

*Dan R. Dalton\*\**

I. INTRODUCTION . . . . .	10
II. THE EMPLOYER'S PLIGHT . . . . .	13
III. WRITTEN INTEGRITY TESTS: ARGUMENTS FOR AND AGAINST . . . . .	18
A. <i>The Case for Written Integrity Tests</i> . . . . .	18
B. <i>The Case Against Integrity Testing</i> . . . . .	20
C. <i>A Preliminary Screen of the Arguments</i> . . . . .	24
IV. The Validity/Base Rate Problem . . . . .	27
A. <i>A Prefatory Example</i> . . . . .	27
B. <i>Integrity Tests and the Validity/Base Rate Problem</i> . . . . .	30
C. <i>The Ethics of Integrity Testing</i> . . . . .	35
V. CONCLUSION . . . . .	38

An employee's privacy is invaded twice in organizations that exercise the full freedom given them by the traditional law. First, it is invaded when the employer collects data about the worker. *Exhaustive questionnaires about the person's life and habits, psychological tests, and electronic tests* — even their most enthusiastic supporters in personnel departments admit that they raise a legitimate question of unfair invasion. But they insist that the benefit to management and society outweighs the invasion. Second, the employee's privacy is invaded when the information collected is put to use.<sup>1</sup>

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\* Professor of Business Law, Indiana University Graduate School of Business. A.B., 1966, J.D., 1969, Indiana University.

\*\* Dow Professor of Management, Indiana University Graduate School of Business. Ph.D., 1979, University of California.

1. DAVID W. EWING, FREEDOM INSIDE THE ORGANIZATION: BRINGING CIVIL LIBERTIES TO THE WORKPLACE 128-29 (1977) (emphasis added).

## I. INTRODUCTION

Estimates place the number of written integrity tests<sup>2</sup> employers administer each year at between 2.5 million<sup>3</sup> and 5 million.<sup>4</sup> Almost one-third of the employers in certain industries regularly use such tests to screen prospective employees,<sup>5</sup> and between 5,000 and 6,000 firms make some use of them.<sup>6</sup> Opponents of integrity tests have

2. We will use the term "written integrity tests" generically, but tests of this type come in a variety of forms. Distinctions among those forms, however, are not relevant to our purposes here. When we refer to a written integrity test or honesty test, we include any commercially available test which purports to assess the integrity of prospective employees for selection purposes. A discussion of the various types of tests is included in Paul R. Sackett, Laura Burris & Christine Callahan, *Integrity Testing for Personnel Selection: An Update*, 42 PERSONNEL PSYCHOLOGY 44 (1989); Paul R. Sackett & Michael M. Harris, *Honesty Testing for Personnel Selection: A Review and Critique*, 37 PERS. PSYCHOL. 221 (1984). See also Congress of the United States Office of Technology Assessment, OTA-SET-442, 31-32 (Sept. 1990). These questions are based on existing test questions found in a variety of integrity tests examined by OTA. The questions have been changed slightly to avoid proprietary disclosures. The questions include:

- 1) How often do you tell the truth?
- 2) Do you think that you are too honest to take something that is not yours?
- 3) How much do you dislike doing what someone tells you to do?
- 4) Do you feel guilty when you do something you should not do?
- 5) Do you think it is stealing to take small items home from work?
- 6) Do you believe that taking paper or pens without permission from a place where you work is stealing?
- 7) What percentage of the people you know are so honest they wouldn't steal at all?
- 8) How many people have cheated the government on their income tax returns?
- 9) In any of your other jobs, was it possible for a dishonest person to take merchandise if a dishonest person had your job?
- 10) Do you believe most employers take advantage of the people who work for them?
- 11) Do you think company bosses get away with more illegal things than their employees?

3. Ed Bean, *More Firms Use Attitude Tests to Keep Thieves Off the Payroll*, WALL ST. J., Feb. 27, 1987, at 41, col. 3 (predicting 30% annual increase in tests administered).

4. Tim Beardsley, *Mind Reader: Do Personality Tests Pick Out Bad Apples?*, 26 SCI. AM. 154 (1991).

5. Jerry Beilenson, *Applicant Screening Methods: Under Surveillance*, 67 PERSONNEL 3 (1990) (28% of all wholesale and retail trade companies regularly use integrity tests).

6. See *Focus on . . . Integrity Testing*, Indiv. Empl. Rts. (BNA) No. 11, at 4 (Mar. 26, 1991) (estimated 6,000 employers using integrity tests) [hereinafter *Integrity Testing*]; *Focus on . . . "Integrity" Tests*, Indiv. Empl. Rts. (BNA) No. 18, at 4 (Oct. 9, 1990) (about 5,000 to 6,000 businesses in U.S. use honesty and integrity tests to screen applicants) [hereinafter *"Integrity" Tests*].

labeled them "a new or disguised form of polygraph,"<sup>7</sup> "psychological rubber hose treatments employers use to intimidate people,"<sup>8</sup> and an example of "Big Brother at work."<sup>9</sup> The development of the tests and the debate over their efficacy has received considerable attention in the popular press,<sup>10</sup> but curiously little mention in the legal literature.<sup>11</sup>

The passage of the Employee Polygraph Protection Act of 1988 (EPPA),<sup>12</sup> which radically reduces employers' ability to polygraph their employees,<sup>13</sup> virtually guarantees an increase in the number of employers that will resort to written integrity testing.<sup>14</sup> The EPPA is "only

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7. Kurt H. Decker, *Honesty Tests — A New Form of Polygraph?*, 4 HOFSTRA LAB. L.J. 141, 151 (1986).

8. Bernard Gavzer, *Should You Tell All?*, PARADE, May 27, 1990, at 4, 5.

9. *Id.* at 4 (quoting Harvard Law Professor Alan M. Dershowitz).

10. See also Gilbert Fuchsberg, *Attorney General in New York Urges Integrity Test Ban: Tool to Determine Honesty and Habits of Workers Called Unreliable, Unfair*, WALL ST. J., Mar. 5, 1991, at E86, col. 6; Robert McGough & Elicia Brown, *Thieves at Work: The Recession Looms. Do You Know Where Your Employees Are?*, FIN. WORLD PARTNERS, Dec. 11, 1990, at 18; Christine Gorman, *Honestly, Can We Trust You? Barred from Using Polygraphs, Employers Seek an Integrity Test*, TIME, Jan. 23, 1989, at 44.

11. For the only articles making any real attempt to grapple with the issues, see Decker, *supra* note 7; Carolyn Wiley & Docia L. Rudley, *Managerial Issues and Responsibilities in the Use of Integrity Tests*, 42 LABOR L.J. 152 (1991); Comment, *Prohibition of Pencil and Paper Honesty Tests: Is Honesty the Best Policy?*, 25 WILLAMETTE L. REV. 571 (1989). A few other pieces acknowledge the existence of a problem. See, e.g., Terry M. Dworkin, *Protecting Private Employees From Enhanced Monitoring: Legislative Approaches*, 28 AM. BUS. L.J. 59, 72-73 (1990); Vicki Quade, *Use of Honesty Tests Raises Privacy Issue*, 68 A.B.A. J. 671 (1982); *Integrity Testing*, *supra* note 6; "Integrity" Tests, *supra* note 6; *Focus on . . . Pre-employment Screening*, *Indiv. Empl. Rts. (BNA) No. 18*, at 4 (Oct. 10, 1989) [hereinafter *Pre-employment Screening*].

12. 29 U.S.C. §§ 2001-09 (1990).

13. The EPPA does not apply to governmental employees. 29 U.S.C. § 2006(a) (1988). The federal government is also authorized to test employees of firms doing sensitive work for governmental agencies such as the CIA, NSA, and the Department of Defense. *Id.* at §§ 2006(b), (c). The providers of security services and manufacturers of controlled substances are also exempted. *Id.* at §§ 2006(e), (f). Other private employers are only allowed to polygraph employees in the case of an "ongoing investigation" into specific instances of "theft, embezzlement, misappropriation, or . . . industrial espionage or sabotage." *Id.* at § 2006(d)(1). For a thorough discussion of the EPPA, see Dworkin, *supra* note 11, at 64-70. The EPPA is estimated to have caused an 85 % reduction in the number of polygraph tests administered in the United States. See Anne E. Libbin, Susan R. Mendelsohn & Dennis P. Duffy, *Employee Medical and Honesty Testing*, 65 PERSONNEL 38, 47 (1988).

14. "There's a general feeling [in Congress] that integrity tests or other types of attempts to seek truthfulness have just exploded as a result of the polygraph ban." Tina Adler, *Integrity Test Popularity Prompts Close Scrutiny*, 20 APA MONITOR 7 (1989). For other authorities attributing the increase in written integrity testing to the EPPA, see, e.g., Gavzer, *supra* note 8, at 4; Wiley & Rudley, *supra* note 11, at 159; Comment, *supra* note 11, at 572; Christi Harlan, *Written "Honesty" Tests Draw Interest as Law Bars Polygraphs as Hiring Tool*, WALL ST. J.,

the first salvo in the 'war' between employee rights to privacy and job security versus the employer's need to know."<sup>15</sup> Integrity testing raises many of the same issues raised by polygraph testing,<sup>16</sup> and the same groups that fought for polygraph regulation are turning their attention to integrity tests.<sup>17</sup> The American Psychological Association (APA) has recently entered the fray with a report opposing the banning of integrity testing,<sup>18</sup> and is reported to have encouraged at least three states<sup>19</sup> not to join the ranks of those few that currently regulate such testing.<sup>20</sup> And at least one observer believes that Congress is likely to take another look<sup>21</sup> at regulating integrity testing.<sup>22</sup>

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Jan. 3, 1989, at B4, col. 2; *Integrity Testing*, *supra* note 11, at 4 (quoting New York State Attorney General Robert Abrams as stating that "[w]ith the outlawing of lie-detector tests as a condition of employment, more and more employers" have turned to integrity tests). For a discussion of the other factors contributing to employers' desire to use written integrity tests, *see infra* notes 26-49 and accompanying text.

15. Dworkin, *supra* note 11, at 72.

16. *See* Harlan, *supra* note 14, at B4, col. 3 ("written tests are bringing with them some of the same problems that plagued polygraphs"); Wiley & Rudley, *supra* note 11, at 159 (concerns about test validity, potential adverse impact, and employee privacy, which have been voiced about written tests are the same concerns that prompted passage of EPPA); *see also infra* notes 54-61, 79-85 and accompanying text.

17. The primary opponents of polygraph testing were organized labor and the ACLU. *See* Decker, *supra* note 7, at 141 (organized labor "has consistently opposed the use of lie detection or truth eliciting devices in the employment relationship"); Harlan, *supra* note 14, at B4, col. 3 (recounting union and labor opposition to the polygraph); Quade, *supra* note 11, at 671 (listing ACLU objections to integrity tests); Comment, *supra* note 11, at 574 n.9 (ACLU a major political force challenging constitutionality of pencil and paper honesty tests and has lobbied Congress to restrict their use) *citing* Quade, *supra* note 11; Ching Wah Chin, *Protecting Employees and Neglecting Technology Assessment: The Employee Polygraph Protection Act of 1988*, 55 BROOKLYN L. REV. 1315, 1320 n.20 (1990) (citing support for polygraph legislation by AFL-CIO, ACLU, and other groups); *Pre-employment Screening*, *supra* note 11, at 4 (state AFL-CIO and ACLU among chief supporters for New York legislation aimed at prohibiting integrity testing).

18. APA TASK FORCE ON THE PREDICTION OF DISHONESTY AND THEFT IN EMPLOYMENT SETTINGS, QUESTIONNAIRES USED IN THE PREDICTION OF TRUSTWORTHINESS IN PRE-EMPLOYMENT SELECTION DECISIONS (1991) [hereinafter APA TASK FORCE]; *see also* discussion *infra* notes 78, 122 and accompanying text.

19. The APA is said to have advised the South Dakota and Connecticut legislatures that proposed legislation banning the use of integrity tests should be withdrawn. *See* Adler, *supra* note 14, at 7. The APA is also reported to have sent a copy of its report to New York's Attorney General. *See* *APA Task Force Releases Final Report on Integrity Testing*, PSYCHOLOGICAL SCI. AGENDA, May-June 1991, at 1, 6 [hereinafter *Final Report on Integrity Testing*].

20. *See infra* notes 92-93 and accompanying text.

21. The EPPA originally included pencil and paper tests, but they were dropped when it appeared that their inclusion threatened to prevent the statute's passage. Dworkin, *supra* note 11, at 72.

22. "A Congress intent on protecting privacy and job security is likely to . . . severely

Whatever Congress ultimately does on the issue,<sup>23</sup> state legislatures and courts are very likely to confront it in the near future.<sup>24</sup> At least one state legislature is reported to have eschewed action on integrity tests due to uncertainty concerning their validity.<sup>25</sup> In this article we attempt to provide some guidance for the policymakers who will have to grapple with the subject of integrity testing. We examine the legal, ethical, and psychometric dimensions of such tests, ultimately concluding that validity problems militate against their use as an employment screening device. We begin our journey toward that conclusion with a sympathetic look at the reasons why employers are motivated to indulge in integrity testing.

## II. THE EMPLOYER'S PLIGHT

Employee theft is a problem of major dimensions for American business.<sup>26</sup> Estimates of the annual cost of employee theft vary dramatically,<sup>27</sup> ranging from \$15 billion to \$50 billion per year.<sup>28</sup> Estimates

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restrict the use of pencil-and-paper tests." *Id.* at 73. This proposition has not enjoyed universal assent. See Robin Inwald, *Those "Little White Lies" of Honesty Test Vendors*, 67 PERSONNEL 52 (June 1990) ("little likelihood that any regulations will be put into effect for a long, long time"). Nor does everyone think that banning written integrity tests would be a good idea. See Comment, *supra* note 11, at 573, 595-96 (opposing prohibition and suggesting regulation).

23. Even if Congress does eventually act, it may take a long time to do so. It took Congress 20 years (and over 40 introduced bills) to regulate the polygraph. Yvonne Koontz Sening, *Heads or Tails: The Employee Polygraph Protection Act*, 39 CATH. U.L. REV. 235, 242 (1989).

24. *Pre-employment Screening*, *supra* note 11, at 4 (predicting "more legislation on the state level, as well as legal challenges to the tests").

25. See Comment, *supra* note 11, at 594 n.119 ("lack of sufficient information on the validity and accuracy of written honesty examinations," as well as lack of precedent or legislation persuaded Oregon legislature to table proposed bill on integrity testing).

26. For a thorough treatment of the subject, see RICHARD HOLLINGER & JOHN P. CLARK, *THEFT BY EMPLOYEES* (1983).

27. For the argument that estimates of employee theft "seem to depend more on the motives of the estimators than on any objective collection and analysis of credible data," see Michael Tiner & Daniel J. O'Grady, *Lie Detectors in Employment*, 23 HARV C.R.-C.L. L. REV. 85, 89 (1988). The authors, both union employees, argue that estimates of employee theft are probably exaggerated. *Id.* at 90.

28. See Gavzer, *supra* note 8, at 5 (\$30 to \$40 billion); Individ. Empl. Rts. (BNA), Sept. 13, 1988, at 3 (\$15 to \$25 billion); Mark Lipman & W.R. McGraw, *Employee Theft: A \$40 Billion Industry*, 498 ANNALS AM. ACAD. POL. & SOC. SCI. 57 (1988) (\$40 billion); Quade, *supra* note 11, at 671 (Commerce Department estimates companies are losing \$40 to \$50 billion a year from employee theft); John F. Steiner, *Honesty Testing*, 15 BUS. F. 31 (Spring 1990) (\$40 billion); Robert J. Tersine & Roberta S. Russell, *Internal Theft: The Multi-Billion-Dollar Disappearing Act*, BUS. HORIZONS, Nov.-Dec. 1981, at 11, 11 (up to \$44 billion). Nor are businesses particularly adept at catching pilfering employees. See Sandra N. Hurd, *Use of the*

of "intangible theft," such as falsified time cards, making personal telephone calls, and taking fake sick days, run even higher — to \$230 billion per year.<sup>29</sup> Some industries are particularly vulnerable to employee theft. For example, the *Wall Street Journal* recently noted that 75% of all retail employees know someone who is stealing from their respective employer.<sup>30</sup> Additionally, in studies of the supermarket industry 43% of the respondents admitted some type of theft of company cash or property, estimating that the "average employee" at their stores steals approximately \$1,209 per year.<sup>31</sup> In fact, up to 30% of business failures have been ascribed to employee theft.<sup>32</sup>

Nor is employee theft the only problem confronting employers. Nearly forty percent of all employees falsify their job applications,<sup>33</sup> and drug and alcohol abuse may cost business an additional \$60 billion to \$98 billion per year.<sup>34</sup> Drug-users are far less productive than their co-workers, miss ten times as many workdays, are three times as likely to injure themselves or others, and are much more likely to steal from their employers.<sup>35</sup> As if this were not enough to give employers a powerful incentive to screen prospective employees, the Drug-

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*Polygraph in Screening Job Applicants*, 22 AM. BUS. L.J. 529, 535 (1985) (pilfering employees go undetected for an average of three years) (citing Note, *The Working Man's Nemesis — The Polygraph*, 6 N.C. CENT. L.J. 94, 100 (1974)).

29. Gavzer, *supra* note 8, at 5, 7 (reporting U.S. Chamber of Commerce estimates).

30. See David J. Solomon, *Hotlines and Hefty Rewards: Retailers Step Up Efforts to Curb Employee Theft*, WALL ST. J., Sept. 17, 1987, at 37, col. 3. Retailers are especially vulnerable to employee theft because cash and merchandise are so accessible to their employees. Peter D. Bullard & Alan J. Resnick, *SMR Forum: Too Many Hands in the Corporate Cookie Jar*, 25 SLOAN MGMT. REV. 51, 52 (1983). Losses from employee theft may amount to as much as 2% of retail sales. *Id.* at 51.

31. John W. Jones, Karen B. Slora & Michael W. Boye, *Theft Reduction Through Personnel Selection: A Control Group Design in the Supermarket Industry*, J. BUS. & PSYCHOLOGY 1990, at 275, 275.

32. See Robert Taylor, *A Positive Guide to Theft Deterrence*, 65 PERSONNEL J. 36 (1986); Tersine & Russell, *supra* note 28, at 12.

33. See Brad V. Driscoll, *The Employee Polygraph Protection Act of 1988: A Balance of Interests*, 75 IOWA L. REV. 539, 554 n.156 (1990) (citing Edward Tivman, *Truth and Consequences: What's Wrong with Lie-Detector Tests*, 17 NEW YORK, Mar. 12, 1984, at 53).

34. See Jon D. Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L.J. 309, 314 (1986) (\$60 billion); Elliot S. Kaplan, Judith Bevis Langevin & Richard A. Ross, *Drug and Alcohol Testing in the Workplace: The Employers' Perspective*, 14 WM. MITCHELL L. REV. 365, 368 (1988) (\$65 billion — alcohol abuse; \$33 billion — drug abuse); Charles S. Pendleton, *Drug Abuse Strategies for Business*, SECURITY MGMT., Aug. 1986, at 75 (\$70 billion).

35. Janice Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52, 53.

Free Workplace Act of 1988<sup>36</sup> requires federal contractors and grantees to maintain a drug-free workplace or lose their funding. Finally, employers are increasingly being held liable for their employees' wrongdoing outside the scope of their employment via the doctrine of negligent hiring.<sup>37</sup>

Employers obviously prefer to screen out potential problem employees before hiring rather than discharging them after problems arise. Preemployment screening obviates the risk of liability to third parties under either a *respondeat superior* or negligent hiring theory, and it is getting increasingly difficult and expensive to fire proven problem employees. The erosion of the doctrine of employment at will<sup>38</sup> and collective bargaining agreements make firing an employee more problematic,<sup>39</sup> and employer discharge decisions are increasingly

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36. Pub. L. No. 100-690, tit. V, subtitle D, 102 Stat. 4181 (1988) (codified at 41 USC §§ 701-07 (1988)).

37. Negligent hiring therefore extends the employer's liability exposure beyond the traditional doctrine of *respondeat superior*, which only holds employers liable for wrongs committed by employees within the scope of their employment. On negligent hiring, see Gavzer, *supra* note 8, at 5; David L. Gregory, *Reducing the Risk of Negligence in Hiring*, 14 EMPLOYEE REL. L.J. 31, 33-36 (1988); Kaplan, Langevin & Ross, *supra* note 34, at 369-74. For some representative cases, see *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391 (Va. 1988); *Malorney v. B & L Motor Freight*, 496 N.E.2d 1086 (Ill. App. Ct. 1986); *Cramer v. Housing Opportunities Comm'n*, 501 A.2d 35 (Md. 1985); *Cutter v. Farmington*, 498 A.2d 316 (N.H. 1985); *Ponticas v. K.M.S. Inv.*, 331 N.W.2d 907 (Minn. 1983).

38. For the classic statement of this doctrine, see *Payne v. Western & Atlanta R.R.*, 81 Tenn. 507, 519-20 (1884): "All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong." On the erosion of the doctrine of employment at will, see, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855 (1983); Paul Lansing & Richard Pegnetter, *Fair Dismissal Procedures for Non-Union Employees*, 20 AM. BUS. L.J. 75 (1982); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Jane P. Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651 (1986); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). Wrongful discharge litigation is potentially quite expensive for employers. In one state (California), for example, a substantial portion of the jury awards in such cases averaged nearly \$500,000. See Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOKLYN L. REV. 1137, 1160 n.85 (1989).

39. Unionized employees can seek arbitration of their discharge. See Ken Jennings, Dilip D. Kare & Amit Goela, *An Analysis of Arbitration Decisions in Employee Theft Cases*, 42 LAB. L.J. 160 (1991). One study indicated that even where relatively serious charges such as theft were at issue arbitrators overturned management's discharge decision in nearly 75% of the cases. *Id.*



followed by employee defamation suits.<sup>40</sup> Even a successful defense against such a suit can cost an employer as much as \$250,000.<sup>41</sup>

Opponents of various forms of employer screening commonly assert that such screening is unnecessary because more thorough reference checking and background investigation will effectively weed out potential problem employees.<sup>42</sup> But many employers fear that vigorous reference checking may itself trigger legal liability,<sup>43</sup> and attempts to check prior employment may yield very little usable information.<sup>44</sup> Fearing defamation liability, many employers have adopted "silence policies," thus refusing to discuss former employees.<sup>45</sup> In consequence, "[e]mployees discharged from jobs for theft and embezzlement often find it relatively easy to secure new opportunities for employment crime, at least in part because of former employers' reluctance to

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40. See John Bruce Lewis, Bruce L. Offley & Gregory V. Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, at 798-800 (1989); O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 306 & n.9 (1988); Ann M. Barry, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264, 264-66 (1989).

41. See Lewis, Offley & Mersol, *supra* note 40, at 798 n.3; Gregory Stricharchuk, *Fired Employees Turn the Reason For Dismissal Into a Legal Weapon*, WALL ST. J., Oct. 2, 1986, at A31, col. 4; JoAnn Tooley et al., *Scaring Bosses Into Silence*, U.S. NEWS & WORLD REP., Oct. 16, 1989, at 125.

42. See, e.g., *Polygraph Protection Act Causes Search for Other Ways of Screening Job Applicants*, 129 Lab. Rel. Rep. (BNA) 9, 10 (1988); Quade, *supra* note 11, at 671.

43. "[M]any employers have deliberately chosen not to pursue aggressive inquiries regarding job applicants, apparently in response to the strictures of employment discrimination, constitutional, criminal, privacy, and defamation law." Gregory, *supra* note 37, at 32.

44. Denying employment on the basis of arrest records may violate state and federal anti-discrimination provisions. *Id.* at 36. Also, "[s]ome states deliberately restrict employer access to information about criminal convictions, may encourage ex-convicts to apply for jobs without any requirement to reveal criminal records, and may prohibit employer use of convictions unless directly related to the specific employment." *Id.* at 37-38.

45. See Lewis, Offley & Mersol, *supra* note 40, at 834; Jolie Solomon, *Reference Preference: Employers Button Lips*, WALL ST. J., Jan. 4, 1990, at B1, col. 1; Barry, *supra* note 40, at 265 n.10. As a result of such policies, "the flow of truthful personnel information, especially between former and prospective employers in regard to job applicants, has been reduced to a trickle and threatens to evaporate completely." Reed & Henkel, *supra* note 40, at 306. Unfortunately for employers, in a growing number of states "silence policies" afford little protection due to the "compelled self-publication" doctrine, which dispenses with the traditional requirement that a defendant must have communicated the defamatory statement to a third party before liability will ensue. For a thorough discussion of this doctrine, see Arlen W. Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 DUQ. L. REV. 227 (1987).

speak out truthfully."<sup>46</sup> Thus, in recent decades employers have found themselves trapped between "legal developments . . . making it more difficult and costly to 'get rid of mistakes'"<sup>47</sup> and doctrines "creating employer liability for torts such as negligent hiring and retention."<sup>48</sup>

Employers caught in this "Catch-22"<sup>49</sup> between increasing liability and their decreasing ability to acquire meaningful information about job applicants turned increasingly to the polygraph as a way out of their dilemma. In 1985, for example, it was estimated that some 1.7 million polygraph examinations were administered to employees and prospective employees.<sup>50</sup> Employers saw the polygraph as an objective,<sup>51</sup> highly accurate<sup>52</sup> device which did not appear to have a discriminatory impact on protected groups.<sup>53</sup>

The growing use of the polygraph in the employment context, however, evoked a rising tide of criticism. Opponents of polygraph testing charged that such testing raised serious privacy<sup>54</sup> issues regarding the questions asked by polygraph examiners.<sup>55</sup> Also worrisome are

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46. Reed & Henkel, *supra* note 40, at 307.

47. Dworkin, *supra* note 11, at 84.

48. *Id.*

49. *Id.* at 85.

50. Benjamin Kleinmuntz & Julian J. Szucko, *Lie Detection in Ancient Times: A Call for Contemporary Scientific Study*, 39 AM. PSYCHOLOGIST 766, 766 (1984).

51. See Dworkin, *supra* note 11, at 62.

52. See *id.* at n.15 (estimates of lie detector accuracy ranging from 75% to 98%, higher percentages coming from field studies); Hurd, *supra* note 28, at 532-33 (70% to over 90%); Lisa Brunn, *Privacy and the Employment Relationship*, 25 HOUS. L. REV. 389, 407 (1988) (quoted accuracy rates of 70% to 90%); Chin, *supra* note 17, at 1325 n.45 (most reliable lie detection technique). "Accuracy," as used in this context, includes both the "reliability" and the "validity" of an examination device. Hurd, *supra* note 28, at 532. "Reliability" means "the consistency of scores obtained by the same person when retested with the identical test or with an equivalent form of the test." *Id.* Donald H.J. Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 75 n.13 (1971). "Validity" refers to "the degree to which the test actually measures what it purports to measure." *Id.* On the distinction between test reliability and test validity, see also Hurd, *supra* note 28, at 532.

53. See Dworkin, *supra* note 11, at 62 & n.12.

54. The right to privacy has been accorded fundamental status by some prominent jurists. See, e.g., *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("the beginning of all freedom"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("the most comprehensive of rights and the right most valued by civilized men"). For the seminal article on the subject, see Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (calling for recognition of a "general right of the individual to be let alone"); see also William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

55. See, e.g., Dworkin, *supra* note 11, at 63 (questions asked during pretest phase when operator is establishing a baseline reading often highly invasive of privacy and unrelated to

problems with both employee access to, and employer dissemination of, the results of the examination.<sup>56</sup> Opponents expressed concern over the polygraph's potential use as a means of employee intimidation or discrimination against potential employees with pro-union sentiments.<sup>57</sup> They noted that the accuracy of a polygraph examination depends, among other things,<sup>58</sup> upon the experience of the examiner,<sup>59</sup> and argued that inaccurate test results had caused employers to make decisions that haunted innocent employees for life.<sup>60</sup> Most significantly, they argued that even the most reliable polygraph examinations result in an unacceptably high level of inaccurate identifications.<sup>61</sup>

Twenty-two states responded to these criticisms with statutes restricting the use of polygraphs as preemployment screening devices,<sup>62</sup> and in 1983, the federal Office of Technology Assessment issued a report critical of the polygraph's validity.<sup>63</sup> In 1988, after a number of false starts, Congress passed the Employee Polygraph Protection Act, effectively denying most private employers the use of polygraph as a preemployment screening device. Not surprisingly, given the powerful incentives employers have to screen out potential problem employees, many employers who have been denied the use of the polygraph have turned to the written integrity test as a screening device.

### III. WRITTEN INTEGRITY TESTS: ARGUMENTS FOR AND AGAINST

#### A. *The Case for Written Integrity Tests*

Written integrity tests were developed for military use in the late 1940s and have been used by some private sector employers since the

employment); Hermann, *supra* note 52, at 82-84 & nn.40-43 (listing sample questions asked during polygraph exams).

56. See, e.g., Dworkin, *supra* note 11, at 63 n.20; Hermann, *supra* note 52, at 86; Hurd, *supra* note 28, at 537; Driscoll, *supra* note 33, at 556.

57. See Tiner & O'Grady, *supra* note 27, at 86.

58. For an extensive list of the factors which allegedly can affect the outcome of a polygraph examination, see Hurd, *supra* note 28, at 530-31; Chin, *supra* note 17, at 1324.

59. See, e.g., Hurd, *supra* note 28, at 531 (proper administration of test "crucial" to accuracy); Driscoll, *supra* note 33, at 548; Chin, *supra* note 17, at 1323.

60. See Chin, *supra* note 17, at 1325-26; see also Note, *Lie Detectors in the Workplace: The Need for Civil Actions Against Employers*, 101 HARV. L. REV. 806, 814 (1988) (persons failing test may be branded liars).

61. See, e.g., Hurd, *supra* note 28, at 537; Tiner & O'Grady, *supra* note 27, at 97; Driscoll, *supra* note 33, at 547; Chin, *supra* note 17, at 1325.

62. See the statutes collected in Chin, *supra* note 17, at 1331 n.68. Twenty-seven others required the licensing of polygraph examiners. *Id.* at 1331 n.69.

63. Office of Technology Assessment, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation* (A Technical Memorandum), OTA-TM-H-15 (1983).

1960s.<sup>64</sup> Along a number of practical dimensions, written tests compare quite favorably with polygraph examinations. The tests are relatively inexpensive to administer,<sup>65</sup> and no specialized equipment, facilities, or trained examiners are necessary. Employers commonly administer vendor provided tests to prospective employees, sending the completed tests to the vendor for "scoring." The employer is then subsequently told by the vendor which prospective employees have been identified by the test as having a propensity toward dishonesty.<sup>66</sup>

More important, written integrity tests are less intimidating than polygraph examinations<sup>67</sup> and examinees who fail written exams are less likely to be stigmatized than are those who fail a polygraph exam.<sup>68</sup> Unlike polygraph exams, written exams typically are interpreted without reference to normative standards and are less subjectively scored.<sup>69</sup> As a result, they are therefore alleged to be substantially more objective and reliable than polygraph exams.<sup>70</sup> And, because polygraph examinations are most accurate when a specific incident of wrongdoing is under investigation,<sup>71</sup> written exams may be superior to the polygraph as a general use, preemployment screening device.

One study which supports the use of integrity tests argues that they meet all of the criteria that any personnel selection procedure must satisfy.<sup>72</sup> In short, they work, allowing firms to screen out many potential problem employees.<sup>73</sup> The tests may be the best tool available

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64. Harlan, *supra* note 14, at B4, col. 2.

65. See Dworkin, *supra* note 11, at 72 & n.75 (tests cost from \$6.00 to \$15.00 and are easier to administer).

66. Vendors differ in the cut-off scores they employ and the means by which the dishonesty determination is made.

67. APA TASK FORCE, *supra* note 18, at 9; Dworkin, *supra* note 11, at 73.

68. APA TASK FORCE, *supra* note 18, at 9. *But see infra* note 85 and accompanying text.

69. APA TASK FORCE, *supra* note 18, at 9.

70. APA TASK FORCE, *supra* note 18, at 9. There is some disagreement on this point. See, e.g., Dworkin, *supra* note 11, at 73 (written exams are "not as accurate as a well-administered polygraph test"). We discuss the accuracy issue in detail *infra* notes 123-30 and accompanying text.

71. See Hermann, *supra* note 52, at 85; Hurd, *supra* note 28, at 536.

72. See John Jones, Philip Ash & Catalina Soto, *Employment Privacy Rights and Pre-employment Honesty Tests*, 15 EMPLOYEE RELS. L.J. 561, 573 (1990). These criteria are that the procedure in question should: 1) be developed in accordance with published professional standards; 2) be demonstrably related to the requirements of the job; 3) provide measurements that are stable and repeatable; 4) afford equal opportunity to all applicants; and 5) limit inquiries into personal affairs to those that are job-related.

73. *Id.* at 574. For the same argument in the polygraph context, see Hurd, *supra* note 28, at 540. Hurd observes that there is a divergence between the interests of employers and job

for the job,<sup>74</sup> and they may be more objective than traditional hiring methods.<sup>75</sup> No one can credibly deny either the significance of the employee theft problem<sup>76</sup> or that employers have a legitimate interest in hiring honest employees.<sup>77</sup> Finally, those who would ban the use of integrity tests must confront the fact that, as the APA concluded, "to do so would only invite alternative forms of preemployment screening that would be less open, scientific, and controllable."<sup>78</sup>

### B. *The Case Against Integrity Testing*

Written integrity tests are vulnerable to some of the same criticisms that were earlier made concerning polygraph examinations.<sup>79</sup>

applicants on this point. The qualified job applicant "wants the process to be accurate every time, lest he or she be the one who is not hired as the result of an inaccurate test." *Id.* Employers, on the other hand, are more concerned with weeding out bad applicants than they are with the possibility that some good applicants may thereby be eliminated. *Id.* Rather, employers are likely to argue that they should be allowed to assume the risk associated with any selection method that they chose. *Id.* at 535.

74. Decker, *supra* note 7, at 147.

75. "Many hiring decisions are already based on extremely subjective judgments by personnel directors. If a hiring decision may be made based on instinct, hunch, or the gut reaction of the interviewer, is it appropriate to limit or prohibit the use of a device such as the polygraph when it is, at least arguably, not significantly less accurate than traditional methods?" Hurd, *supra* note 28, at 535.

76. See *supra* notes 26-32 and accompanying text.

77. One of the few extant cases involving integrity testing explicitly recognizes the employer's interest. See *Heins v. Unemployment Comp. Bd. of Review*, 534 A.2d 592, 594 (Pa. Commw. Ct. 1987) ("employee honesty is a genuine and job-related concern for an employer"). In *Heins* a part-time worker unsuccessfully appealed a denial of unemployment compensation benefits premised upon the finding that his discharge was justified due to his "willful misconduct" in refusing to take an honesty test required of all employees. The plaintiff argued that the test was unreasonably intrusive and constituted a new condition of employment. *Id.* at 593. The court observed that "an employee's privacy rights must be weighed against an employer's legitimate desire to prevent theft." *Id.* at 594. Although the plaintiff employee had asserted that the test was inaccurate and an unreliable predictor of employee behavior, he had introduced no evidence to that effect other than his own subjective belief. *Id.* at 594-95. Even had additional evidence been introduced, however, it might not have led to a different outcome in view of the court's observation that "in any event, the fact that the test may not have been of the highest reliability does not necessarily render Employer's request or decision to use it unreasonable." *Id.* at 595.

78. APA TASK FORCE, *supra* note 18, at 26; see also Chin, *supra* note 17, at 1343-44 n.125 (noting renewed employer interest in graphology, or handwriting analysis, as tool for making employment decisions); Gilbert Fuchsberg, *Integrity-Test Publishers Fear Pending Study*, WALL ST. J., Sept. 20, 1990, at B1, col. 3, B7, col. 1; *Pre-employment Screening*, *supra* note 11, at 4 (both expressing similar fears).

79. See *supra* notes 54-61 and accompanying text.

Opponents of integrity testing argue that it invades employees' privacy and is an affront to their dignity.<sup>80</sup> They worry that tests could be used to screen out job applicants who have pro-union sympathies<sup>81</sup> or who are likely to resist corporate pressures to commit immoral or unethical acts.<sup>82</sup> Opponents also fear that the tests may have an adverse impact on minorities.<sup>83</sup> They further complain that employers only administer such exams to lower level employees, declining to test managers whose dishonesty may cause their organizations far greater harm.<sup>84</sup> Finally, the opponents voice the fear that those who fail integrity tests may be stigmatized as potentially dishonest.<sup>85</sup>

The critics also raise the possibility that integrity tests may not effectively accomplish the purposes for which employers use them. The tests may provide managers with a false sense of security,<sup>86</sup> becoming a substitute for managerial thought.<sup>87</sup> They may also screen out persons of high moral character,<sup>88</sup> or result in the replacement of

80. See, e.g., Quade, *supra* note 11, at 671; Tiner & O'Grady, *supra* note 27, at 87-89. See also the discussion of potential employer liability for invasion of privacy *infra* note 97 and accompanying text.

81. See Susan Dentzer, *Can You Pass the Job Test?*, NEWSWEEK, May 5, 1986, at 46, 49.

82. *Id.*; see also Gavzer, *supra* note 8, at 5.

83. See Comment, *supra* note 11, at 582-83 n.53 (tests conceivably could contain questions worded in a way that does not provoke the same responses from persons of varying racial and ethnic backgrounds).

84. See Gavzer, *supra* note 8, at 4.

85. See Inwald, *supra* note 22, at 55-56; *Pre-employment Screening*, *supra* note 11, at 4; Wiley & Rudley, *supra* note 11, at 154.

86. Inwald, *supra* note 22, at 58.

87. See Inwald, *supra* note 22, at 52, for the following observation:

You want better employees. The [exam] vendors can help you. You want a "yes-no" answer. They're willing to give it, and it will not be anything like those "wishy-washy" psychologists' reports that actually put the burden of making the hiring decision back on you. Yes, you will get a "go-no go," "honest-dishonest," "violent-nonviolent" rating that is "validated" and "accurate" and "reliable."

*Id.* Similar criticisms have been made concerning polygraph examinations. See, e.g., Tiner & O'Grady, *supra* note 27, at 91-92 ("[p]olygraphs give unreflective employers the illusion of good decisionmaking while excusing them from the toil and thought that effective judgments inevitably require"); Chin, *supra* note 17, at 1342 (polygraphs reflect "employers' wish for an inexpensive, simple device that will solve their management problems").

88. See Comment, *supra* note 11, at 582 n.53 for the following hypothetical:

Honesty exams are designed to detect test subjects who falsify answers and respond with the best sounding answer for each question. However, . . . A's moral character actually is superb and is truly represented by the best sounding answer. Even though A would be an outstanding employee, his chances of obtaining the job may be diminished because his exam responses sounded *too good*.

*Id.* (original emphasis).

“the pen pilferer or time stealer with someone who doesn’t steal pens or time, but is incompetent and slow at getting the job done.”<sup>89</sup> The test may also replace the pen pilferer with someone who “is a better denier on the test and turns out to be both a major thief (those are the most difficult to detect) and incompetent.”<sup>90</sup> Obviously, the more applicants a test screens out, the more potential thieves will be rejected, but excessive screening can itself impose costs on the employer.<sup>91</sup>

Critics also assert that employers who opt to use integrity tests as a screening device may be exposing themselves to the risk of legal liability. However, only one state, Massachusetts, currently bans integrity testing.<sup>92</sup> Conversely, Rhode Island specifically sanctions the use of integrity tests so long as they are “not used to form the primary basis for an employment decision.”<sup>93</sup> Additionally, at least one opponent of integrity testing has argued that state polygraph statutes should be interpreted as applying to written integrity tests,<sup>94</sup> but the only cases in which the issue has arisen have declined to embrace such an interpretation.<sup>95</sup> Opponents also allege that employers utilizing integ-

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89. Inwald, *supra* note 22, at 56.

90. *Id.*

91. *Id.* “At a time when companies are in fierce competition for new employees, excessive and erroneous rejections can leave important positions open, with disastrous effects on company service and profitability.” *Id.* One critic is quoted as saying that “[s]ome of these pencil-and-paper honesty tests can screen out up to 70% of the people who take the tests.” Harlan, *supra* note 14, at B4, col. 3 (quoting Robert Fitzpatrick, a Washington, D.C. employment lawyer).

92. The Massachusetts statute accomplishes this by specifically including written examinations within the penumbra of its definition of a prohibited “lie detector test.” *See* MASS. GEN. LAWS ANN. ch. 149, § 19B(1) (West Supp. 1989) (“lie detector test” includes “any test utilizing a polygraph or any other device, mechanism, instrument *or written examination*”) (emphasis added).

93. R.I. GEN. LAWS § 28-6.1 (Supp. 1988).

94. *See* Decker, *supra* note 7, at 149 (honesty tests “within the ‘spirit’ and ‘intent’ of Pennsylvania polygraph statute”).

95. *See* Cort v. Bristol-Myers Co., 431 N.E.2d 908, 912 n.8 (Mass. 1982) (noting that legislature has forbidden use of polygraph but has not forbidden type of instrument at issue in suit by discharged employees); Spannaus v. Century Camera, Inc., 309 N.W.2d 735, 745 (Minn. 1981) (upholding polygraph statute against vagueness attack by interpreting phrase “any test purporting to test honesty” as including only “those tests and procedures which similarly purport to measure physiological changes in the subject tested”). Neither of the other extant cases involving integrity testing addressed the issue of the applicability of the state polygraph statute. *See generally* Stanton Corp. v. Department of Labor, 166 A.D.2d 331 (N.Y. App. Div. 1990) (affirming trial court order to process Targeted Jobs Tax Credits not processed due to employer use of integrity test). *See also* Heins v. Unemployment Comp. Bd. of Review, 534 A.2d 592 (Pa. Commw. Ct. 1987).

riety tests might be civilly liable for defamation,<sup>96</sup> invasion of privacy,<sup>97</sup>

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96. Improper disclosure of the fact that a job applicant has "failed" an integrity test might expose the employer to liability for defamation. See Decker, *supra* note 7, at 147; Wiley & Rudley, *supra* note 11, at 158; Comment, *supra* note 11, at 584; see also O'Brien v. Papa Gino's of America, 780 F.2d 1067 (1st Cir. 1986) (affirming defamation liability of employer for communicating employee drug test results to others in the company); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976), *cert. den.*, 434 U.S. 962 (1977) (same). Employers do, of course, enjoy a qualified privilege which would shield them from liability for such a communication to a party who had a legitimate interest in knowing the truth. See, e.g., Jones v. Walsh, 222 A.2d 830 (N.H. 1966). Also, proof of actual malice on the employer's part will vitiate the privilege. O'Brien, 780 F.2d at 1074. Finally, truth is a defense to defamation. *Id.* at 1073. But although it may literally be true that a particular applicant "failed the integrity test," many courts are likely to look at the truth of the underlying allegation (*i.e.*, that the applicant is dishonest) if the fact of an applicant's failure is communicated to a third party who has no legitimate interest in knowing it. See, e.g., Lewis v. Equitable Life Assur. Soc'y, 389 N.W.2d 876, 888-89 (Minn. 1986) (relevant question in case of employees "fired for gross insubordination" was whether they in fact engaged in gross insubordination).

97. Some commentators have argued for the application of the constitutional right of privacy to job applicants. See Hermann, *supra* note 52, at 126-37. The "state action" requirement, however, precludes that application of constitutional privacy rights in the context of private employment. On the "state action" requirement, see United States v. Cruikshank, 92 U.S. 542, 554 (1875) (fourteenth amendment "prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen against another"). Given appropriate facts, however, employer use of written integrity tests could constitute tortious invasion of privacy. See Comment, *supra* note 11, at 583-84. There are four types of tortious invasion of privacy: unreasonable intrusion upon the seclusion of another; appropriation of another's name or likeness; unreasonable publicity given to another's private life; and publicity that unreasonably places another in a false light before the public. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

Questions on a written exam that are unduly intrusive and bear no demonstrable relation to legitimate employer interests could conceivably amount to an "unreasonable intrusion." The *Restatement* indicates that an "investigation or examination into . . . private concerns" can trigger this kind of liability. *Id.* at § 652B, Comment *b.* One court has observed that the test for invasion of privacy actions emanating from the private employment context is "whether the substantiality of the intrusion on the employee's privacy . . . outweighs the employer's legitimate business interest in obtaining . . . the information." Bratt v. International Business Machs., 785 F.2d 352, 360 (1st Cir. 1986). This argument has failed to succeed in both of the cases where it has been raised in connection with a written examination. See Cort v. Bristol-Myers Co., 431 N.E.2d 908, 910 & 912 n.9 (Mass. 1982) (finding no invasion of privacy because discharged employees refused to answer, or answered flippantly, allegedly intrusive questions, but acknowledging possibility that "there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer"); Heins v. Unemployment Comp. Bd. of Review, 534 A.2d 592, 594 (Pa. Commw. Ct. 1987) (employee's privacy rights "must be weighed against an employer's legitimate desire to prevent theft"). It has been suggested that "an employee's consent to employer inquiries is a defense to the invasion of privacy tort when the consent is informed and knowing." Comment, *supra* note 11, at 584. Any such suggestion, however, is sure to be met by the contention that any consent given by an employee or job applicant is not "voluntary." See, e.g., ARTHUR MILLER, THE ASSAULT ON PRIVACY 185-86 (1971) ("To talk



or intentional infliction of emotional distress.<sup>98</sup> Also, if it could be demonstrated that the particular test instrument used by the employer had a disparate impact on protected minorities, liability under Title VII is possible.<sup>99</sup>

### C. *A Preliminary Screen of the Arguments*

We acknowledge the seriousness of the problem confronting employers<sup>100</sup> and their legitimate interest in taking effective measures to deal with it.<sup>101</sup> We think that the commonly encountered suggestion that well-managed companies need not employ screening devices to avoid theft is misplaced.<sup>102</sup> We would be the last to deny that factors other than employee selection affect the level of employee theft, and even if companies had access to a completely accurate test they would be ill-advised to place exclusive reliance on it. However, there are obvious and widely acknowledged limits on the power of corporate culture and management to control employee behavior.<sup>103</sup>

of information being 'voluntarily' given in the context of . . . an employment relationship . . . is to ignore reality.")

Unnecessarily broad dissemination of the results of an applicant's integrity test conceivably could amount to "unreasonable publicity." Comment, *supra* note 11, at 584 & n.58. However, "publicity" in this context means that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." RESTATEMENT (SECOND) OF TORTS § 652D, Comment a (1977). Such widespread dissemination of test results seems to us highly unlikely.

98. Comment, *supra* note 11, at 584 (employers might face an intentional infliction of emotional distress suit if outrageous conduct in testing procedures causes applicants to suffer emotional distress). Normal testing situations, however, are unlikely to engender such liability. The RESTATEMENT (SECOND) indicates that liability will only be found "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46, Comment d (1965).

99. See Decker, *supra* note 7, at 143-44; Wiley & Rudley, *supra* note 11, at 155; Comment, *supra* note 11, at 578-82. The Uniform Guidelines on Employee Selection Procedures prohibit the use of any selection procedure which has an adverse impact on the opportunities of any race, sex, or ethnic group unless such procedure has been properly validated. UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 29 C.F.R. § 1,607.3(A) (1988).

100. See *supra* notes 26-48 and accompanying text.

101. See *supra* note 77 and accompanying text.

102. See, e.g., Dworkin, *supra* note 11, at 73 n.79; Wiley & Rudley, *supra* note 11, at 154; Tiner & O'Grady, *supra* note 27, at 91-92. See also *supra* note 42 and accompanying text.

103. See, e.g., ANTHONY DOWNS, *INSIDE BUREAUCRACY* 143 (1967) ("No one can fully control the behavior of a large organization."); HARVEY LEIBENSTEIN, *ECONOMIC THEORY AND ORGANIZATIONAL ANALYSIS* 167 (1960) (as organization increases in size, amount of detailed control higher authorities can exert over organizational activities declines); GORDON

We acknowledge the importance of employee rights concerning privacy and access to employment, but unlike some opponents of testing,<sup>104</sup> we do not see such rights as absolute.<sup>105</sup> Increased initial disclosure may be one price employees must pay for the increasing level of job security afforded by the erosion of employment at will.<sup>106</sup> It is reasonable that employers, confronted with legal developments making it increasingly costly to rectify hiring mistakes,<sup>107</sup> will respond by trying to acquire as much information about job applicants as possible. This information can be used by employers to reduce the incidence of costly hiring mistakes.

One point that is often lost in the debates over all forms of testing is the positive benefits honest employees derive from effective employer selection procedures.<sup>108</sup> These potentially include increased chances of securing employment,<sup>109</sup> enhanced job security,<sup>110</sup> higher wages,<sup>111</sup> and a safer work environment.<sup>112</sup>

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TULLOCK, *THE POLITICS OF BUREAUCRACY* 142-93 (1965) (discussing "authority leakage," the progressive loss of control over organizational sub-units that accompanies organizational expansion); John Child, *Organizational Structure, Environment and Performance: The Role of Strategic Choice*, 6 *SOCIOLOGY* 1, 7 (1972) (increased size means potential loss of control).

104. See Hermann, *supra* note 52, at 110-11 (opposing personality testing on privacy grounds even if it were absolutely infallible in predicting behavior); see also Chin, *supra* note 17, at 1320 n.20 & 1351 (suggesting that some of the organizations opposing polygraph examinations on reliability grounds were really concerned with employee privacy and asking whether the development of an infallible lie detecting device would be socially desirable).

105. "There may . . . come a time where the substantial interest of the employer may take precedence over the worker's right of privacy." Charles B. Craver, *The Inquisitorial Process in Private Employment*, 63 *CORNELL L. REV.* 1, 39-40 (1977), quoted in Chin, *supra* note 17, at 1327 n.51.

106. See *supra* note 38 and accompanying text.

107. See discussion *supra* notes 38-41 and accompanying text.

108. "Both employers and employees have an interest in maintaining a proper balance between availability of information about employees and respect for the employees' right to privacy." Brunn, *supra* note 52, at 390-91.

109. The greater the employer's ability to distinguish honest employees from potentially dishonest ones, the lower the probability that the latter will be hired instead of the former. The only beneficiary of the employer's inability to make such an identification is the potentially dishonest employee.

110. See *supra* note 32 and accompanying text on the role of employee theft in causing business failures. Honest employees who lose their jobs when their employers go out of business obviously pay a substantial price for the dishonesty of some of their coworkers.

111. Employers who suffer fewer losses from employee theft and "intangible theft" are more profitable and, as a result, can afford higher wages and better benefits. Less obvious is the fact that if employers are unable to distinguish good workers from bad, hiring in effect becomes a lottery and economically rational employers will pay only a lottery price for labor. As employers' confidence in their ability to discriminate meaningfully among job applicants on this dimension increases, so, presumably, will the price that they are willing to pay for labor.

112. See *supra* note 35 and accompanying text.

Just as some of the benefits of effective screening are overlooked, a few of the concerns raised about integrity testing are, at best, hypothetical. We are unaware of any evidence that integrity tests have been used to screen out job applicants with pro-union sympathies or who are likely to prove unusually resistant to unethical employer pressures. Nor is there any convincing evidence that such tests have an adverse impact on female or minority applicants.<sup>113</sup> Proper employer handling of test results can minimize the likelihood that an applicant who fails the test will be stigmatized by that failure. Proper handling of the results will also reduce the employer's potential liability for defamation and invasion of privacy. Similarly, careful selection and administration of examination items can eliminate potential employer liability for intentional infliction of emotional distress.

No doubt some employers will use examinations unwisely, exposing themselves to civil liability and the ultimate punishment that the market imposes on competitors who make bad business decisions. Even a completely accurate integrity test will amount to no more than a tool, albeit a very useful one, and as such should be used only with a healthy awareness of its strengths and limitations. We are unwilling to embrace the principle that any tool or idea should be rejected merely because it is vulnerable to misuse.

The critics of integrity testing have, however, advanced a line of argument that we do find disturbing and, ultimately, compelling. This argument is based upon the validity of the integrity tests currently in use and their potential for misidentifying honest applicants as potentially dishonest employees.<sup>114</sup> We will subsequently refer to this problem with integrity tests as the "*validity/base rate problem*." To illustrate the importance of the validity/base rate problem, we begin with a prefatory example.

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113. See also D.W. ARNOLD, *THE REID REPORT'S LACK OF ADVERSE IMPACT* (1989); K.K. BAGUS, *INDUSTRY-SPECIFIC AFFIRMATIVE ACTION STUDIES* (1988); DAVID J. CHERINGTON, *VALIDATION OF THE APPLICANT REVIEW: ANALYSIS FOR ADVERSE IMPACT* (1989); DONALD MORETTI & WILLIAM TERRIS, *THE PERSONNEL SELECTION INVENTORY: A PREDICTION VALIDATION* (1983); PERSONNEL DECISIONS INC., *DEVELOPMENT AND VALIDATION OF THE PDI EMPLOYMENT INVENTORY* (1985); A.L. STRAND & M.L. STRAND, *VALIDITY, RELIABILITY, COMPLIANCE, AND EFFICACY STUDIES OF THE T.A., E.S., D.A., AND P.A.S.S. SURVEYS* (1986); William Terris, *Attitudinal Correlates of Employee Integrity*, 1 J. POLICE & CRIM. PSYCHOLOGY 60 (1985); William Terris & John W. Jones, *Psychological Factors Related to Employees' Theft in the Convenience Store Industry*, 51 PSYCHOL. REP. 1219 (1982); Steven H. Werner, John W. Jones & Brian D. Steffy, *The Relationship Between Intelligence, Honesty, and Theft Admissions*, 49 EDUC. & PSYCHOL. MEASUREMENT 921 (1989).

114. See, e.g., Inwald, *supra* note 22, at 55-56 & 58; *Pre-employment Screening*, *supra* note 11, at 4; Wiley & Rudley, *supra* note 11, at 154.

#### IV. THE VALIDITY/BASE RATE PROBLEM

##### A. A Prefatory Example

Nippon Motors Corporation, responding to pressure from our trade unions and politicians and to import quotas, has opened several automobile plants in the U.S. These plants are a huge success, turning out top quality cars and trucks, and employing many American workers. U.S. firms supplying domestic automobile manufacturers, however, are far from happy. They argue that Nippon refuses to purchase auto parts from them, instead importing from Japan everything not manufactured in its U.S. plants. Nippon counters that its parts purchases are attributable to the fact that the parts made by U.S. suppliers do not consistently meet Nippon's high quality standards rather than to economic chauvinism. U.S. parts suppliers disagree, and Nippon, hoping to quell criticism and forestall "domestic content" legislation, agrees to purchase a certain percentage of the parts it uses in its U.S. operations from local suppliers whose parts pass its rigorous tests.

The test Nippon proposes to use on tires submitted by domestic tire manufacturers for consideration as original equipment tires on Nippon vehicles is a test Nippon calls the "X-scan." Nippon claims that the X-scan is 98% accurate in identifying tires with a defect in their sidewall structure which can cause premature tread wear and, in extreme cases, represent a safety hazard. Not surprisingly, many tires of the domestic manufacturer are rejected. Why? Are the domestic manufacturers' tires necessarily that bad? Not necessarily. The key to the problem is that the 98% accuracy level claimed for the X-scan is potentially deceptive. Those unfamiliar with statistical sampling may reasonably assume that if Nippon is telling the truth about the X-scan's accuracy, 98% of the tires that the X-scan identified as defective are in fact flawed. However, a 98% accuracy level under these circumstances means that *less than 20%* of the tires identified as defective are actually flawed! Table 1 demonstrates why this is so.

In the upper range of Table 1 the validity of the X-scan is set at Nippon's claimed 98% and the base rate for tire defects is set at .005 (5 tires in 1000 are in fact flawed). If 10,000 tires are X-scanned, 50 actually will be defective. Because the test is only 98% accurate, only 49 of these ( $50 \times .98$ ) will be identified as flawed. So far, only one defective tire will slip through. In an imperfect world, this level of accuracy is quite admirable. However, although 9950 of the tires tested are *not* defective, the X-scan will only correctly identify 9751 ( $9950 \times .98$ ) as non-defective, misidentifying 199 ( $9950 - 9751$ ) perfectly good tires as defective. Thus, only 19.8% (49) of the 248 ( $49 + 199$ )

Table 1

Validity of the Testing Procedure	Base Rate for Defects	# Tested	Defective Tires	Tires w/o Defects	Accurate Positives	False Positives	% Correctly Identified as Flawed
.98	.005	10000	50	9950	49	199	19.8%
.90	.005	10000	50	9950	45	995	4.3%

tires the X-scan identified as defective are truly defective, and a "98% accurate" test is actually a test that correctly identifies defects less than 20% of the time.<sup>115</sup> The result of the X-scan is that Nippon achieves an accuracy rate for the tires it accepts of 98%, while the domestic manufacturer is returned 200 rejected tires of which approximately 75% ( $[200-49]/200$ ) are perfectly good.

As Table 1 also illustrates, a reduction in the X-scan's accuracy level to 90% (a very high level of test accuracy by social science standards) reduces the odds of a correct identification of a flaw to just over 4%. With an accuracy level of 90% the number of tires returned increases and 95% ( $[1040-45]/1040$ ) of the rejected tires are incorrectly identified as defective. As the accuracy of the X-scan decreases, the percentage of the domestic manufacturer's tires which are improperly rejected increases. Therefore, the dynamics of the validity/base rate interaction are such that relatively small variations in either factor produce significant changes in test results, changes which lead to counterintuitive conclusions about the efficacy of the test.

As the accuracy of the test declines, deception results from the rise in the incorrect rejection ratio. When the test accuracy falls below 90% the problem of incorrect rejection becomes chronic. The next section argues that the validity/base rate problem is even more problematic where integrity tests are concerned, but before we proceed to that discussion, several other points about Nippon's X-scan are in order.

First, note that the X-scan, despite its limitations, may nonetheless satisfy all of Nippon's needs. If Nippon's only objective is to reduce the number of defective tires it installs on its cars,<sup>116</sup> the X-scan will be very successful. The price of this objective, the rejection of a larger number of non-defective tires, may be one Nippon is quite willing to pay. Note also that Nippon's objective is an eminently reasonable one. Defective tires are a safety hazard capable of causing death or serious injury to Nippon's customers and substantial legal liability to Nippon. Furthermore, the X-scan may be the best available tire testing procedure. None of this, however, is likely to be much comfort to the manufacturers who have 199 good tires inaccurately rejected. Some

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115. We acknowledge John Allen Paulos for the use of a similar example to illustrate a statistical concept of conditional probability known as Bayes theorem. JOHN ALLEN PAULOS, *INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES* 89 (1990).

116. If Nippon has a second, covert objective of justifying its exclusive resort to Japanese suppliers, this outcome can readily be achieved by manipulating the acceptable percentage of defective tires (as determined by the X-scan) necessary to qualify any manufacturer as a Nippon supplier.

tire manufacturers will probably label Nippon's reliance on the X-scan "unfair." The significance of the 199 misidentified tires assumes greater importance when people seeking employment are substituted for automobile tires.

### B. *Integrity Tests and the Validity/Base Rate Problem*

Written integrity tests have been the object of discussion for at least twenty years,<sup>117</sup> but the demise of the polygraph has intensified the integrity test debate. Early inquiries concluded that too little research had been done to allow a credible evaluation of such tests' validity.<sup>118</sup> A more exhaustive review of integrity testing in personnel selection similarly concluded that additional research and the involvement of researchers independent from test vendors would be required before a better evaluation of integrity tests could be made.<sup>119</sup>

More work has been done on integrity testing, but no consensus concerning its validity has emerged. Some authorities continue to express skepticism about the tests' validity.<sup>120</sup> Others, however, have pronounced them to be "valid and reliable."<sup>121</sup> The tide appears to be turning in favor of the responsible use of integrity tests as a device for screening job applicants. Symbolic of this shift is the recently published report of the APA Task Force on the Prediction of Dishonesty and Theft in Employment Settings which concluded that "[d]espite

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117. See also Philip Ash, *Screening Employment Applicants for Attitudes Toward Theft*, 55 J. APPLIED PSYCHOLOGY 161 (1971); Richard W. Rosenbaum, *Predictability of Employee Theft Using Weighted Application Blanks*, 61 J. APPLIED PSYCHOL. 94 (1976). For excellent compendia, see Paul Sackett & Kurt Decker, *Detection of Deception in the Employment Context: A Review and Critique*, 32 PERSONNEL PSYCHOL. 487 (1979); Sackett & Harris, *supra* note 2.

118. See also Sackett & Decker, *supra* note 117.

119. See Sackett & Harris, *supra* note 2, at 222.

120. See, e.g., Adler, *supra* note 14, at 7 ("we're very skeptical that there is anything that is a true Pinocchio prognosticator"); Robert W. Moore & Robert M. Stewart, *Evaluating Employee Integrity: Moral and Methodological Problems*, 2 EMPLOYEE RESP. & RTS. J. 203, 213 (1989) ("the validity of the [integrity] tests does not appear to be sufficiently robust"). The Office of Technology Assessment's most recent report concludes that "[t]he research on integrity tests has not yet produced data that clearly supports or dismisses the assertion that these tests can predict dishonest behavior." Office of Technology Assessment, *The Use of Integrity Tests for Pre-Employment Screening*, cited in Tori DeAngelis, *Honesty Tests Weigh in With Improved Ratings*, 22 APA MONITOR 7 (1991).

121. Thomas J. Bergmann, Daniel H. Mundt, Jr. & Elizabeth J. Illgen, *The Evolution of Honesty Tests and Means for Their Evaluation*, 3 EMPLOYEE RESP. & RTS. J. 215, 221 (1990). Paul Sackett, the author of a comprehensive review of integrity testing, has been quoted as saying that "[t]he evidence is now much stronger that there is a relation between scores on these tests and later counter-productive behavior on the job." Adler, *supra* note 14, at 7.

all of our reservations about honesty tests . . . we do not believe that there is any sound basis for prohibiting their development and use."<sup>122</sup>

As our prefatory example suggests, the use of written integrity tests as a selection device can produce counterintuitive, and disturbing, outcomes that reject perfectly good applicants. This undesirable result becomes chronic when the test's validity rate declines. In our tire test example, we knew both the base rate of tire defects and the validity of the test. In the case of integrity testing, we have no way of knowing with any degree of precision either the actual base rate for employee dishonesty or the true validity of written integrity tests. In both cases, however, sufficient information is available to enable us to make our point.

Some consensus exists for placing the base rate for employee dishonesty in the neighborhood of 5%.<sup>123</sup> Consequently, we focus on a 5% base rate in the following discussion, but employ a wider range of base rates in Table 2, which follows. Where the validity of written integrity tests is concerned, we rely mainly on a recent meta-analysis of studies yielding criterion-related validities of such tests.<sup>124</sup> The mean validity coefficients (when corrected for sampling error) reported in those studies ranged from .26 to .76 depending on the criterion.<sup>125</sup> This range is consistent with validity levels reported elsewhere.<sup>126</sup> Table 2 accordingly provides outcomes produced by these and other validity levels.

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122. APA TASK FORCE, *supra* note 18, at 26.

123. See HOLLINGER & CLARK, *supra* note 26, at 12 (base rate for non-trivial employee theft less than 5% in most settings); Kevin R. Murphy, *Detecting Infrequent Deception*, 72 J. APPLIED PSYCHOL. 611, 612 (1987). A survey of wrongdoing among 225,000 job applicants resulted in admissions of involvement in theft from 6.1% of the respondents. Philip Ash, *Honesty Test Scores, Biographical Data, and Delinquency Indicators*, presented at the ACAD. CRIM. JUST. SCI. (Mar. 1987) (available through SRA/London House, 1550 Northwest Highway, Park Ridge, IL 60068).

124. See also Deniz S. Ones, Chockalingam Viswesvaran & Frank L. Schmidt, *Integrity Testing: Empirical Confirmations and Refutations Using Meta-Analysis*, reported in APA TASK FORCE, *supra* note 18, at 17. For additional meta-analyses, see W.R. Kpo & W.G. Harris, *Generalizability of an Attitudinal-Behavioral Measure of Integrity*, presented at the Ann. Meeting New England Psychological Ass'n (Boston, 1986) (cited in Sackett, Burris & Callahan, *supra*, note 2, at 516); Michael A. McDaniel & John W. Jones, *A Meta-Analysis of the Validity of the Employee Attitude Inventory Theft Scales*, 2 J. BUS. & PSYCHOL. 327 (1986) (cited in Sackett, Burris, & Callahan, *supra* note 2, at 517). We relied on Ones, Viswesvaran & Schmidt for two reasons. First, it is more inclusive and contemporary. Second, the other meta-analyses produced lower validity estimates. Clearly, lower validity levels result in even lower levels of accuracy than our analyses here suggest.

125. APA TASK FORCE, *supra* note 18, at 17.

126. See also Sackett, Burris & Callahan, *supra* note 2; Sackett & Harris, *supra* note 2.



Table 2 illustrates the interaction of these various base rates and validity levels. The shaded portion of Table 2 highlights outcomes obtained when the 5% base rate for employee theft suggested by the literature is employed in conjunction with four different validity levels (.90, .75, .50, .25).

Our method for determining the proportion of correctly identified potential thieves is identical to the method we employed in our prefatory tire example. Consider the first shaded range (.90 validity; .05 base rate) in Table 2. Out of 10,000 job applicants the 5% base rate indicates that 500 ( $10,000 \times .05$ ) will be potential thieves and the remaining 9500 ( $10,000 - 500$ ) will be honest. With a .90 test validity, 450 ( $.90 \times 500$ ) of the 500 potential thieves will be correctly identified (accurate positives). Not only will 50 potential thieves elude identification, but only 8550 ( $9500 \times .90$ ) of the 9500 honest applicants will be correctly identified as honest. Thus, 950 ( $9500 - 8550$ ) job applicants will be inaccurately labeled potential thieves (false positives). Dividing the number of accurate positives (450) by the total of number of positives produced (1400;  $450 + 950$  false positives) indicates that the actual probability that an applicant identified as a potential thief by the test is actually dishonest is 32.1%. This means that 950 people (over two-thirds of those rejected) will be wrongfully denied employment based upon this marginally accurate test.

Thus, even integrity tests possessing a high level of validity are very likely to be mistaken when identifying any particular job applicant as a potential thief. This potential for misidentification is even more apparent when we consider the outcomes produced by tests whose validity levels mirror those reported in published validity studies.<sup>127</sup> As Table 2 illustrates, a test with a .25 validity (approximately the bottom end of the reported range) will be correct in its designation of a job applicant as a potential thief only 1.7% of the time. A test with a validity level of .75 (approximately the upper end of the reported range) will only be correct in its identification of potential thieves 13.6% of the time. Even the most optimistic assumption concerning test validity (.90) and the most pessimistic estimate of the level of employee theft (.15 base rate) yield an accuracy rate (61.4%) that misidentifies one out of every three applicants identified as dishonest.

Such levels of accuracy enhance the probability that employers will face some legal liability as a result of testing.<sup>128</sup> Legal considerations

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127. See *supra* note 125 and accompanying text.

128. LEX K. LARSON, EMPLOYMENT SCREENING § 3.05 (1989) (inaccurate tests expose employers to potential liability for employment discrimination, defamation, or negligence).

Table 2

Validity of the Testing Procedure	Base Rate for the Undesirable Behavior	# Tested	Applicants w/ Undesirable Behavior	Applicants w/o Undesirable Behavior	Accurate Positives	False Positives	% Correctly Identified
.90	.01	10000	100	9900	90	990	8.3%
.75	.01	10000	100	9900	75	2475	2.9%
.50	.01	10000	100	9900	50	4950	1.0%
.25	.01	10000	100	9900	25	7425	.3%
.90	.05	10000	500	9500	450	950	32.1%
.75	.05	10000	500	9500	375	2375	13.6%
.50	.05	10000	500	9500	250	4750	5.0%
.25	.05	10000	500	9500	125	7125	1.7%
.90	.10	10000	1000	9000	900	900	50.0%
.75	.10	10000	1000	9000	750	2250	25.0%
.50	.10	10000	1000	9000	500	4500	10.0%
.25	.10	10000	1000	9000	250	6750	3.6%
.90	.15	10000	1500	8500	1350	850	61.4%
.75	.15	10000	1500	8500	1125	2125	34.6%
.50	.15	10000	1500	8500	750	4250	15.0%
.25	.15	10000	1500	8500	375	6375	5.6%

aside, however, it is important to note that, at the higher validity and base rate levels, integrity tests "do the job" for employers by enabling them to screen out a substantial percentage of potentially dishonest job applicants. For example, if test validity is .75 and the base rate is .05, Table 2 confirms the fact that 375 (75%) of the 500 potentially dishonest applicants will be captured by the screen.

Table 2 also confirms the fact that this benefit is purchased at the cost of denying employment to 2,375 honest applicants. True, these individuals may ultimately gain employment elsewhere, but some of them may not find jobs for a long time. Also, to the extent that integrity exams are indeed reliable,<sup>129</sup> it is possible that some honest applicants may repeatedly fail them.<sup>130</sup> As employer use of integrity tests grows, such individuals may repeatedly be denied employment for reasons beyond their understanding because "most applicants are not, for legal reasons, told why they are not hired."<sup>131</sup> Some employers may see this as an acceptable price to pay for the undeniably worthy goal of a more honest, efficient workforce. Job applicants, however, can be expected to be considerably less enthusiastic about these risks associated with integrity testing.

What level of test validity, if any, would be acceptable? One commentator suggests a "minimum threshold" which is satisfied "when the data in favor of the hypothesis are at least as strong as the evidence against this hypothesis."<sup>132</sup> By this measure, if 50% of the applicants identified as potential thieves were accurately so identified, the misidentification of the other 50% would be permissible. We suspect that many persons (personnel directors included) would have

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Beyond the formal impact of test inaccuracy on an employer's legal liability, properly presented evidence of test inaccuracy seems likely to deprive employers of any presumption of reasonableness that they might otherwise enjoy in the minds of judges or jurors. Nor are the courts completely unaware of the validity issue. *See Daniel Const. Co. v. Local 257, IBEW*, 856 F.2d 1174 (8th Cir. 1988), affirming an arbitrator's decision awarding back pay to employees fired for failing a psychological test used to screen potential security risks from a nuclear plant construction site. The arbitrator concluded that an appropriate and reasonable test must be "reliable" and "valid" to satisfy the relevant collective bargaining agreement. *Id.* at 1179. He further concluded that the test in question was sufficiently reliable, but lacked adequate validity because it "would have screened out a large number of employees who were actually stable, while passing a number of employees who were unstable." *Id.*

129. *See supra* note 52.

130. "If integrity tests are reliable (in the sense that individual scores are fairly consistent over time), then their use could create a population of persons who are repeatedly misclassified, and systematically denied employment without cause." Wiley & Rudley, *supra* note 11, at 154-55.

131. APA TASK FORCE, *supra* note 18, at 12.

132. Murphy, *supra* note 123, at 612.

qualms about this level of test error if their own employment prospects were at stake. We also note that only two of the ranges examined in Table 2 satisfy this minimal criterion. Both of those ranges involve substantially higher levels of test validity (90%) and higher base rates for employee theft (.10 & .15) than those reported in the literature.

Further test development might yield validity improvements and further research might confirm higher base rates for employee theft. Some persons, however, would be likely to object that integrity testing was "unfair" if any honest person was denied employment due to test inaccuracy. Is there any principled basis for such an objection? To answer this question, we turn to a brief ethical analysis of the accuracy dimension<sup>133</sup> of integrity testing.

### C. *The Ethics of Integrity Testing*

In this section we will look at integrity testing through three ethics "lenses": Kantian rights theory, Rawlsian Justice Theory, and classical utilitarianism.<sup>134</sup> Of these three well-known theories, only utilitarianism is likely to find integrity testing acceptable, and only under certain circumstances. Utilitarianism is a consequentialist theory,<sup>135</sup> measuring the moral quality of actions or practices<sup>136</sup> by their tendency to produce

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133. We do not make any attempt here to discuss some of the other ethical issues associated with integrity testing. For example, deceptive tests which disguise their essential purpose from examinees plainly raise ethical concerns, as does the argument that prospective employees never "voluntarily" consent to take integrity tests due to the inherently coercive aspects of the employment situation. On the latter point, see *supra* note 97.

134. Certainly, other ethics theories exist which could also profitably be applied to integrity testing. Space constraints prevent an exhaustive examination of all applicable theories and the three selected capture the great majority of the ethical underpinnings of the debate about integrity testing. By selecting these theories we do not intend to "stack the deck" by presenting a preponderance of theories likely to oppose integrity testing. We freely acknowledge the existence of other theories which might well support testing. For example, ethical egoism, the doctrine that "each person ought to pursue his or her own self-interest exclusively," would suggest that corporations believing integrity testing to be in their best interests not only could, but should, engage in testing. We have not included egoism simply because we cannot envision it playing any meaningful role in the social debate over integrity testing. For the quoted definition of ethical egoism and a discussion of its strengths and weaknesses, see JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 66-78 (1986).

135. Consequentialist, or teleological, theories judge the morality of actions according to their consequences. Such theories are in contrast to deontological theories, which hold that actions may be intrinsically right or wrong regardless of their consequences. For a discussion of this basic division in ethical theory, see WILLIAM K. FRANKENA, *ETHICS* chs. 2-3 (1963).

136. The utilitarian camp today is divided in many important ways. One fundamental schism is between act-utilitarians, who look at the utility consequences of actions only, and rule-utilitarians, who believe that "the rightness or wrongness of an action is to be judged by the goodness

"the greatest happiness, or the greatest good, for the greatest number."<sup>137</sup> Those actions "are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."<sup>138</sup> "Happiness" means "pleasure, and the absence of pain,"<sup>139</sup> and "unhappiness" means "pain, and the privation of pleasure."<sup>140</sup>

Utilitarians would therefore be likely to sanction integrity testing if they were convinced that it maximized utility. Utility would be maximized if the benefits derived from testing, such as lower theft rates, higher profits and wages, and lower prices offset the unhappiness of honest job applicants denied employment and dishonest people denied the opportunity to steal.<sup>141</sup> Utilitarian calculations are notoriously difficult to do,<sup>142</sup> but it seems fair to generalize by saying that, *ceteris paribus*,<sup>143</sup> the more accurate the examination, the more willing

or badness of the consequences of a rule that everyone should perform the action in like circumstances." J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 3, 9 (1976) (emphasis added). Thus, rule utilitarians would oppose actions which maximize utility in individual cases if those actions would not maximize long-run utility if universally adhered to.

137. WILLIAM L. REESE, *DICTIONARY OF PHILOSOPHY AND RELIGION* 601 (1980).

138. JOHN STUART MILL, *UTILITARIANISM* 10 (O. Piest ed. 1980).

139. *Id.*

140. *Id.* Today, many utilitarians eschew this hedonic measure of the good, adopting other measures of utility. For example, *preference utilitarians* suggest that we should act "so as to maximize the satisfaction of people's preferences." RACHELS, *supra* note 134, at 93 (original emphasis). *Ideal utilitarians*, on the other hand, say "only that right actions are the ones that have the best results, *however* goodness is measured." MILL, *supra* note 138, at 10 (original emphasis).

141. This tendency of utilitarianism to sacrifice the interests of the individual in the name of the greater good has been one of the fundamental objections to it as an ethical theory. See Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 *J. LEGAL STUD.* 103, 116 (1979) (discussing utilitarianism's "readiness to sacrifice the innocent individual on the altar of social need"). Posner labels this aspect of utilitarianism the "moral monstrousness" problem, and notes another dimension of it reflected by our inclusion of the unhappiness of would-be thieves in our calculations, that is "utilitarian's refusal to make moral distinctions among types of pleasure." *Id.*

142. See *id.* at 112-14 for a full discussion of this problem.

143. Of course, all other things never are equal. A sophisticated utilitarian analysis of integrity testing would have to embrace a number of issues other than test validity. For example, would the process of testing itself produce disutility by starting the employment relationship on a note of distrust? For the suggestion that drug-testing and polygraph testing undermine trust, see Patricia A. Greenfield, Ronald J. Karren & Janet K. Giacobbe, *Drug Testing in the Workplace: An Overview of Legal and Philosophical Issues*, 2 *EMPLOYEE RESP. & RTS. J.* 1, 7 (1989) (drug-testing); Chin, *supra* note 17, at 1342-43 n.122 (polygraph). Also, such an analysis should embrace the potential disutility which might result from the fact that good, potentially utility producing workers may be erroneously screened out in favor of other workers who may be honest, but less efficient.

the utilitarian would be to sanction testing. Conversely, greater numbers of false positives would increase the potential unhappiness resulting from testing (i.e., to disappointed applicants and their economic dependents). This would increase the probability that such unhappiness would outweigh any benefits derived by employers and their economic dependents.

Kantians, on the other hand, are unlikely to sanction integrity testing so long as any individual is harmed by being misidentified as potentially dishonest. Immanuel Kant's Categorical Imperative enjoins us to "[a]ct as if the maxim of thy act were to become by thy will a universal law of nature."<sup>144</sup> His Practical Imperative admonishes us to "[t]reat every man as an end in himself, and never as a means only."<sup>145</sup> The Categorical Imperative is, at best, an insistence on logical consistency; one should never "except oneself from the principle one's act requires of others."<sup>146</sup> The Practical Imperative insists that we should "never use another as an instrument."<sup>147</sup> Thus, businesses that would be unwilling to have their customers make purchase decisions using a device like our mythical X-scan,<sup>148</sup> and managers who would be unwilling to have their own employment prospects determined by a test of similar accuracy, cannot consistently use integrity tests on job applicants. To do so would be to treat wrongfully rejected honest applicants as a means to the employer's end of a more honest work force.

Rawlsians would be similarly unmoved by any utilitarian benefits associated with integrity testing. Very early in *A Theory of Justice* John Rawls tells us:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by the many.<sup>149</sup>

The focus is therefore on individuals getting what they justly deserve rather than on the aggregate gains and losses to society at large from

144. REESE, *supra* note 137, at 278.

145. *Id.*

146. *Id.*

147. *Id.*

148. See *supra* part IV A.

149. JOHN RAWLS, *A THEORY OF JUSTICE* 3-4 (1971).

the practice at issue. Even if integrity testing does, in fact, maximize utility or some other social value,<sup>150</sup> that benefit cannot be purchased at the cost of individual unfairness unless those harmed by the practice are better off with it in place than without it. In a Rawlsian world, "[a]ll social values — liberty and *opportunity*, income and wealth, and the bases of self respect — are to be distributed equally unless an unequal distribution of any . . . of these values is to everyone's advantage."<sup>151</sup> We would have great difficulty arguing that honest job applicants who are denied employment due to a negative result on an integrity test are better off than they would be without such a test.<sup>152</sup>

## V. CONCLUSION

We acknowledge the many legitimate reasons why employers may be tempted to employ integrity testing to improve the quality of their work forces and we are sympathetic with their plight. We hesitate to call for an absolute ban on integrity testing for a number of reasons. A ban would create disincentives to the development of more effective test instruments,<sup>153</sup> and we are not among those who oppose the very notion of an integrity test on principle.<sup>154</sup> In fact, if integrity tests demonstrated very high validity levels and the base rate for employee theft was significantly higher than the basic 5% rate suggested by the literature, we might well be moved by utilitarian considerations to sanction testing. At present, however, we are forced to conclude that the admitted benefits of today's integrity testing are purchased at far too high a price.

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150. One such competing value is economic efficiency. For a superb discussion of efficiency and its relation to utilitarian theory, see generally Posner, *supra* note 141.

151. RAWLS, *supra* note 149, at 62 (emphasis added).

152. *See id.* at 149. Although the main point of Rawls's effort was to identify principles of justice which should apply to society and its institutions, Rawls also acknowledged that "a complete theory of right includes principles for individuals as well." *Id.* at 108. Basic to these is the "duty of justice," which "requires us to support and to comply with just institutions that exist and apply to us" and "to further just arrangements not yet established . . . when this can be done without too much cost to ourselves." *Id.* at 115. Rawls thus speaks both to the legal policymakers who must ultimately decide whether society should allow employment decisions to be based, in whole or in part, upon integrity tests, and to individual companies that, in the absence of regulation, must decide whether to use such tests as a screening device.

153. *See* Chin, *supra* note 17, at 1353-54, for this criticism of the Employee Polygraph Protection Act of 1988.

154. *See supra* note 104 and accompanying text.