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# Ohio Northern University Law Review

## Articles

### Law's Failure to Keep Pace with Empirical Science: An Examination of Personality and Emotional Intelligence Testing in the Workplace

H. BEAU BAEZ III\*

#### I. INTRODUCTION

In 2013 seventy percent of all American workers were disengaged with their jobs, which cost American businesses nearly \$500 billion in lost profits—disengaged workers are absent more often, are less productive, get lower satisfaction scores from customers, and have more accidents on the job.<sup>1</sup> The *Dilbert* cartoon strip, one of the most successful in American history, attempts to capture some of the reasons for this disengagement by poking fun at business practices and personalities, with Dilbert, Wally, and Dogbert as tragedians trapped in a dysfunctional work environment.<sup>2</sup> One way to improve employee engagement is to use scientifically validated personality tests to place the right people in the right jobs.<sup>3</sup> Job engagement

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1. GALLUP, STATE OF THE AMERICAN WORKPLACE: EMPLOYEE ENGAGEMENT INSIGHTS FOR U.S. BUSINESS LEADERS 8-9 (2013).

2. See Scott Adams, Editorial Cartoon, *Dilbert* (Jan. 29, 2014), available at <http://search.dilbert.com/strips>.<http://www.dilbert.com/about/>. Dilbert appears in 2,000 newspapers around the world. In the January 29, 2014 strip, Dilbert tells the CEO of his company the following: “I discovered that the customer for our fleet sale of commercial drones is an international terrorist. Now we have to cancel the order, take a big hit to earnings, and decimate the value of your stock options in the company.” The CEO responds: “Or . . . I could transfer you to a department that has a poor safety record and hope for the best.” *Id.*

3. GALLUP, *supra* note 1, at 44-45.

not only helps businesses to be more successful, but it also allows employees to live more fulfilled lives.<sup>4</sup>

Many employers utilize personality tests in the employment selection process to identify job candidates who have more than just the requisite knowledge and skills necessary for a particular job.<sup>5</sup> Psychology, through the use of empirically proven methods, has the ability to measure personality and emotional intelligence (“EQ”), which can provide employers with the additional data they need to find the right people for their organizations.<sup>6</sup> Places of employment are not all the same, each having their own different culture.<sup>7</sup> Likewise, people are not all the same, each individual brings their personalities to the work place.<sup>8</sup> “Personality refers to an individual’s unique constellation of consistent behavioral traits”<sup>9</sup> and “[e]motional intelligence consists of the ability to perceive and express emotion, assimilate emotion in thought, understand and reason with emotion, and regulate emotion.”<sup>10</sup> By using a scientific approach in hiring, employers can increase the number of successful hires, which allows them to match their business culture to an individual’s personality.<sup>11</sup> This is far better than the current approach, where employers blindly hire a peg and then place the peg into a hole, hoping they did not hire the proverbial round peg for a square hole.

Nevertheless, law and society are skeptical when it comes to the science of the mind—psychology.<sup>12</sup> Post-medieval science has led to marvelous discoveries in manufacturing, agriculture, architecture, medicine, and a host of other disciplines.<sup>13</sup> These discoveries were predicated on the use of the

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4. *See id.* at 43.

5. Ruth Mantell, *Job Seekers, Get Ready for Personality Tests: More Employers are Using Pre-Hire Assessments*, MARKET WATCH (Sept. 12, 2011 3:11 PM), <http://www.marketwatch.com/story/job-seekers-get-ready-for-personality-tests-2011-09-12>.

6. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, EMOTIONAL INTELLIGENCE TESTS 1, available at <http://www.opm.gov/policy-data-oversight/assessment-and-selection/other-assessment-methods/emotional-intelligence-tests/> (last visited Sept. 21, 2014).

7. *See Diversity at Work: Creating an Inclusive and Supportive Work Environment*, HUMAN RESOURCES COUNCIL, <http://hrcouncil.ca/hr-toolkit/diversity-supportive-environment.cfm> (last visited Sept. 22, 2014).

8. *See id.*

9. WAYNE WEITEN, PSYCHOLOGY: THEMES AND VARIATIONS 491 (8th ed. 2010).

10. *Id.* at 385.

11. *Learn More About Assessment & Selection*, UNITED STATES OFFICE OF PERS. MGMT., available at <http://www.opm.gov/policy-data-oversight/assessment-and-selection/> (last visited Sept. 22, 2014).

12. WAYNE WEITEN, PSYCHOLOGY: THEMES AND VARIATIONS: BRIEFER VERSION 15 (8th ed., 2010) (“Psychology is the science that studies behavior and the physiological and cognitive processes that underlie it . . .”).

13. *See* Lauren Ames et al., *The Impact of the Scientific Revolution: A Brief History of the Experimental Method in the 17th Century*, OPENSTAX CNX, <http://cnx.org/contents/39ba7a28-338d-4995-b2e5-45562bf46024@1> (last visited Sept. 22, 2014).

scientific method, which is a “[p]rocedure . . . consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypotheses.”<sup>14</sup> The scientific method does not guarantee perfection, as there have been, and will continue to be failures in every scientific discipline.<sup>15</sup> Thomas Alva Edison, the inventor of the first long-lasting light bulb, tried thousands of different substances before finding one that worked—he stopped when he found a filament that would light a bulb for 1,500 hours.<sup>16</sup> Yet, the law does not fully embrace this same trial and error method, as it is when utilized by scientists studying the mind.<sup>17</sup> It is time for the law to recognize personality testing as scientifically valid, thereby helping businesses and employees—the right people in the right jobs will increase productivity and happiness.

## II. LEGAL BIAS AND THE MIND

The law is replete with examples of bias in situations where mental processes are involved. In tort law, for example, personal injury victims are entitled to recover all reasonable medical expenses from a tortfeasor, but if the harm is purely psychological rather than physical, the courts and legislatures—the lawgivers—often place significant barriers on full recovery.<sup>18</sup> Reasons for these restrictions include concern over temporary or trivial harm, falsification or imagined harm, and the unfairness of allowing damages for consequences that appeared remote at the time the wrongful act occurred.<sup>19</sup> While these are legitimate concerns, they fail to address the significant harm that some victims suffer or the possibility of faking some physical injuries—many mental injuries, just like back pain, require subjective reporting from the victim.<sup>20</sup>

Intentional Infliction of Emotional Distress (“IIED”) is a tort that compensates victims for harm to the mind.<sup>21</sup> The law places two significant limitations on IIED victims: the tortfeasor’s conduct must be extreme and

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14. *Definition of Scientific Method in English*, OXFORD ENGLISH DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/scientific-method](http://www.oxforddictionaries.com/us/definition/american_english/scientific-method) (last visited Sept. 21, 2014).

15. Martyn Shuttleworth, *Definition of Scientific Method*, EXPLORABLE PSYCHOLOGY EXPERIMENTS (Nov. 18, 2009), <https://explorable.com/definition-of-the-scientific-method>.

16. *Edison's Electric Light Bulb Patent*, HISTORY ENGINE, <http://historyengine.richmond.edu/episodes/view/5609> (last visited Sept. 30, 2014).

17. Nancy Levitt, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 266 (1989).

18. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 214 (4th ed. 2010). In the typical car accident scenario, the person that negligently causes the accident will be liable for the plaintiff’s reasonable medical expenses, even if those costs are millions of dollars. *See id.*

19. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 360-61 (5th ed. 1984).

20. *See id.*

21. DIAMOND, *supra* note 18, at 23.

outrageous, and the harm must result in severe emotional harm.<sup>22</sup> However, other intentional torts, such as battery, do not place these limitations on harm to the psyche.<sup>23</sup> For example, suppose that a tortfeasor intentionally scratches a victim on the hand, resulting in a \$50 charge for visiting the doctor, but \$10,000 in mental counseling fees. Since this qualifies as battery, the victim will recover for both the physical and mental harm, as those are the amounts necessary to make the victim whole.<sup>24</sup> A second example of the law's bias against mental injury involves pain and suffering awards, claimed by many personal injury victims; however, many states have enacted legislation limiting this important remedy, especially in medical malpractice cases.<sup>25</sup> In one final tort example, involving the canonical case of *Palsgraf v. Long Island Railroad*,<sup>26</sup> most law students and lawyers are unaware that Mrs. Palsgraf's injuries were rooted in injury to her psyche—she suffered from post-traumatic-stress disorder, resulting in fatigue and an inability to work.<sup>27</sup> In *Palsgraf*, Judge Benjamin Cardozo ruled against Mrs. Palsgraf on scope of duty grounds, yet it is possible that the nature of her injury was a significant factor in the decision.<sup>28</sup>

An example of federal bias appears in the Internal Revenue Code, where an exclusion from gross income exists for amounts received by a victim for his personal physical injuries.<sup>29</sup> But amounts received for purely psychological injuries are fully taxable under the Internal Revenue Code.<sup>30</sup> If the policy reason for allowing a physical injury exclusion is to make the victim whole, there is no rational basis for denying the same exclusion for the mentally injured—other than congressional bias against those with injuries to the mind.<sup>31</sup>

However, tort law does provide one example, which allows for emotional harm without heightened rules for recovery.<sup>32</sup> The first situation

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22. *Id.* at 26.

23. BEAU BAEZ III, TORT LAW IN THE USA 74 (2010) (“A battery occurs when a person intentionally causes a harmful or offensive touching of another.”).

24. *See id.* at 75-76.

25. *Id.* at 166.

26. 162 N.E. 99 (N.Y. 1928).

27. *See* WILLIAM H. MANZ, THE PALSGRAF CASE: COURTS, LAW, AND SOCIETY IN 1920S NEW YORK 48 (2005) At the time, the diagnosis was called “traumatic hysteria”, alternatively known as “railway spine” or “railway brain.” *Id.*

28. *See Palsgraf*, 162 N.E. at 101.

29. 26 U.S.C. § 104(a)(2) (“[G]ross income does not include (2) the amount of any damages . . . received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.”).

30. 26 C.F.R. § 1.104-1(c). The Treasury Department clarifies this treatment by stating that “[e]motional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).” *Id.*

31. *See* KEETON, *supra* note 19, at 360.

32. *See id.* at 362.

involves the intentional or negligent handling of a close relative's dead body.<sup>33</sup> These cases generally allow a close relative to recover for their emotional harm, presumably because the likelihood of psychological harm is obvious on its face.<sup>34</sup> As humans, we all understand the grief surrounding the death of a loved one and can imagine the additional emotional trauma that would be inflicted by the mishandling of the corpse.

The law demonstrates its bias when pure psychological harm is involved.<sup>35</sup> When the lawgivers clearly appreciate the harm, then the law accommodates the victims by allowing for relatively easy recovery.<sup>36</sup> Nevertheless, when the harm is more remote, at least from the lawgivers' perspective, then hurdles are placed to make recovery more difficult.<sup>37</sup> This is not a scientific approach to creating law, but one based on bias and ignorance.

### III. PSYCHOLOGICAL MEASUREMENT

*[T]he field of research that speaks to the issues of psychological measurement is, at best, a little-known area and, at worst, considered a phony or illegitimate area of study on par with research on ghosts and leprechauns.*<sup>38</sup>

The law is reluctant to accord equal status to empirical evidence concerning the mind versus empirical evidence concerning the body, which may be due to our inability to examine the mind in exactly the same way we examine a person's body.<sup>39</sup> When we meet a person, we quickly identify their size, shape, eye color, skin color, and any obvious physical differences, such as noting a missing hand. After speaking to a person for a few minutes, we may make additional observations: accents, speech impediments, or even intelligence. Yet, these observations may all be incorrect as someone may fake an accent, a speech impediment may be

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33. *Id.* In *Torres v. State of New York*, 228 N.Y.S.2d 1005, 1008 (1962), emotional damages were awarded when a state hospital failed to contact a decedent's relatives before performing an autopsy and burying the body on hospital grounds. *Id.* In *Allen v. Jones*, 104 Cal. App. 3d 207, 214 (1980), the plaintiff recovered for his emotional harm when the cremated remains of his brother were lost in transit due to the negligence of the defendant.

34. *See, e.g., Torres*, 228 N.Y.S.2d at 1008; *Allen*, 104 Cal. App. 3d at 214-15.

35. *See* RESTATEMENT (THIRD) OF TORTS § 46 cmt. a (2012).

36. *See* RESTATEMENT (THIRD) OF TORTS § 46 illust. 3 d. (2012).

37. *See id.*

38. RAOUL A. ARREOLA, DEVELOPING A COMPREHENSIVE FACULTY EVALUATION SYSTEM: A GUIDE TO DESIGNING, BUILDING, AND OPERATING LARGE-SCALE FACULTY EVALUATION SYSTEMS 99 (3d ed. 2007).

39. Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 297 (2013).

temporary based on a recent dental appointment, and poor speaking skills may not reflect a person's genius in mathematics or music.<sup>40</sup>

The first step in creating parity between the body and the mind is to understand the tools used in psychology, including its limitations.<sup>41</sup> The gold standard in psychometrics—the science concerned with measuring the human mind—is utilizing an instrument with high levels of validity and reliability.<sup>42</sup> “[R]eliability refers to the consistency with which observations or measurements are made”<sup>43</sup> and validity is “[t]he effectiveness of the test in representing, describing, or predicting the attribute that the user is interested in.”<sup>44</sup> Validity is further broken up into content validity, construct validity, and criterion-related validity.<sup>45</sup> Though the terms are a bit different from those used in the sciences we are more familiar with—biology, chemistry, and physics—the same scientific method is at work.<sup>46</sup> A chemist, for example, when mixing two parts hydrogen with one part oxygen expects to get water each and every time he conducts this experiment—a psychologist would term this expected result as reliability.<sup>47</sup>

One view of the scientific method is that it consists of three broad processes: test design, test implementation, and test interpretation.<sup>48</sup> Test design is the thought and preparation that occurs before conducting an

40. Science has discovered a number of different intelligences, which are not related to each other. See Dee Dickinson, *Learning Through Many Kinds of Intelligence*, JOHN HOPKINS SCH. EDUC., [http://education.jhu.edu/PD/newhorizons/strategies/topics/mi/dickinson\\_mi.html](http://education.jhu.edu/PD/newhorizons/strategies/topics/mi/dickinson_mi.html) (last visited Oct. 7, 2014).

41. See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, INTROSPECTION 1 (2010), available at <http://plato.stanford.edu/entries/introspection/#RisIntPsySci> (last visited Sept. 29, 2014).

42. THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2347 (1971). The word psychometrics is derived from two Greek words: ψυχο (psycho) and μετρηα (measuring), which literally means the measurement of the mind. *Id.*; ARREOLA, *supra* note 38, at xx (“Psychometrics/statistics is concerned with the measurement of human characteristics and the design and analysis of research based on those measurements.”).

43. BART L. WEATHINGTON ET AL., RESEARCH METHODS FOR THE BEHAVIORAL AND SOCIAL SCIENCES 84 (2010).

44. ARREOLA, *supra* note 38, at 99.

45. *Id.* (citations omitted).

Content validity refers to the faithfulness with which the test represents or reproduces an area of knowledge. Construct validity refers to the accuracy with which the test describes an individual in terms of some psychological trait or construct. Criterion-related validity, or predictive validity, refers to the accuracy with which the test scores make it possible to predict some criterion variable of educational, job, or life performance.

*Id.*

46. *The Science of Psychology*, NEW CHARTER UNIVERSITY, <https://new.edu/resources/psychologists-use-the-scientific-method-to-guide-their-research> (last visited Sept. 29, 2014).

47. See WEATHINGTON, *supra* note 43, at 84.

48. See generally G. Michael Shook et al., *Tracers and Tracer Testing: Design, Implementation, and Interpretation Methods*, IDAHO NAT'L LABORATORY (Jan. 2004), <http://www.inl.gov/technicalpublications/Documents/2603379.pdf>. (last visited Oct. 7, 2014).

experiment.<sup>49</sup> For the chemist deciding to turn hydrogen and oxygen into water, he will determine what equipment, supplies, and conditions are necessary. This will certainly include hydrogen, oxygen, vacuum tubes, electricity, and likely a laboratory to conduct the experiment.<sup>50</sup> Likewise, the psychologist goes through the same process: who are the experiment subjects, what psychological construct is under examination, where the experiment will occur, what are the ethical implications, and what is the expected outcome.<sup>51</sup> Test implementation is the point in time when the experiment occurs.<sup>52</sup> The chemist making water will combine the hydrogen, oxygen, and electricity to create water.<sup>53</sup> The psychologist will ask people questions or observe their reaction to some event.<sup>54</sup>

The final step in the empirical process is to analyze the results.<sup>55</sup> The chemist making water will verify that they obtained water in the right proportion to hydrogen and oxygen.<sup>56</sup> Since the mind cannot be observed in exactly the same way one observes water molecules, the psychologist must rely on the science of inferential statistics—the making of inferences based on empirically gathered data.<sup>57</sup> Lawyers are familiar with inferences, with their first formal exposure likely occurring in their first year of law school with concepts, such as *res ipsa loquitur*.<sup>58</sup> In criminal law, juries are asked

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49. *Id.*

50. Jill Granger, *The Mystery, Art, and Science of Water: The Chemistry of Water: Electrolysis*, SWEET BRIAR COLL., <http://witcombe.sbc.edu/water/chemistryelectrolysis.html> (last visited Oct. 7, 2014).

51. Kendra Cherry, *How to Conduct a Psychology Experiment*, <http://psychology.about.com/od/researchmethods/ss/conducting-psychology-experiments.htm> (last visited Oct. 1, 2014).

52. See generally Shook, *supra* note 48.

53. Granger, *supra* note 50.

54. Jason P. Mitchell, *Inferences about Mental States*, PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY (2009), <http://rstb.royalsocietypublishing.org/content/364/1521/1309.full.pdf+html?sid=e5ab22-c58a-4dd9-bb7e-17f38c8e8453>.

55. Robert S. Kaplan, *The Role for Empirical Research in Management Accounting*, 11 ACCT. ORG. SOC'Y 429, 437 (1986), available at [http://ac.els-cdn.com/0361368286900127/1-s2.0-0361368286900127-main.pdf?\\_tid=ed64d3ea-45c8-11e4-9290-0000aacb361&acdnat=1411769180\\_f47d4b4df44f07e609259af00c8d1202](http://ac.els-cdn.com/0361368286900127/1-s2.0-0361368286900127-main.pdf?_tid=ed64d3ea-45c8-11e4-9290-0000aacb361&acdnat=1411769180_f47d4b4df44f07e609259af00c8d1202).

56. Granger, *supra* note 50.

57. Kendra Cherry, *Why Are Statistics Necessary in Psychology?*, ABOUT.COM, <http://psychology.about.com/od/education/f/why-are-statistics-necessary-in-psychology.htm> (last visited Oct. 7, 2014).

58. *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863) (A flour barrel rolled out of a second story window onto a man walking on the sidewalk below. *Id.* Neither the plaintiff nor defendant knew how the barrel had rolled out, but the court ignored the lack of evidence and noted that barrels do not fall out of windows absent negligence. *Id.* In other words, the court allowed the plaintiff to make an inference of negligence. *Id.* at 301).



to make inferences, some of which result in the execution of a defendant.<sup>59</sup> For example, if the evidence at trial shows that a police officer heard a gunshot, rushed into a close room, and found the defendant with a gun over the recently deceased victim, most people would feel comfortable making the inference that the defendant killed the victim.<sup>60</sup> Inferences range from weak to strong, though strong inferences do not guarantee agreement with reality.<sup>61</sup> In our criminal law example above, it is possible that the defendant is innocent of murder. If we were omniscient, we might know that, in reality, a small robot with a gun was hidden in the ventilation system and that the robot was responsible for the deadly bullet, all part of an elaborate plot to frame the defendant. Aside from a surrealistic Agatha Christie plot, rational people generally accept that a man found with a gun, with gunpowder on his fingers seconds after someone is killed, next to the victim, in a closed room, is in fact the killer. Reasonable jurors feel quite comfortable in making the inference that the defendant shot the victim, even though they know there is a small statistical chance that they are wrong.<sup>62</sup> Just as lawyers use inferences in their trade, psychologists also use them in their experiments.<sup>63</sup>

In the studies referenced in this article, researchers conducted scientific analysis to find the strength of association between two items—the predictor and the criterion.<sup>64</sup>

The criterion in personnel research is that which is to be predicted: a measure of performance, of a limited aspect of performance, or of some valued behavior associated with the assigned job role . . . . The *predictor* is used to assess the job candidate's (future) suitability for the job. The *criterion* is used to assess the employee's (current) performance on the job . . . . *Validation* is the

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59. COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, §1.04 (1990) [hereinafter JURY INSTRUCTIONS].

60. See Mitchell, *supra* note 54.

61. CATHAL WOODS, AN INTRODUCTION TO REASONING: VALID, STRONG, & WEAK INFERENCE 2 (2014), *available* at [https://docs.google.com/a/onu.edu/document/d/1hi4sIe5\\_WZuulmrSRPfvFey4SIBZ9GUg-Rn4FGNqww/edit](https://docs.google.com/a/onu.edu/document/d/1hi4sIe5_WZuulmrSRPfvFey4SIBZ9GUg-Rn4FGNqww/edit).

62. JURY INSTRUCTIONS, *supra* note 59.

63. See Mitchell, *supra* note 54.

64. Reuben M. Baron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. OF PERSONALITY & SOC. PSYCHOLOGY 1173, 1174 (1986).

process of estimating the relation between the predictor and the criterion. [Emphasis added].<sup>65</sup>

A study, for example, might indicate that there is a .40 correlation between the performance on a personality test and job performance. The personality test is the predictor, or “independent variable,”<sup>66</sup> and job performance is the criterion, or “dependent variable.”<sup>67</sup> The study will have selected an appropriately sized sample of people in determining if there was a connection between performance on a personality test and job performance.<sup>68</sup> The .40 number used in this example is the “coefficient of correlation” between the independent and dependent variable.<sup>69</sup> A coefficient of correlation can be any value from -1.00 to + 1.00.<sup>70</sup> A + 1.00 establishes a perfect correlation between the two variables<sup>71</sup> and a -1.00 establishes a perfect negative correlation between the two variables.<sup>72</sup> A zero would show that there is no correlation between the two variables.<sup>73</sup>

The next issue in understanding psychometrics involves taking into account the consequences in making a decision based on a weak correlation.<sup>74</sup> For example, a study may examine the use of a new artificial sweetener in ice cream, with .25 correlation between it and improved taste. Although this is a weak correlation, most people would likely try the new artificial sweetener because the negative consequence of not enjoying the taste would be short lived. That same .25 correlation between a new automobile braking feature and that car stopping quickly might result in people refusing to ride in the car because the consequence for failed brakes now includes serious bodily harm.

The final statistical concept that needs explanation is the “coefficient of determination,” which is mathematically obtained by squaring the

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65. ROBERT M. GUION & SCOTT HIGHHOUSE, *ESSENTIALS OF PERSONNEL ASSESSMENT AND SELECTION* 9 (2006).

66. Russell Dewey, *Independent, Dependent, and Subject Variables*, PSYCH WEB (2004), [http://www.intropsych.com/ch01\\_psychology\\_and\\_science/independent\\_dependent\\_and\\_subject\\_variables.html](http://www.intropsych.com/ch01_psychology_and_science/independent_dependent_and_subject_variables.html).

67. *Id.*

68. Baron, *supra* note 64, at 1174-75.

69. *Statistics Calculator, Correlation and Regression*, PAC, available at <https://www.statpac.com/statistics-calculator/correlation-regression.htm> (last visited Oct. 7, 2014).

70. Elizabeth Lanthier, *Correlation*, N.V.A. CMTY. COLL. (2002), <http://www.nvcc.edu/home/elanthier/methods/correlation.html> (last visited Oct. 7, 2014).

71. *Id.*

72. *Id.*

73. *Understanding Correlations*, PSYCHOMETRIC ASSESSMENTS, <http://www.psychometric-assessment.com/understanding-correlations/> (last visited Sept. 30, 2014).

74. Costa McCrea, *Five Factors in Peer Ratings: Correlation of Psychometrics*, 52 J. OF PERSONALITY & SOC. PSYCHOLOGY. 1 (1987).

coefficient of correlation.<sup>75</sup> If there is a relationship of .40 between two variables—for example, between a personality test and job performance—then the coefficient of determination is .16, or 16%.<sup>76</sup> This means that personality explains 16% of the total variation in job performance.<sup>77</sup> Conversely, this means we do not know if personality plays a part in the remaining 84% of job performance.<sup>78</sup>

There is some concern for making any decision using a tool with a weak correlation as errors will occur.<sup>79</sup> This is because the use of psychology, as a scientific method, is relatively new compared to the scientific method's long pedigree in the physical sciences. In the employment context, this means that some people that possess the requisite knowledge, skills, ability, and personality for a job will not be hired even though, if we were omniscient, they would meet all of the employer's criteria. Keep in mind that the use of inferences can lead to mistakes.<sup>80</sup> "The psychometric approach involves developing imperfect indicators of some underlying concept. They are imperfect because they are subject to measurement error."<sup>81</sup> From an employer's perspective, using a personality measurement tool, even a weak one, is better than selecting people by pure chance.<sup>82</sup> The National Commission on Testing and Public Policy cautioned on the use of selection tools, noting that "[t]est scores are imperfect measures and should not be used alone to make important decisions about individuals. . . in the allocation of opportunities, individuals' past performance and relevant experience must be considered."<sup>83</sup> However, this recommendation fails to

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75. James Dean Brown, *The Coefficient of Determination*, SHIKEN: JALT TESTING & EVALUATION SIG NEWSLETTER, Mar. 2003, at 15.

76. *Id.* at 16.

77. *Id.* at 15-16.

78. *Id.*

79. HOSSEIN ARSHAM, STATISTICAL THINKING FOR MANAGERIAL DECISIONS 21, available at <http://home.ubalt.edu/ntsbarsh/business-stat/opre504.htm#rstatdecisionmake> (last visited Sept. 29, 2014).

80. JURY INSTRUCTIONS, *supra* note 59.

81. GUION & HIGHHOUSE, *supra* note 65, at 6.

82. See *HR Ideas and Trends Issues*, No. 725, HUMAN RES. MGMT. COMP. GUIDE, (HR Ideas and Trends Newsletters) Nov. 3, 2011, at 2 ("[c]apable personality tests, if used correctly, will lead to better selection decisions, less turnover, and a more effective business organization.").

83. FROM GATEKEEPER TO GATEWAY: TRANSFORMING TESTING IN AMERICA, NAT'L COMM. ON TESTING & PUB. POLICY 30 (1990), available at [http://www.bc.edu/research/nbetpp/back\\_docs/GatekeeperSum.html](http://www.bc.edu/research/nbetpp/back_docs/GatekeeperSum.html). This Commission

was formed in 1987 as an interdisciplinary body composed of individuals with expertise, interests, and experience in a wide variety of fields—education, business, labor, law, assessment and measurement, and manpower development and training (a prominent member of the Commission at the time was none other than Arkansas Governor Bill Clinton). The Commission's mandate was: (a) to investigate trends, practices, and impacts of the use of standardized test instruments and other forms of assessment in schools, the workplace, and the military; and (b) to recommend improvements in testing that would promote the

understand that all selection tools, including the traditional interview, are also imperfect.

To recommend that imperfect measures should not be used alone is to recommend that sets . . . of imperfect measures be considered jointly. The unstated assumption may be that the imperfections will cancel out, thereby improving predictions; that assumption is not supported by evidence. Public policy is usually formalized in laws. We would hate to see laws requiring that decisions be based on combining valid but imperfect test scores with other information that has no evidence of validity.<sup>84</sup>

It appears that those opposed to scientifically valid tests may prefer processes that have no demonstrated validity, such as the traditional interview. Even for hiring processes that involve scientific tools,

[t]he simple, fundamental question . . . is, 'How well has the intended characteristic been measured?' More precisely, the question asks, 'With what confidence can the scores resulting from the measurement be interpreted as representing varying degrees or levels of the specified characteristic?' There is never a simple answer. Answers are judgments, not numbers, and they are to be supported by data and logical argument. They depend on the relative weight of evidence—the weight of accumulated evidence supporting an interpretation relative to the weight of accumulated evidence opposing it. One looks not at single bits of information but at the preponderance of the evidence.<sup>85</sup>

Thus, in both the traditional and more scientifically based hiring process, it is important to understand what is occurring: when extending a job offer, both approaches are making the inference that the candidate will succeed.

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identification and nurturing of talent, especially among racial, ethnic, and linguistic minorities. Over a 3-year period, the Commission held hearings, heard presentations from a range of experts, and invited and reviewed over 50 papers. On May 23, 1990, the NCTPP released its 3-year study, *From Gatekeeper to Gateway: Transforming Testing in America*. The study, which was funded by the Ford Foundation and administered through Boston College, details the Commission's 3-year examination of the role that testing plays in education and the workplace. The study's guiding recommendation was that testing policies and practices should be restructured to help people develop their talents and to help institutions become more productive, just, and accountable.

Heather Roberts-Fox, *Proposal Under Reivew to Reconstitute the National Commission on Testing and Public Policy*, THE INDUS.-ORG. PSYCHOLOGIST (July 1998), <http://www.siop.org/tip/backissues/TIPJuly98/roberts.aspx>.

84. GUION & HIGHHOUSE, *supra* note 65, at 16-17.

85. *Id.* at 137.

Without question, in individual cases, the traditional approach will succeed when the scientific approach fails and vice versa.<sup>86</sup> Employers, however, are primarily concerned with the success rate over time, and that provides the scientific approach with the advantage.<sup>87</sup> In playing roulette, for example, a gambler might choose the least risky bet on the table, which means that he will win 47.37% of the time.<sup>88</sup> The casino knows that overtime, bet after bet, it will have a 5.26% edge over this gambler and an even higher percentage for riskier gamblers.<sup>89</sup> Now, envision a company that hires 100 employees in the same department over a five-year period and that a personality test will yield a 10% higher success rate over the traditional process. If the traditional approach yields eighty successful candidates, the scientific approach will yield eighty-eight successful candidates.<sup>90</sup> Note that in both cases, neither achieved a 100% success rate—that was not the goal. The goal was to maximize the number of successful hires over time, and reduce the number of good candidates that the traditional approach would have rejected.<sup>91</sup>

LAW SCHOOL FACULTY HIRING:  
A CASE STUDY IN NON-SCIENTIFIC HIRING

A process steeped in tradition, rather than science, is generally used in the hiring of law school faculty members.<sup>92</sup> Most new law school professors enter the legal academy through a process that is fairly uniform at most accredited law schools.<sup>93</sup> The first step is for initiates to register with the American Association of Law Schools (“AALS”) and get their resume information entered into the Faculty Appointments Register.<sup>94</sup> Faculty hiring committees scour through nearly 1,000 resumes looking for candidates that meet their particular institutional needs.<sup>95</sup> Some hiring teams focus on specific curricular needs, such as focusing on hiring a new torts professor when a senior colleague retires and there is a need to fill the

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86. *Id.*

87. *Assessment*, *supra* note 11.

88. Michael Shackleford, *Roulette, THE WIZARD OF ODDS*, <http://wizardofodds.com/games/roulette/> (last visited Sept. 11, 2014).

89. *Id.*

90. *Supra* notes 86-89 and accompanying text.

91. Shackleford, *supra* note 88 and accompanying text. I suppose that it is the quantification of people to a statistic that bothers some people, which is why they oppose these measures. But they fail to appreciate that the traditional interview will also fail to identify candidates that would have been successful, but for a bad interviewing day. *Id.*

92. See Tracy E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUDIES 7-10 (2014) (discussing the interview process generally).

93. See *id.* at 7.

94. *Faculty Appointments Register*, AM.ASS'N OF L. SCH., <http://www.aals.org/frs/far.php> (last visited Oct. 8, 2014).

95. George, *supra* note 92, at 1.

vacant position.<sup>96</sup> Others are less concerned with curricular needs, and instead look for promising scholars, carefully noting which candidates have published law review articles.<sup>97</sup> Still, other committees are primarily looking for candidates to add diversity to their ranks.<sup>98</sup> There is broad consensus revolving around the candidate's alma mater, the position held on law review, and judicial clerkships.<sup>99</sup> Up to this point in the selection process the only points of examination are a candidate's credentials.<sup>100</sup>

The second step in the recruitment process is the coveted interview at the AALS Faculty Recruitment Conference ("FRC")—held each year at the Marriott Wardman Park Hotel in Washington, D.C., in late October or early November.<sup>101</sup> Law school hiring teams contact those they want to interview for twenty-five minute interview slots at the FRC, interviewing over forty candidates in a mind whirring marathon that looks a bit more like a speed dating event than the entry into the legal academy.<sup>102</sup> Throughout the hurry-scurry, candidates—at least the most sought after ones—race through the hotel's three-building complex.<sup>103</sup> A candidate might bolt from an interview on the tenth floor in one tower, take an elevator to the first floor—or more likely avoid the packed elevators and race down the stairs—then sprint through connecting passages to a second building, and rush up a few more floors with only moments to spare, all while dressed in business attire.<sup>104</sup>

The content for each FRC interview varies for each law school.<sup>105</sup> Some hiring teams discuss their institution's unique mission (e.g., commitment to research, serving the underserved, or preparing students to enter the legal market), others want to discuss teaching ability, and almost all will ask candidates to discuss their scholarship agenda.<sup>106</sup> When discussing scholarship, candidates present their thoughts about some area of the law and the hiring committee peppers the candidate with questions, as if this was an oral argument before the Supreme Court.<sup>107</sup> Ultimately, the FRC is unlikely to provide a hiring team with many favorable impressions,

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96. *Id.* at 8.

97. Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV., 215, 243, 246 (1981).

98. *Id.* at 243, 253-55.

99. *Id.* at 243.

100. George, *supra* note 92, at 8.

101. *Faculty Recruitment Conference*, AM. ASS'N OF L. SCH., <http://www.aals.org/frs/frc.php> (last visited Dec. 14, 2011).

102. *See* George, *supra* note 92, at 8.

103. Don Zillman et al., *Uncloaking Law School Hiring: A Recruit's Guide to the AALS Faculty Recruitment Conference*, 38 J. LEGAL EDUC. 345, 350 (1988).

104. *Id.*

105. *Id.* at 352-53.

106. *Id.*

107. *Id.* at 352, 354.

especially of the candidate with the time slot at the end of the last day, who is competing with hiring team members preparing to rush to the airport for a flight home.<sup>108</sup> Hiring committees do choose a few candidates for the next stage in the hiring process, the on-campus interview with the entire law school faculty.<sup>109</sup>

The on-campus interview usually begins with dinner at a nice restaurant the evening before the interview, with the law school picking up the bill for the candidate and two or three faculty members.<sup>110</sup> The next day consists of a series of interviews with the faculty, dean, and possibly staff or students.<sup>111</sup> To determine the candidate's intellectual ability, the candidate is asked to do a "job talk," which can last anywhere from thirty minutes to an hour.<sup>112</sup> Candidates make a presentation to the faculty on a topic of the candidate's choosing.<sup>113</sup> Usually the job talk involves riveting discussions on topics like Commerce Clause implications on Indian gaming, Section 2 of the North Dakota Constitution, or the legal implications for ethanol corn subsidies.<sup>114</sup> After the interviews of all the candidates come to an end, the faculty meets to debate the merits of each candidate, discuss scholarship potential, teaching ability, and perceived fit within the current law school culture.<sup>115</sup> Faculty then cast votes, either as the final step in the process or as recommendations to the Dean.<sup>116</sup>

By the time the school extends a job offer to a faculty candidate, there has been no meaningful determination as to whether the candidate's personality or EQ will fit within the current law school culture.<sup>117</sup> While the interview process identifies the most egregious cultural misfits, most lawyers can fake collegiality during the twenty-four hour interview period.<sup>118</sup> A single bad hire can create havoc on a faculty for decades, creating a toxic environment for the faculty and staff.<sup>119</sup> However, there are law schools that tolerate poor behavior from faculty that are viewed as

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108. Zillman, *supra* note 103, at 350-52.

109. George, *supra* note 92, at 8.

110. *Id.* at 8-9.

111. *Id.*

112. *Id.* at 8.

113. Zillman, *supra* note 103, at 357.

114. *Id.*

115. Bruce, *supra* note 97, at 243-59.

116. George, *supra* note 92, at 9.

117. *Id.* at 15.

118. See, e.g., Mitchell H. Peterson et al., *Examining the Role of Applicant Faking in Hiring Decisions: Percentage of Fakers Hired and Hiring Discrepancies in Single- and Multiple-Predictor Selection*, 24 J. BUS PSYCHOLOGY 373, 373-74 (2009).

119. See Cynthia Berryman-Fink, *Can We Agree to Disagree? Faculty-Faculty Conflict in MENDING THE CRACKS IN THE IVORY TOWER: STRATEGIES FOR CONFLICT MANAGEMENT IN HIGHER EDUCATION* 141-163 (Suzanne A. Holton ed. 1999).

excellent scholars.<sup>120</sup> In these schools, they assign great scholars, but cultural misfits to small classes, thereby minimizing their contact with students.<sup>121</sup> Nevertheless, as long as they keep getting published in the top law journals, a multitude of sins are forgiven—institutional prestige, as measured by the U.S. News and World Report rankings, trump good teaching, healthy work environments, and student happiness.<sup>122</sup>

#### IV. PERSONALITY & EMOTIONAL INTELLIGENCE

The link between personality and emotional intelligence to job performance is compelling.<sup>123</sup> Though there is strong evidence that cognitive measurement tools are good predictors of job success, one important reason that they are not perfect predictors is that human personality is also an important factor in job success.<sup>124</sup> However, not all are convinced.<sup>125</sup> Annie Murphy Paul, a former senior editor for *Psychology Today* magazine, attacked the \$400 million a year testing industry, comparing personality tests to phrenology—a discredited 19<sup>th</sup> century personality instrument that measured mental traits by examining the twenty-seven bumps on a person's head.<sup>126</sup> With over 2,500 different personality and emotional intelligence instruments on the market, Ms. Murphy is likely correct that some of them are ineffective.<sup>127</sup> Discernment is the solution to finding effective and reliable tests.<sup>128</sup>

##### A. Personality

Personality is “the sum total of ways in which an individual reacts to and interacts with others . . . [and] we most often describe it in terms of the

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120. *Id.* at 163-65.

121. *Id.* at 161 (inferring from informal resolution attempts in variations of grievance).

122. Kyle Sweitzer & J. Fredericks Volkwein, *Prestige Among Graduate and Professional Schools: Comparing the U.S. News' Graduate School Reputation Ratings Between Disciplines*, 50 RES. HIGH. EDUC. 812, 813 (2009).

123. Frank L. Schmidt & John E. Hunter, *The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research Findings*, 124 PSYCHOL. BULL. 262, 267 (1998).

124. Lex Borghans et al., *The Economics and Psychology of Personality Traits* 41 (Nat'l Bureau of Econ. Research, Working Paper No. 13810, 2008), available at <http://www.nber.org/papers/w13810.pdf>.

125. See ANNIE MURPHY PAUL, *THE CULT OF PERSONALITY: HOW PERSONALITY TESTS ARE LEADING US TO MISEDUCATE OUR CHILDREN, MISMANAGE OUR COMPANIES, AND MISUNDERSTAND OURSELVES* at xvi, 2, 4, 6, 13, 14 (2004).

126. *See id.*

127. *Id.* at xiv.

128. H. Beau Baez, *Personality Tests in Employment Selection: Use With Caution*, CORNELL HR REVIEW (Jan. 26, 2013), <http://www.cornellhrreview.org/personality-tests-in-employment-selection-use-with-caution/>.



measurable traits a person exhibits.”<sup>129</sup> One of the best supported models for measuring personality involves the “Big Five Model,” with its five basic dimensions that capture most of the variation in human personality.<sup>130</sup> The traits include neuroticism/emotional stability,<sup>131</sup> extraversion,<sup>132</sup> openness to experience,<sup>133</sup> agreeableness,<sup>134</sup> and conscientiousness.<sup>135</sup> These five job traits are connected to job performance and are predictors of certain outcomes: “avoiding counterproductive behavior, reducing turnover and absenteeism, exhibiting more teamwork and leadership, providing more effective customer service, contributing more citizenship behavior, influencing job satisfaction and commitment to the firm, and enhancing safety.”<sup>136</sup>

Several tests measure the Big Five personality dimensions, but the two most popular are the NEO-Personality Inventory and the Personality Characteristics Inventory (“PCI”).<sup>137</sup> The PCI is comprised of 150 multiple-choice questions and asks questions like “I tend not to say what I think about things” (i.e., testing extraversion) or “I approach most of my work steadily and persistently” (i.e., testing conscientiousness).<sup>138</sup> The first Big Five personality test developed for the business community was the Hogan Personality Inventory (“HPI”), with its focus on normal personality rather than abnormal personality.<sup>139</sup> A 2003 meta-analytic review of 43 studies

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129. STEPHEN P. ROBBINS & TIMOTHY A. JUDGE, ORGANIZATIONAL BEHAVIOR 135 (14th ed. 2011).

130. *Id.* at 138.

131. *Id.*

132. *Id.*

133. *Id.*

134. ROBBINS, *supra* note 129, at 138.

135. *Id.*

136. ROBERT D. GATEWOOD ET AL., HUMAN RESOURCE SELECTION 507 (7th ed., 2011).

137. Murray R. Barrick & Michael K. Mount, *Autonomy as a Moderator of the Relationships Between the Big Five Personality Dimensions and Job Performance*, 78 J. APPLIED PSYCHOL. 111, 113 (1993); *Personality Tests*, *supra* note 128, at n.16. Self-report questionnaires are less expensive to administer, which is why they tend to be more popular than approaches that require the administration by a trained psychologist. *See id.*

138. GATEWOOD, *supra* note 136, at 511.

139. *Hogan Personality Inventor: Overview Guide*, HOGAN ASSESSMENTS (2009), [http://www.hoganassessments.com/sites/default/files/assessments/pdf/HPI\\_Brochure.pdf](http://www.hoganassessments.com/sites/default/files/assessments/pdf/HPI_Brochure.pdf). The HPI utilizes the following seven dimensions:

“Adjustment: confidence, self-esteem, and composure under pressure  
 Ambition: initiative, competitiveness, and desire for leadership roles  
 Sociability: extraversion, gregarious, and need for social interaction  
 Interpersonal Sensitivity: tact, perceptiveness, and ability to maintain relationships  
 Prudence: self-discipline, responsibility, and conscientiousness  
 Inquisitive: imagination, curiosity, and creative potential  
 Learning Approach: achievement-oriented and up-to-date on business and technical matters . . .”

found that the HPI is an effective predictor of job performance for many different jobs, including customer service representatives, hospital administrators, bus drivers, department managers, and police officers.<sup>140</sup>

### *B. Personality Test Criticism*

There is some debate in the industrial/organizational (“IO”) psychology field as to whether employee selection should use personality measures.<sup>141</sup> Many believe that personality tests used for employee selection are not valid, and in any event can be faked.<sup>142</sup> The earliest personality tests go back at least to 1919, at the dawn of IO psychology.<sup>143</sup> In one article that reviewed 113 personality selection tool studies, conducted from 1919 to 1952, personality was found to correlate to job success at levels similar to studies that are more recent.<sup>144</sup> For studies published from 1952 to 1963, one paper noted that the studies indicated that personality had some predictive power, but not at a level that personality should be used for employee selection.<sup>145</sup> This same article concluded that:

[T]here is no generalizable evidence that personality measures can be recommended as good or practical tools for employee selection. . . . The best that can be said is that in *some* situations, for *some* purposes, *some* personality measures can offer helpful predictions. But there is nothing in this summary to indicate in advance which measure should be used in which situation or for which purposes. In short, it must be concluded (as always) that the validity of any personality measure must be specifically and competently determined for the specific situation in which it is to be used and for the specific purpose or criterion within that situation. . . . It seems clear that the only acceptable reason for using personality measures as instruments of decision is found only after doing considerable

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*Id.*

140. Joyce Hogan & Brent Holland, *Using Theory to Evaluate Personality and Job-Performance Relations: A Socioanalytic Perspective*, 88 J. APPLIED PSYCHOL. 100, 102-03 (2003).

141. See Frederick P. Morgeson et al., *Are We Getting Fooled Again? Coming to Terms with Limitations in the Use of Personality Tests for Personnel Selection*, 60 PERS. PSYCHOL. 1029, 1034 (2007).

142. Wesley A. Scroggins et al., *Psychological Testing in Personnel Selection, Part I: A Century of Psychological Testing*, 37 PUB. PERS. MGMT. 99, 105 (2008).

143. Edwin E. Ghiselli & Richard P. Barthol, *The Validity of Personality Inventories in the Selection of Employees*, 37 J. APPLIED PSYCHOL. 18, 18 (1953).

144. See *id.* at 19-20.

145. See Guion, *supra* note 65, at 136, 141.

research with the measure in the specific situation and for the specific purpose for which it is to be used.<sup>146</sup>

A 2010 review of the academic literature found correlations between personality and job success to fall in the .03 to .15 range, which the authors note is “close to zero.”<sup>147</sup> To put these correlations in perspective, personality tests used in employee selection account for approximately 5% of an employee’s job success and 95% of their performance is unaccounted for by personality.<sup>148</sup> “Interestingly, the .15 correlation is almost identical to what was noted in the 1960’s, meaning there has been no measurable change in the data for fifty years.”<sup>149</sup>

One possibility for the relatively low correlation rates is improper interpretation of the data.<sup>150</sup> A 2011 study found evidence for a curvilinear relationship between personality traits and job performance, while all earlier studies assumed a linear relationship.<sup>151</sup> This suggests that for complex jobs, high personality scores may correlate at higher rates to ultimate job success.<sup>152</sup>

### C. EMOTIONAL INTELLIGENCE

As the name implies, emotional intelligence (“EQ”) is not a personality trait, but a type of intelligence.<sup>153</sup> Beginning in the 20<sup>th</sup> century, society has viewed intelligence almost exclusively through the lens of intelligence quotient (“IQ”) tests.<sup>154</sup> IQ tests have the advantage of being very reliable, but are limited in that they measure abstract reasoning and verbal fluency.<sup>155</sup> In 1990, Peter Salovey and John Mayer proposed an additional intelligence: emotional intelligence.<sup>156</sup> Emotional intelligence is comprised of four components:

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146. *Id.* at 135, 159-60.

147. Morgeson, *supra* note 141, at 1033.

148. *Id.* at 1037.

149. *Personality Tests*, *supra* note 128.

150. *See infra* note 168-169 and accompanying text.

151. Huy Le et al., *Too Much of a Good Thing: Curvilinear Relationships Between Personality Traits and Job Performance*, 96 J. APPLIED PSYCHOL. 113, 113 (2011).

152. *Id.* at 128-29.

153. John D. Mayer et al., *Emotional Intelligence: New Ability or Eclectic Traits*, 63 AM. PSYCHOL. 503, 508 (2008); Michaela Davies et al., *Emotional Intelligence: In Search of an Elusive Construct*, 75 J. OF PERS. AND SOC. PSYCHOL. 989, 992 (1998).

154. WEITEN, *supra* note 2, at 361-62 (“An intelligence quotient (IQ) is a child’s mental age divided by chronological age, multiplied by 100.”).

155. *Id.* at 364, 366.

156. Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION, AND PERSONALITY 185, 185 (1990).

First, people need to be able to accurately perceive emotions in themselves and others and have the ability to express their own emotions effectively. Second, people need to be aware of how their emotions shape their thinking, decisions, and coping mechanisms. Third, people need to be able to understand and analyze their emotions, which may often be complex and contradictory. Fourth, people need to be able to regulate their emotions so that they can dampen negative emotions and make effective use of positive emotions.<sup>157</sup>

It is important to note that if EQ is, in fact, a type of intelligence, it can change within some biologically determined range.<sup>158</sup>

The marketplace is beginning to recognize the importance of EQ.<sup>159</sup> One survey indicated that 60% of employers would not hire a high IQ candidate with a low EQ.<sup>160</sup>

When asked why emotional intelligence is more important than high IQ, employers said that employees with high EQ (in order of importance):

- Are more likely to stay calm under pressure
- Know how to resolve conflict effectively
- Are empathetic to their team members and react accordingly
- Lead by example
- Tend to make more thoughtful business decisions<sup>161</sup>

When these same employers were asked to identify specific behaviors and qualities that demonstrate EQ, they responded that employees who demonstrate high EQ:

- Admit and learn from their mistakes
- Can keep their emotions in check and have thoughtful discussions on tough issues
- Listen as much, or more than, they talk
- Take criticism well

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157. WEITEN, *supra* note 2, at 386.

158. John D. Mayer et al., *Emotional Intelligence Meets Traditional Standards for an Intelligence*, 27 INTELLIGENCE 267, 269-70 (2000).

159. *Seventy-One Percent of Employers Say They Value Emotional Intelligence Over IQ, According to CareerBuilder Survey*, PRNEWswire (Aug. 18, 2011), <http://www.prnewswire.com/news-releases/seventy-one-percent-of-employers-say-they-value-emotional-intelligence-over-iq-according-to-careerbuilder-survey-127995518.html>.

160. *Id.*

161. *Id.*

- Show grace under pressure<sup>162</sup>

Academic literature echoes the same opinions given by the surveyed employers on the subject.<sup>163</sup> Research indicates that emotional intelligence has predictive validity “in important domains such as academic performance, job performance, negotiation, leadership, emotional labor, trust, work-family conflict, and stress.”<sup>164</sup> While some contend that emotional intelligence and personality are the same, other studies reveal that emotional intelligence is measuring something apart from personality.<sup>165</sup> Specifically, when measuring emotional intelligence as a separate construct, it is measurable separate from intelligence and personality.<sup>166</sup> In one 1995 study, it was claimed that emotional intelligence was the most significant job performance predictor.<sup>167</sup> However, as in many areas of research, the keynote finding of one study does not even make the footnote of a similar study.<sup>168</sup> Such was the case in 2011 when a study, relying on much more data than the 1995 sample, could not support the earlier claim that EQ predicts job performance.<sup>169</sup> Although the exact role EQ plays in the workplace is still up for debate, it is reasonable to assume from the multitude of studies linking EQ to various performance factors that a valid and reliable emotional intelligence test used in the selection process should result in useful data.<sup>170</sup>

#### D. Applicant Faking

To the extent that a hiring process uses personality and EQ tests, the issue of applicant faking needs to be addressed.<sup>171</sup> Faking is defined “as the tendency to deliberately present oneself in a more positive manner than is accurate in order to meet the perceived demands of the testing situation.”<sup>172</sup> “The concern is that a person with high cognitive abilities will have the

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162. *Id.*

163. Ernest H. O’Boyle et al., *The Relation Between Emotional Intelligence and Job Performance: A Meta-Analysis*, 32 J. ORGANIZ. BEHAV. 789-90 (2010).

164. *Id.* at 789.

165. See Joseph C. Rode et al., *Emotional Intelligence and Individual Performance: Evidence of Direct and Moderated Effects*, 28 J. ORGANIZ. BEHAV. 399, 399 (2007).

166. O’Boyle, *supra* note 163, at 806.

167. DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ 160-161 (1995).

168. Compare *id.*, with O’Boyle *supra* note 163, at 804-05.

169. O’Boyle, *supra* note 163, at 804-05.

170. Moshe Zeidner et al., *Emotional Intelligence in the Workplace: A Critical Review*, 53 J. APPLIED PSYCHOL. 371, 371 (2004); Thomas Sy et al., *Relation of Employee and Manager Emotional Intelligence to Job Satisfaction and Performance*, 68 J. VOCATIONAL BEHAVIOR 461, 461 (2006).

171. See *supra* note 167 and accompanying text.

172. Jinyan Fan et al., *Testing the Efficacy of a New Procedure for Reducing Faking on Personality Tests Within Selection Contexts*, 97 J. APPLIED PSYCHOL. 866, 867 (2012).

intellectual skill necessary to identify the answers that will maximize their chances of getting a position.”<sup>173</sup> A quick search on the Internet will find advice on how to fake these tests.<sup>174</sup> One article, geared toward lawyers seeking employment with firms who conduct personality or EQ tests, notes:

I'm not convinced that you can't 'game' the test to some extent. So here are my tips for 'passing' the test:

- Resist the urge to be too revealing. The assessment is part of the job interview, not something for your own enlightenment. If you are curious about your psychological profile, take one of the tests out there on your own dime.
- Be a social animal. If you need to lock yourself in a soundproof room to do your work, don't admit it. These days, law firms are very keen on team work. Never mind that most of the big rainmakers tend to be solipsistic egomaniacs. The buzz word is 'cooperation.'
- Be sunny. Lawyers are paid to look at the worst-case scenarios, so they tend to be skeptical, if not pessimistic. Despite your inclination to look on the dark side, try to project a positive, 'I'll-find-a-solution' attitude. That's what clients want to hear.
- Be cool. If you get angry or take criticism badly, don't admit it. Grit your teeth and say you welcome criticism—and that you always learn from it.
- Review math. Yes, there was a math section on the test that completely threw me. It might help to buy one of those SAT prep books.<sup>175</sup>

One recent study found faked answers for one quarter to one half of the applicants.<sup>176</sup> So how can employers who want to use personality or EQ tests in their selection process mitigate against the risk of applicant faking? Counter-measures to faking include the test and retest approach to see if an individual is consistent in their answers, or asking questions that require

173. *Personality Tests*, *supra* note 128.

174. A.L. Day & S.A. Carrol, *What's the Big Deal with Emotional Intelligence Tests?*, I/O AT WORK, <http://www.ioatwork.com/whats-the-big-deal-with-emotional-intelligence-tests/> (last visited Oct. 1, 2014).

175. Vivia Chen, *The Careerist Goes on the Couch*, THE CAREERIST (Feb. 1, 2011), <http://thecareerist.typepad.com/thecareerist/2011/02/aceing-the-psych-test.html>.

176. Richard L. Griffith et al, *Do Applicants Fake? An Examination of the Frequency of Applicant Faking Behavior*, 36 PERS. REV. 341, 341 (2007).

quick responses.<sup>177</sup> However, counter-measures to faking may result in less reliable and valid results since some tools used to detect faking do not work well.<sup>178</sup>

#### *E. Skepticism in Personality Testing*

“There are skeptics . . . who are derisive of these tests because they feel the questions posed in them are irrelevant in determining a person’s personality or emotional intelligence.”<sup>179</sup> For example, one exam used in selecting first year legal associates asks “do you like flowers?”<sup>180</sup> “Clearly an applicant’s affection for flowers is not connected to the knowledge, skills, or abilities necessary to be a successful lawyer.”<sup>181</sup> “It is this type of question that skeptics use to prove, at least to themselves, the total irrelevancy of psychological testing.”<sup>182</sup> “However, proponents of these tests contend that the cynics are wrong because they misunderstand the purpose behind the questions.”<sup>183</sup> “Personality tests may ask a series of supposedly irrelevant questions because the test is examining the patterns behind the responses, not the answer to any particular question—it is that pattern that provides insight into the test taker’s personality.”<sup>184</sup>

Though lawyers tend to be skeptical of psychology, some large law firms are beginning to recognize the value in using psychological tools in selecting associates.<sup>185</sup> One U.S. law firm, McKenna Long & Aldridge, utilizes a 30-minute online personality test<sup>186</sup> created by TalentQuest.<sup>187</sup> TalentQuest claims that their personality test can be an effective tool for predicting certain personality traits that are successful at a particular law firm.<sup>188</sup> They note that

As a selection and development instrument, TalentQuest Assessments offer the following benefits:

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177. Fan, *supra* note 172, at 867.

178. Mitchell H. Peterson et al., *Applicant Faking, Social Desirability, and the Prediction of Counterproductive Work Behaviors*, 24 HUMAN PERFORMANCE 270, 286 (2011).

179. *Personality Tests*, *supra* note 128.

180. Chen, *supra* note 175.

181. *Personality Tests*, *supra* note 128.

182. *Id.*

183. *Id.*

184. *Id.*

185. Vivia Chen, *McKenna Long’s Recruiting Couch*, THE CAREERIST (Jan. 25, 2011), <http://thecareerist.typepad.com/thecareerist/2011/01/should-firms-use-psyche-test-in-hiring.html>.

186. *Inspiring Insight Into the Whole Person*, OPP, <http://www.opp.com/tools/16pf/> (last visited Sept. 19, 2014). This test is based on the 16PF, which claims to measure the whole domain of human personality. *Id.*

187. Vivia Chen, *supra* note 175.

188. *Id.*

- Objective evaluation of a candidate's fit for the position and the organization;
- Higher employee productivity;
- Reduced training and hiring costs;
- More efficient and more effective interview processes;
- Lower turnover; and
- Enhanced understanding of employees.<sup>189</sup>

Currently three American Bar Association accredited law schools use psychological testing tools as part of their hiring process.<sup>190</sup> All three use the same outside talent vendor, Talent Plus, who “is the premier global human resources consulting firm. . .”<sup>191</sup> “Through a series of proprietary, structured interviews, Talent Plus is able to analyze top performers to define success criteria, scientifically measure an individual's talents against industry and corporate benchmarks, and predict an individual's potential to perform a specific job with excellence.”<sup>192</sup> For those concerned about validity, reliability, or legality, Talent Plus claims that they use rigorous scientific methods in developing their tools.<sup>193</sup> Having worked at one of these schools for seven years—the Charlotte School of Law—I see an extremely cohesive faculty focused on student success. Granted, this is anecdotal evidence from one law school and reflects my judgment concerning my colleagues. Yet, as these three schools continue to use scientific hiring methods, they will find that they have a faculty that meets their personality and EQ criteria.<sup>194</sup>

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189. *Online Assessments: Getting the Right People in the Right Positions and Planning for Future Development*, TALENT QUEST, [https://www.talentquest.com/corpsite/sites/default/files/TQ\\_DataSheet\\_Online%20Assessments\\_v1\\_0.pdf](https://www.talentquest.com/corpsite/sites/default/files/TQ_DataSheet_Online%20Assessments_v1_0.pdf) (last visited Sept. 19, 2014).

190. See *Infilaw Management Solutions: Our Mission*, THE INFILAW SYSTEM, <http://www.infilaw.com/managementsolutions> (last visited Sept. 19, 2014). The Charlotte School of Law, Florida Coastal School of Law, and Arizona Summit School of Law are all part of the Infilaw system of law schools. *Our Schools*, THE INFILAW SYSTEM, <http://www.infilaw.com/our-schools> (last visited Sept. 28, 2014).

191. *Who We Are*, TALENT PLUS, [http://www.talentplus.com/talent\\_plus.php](http://www.talentplus.com/talent_plus.php) (last visited Dec. 16, 2011).

192. *Solutions: Building Talent-Based Organizations Through Recruitment*, TALENT PLUS, <http://www.talentplus.com/solutions.php> (last visited Dec. 16, 2011).

193. *Id.* (“Our research methodology and statistics are rigorous and meet the guidelines set forth by the American Psychological Association (APA), British Psychological Association (BPS), Office of Federal Contract Compliance Programs (OFCCP) and Employment Opportunity Commission's (EEOC) Uniform Guidelines on Equal Employee Selection Procedures.”)

194. *Management Solutions*, *supra* note 190.



## V. EMPLOYMENT LAW CONCERNS

Companies that utilize personality and emotional intelligence tests must also examine employment law consequences that attach to using these tests.<sup>195</sup> This is because employment law is primarily concerned about fairness towards certain classes of people, and only secondarily about hiring through the use of the valid and reliable tools.<sup>196</sup> If a personality or EQ test is improperly constructed, the potential legal ramifications are substantial.<sup>197</sup> The two most significant legal considerations in using personality and emotional intelligence tests are Title VII discrimination and discrimination under the Americans with Disabilities Act (“ADA”).<sup>198</sup> Ignoring intentional discrimination for purposes of this article, the risk for companies using valid and reliable psychological instruments involves inadvertent discrimination.<sup>199</sup>

## A. Title VII

The Federal Civil Rights Act of 1964 generally prohibits employers from discriminating on the basis of “race, color, religion, sex, or national origin” in the employment context, including the employee selection process.<sup>200</sup> To assist employers in the selection process, Title VII allows professionally developed ability tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin.”<sup>201</sup> Personality differences between races are small, and should not impact the use of personality tests in the employee selection process.<sup>202</sup> In the first Supreme Court case that examined unintentional discrimination, *Griggs v. Duke Power Co.*,<sup>203</sup> the Court accepted a lower court finding that that the business was not intentionally discriminating against the plaintiffs based on race.<sup>204</sup> The Court then shifted its inquiry to

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195. See Kay Lazar, *Employers Test With a New Attitude: Controversial Questionnaires Screen Applicants for Hire Purposes*, BOSTON HERALD, Apr. 18, 1999, at 1.

196. See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(k)(1)(A)(i).

197. See *id.*, § 2000e-2(k)(1)(A)(i).

198. 42 U.S.C. § 12112(a) (2012).

199. See Eve Tahmincioglu, *Employers Turn to Tests to Weed Out Job Seekers: Some Screens May Violate Law, But Applicants Rarely Have Choice*, TODAY MONEY (Aug. 15, 2011), <http://today.msnbc.msn.com/id/44120975/ns/today-money/t/employers-turn-tests-weed-out-job-seekers/>.

200. 42 U.S.C. § 2000e-2(a)(1). The shorthand term “Title VII,” used by practitioners and in the literature, refers to this section’s location in Pub.L. 88-352 passed in 1964 rather than to its location in Title 42, Subchapter VI of the U.S. Code. See *id.*

201. § 2000e-2(h).

202. Hannah J. Foldes et. al., *Group Differences in Personality: Meta-Analyses Comparing Five U.S. Racial Groups*, 61 PERS. PSYCHOL. 579, 579, 605 (2008).

203. 401 U.S. 424.

204. *Griggs*, 401 U.S. at 429-30.

the employer's use of two commercially available ability tests<sup>205</sup>—both still in use today—and held that these facially non-discriminatory tests violated Title VII because the tests had a disparate impact on the African-American plaintiffs and the employer did not prove that the tests were related to job performance.<sup>206</sup> The *Griggs* Court, however, ended its opinion with agreement that employee selection tools are extremely important to business, but that business needs to use tests designed “for the job and not the person in the abstract.”<sup>207</sup> Presumably, if the employer in *Griggs* had conducted a meaningful study and determined that the two ability tests relate to job performance, then the Court would have found there was no Title VII violation.<sup>208</sup> Today, Title VII codifies the Court's jurisprudence.<sup>209</sup> To prevail in a disparate impact case, a plaintiff must establish the violation of at least one of two tests.<sup>210</sup> The first test requires the plaintiff to prove that an employment practice results in disparate impact, which if proven shifts the burden to the defendant to demonstrate that the practice in question is consistent with business necessity.<sup>211</sup> The second test requires the plaintiff prove that there was an alternative employment practice, the defendant refused to adopt it, and the alternative employment practice would have eliminated or reduced the disparate impact.<sup>212</sup> Presumably, the employer must also have been aware of the alternate employment practice at the time of the defendant's consideration for employment.<sup>213</sup> Though most of the litigation involving alternative employment practices involves the use of employment tests, plaintiffs have rarely prevailed because their suggested alternatives were neither less discriminatory nor advanced the employer's purpose in using the test.<sup>214</sup> This leaves the first test—job relatedness—as the only significant disparate impact issue facing legal employers that use personality tests.<sup>215</sup>

Essentially, a disparate impact claim is a plaintiff proving discrimination using statistics.<sup>216</sup> An employer can then defeat a disparate

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205. The Wonderlic Personnel Test, today called the Wonderlic Classic Cognitive Ability Test, claims to “measure a candidate's ability to understand instructions, learn, adapt, solve problems and handle the mental demands of the position.” *Wonderlic Personnel Test*, WONDERLIC, <http://www.wonderlic.com/assessments/ability/cognitive-ability-tests/classic-cognitive-ability-test> (last visited July 4, 2012).

206. *Griggs*, 401 U.S. at 431.

207. *Id.* at 436.

208. *See id.* at 431.

209. *See* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i-ii).

210. *See id.*

211. § 2000e-2(k)(1)(A)(i).

212. § 2000e-2(k)(1)(A)(ii).

213. LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 24.01 24-5 (2d ed. 1998).

214. *Id.* §24.03, at 24-9.

215. *See id.* §§24.01-24.03, at 24-5, 24-8 (2d ed. 1997).

216. GATEWOOD, *supra* note 136, at 38-39.

impact claim by “proving business necessity, bona fide occupational qualifications (“BFOQ”), or validity.”<sup>217</sup> The *bona fide* occupational qualification defense only applies to sex and religious discrimination, and therefore only applies to a small group of employers.<sup>218</sup> Business necessity is limited to safety concerns for those in the protected class (e.g., prohibiting pregnant women from working on a job that would exposes them to lead, which would be dangerous for the unborn child).<sup>219</sup> This leaves employers with the need to establish validity for their selection tools.<sup>220</sup> To help government agencies and employers with a uniform understanding of validation, in 1978 the government created the Uniform Guidelines on Employee Selection Procedures (“Guidelines”).<sup>221</sup> The Guidelines provide options for establishing validity, though modern science is often opposed to the older science enshrined in the Guidelines.<sup>222</sup> In one recent case rejecting disparate impact, the Supreme Court held that the City of New Haven, Connecticut had developed an examination that was job related, was necessary for the firefighting business at issue in the case, and had the requisite validity.<sup>223</sup> This demonstrates the importance of validating tests before administering them.<sup>224</sup>

#### B. *Americans with Disabilities Act*

The American with Disabilities Act (“ADA”) prohibits employers from conducting pre-employment medical exams.<sup>225</sup> Though most employers are only interested in identifying personality traits necessary for a particular position, some personality tests might also have the ability to identify a medical condition, thereby violating the ADA.<sup>226</sup> For example, in *Karraker v. Rent-A-Center*,<sup>227</sup> the Court held that the possibility that an employer could have utilized a personality test to diagnose a medical condition violated the ADA.<sup>228</sup> Specifically, the employer used the Minnesota Multiphasic Personality Inventory (“MMPI”), which can measure “depression, hypochondriasis, hysteria, paranoia, and mania.”<sup>229</sup> The Court rejected the argument that they were not using it for the purpose of

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217. *Id.* at 39.

218. *Id.*

219. *Id.*

220. LARSON, *supra* note 213, §24.03, at 24-7.

221. GUION, *supra* note 65, at 84.

222. *Id.* at 87.

223. Ricci v. DeStefano, 557 U.S. 557, 587-88 (2009).

224. *See id.*

225. 42 U.S.C. § 12112(d)(2)(A).

226. *See id.*

227. 411 F.3d 831.

228. *Id.* at 833.

229. *Id.*

diagnosing a medical condition. Explaining, that because the test can reveal mental illness then it should be legally classified as a medical exam.<sup>230</sup> In another case, an employer asked candidates whether they agreed or disagreed with the following statements:

- People do a lot of things that make you angry.
- There's no use having close friends; they always let you down.
- Many people cannot be trusted.
- You are unsure of what to say when you meet someone.<sup>231</sup>

The applicants were concerned that the questions might identify mental illness, which the ADA prohibits, so the company agreed to remove the questions from future tests.<sup>232</sup> Personality tools designed by knowledgeable psychologists familiar with employment laws should have no difficulty in avoiding the ADA.<sup>233</sup>

## VI. CONCLUSION

Superior hiring decisions, based on scientifically validated tools, is good for the employer, employee, and the economy.<sup>234</sup> A person with the wrong personality for a particular employer has the potential to create a toxic workplace environment that can lead to significant costs for an employer.<sup>235</sup> Each poor hiring decision costs a business one and a half<sup>236</sup> to five times of that employee's salary and benefits.<sup>237</sup> Assuming \$50,000 in combined salary and benefits, the bad hire will cost an employer at least an additional \$75,000.<sup>238</sup> These potential costs more than justify the litigation risk imposed by using personality and EQ tests in employee selection—the benefits of more successful employees far outweigh the costs.<sup>239</sup> The key is for employers to use valid, reliable, and legally sustainable tests in hiring employees, because not only will this reduce potential lawsuits, but also because it is the only way that employers can scientifically identify the best candidates for the job.<sup>240</sup>

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230. *Id.* at 837.

231. Tahmincioglu, *supra* note 199.

232. *Id.*

233. *Employment Tests and Selection Procedures*, EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/policy/docs/factemployment\\_procedures.html](http://www.eeoc.gov/policy/docs/factemployment_procedures.html) (last visited Sept. 29, 2014).

234. *See Survey: Bad Hires Cost Big Money*, PHILA. BUS. J. (Apr. 11, 2006) <http://www.bizjournals.com/philadelphia/stories/2006/04/10/daily19.html>.

235. *See Lazar, supra* note 195, at 1-2.

236. *See id.* at 2.

237. *Bad Hires, supra* note 234.

238. *See Lazar, supra* note 195, at 2; *see also Bad Hires, supra* note 234.

239. *See Lazar, supra* note 195, at 2.

240. *See id.*

Unfortunately, the law places barriers to scientifically superior outcomes, which is based on the law's bias towards psychology.<sup>241</sup> The solution is to educate lawyers, judges, and legislators to the advances in psychology over the past hundred years so that they can make the changes necessary to create a more productive and happy workforce.<sup>242</sup>

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241. Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1565-66 (2013).

242. *See id.*