The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing

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I. INTRODUCTION

Perhaps no other employment-related issue has attracted more public attention in recent years than workplace privacy. More than ever before, employers, driven by the desire to ensure worker productivity and the need to guard against legal liability, find themselves compelled to probe deeply into the backgrounds, qualifications, and
mental make-up of current and potential employees to evaluate their suitability for employment and to assure their continued reliability on the job. All the while, workers are developing an increasingly sophisticated understanding of their legal and moral rights, and disputes over the extent of the employee's prerogative to remain free from employer probing and surveillance are steadily gaining in frequency. Persistent media coverage of the dispute over workplace privacy, in turn, has brought the issue sharply into focus. The resulting tension between the employer's need to know and the employee's interest in maintaining an impenetrable sphere of privacy has become the subject of a pervasive public and legal discourse that is likely to preoccupy courts and legislatures for years to come.

Though not directly concerned with privacy law, this Comment addresses one privacy issue that has recently come to the forefront, namely, the appropriateness of assessing job applicants' integrity by means of

1. See Kurt H. Decker, Employee Privacy Law and Practice 11 (1987). These concerns are no doubt legitimate. Employers most certainly have an interest in maintaining a productive, loyal, honest and dependable work force, particularly since the estimated cost of employee drug use and theft alone amounts to billions of dollars each year. See L. Camille Hébert, Employee Privacy Law § 1:02, at 5 (1993). Employers are also increasingly becoming subject to substantial potential liability for hiring and retaining dangerous employees, if they knew or should have known of the employee's dangerous propensities and the employee in fact caused harm to a third party. For a detailed discussion of negligent hiring, see part V.B. infra; see also Michael Silver, Negligent Hiring Claims Take Off, A.B.A. J., May 1987, at 72 (indicating that, though of recent origin, negligent hiring is a rapidly expanding tort that is now a recognized cause of action in most states). Significantly, concerns related to employee violence have come to the forefront in recent years. See Workplace Violence: Employers Apprised of Legal Problems Coming from Efforts to Stem Violence, Gov't Employee Rel. Rep. (BNA), Feb. 21, 1994, available in Westlaw, BNA-LB Database, 32 GERR 232, 1994. According to one report, approximately two million persons were attacked at work during 1993, while six million were threatened and sixteen million were subject to harassment. Workplace Violence: Workshop on Safe Workplaces Alerts Employers to Legal Problems Involved, Gov't Employee Rel. Rep. (BNA), May 9, 1994, available in Westlaw, BNA-LB Database, 32 GERR 597, 1994. Homicide, in turn, "has become the leading cause of workplace death." Employee Privacy Issues Can Affect All Areas of Employment, Attorney Says, Daily Lab. Rep. (BNA), Dec. 13, 1993, available in Westlaw, BNA-LB Database, 1993 DLR 237 d11, 1993. Yet, although employers thus clearly have valid reasons for using caution in the selection and supervision of employees, the question remains whether the particular methods chosen are effective, appropriate and justified. It is these concerns that have become the focal point of the public discourse regarding workplace privacy.

2. See Employee Privacy Issues Can Affect All Areas of Employment, Attorney Says, supra note 1 ("employees [now] are much more willing to challenge their employer and sue to protect their rights").

3. In stressing the importance of an employee's right to privacy, Hébert describes privacy in the following manner:

   "The right to privacy is about dignity—not subjecting individuals to procedures that probe the secrets of their minds and bodies and to inquiries into areas of their life that they are entitled to keep to themselves. The right to privacy is about autonomy—allowing individuals to make their own choices about fundamental aspects of their lives. The right to privacy is about individuality, because the essence of individuality is the right to make one's own decisions about how to lead one's life; the different choices that we make are what makes us individuals."

Hébert, supra note 1, § 1:04, at 13.
written, paper-and-pencil "honesty tests." In particular, the analysis focuses on the nature of the privacy debate as it unfolds in the honesty testing context by discussing the business of honesty testing (Part II); existing legal limitations on the use of honesty testing (Part III); the current state of research regarding the efficacy and validity of integrity tests (Part IV); and the justifications advanced for corporate reliance on integrity tests in the employment context (Part V). Part VI raises some social and ethical concerns implicit in the practice of honesty testing, while Part VII sets forth proposed alternatives for regulation.

II. THE BUSINESS OF HONESTY TESTING

The past few decades have seen a rapid rise in the number of businesses that rely on various types of honesty testing as a method of screening potential, and at times present, employees. The trend began in the 1960s and 1970s when employers, apart from conducting general background investigations of job applicants, turned to polygraph examinations as a preferred means of eliminating apparently dishonest individuals from the applicant pool. With the passage of the Employee Polygraph Protection Act of 1988, which prohibits the use of this screening device for most private employers, many companies have come to rely on so-called paper-and-pencil integrity tests as an alternative for identifying dishonest or "counterproductive" workers. Approximately five to six thousand

4. Although one early honesty test developed for use by the military dates back to 1942, the overwhelming majority of tests have been published since the mid-1970s. Philip Ash, A History of Honesty Testing, in Preemployment Honesty Testing 3, 12-14 (John W. Jones ed., 1991). Employer reliance on written integrity tests for purposes of screening employees is thus a very recent phenomenon.

5. The terms "integrity test" and "honesty test" are used synonymously in this comment.

6. Pre-employment testing in general appears to be on the rise. As one scholar reports:

The American Society for Personnel Administration found 39% of 360 companies surveyed were testing more in 1985 than in 1980, and 44% were considering even more testing. A 1988 survey of 245 human resource executives by the Bureau of National Affairs (a publisher) found that 63% of surveyed companies ask applicants to supply work samples or take performance tests, while 30% require ability tests, and 25% test for job knowledge.

Lawrence M. Rudner, Pre-Employment Testing and Employee Productivity, PUB. PERSONNEL MGMT., Summer 1992, at 133. The same author cautions:

While testing can lead to increased productivity, there is little to indicate that companies can properly implement a testing program or evaluate its effectiveness. Many reputable test publishers quickly point out that the average consumer places too much value on testing. At best, tests only estimate a person's ability or the extent to which a person possesses some attribute. Tests should only be used to enhance an employment decision. Too often, test results are treated as scientific evidence and totally replace professional judgment in making decisions.

Id. at 134 (internal citations omitted).


9. Joseph W. Ambash, Honesty, Personality and Psychological Testing in the Employment Context, 1990 WL 357776, at *2 (July 1990). Although at least 46 individual honesty tests are currently available, see Ash, supra note 4, at 14, the lion's share of the honesty test
employers now administer as many as five to seven million honesty tests to prospective employees each year. The trend toward increasing dependence upon honesty testing, moreover, apparently continues unabated: a 1992 Ernst & Young survey of retail executives found that forty-seven percent of respondents had used paper-and-pencil honesty tests in 1990, and that nineteen percent of retailers intended to implement honesty testing in the future. It has been estimated that the integrity test business is now growing at an annual rate of twenty percent.

Honesty test marketers claim that, by measuring employee "honesty" (and occasionally such other constructs as violent tendencies or drug use), these tests allow employers to obtain accurate attitudinal profiles of test takers. As a result, they argue, employers should be in a better position to identify persons who are likely to engage in theft or, more generally, "counterproductive behavior" in the workplace. Honesty tests may be roughly classified as belonging in either of two separate categories. The first group comprises those tests characterized as "overt" because they rely upon straightforward questions regarding subjects' attitudes toward dishonesty and past instances of dishonest conduct. These tests are based upon the presumption that honest individuals regard dishonesty as unusual behavior deserving punishment, while dishonest persons consider dishonesty to represent the status quo. Examples of overt questions include the following:

- "How often do you tell the truth?"
- "Do you think that you are too honest to take something that is not yours?"
- "How much do you dislike doing what someone tells you to do?"
- "Do you feel guilty when you do something you should not do?"
- "Do you think it is stealing to take small items home from work?"


10. Herbert, supra note 1, § 7:02, at 8. Honesty tests are attractive because they are easily administered and inexpensive. The cost of an honesty test typically ranges from $7 to $30 per copy, far below the price of a polygraph examination. See id.

11. The Ernst & Young/IMRA Survey of Retail Loss Prevention Trends, Chain Store Age Executive, Jan. 1992, § 2, at 22, 56 [hereinafter Ernst & Young Survey].

12. H. John Bernardin & Donna K. Cooke, Validity of an Honesty Test in Predicting Theft Among Convenience Store Employees, 36 Acad. Mgmt. J. 1097, 1097 (1993). Given this explosive growth, it should be of considerable concern that the testing industry remains largely unregulated. As one author aptly remarks, "test publishers are given credit when their products support sound employment decisions, and they are usually held harmless when employers make wrong decisions on the basis of tests." Rudner, supra note 6, at 145. Nevertheless, as seen below, few efforts at regulation have been undertaken.


14. Herbert, supra note 1, § 7:01, at 3-4.

15. Id.

16. Id. § 7:01, at 6.
"What percentage of the people you know are so honest they wouldn't steal at all?"
"How easy is it to get away with stealing?"
"Do you believe most employers take advantage of the people who work for them?"17

The second type of integrity test marketed by test publishers—generally known as the "veiled purpose" or "personality-based"—seeks to identify dishonest propensities by eliciting, in a disguised fashion, attitudes considered to correlate in some manner with honesty.18 Such tests may ask questions similar to those listed below:

- "True or False: Eating right is important to my health."
- "True or False: I like to take chances."
- "On the average, how often during the week do you go to parties?"
- "I feel lonely even when I am with other people [all of the time, most of the time, sometimes, almost never, never]."
- "How often do you blush?"
- "How often do you make your bed [every day, never, etc.]?"19

The lines between these tests are gradually becoming blurred, however, as newly developed measures of honesty are coming to rely on an increasingly broader range of reported attitudes and behaviors.20 Furthermore, growing numbers of test publishers are broadening the behaviors these tests were designed to predict by including all forms of "counterproductive behavior" along with the traditional construct of "theft."21 Nevertheless, according to O'Bannon et al., most honesty tests will include items from any or all of four general categories of inquiry: (1) admissions of illegal or disapproved activities; (2) opinions regarding illegal or disapproved behavior; (3) descriptions of one's own personality and thought patterns; and (4) reactions to hypothetical situations.22 Since few test publishers make their scoring keys available, the relevance of each of these items to the overall test result cannot easily be determined in any given instance.23 Each item, however, is based upon a distinct rationale. Thus, test developers rely upon the fact that a significant number of job applicants readily confess prior illegal conduct when asked to do so on integrity tests, so that questions seeking theft admissions and the like do

17. These sample questions are listed in United States Congress Office of Technology Assessment, The Use of Integrity Tests for Pre-Employment Screening 31-32 (1990) [hereinafter OTA Report]. The authors note that the questions have been changed slightly from the format in which they appear in actual integrity tests in order to avoid proprietary disclosures. Id. at 31 n.27.
18. Hébert, supra note 1, § 7:01, at 5. Competition between open and veiled-purpose integrity tests has surfaced only in the past few years. Since the predictive value of personality-type measures tends to be lower than that of clear-purpose tests, and since the latter also rest on a significantly larger research base, it is predicted that clear-purpose tests will retain a dominant market share. Ash, supra note 4, at 9.
19. OTA Report, supra note 17, at 32.
20. Id. at 32-33.
21. Id. at 33.
22. O'Bannon et al., supra note 7, at 17-18.
23. Id. at 18.
elicit valid results. Second, based upon research showing that offenders display certain attitudes that distinguish them from non-offenders, test publishers assume that opinions regarding illegal behavior will prove indicative of deviant tendencies among test takers. Self-assessments of personality and thought patterns, in turn, are considered useful in revealing attitudes—such as risk taking, personal alienation, and impulsivity—that are thought to correlate with dishonest behavior. Finally, questions that seek to elicit reactions to hypothetical situations are aimed at reaching an assessment of the subject's degree of disapproval of dishonest conduct.

Integrity tests, then, not only require the examinee to reveal highly personal information but also may have potentially far-reaching consequences should the results of an honesty test determine a test taker to be "dishonest." Given their invasive nature, it might be expected that honesty testing, as a preemployment selection device, would be subject to some degree of regulation. This, however, is not the case. Indeed, an American Psychological Association Task Force Report on the status of integrity testing cautioned against prohibition of honesty testing and merely recommended that test publishers adhere to existing standards and guidelines. At the same time, neither federal nor, for the most part, state law restricts or regulates honesty testing (whether it be in terms of test development, test marketing, or test administration, or regarding subsequent use of test results). What is more, courts have generally held that the practice of integrity testing does not violate any private rights of employees.

III. LEGISLATIVE AND JUDICIAL APPROACHES TO HONESTY TESTING

In 1988, Congress passed the Employee Polygraph Protection Act (EPPA), which proscribes the use of polygraphs and similar devices by most private-sector employers for purposes of measuring the honesty of both current and potential employees. An estimated eighty-five percent of all polygraph tests previously administered by U.S. employers are now prohibited under the EPPA. However, the Act's prohibition ex-
pressly does not extend to written paper-and-pencil tests; indeed, an ear-
lier draft of the bill that would have incorporated written honesty
examinations among the range of testing devices made unlawful by this
legislation was subsequently deleted. Passage of the EPPA therefore
has provided private businesses with a powerful incentive to resort to
other methods of screening job applicants. Most likely because of the
marked similarities in both approach and purpose, employers have come
to rely heavily upon the use of written integrity tests which, like the poly-
graph, explicitly strive to ascertain employee trustworthiness.

In light of the fact that honesty tests provide a convenient replacement
for the previously popular polygraph examination, at least one commen-
tator has proposed that such tests should be regarded as substitute
polygraphs and hence be regulated under existing polygraph statutest. The
author observes that polygraph examinations not only have served as
models for the development of integrity tests but are frequently em-
ployed as backdrops against which the latter are measured. Furthermore, the author argues, they could well be considered to fit within the
“spirit” and “intent” of specific state polygraph statutest. In fact, a sub-
stantial number of states had passed statutes prohibiting use of polygraph
examinations prior to the enactment of the EPPA. In many instances,
these statutes can be read broadly to ban written integrity tests as well,
since they prohibit not only polygraphs and lie detectors, but also “simi-
lar” tests or devices. Notwithstanding this potential for flexibility in in-

33. Hébert, supra note 1, § 7:08, at 29. The EPPA defines “lie detector” as “a poly-
graph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other
similar device (whether mechanical or electrical) that is used, or the results of which are
used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty
of an individual.” 29 U.S.C. § 2001(3). The House Conference Report, moreover, explic-
itly states that written or oral honesty tests are not intended to be included within the
definition of “lie detector.” H.R. CONF. REP. No. 659, 100th Cong., 2d Sess. 11 (1988),
reprinted in 1988 U.S.C.C.A.N. 749, 750. “In deciding to strike the language from the defi-
nition, the Committee concludes that this issue should be handled separately from the lie
34. Ambash, supra note 9.
35. See Decker, supra note 13, at 141-43.
36. Id. at 143.
37. Id. at 149. In a not entirely convincing fashion, Decker argues that, since paper-
and-pencil honesty tests are normally scored mechanically, they could be regarded as en-
compassed by prohibitions against “mechanical lie detector” tests such as those contained
over, he suggests, honesty tests should be treated like polygraphs because the tests aim to
evaluate the same subjects. Decker, supra note 13, at 149.
38. See Decker, supra note 13, at 142 (24 states had enacted legislation prohibiting
polygraph examinations by employers by the year 1985; various others required polygraph
operators to be licensed).
39. See Kenneth E. Bemis IV, Comment, Prohibition of Pencil and Paper Honesty
statutes employing the phrase “similar test or examination” are CAL. LAB. CODE § 432.2
(West 1989); MD. CODE ANN., LABOR & EMPLY. § 3-102 (1992); DEL. CODE ANN. tit. 19,
§ 704 (1985). Other states that have broadly worded polygraph statutes include Alaska,
terpretation, courts to date have refrained from applying such a broad statutory construction, and the few jurisdictions that have expressly addressed the issue have favored a narrow reading of the statutory prohibition. The Minnesota polygraph statute, for example, states that “[n]o employer or agent thereof shall directly or indirectly solicit or require a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee.”

Despite the fact that this language could easily be regarded to extend to paper-and-pencil honesty tests, the Minnesota Supreme Court held otherwise. In *State v. Century Camera, Inc.*, the court—concerned that the phrase “any test purporting to test honesty” was unconstitutionally vague—narrowly interpreted the statutory provision to apply solely to those testing devices that measure physiological changes and to exclude written examinations.

A similar conclusion was recently reached by the Wisconsin Court of Appeals in *Pluskota v. Roadrunner Freight Systems, Inc.* regarding a similar provision of the Wisconsin Fair Employment Act. The Wisconsin statute provided that “[n]o employer . . . may directly or indirectly solicit, require or administer a polygraph, voice stress analysis, psychological stress evaluator or any other similar test purporting to test the honesty of any employee or prospective employee.” The plaintiff in *Pluskota* alleged that he was terminated by Roadrunner after having been forced, under threat of termination, to take an unfair honesty test (the paper-and-pencil “CompuScreen II”) in violation of the statute. He expressly contended that the “similar test” language effectively included written honesty tests within the scope of the statute. The court disagreed. Applying rules of statutory construction (in particular, *ejusdem generis*), the court concluded that the reference to “similar tests” was re-

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40. MINN. STAT. ANN. § 181.75(1) (West 1993) (emphasis added).
41. 309 N.W.2d 735, 745 (Minn. 1981).
42. Id. (“[W]e exclude from the current prohibitions of section 181.75 written psychological questionnaires, personal judgments made by an employer or his or her agent, even if based in part on observations of physical behavior or demeanor, and all other gauges of honesty which do not purport to measure physiological changes.”).
43. 524 N.W.2d 904 (Wis. Ct. App. 1994).
45. WIS. STAT. § 111.37(1)(b) (1988). The Wisconsin legislature amended § 111.37 in 1991 to provide that “no employer may . . . [d]irectly or indirectly require, request, suggest or cause an employee or prospective employee to take or submit to a lie detector test.” WIS. STAT. § 111.37(2) (Supp. 1994).
46. Roadrunner required all dock area workers to take the CompuScreen II after stereo equipment was reported stolen from the dock area of its warehouse. Pluskota initially refused to take the test under threat of termination and was suspended. He later returned to work and submitted to the test after being assured that it was a job requirement. Although his test results were “unremarkable” and the theft was determined not to have been the work of insiders, Pluskota was terminated one month later on grounds of “past performance.” He alleged that the true reason for his termination related to the CompuScreen II.
stricited to tests that, like those enumerated, measure physiological responses.\textsuperscript{47}

On a broader scale, the Pennsylvania Commonwealth Court in \textit{Heins v. Unemployment Compensation Board of Review}\textsuperscript{48} expressly endorsed the practice of administering workplace honesty exams on the grounds that "employee honesty is a genuine and job-related concern for an employer."\textsuperscript{49} At issue in \textit{Heins} was an administrative board order denying a former employee unemployment compensation benefits because of his refusal to take a paper-and-pencil honesty test.\textsuperscript{50} Since the employee had not challenged the permissibility of honesty testing under the state's polygraph statute,\textsuperscript{51} the court did not have occasion to address this question; however, its finding that the employer acted reasonably in asking the claimant to submit to an honesty exam\textsuperscript{52} strongly suggests that the Pennsylvania statute, like its Minnesota counterpart, is to be narrowly construed.

Currently, only two state statutes explicitly prohibit or restrict the use of employee integrity tests in any significant way. Honesty testing has been entirely banned as an employee screening device in Massachusetts.\textsuperscript{53} Massachusetts, by statute, makes it unlawful for any employer to require a job applicant or current employee to take a "lie detector test," a term which is defined as

\begin{quote}
any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of
\end{quote}

\textsuperscript{47} Pluskota, 524 N.W.2d at 906-07. Under the rule of \textit{ejusdem generis}, the meaning of "any similar test" must be limited to tests similar to a "polygraph, voice stress analysis, [or] psychological stress evaluator." \textit{Id.} at 907. It is important to note, however, that the court found support in the statute's legislative history: the bill was amended to add the word "similar" between "other" and "test" upon the specific recommendation of representatives of the testing industry that it be made clear that the statute should be applied only to tests that measure physiological changes. \textit{Id.} at 907-08. The exact wording of the statutory provision can thus be of critical importance in determining the scope of the statutory prohibition.

\textsuperscript{49} \textit{Id.} at 594.
\textsuperscript{50} The court interpreted Heins' complaint to state that he had good cause for refusing to take the Reid honesty test because it was an unreasonable intrusion. \textit{Id.} at 593. Noting that "an employee's privacy rights must be weighed against an employer's legitimate desire to prevent theft," the court rejected Heins' claim on the grounds that the employer had articulated a legitimate reason—ensuring the honesty of its employees—and that the Unemployment Compensation Board's findings that the employer's request was reasonable rested on substantial evidence: the test was given to all employees, was only one factor used in assessing honesty, and was not given with the purpose of harassing Heins. \textit{Id.} at 594. Because of the particular circumstances of \textit{Heins}, which involved a refusal to take an honesty test and which placed the burden on the plaintiff to prove that his refusal was reasonable, \textit{id.} at 595, the degree to which the court's reasoning may be applied in other contexts is not altogether clear. It does, however, indicate that courts may not be readily inclined, absent statutory prohibition, to impose limitations on employers' use of integrity tests.

\textsuperscript{51} 18 PA. CONS. STAT. ANN. § 7321 (1983). The statute prohibits "mechanical lie detector tests" which, according to Decker, could be construed liberally to encompass mechanically scored integrity tests. See Decker, \textit{supra} note 13, at 149.
\textsuperscript{52} \textit{Heins}, 534 A.2d at 595.
\textsuperscript{53} MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1989).
which are used or interpreted by an examiner for the purpose of pur-
porting to assist in or enable the detection of deception, the verifica-
tion of truthfulness, or the rendering of a diagnostic opinion
regarding the honesty of an individual.\(^{54}\)

By including written examinations in the statutory definition of lie detec-
tor tests, the Massachusetts statute evinces a clear intent to prohibit all
forms of integrity testing.

Rhode Island also has imposed statutory limitations upon employers’
use of honesty testing. The Rhode Island statute employs a definition of
“lie detector test” identical to that used by Massachusetts\(^ {55}\) and generally
prohibits employers from requesting, requiring, or subjecting any em-
ployee to a lie detector test as a condition of employment.\(^ {56}\) The statute,
however, contains the further proviso that written examinations may be
used if their results do not form the primary basis for an employment
decision.\(^ {57}\)

Legislative efforts in other states to expand the scope of polygraph stat-
tutes to include paper-and-pencil honesty testing have largely failed.
Thus, Bemis reports in some detail on efforts to amend Oregon’s poly-
graph statute to prohibit written honesty tests.\(^ {58}\) These proposed amend-
ments were eventually tabled,\(^ {59}\) and to date no such changes appear in
the Oregon statute.\(^ {60}\) Similarly, a proposal by the New York Attorney
General to make employer-mandated integrity testing illegal\(^ {61}\) has yet to
appear in statutory form.

At the same time, despite the fact that honesty tests are intuitively per-
ceived by many as an invasion of the test taker’s right to privacy, constitu-
tional privacy protections are not likely to extend to the great majority of
testing situations.\(^ {62}\) First, no constitutional rights are implicated where

\(^{54}\) \textit{Id.} § 19B(2).
\(^{56}\) \textit{Id.} § 28-6.1-1.
\(^{57}\) \textit{Id.}
\(^{58}\) Bemis, \textit{supra} note 39, at 592-95. The bill’s defeat has been attributed to the presence
of a strong business lobby arguing against the amendment as well as to the lack of
sufficient information regarding the validity and accuracy of integrity tests. \textit{Id.} at 594
n.119. These observations are consistent with other reports that the testing industry is
rapidly gaining visibility, and, it may be presumed, political influence. See \textit{O’Bannon et
al.}, \textit{supra} note 7, at 117-18. Given the fact that those most likely to be adversely affected
by pervasive reliance on honesty testing—namely, the individual job seekers—are also
those least likely to make themselves heard within the political arena, this development
can only serve to highlight the disparity in bargaining power between the testers and the
tested.
\(^{59}\) Bemis, \textit{supra} note 39, at 595.
\(^{61}\) \textit{See Hebert, supra note 1, § 7:11, at 36.}
\(^{62}\) At least two types of privacy rights are protected under the Fourteenth Amend-
ment to the United States Constitution: “One is the individual interest in avoiding disclo-
sure of personal matters, and another is the interest in independence in making certain
ably, integrity tests, which require the test taker to reveal often highly personal information,
implicate the first of these rights. In addition, it can be argued that honesty testing, be-
cause it elicits information regarding past misconduct, may give rise to a violation of the
test taker’s Fifth Amendment right against self-incrimination. \textit{Cf.} Bemis, \textit{supra} note 39, at
honesty tests are used by private employers, absent state action. Second, it is important to note that, with respect to public employers, an applicant's voluntary consent to take an integrity test may be interpreted as a waiver of the applicant's privacy interests. Finally, courts have yet to consider whether a state employer's requirement that applicants submit to honesty testing in fact violates the job seeker's privacy.

Honesty testing might, however, under the proper circumstances constitute a tortious invasion of privacy under common law. The Restatement (Second) of Torts identifies four different situations that might give rise to a common-law cause of action for violation of a person's right to privacy: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of another's name or likeness; (c) unreasonable publicity of another's private life; and (d) publicity that unreasonably places another in a false light. Test questions that are not job-related and unduly probe into personal and private matters may be characterized as an "intrusion" sufficient to sustain a claim for tortious invasion of privacy. However, it has been noted that, thus far, "[t]his argument has failed to succeed in both of the cases where it has been raised in connection with a written examination."

Some potential statutory regulation of honesty tests is provided by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex, religion, and national origin. Any integrity test that can be shown to have a disparate adverse impact upon one of these protected categories of employees could be held in violation

576-77 (an applicant's voluntary consent to take an integrity test may be interpreted as a waiver of the applicant's privacy interests).
64. Bemis, supra note 39, at 576-77. Bemis concedes, however, that the voluntariness of the individual's consent is very much at issue where refusal to participate may well mean rejection for the job under consideration. Id.
65. See Hébert, supra note 1, § 7:06. Still, even the use of far more invasive psychological tests has been upheld by the courts where the nature of the job required close scrutiny of the emotional make-up of job applicants. Id.; see, e.g., McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978), aff'd, 601 F.2d 575 (3d Cir. 1979) (probing psychological evaluation of firefighter was justified by the government's compelling interest in eliminating high-risk job candidates).
of Title VII. Notwithstanding these limitations, research to date tends to indicate that integrity tests have no adverse effect on protected groups.69

In sum, neither courts nor federal and state legislatures have taken significant steps to regulate or prohibit honesty testing, and it remains a fact that "[t]he current regulatory method in most states is industry self-regulation."70 For a variety of reasons (discussed in some detail in the pages to follow), this state of affairs has caused significant concern among many scholars.

IV. TEST VALIDITY

Several research teams in past years have published comprehensive reviews of the current status of honesty test research.71 Although these scholars have reached somewhat divergent conclusions regarding the utility of honesty testing as a method of employee selection, all agree that validation research for integrity testing has been marked by serious weaknesses. Indeed, critical evaluation of research results is made especially difficult by the fact that scoring keys are typically proprietary72 and that the majority of research has been performed by investigators working for test developers.73 Nevertheless, some scholars now regard honesty testing with a certain amount of guarded optimism. Sackett et al., for instance, note that, because of significant increases in the availability of research results, a "more compelling case" can presently be made for the predictive value of integrity testing than was the case several years earlier.74 The authors remain cautious, however, in part because of the possibility of suppression of negative results in an environment where much of the research is conducted by representatives of test publishers, and because much research continues to be unpublished, affording no opportunity for peer review.75

69. Hébert, supra note 1, § 7:09, at 31. Nevertheless, Hébert notes that, since most of the available research was conducted by the test publishers and suffers from other possible validity problems, these data are subject to attack, so that the issue is by no means settled. Id. at 32.
71. See, e.g., O'Bannon et al., supra note 7; Paul R. Sackett et al., Integrity Testing for Personnel Selection: An Update, 42 PERSONNEL PSYCHOL. 491 (1989); OTA REPORT, supra note 17, at 8-15; APA REPORT, supra note 28; Guastello & Rieke, supra note 9, at 501.
72. Sackett et al., supra note 71, at 494. As a consequence, peer review of these tests is greatly hampered, because it is impossible to determine how test answers should be evaluated and what weight should be given to different test questions. Id. at 521.
73. Bernardin & Cooke, supra note 12, at 1098; OTA REPORT, supra note 17, at 39, 49. As the OTA Report remarks, "[s]ituations such as these, with stakeholders controlling performance and dissemination of research, necessarily raise caution flags." Id. at 8.
74. Sackett et al., supra note 71, at 520.
75. Id. at 521. The authors state that independent research is discouraged by the proprietary nature of scoring keys and the difficulties in obtaining cooperation from certain publishers. In addition, they identify as an equally significant factor the fact that academic researchers have few incentives to become active in the field because publication outlets
REGULATING INTEGRITY TESTING

The practice of honesty testing has also received measured endorsement from the American Psychological Association Task Force on Dishonesty and Theft, which conducted a detailed review of integrity test research.\textsuperscript{76} It is important to note that the APA Task Force reached its conclusions largely on the basis of pragmatic considerations. In the view of APA Task Force members, an evaluation of honesty tests cannot be performed in absolute terms. Rather, the validity of such tests must be compared against the validity of other, alternative procedures: "In essence," the Task Force submits, "one must always keep salient the question, 'What would you have them do instead?'"\textsuperscript{77} Unable to identify satisfactory alternative methods of screening job applicants,\textsuperscript{78} the APA Task Force Report cautions that a prohibition of honesty testing "would only invite alternative forms of pre-employment screening that would be less open, scientific, and controllable."\textsuperscript{79} The Task Force Report, therefore, can be interpreted as a guarded approval of honesty testing.

The APA Task Force's rationale is disquieting. It plainly rests on a pre-existing value judgment that accords considerably greater weight to the employer's need to control theft than to the employee's right to be free from unreasonable intrusion and the danger of stigmatization. Given the fact that honesty testing is a relatively recent innovation, the authors' proposition that no satisfactory alternatives to written examinations are available may well be questioned. Questions may also be raised regarding their apparent, but undocumented presumption that employee theft has increased in such magnitude as to require new, and previously unnecessary, responses. It is quite likely, moreover, that the APA Task Force Report has contributed significantly to the current reluctance on the part of legislatures and courts to embark upon efforts to regulate integrity testing.\textsuperscript{80} Despite its cautious sanction of integrity testing, however, it should be kept in mind that the APA Task Force report does point to a large number of problem areas and strongly stresses the need for further validation studies are not easily found and because honesty test research is not a traditional area of inquiry within personnel psychology.

\textsuperscript{76} APA REPORT, supra note 28.
\textsuperscript{77} Id. at 7.
\textsuperscript{78} Id. at 8-9.
\textsuperscript{79} Id. at 26. "It is important to realize that any prohibition of honesty-test screening, unlike the prohibition of the polygraph, could create a niche elsewhere that might be beyond professional and scientific review altogether." Id. at 9. The Task Force does not identify the specific nature of any such "niches" that might be created. Its perhaps overly cautious approach, furthermore, appears to ignore the fact that employers already have at their disposal a wide array of more traditional screening procedures (such as background checks, interviews, criminal record and credit checks, references, etc.) that may well constitute adequate alternatives.

\textsuperscript{80} Metzger & Dalton, supra note 63, at 12. Metzger and Dalton report that the APA recommended withdrawal of proposed legislation banning honesty testing to the legislatures of both South Dakota and Connecticut. Id. n.19.
research, the development of guidelines, and increased openness on the part of test marketers.

In contrast to the APA Task Force, the United States Congress Office of Technology Assessment, in a comprehensive survey of honesty test research, concluded that, "[g]iven the paucity of independent confirmation of research results, problems identified in published reviews and in OTA's review of a sample of validity studies, and unresolved problems relating to the definition and measurement of the underlying psychological constructs," existing research was insufficient to conclude that these tests could reliably predict dishonesty in the workplace. The OTA Report rejects the argument that integrity tests are to be considered preferable to other methods of pre-employment screening and notes that other methods do not, as a rule, result in the classification of employment applicants as either honest or dishonest individuals. Altogether, pointing to the dangers of systematic misclassification of those who "fail" honesty tests, the potential adverse impacts on protected groups, and the serious privacy implications of honesty testing, the OTA Report urged Congress to consider these issues in relation to possible regulation of honesty tests. Another highly critical review of honesty testing has been published by Guastello and Rieke, who conclude that the "honesty" construct purportedly measured in honesty tests finds no support in psychological theory; that the tests can be faked and have little predictive value; and that integrity test results tend to mislabel otherwise honest individuals.

It is clear from the foregoing that scholars are in disagreement regarding the advisability of employer reliance upon integrity testing as a means of controlling counterproductive or deviant workplace behavior. Indeed, most authors would concur that significantly more research is required before the issue may be laid to rest. Honesty test research to date has focused primarily on criterion validation, i.e., an empirical investigation of the extent to which integrity test results may be seen as predictive of behavior, most often measured in terms of honesty in the workplace. On the other hand, students of the subject have rarely undertaken a critical examination of the underlying assumptions informing honesty testing. As currently designed, however, both open and veiled honesty tests appear to be based upon two fundamental presumptions: (1) that "honesty" constitutes a measurable trait marked by considerable stability over time; and (2) that this trait in some form translates, and thus is in fact predictive of, actual behavior. Both assumptions merit closer examination.

81. APA REPORT, supra note 28, at 18-19.
82. Id. at 21.
83. Id. at 21-22.
84. OTA REPORT, supra note 17, at 10.
85. Id. at 67.
86. Id. at 12-18.
87. Guastello & Rieke, supra note 9, at 515-16.
88. See, e.g., HÉBERT, supra note 1, § 7:03, at 17.
89. See O'BANNON ET AL., supra note 7, at 69.
A. Construct Validity

One of the fundamental difficulties with honesty testing is that no consensus exists regarding the question of what it is that these tests are designed to measure in the first place. This is so mainly because test developers generally do not make explicit what particular theoretical framework, if any, has guided their approach in designing integrity tests and developing test questions. This lack of an express psychological theory of personality notwithstanding, it may be presumed—given the testers' emphasis on "honesty" as well as the evident predictive purpose of honesty testing—that integrity testing rests on the basic assumption that honesty or dishonesty constitute measurable personality traits. Accordingly, part of the debate over the validity of integrity testing revolves around the acceptability of trait theory as an underlying theoretical paradigm and, within that paradigm, around the question of whether dishonesty represents a basic element of individual character.

Trait theory assumes that personality is made up of a finite number of distinguishable attributes, or traits, which can be inferred from behavior. Such traits are thought to be qualities that, though variable in amount, are common to large numbers of people, and constitute relatively stable predispositions that translate with some consistency into particular behavioral responses. The primary task of trait theorists, then, is to determine what external signs may successfully serve as indicators of the presumed underlying internal dispositions.

An examination of the relevant psychological literature, however, reveals that considerable controversy exists regarding the general value of character as a predictor of behavior. Indeed, many scholars have come to reject trait theory entirely, emphasizing instead the significant influence of situational factors on individual behavior. As Walter Mischel, one of the foremost opponents of trait theory, states, "[t]he focus on internal traits and states as the key determinants of behavior has led to a tremendous concern with individual characteristics . . . . Attention to in-

90. See OTA REPORT, supra note 17, at 33, 53.
91. See id. at 33.
92. WALTER MISCHL, PERSONALITY AND ASSESSMENT 6 (1968).
93. Id.
94. Id. at 8-9. Despite their differences, psychodynamic theories, which likewise rest on the basic assumption that personality is made up of underlying mental structures, may be described in similar terms. See id. at 8.
95. The mere conclusory determination that an individual possesses a trait has little value:

One focal point of the debate [over integrity testing] is the question of whether dishonesty is a personality trait. If a test is designed to measure the degree to which an individual possesses this trait, however, there remains the question of how the trait is linked to specific behaviors of interest. It is at least theoretically possible for individuals to be identified as possessing a trait called dishonesty without their necessarily committing theft or other counterproductive acts in the workplace.

OTA REPORT, supra note 17, at 33.
ternalized traits and states has been accompanied by an equally massive neglect of environmental considerations in assessment." 97 According to Mischel, research demonstrates that behavior is in fact highly event-specific; behavioral stability is a function of consistency in the conditions evoking the behavior and its consequences. "When response-reinforcement relations and discriminative and eliciting stimuli endure over time, then behavior remains stable; when the maintaining conditions for behavior change, the behavior itself changes." 98 In other words, as long as the individual remains in a social environment that reacts to his conduct in a consistent fashion, he or she will tend likewise to respond in a consistent manner to the same external events. 99 Conversely, individuals discriminate sharply among even seemingly close stimulus situations and consequently the widespread response consistencies assumed by trait theories usually do not exist. Changes in stimulus conditions, ranging from trivial changes in the details of the assessment procedure . . . to alterations in the individual's life conditions, all modify the behavior that occurs. People simply are not inanimate objects like tables . . . [W]hat a person does cannot be isolated meaningfully from the conditions in which he does it. 100

One example that illustrates the importance of considering contextual variables in explaining behavior arises from psychological research examining factors that influence automobile accident rates. 101 Initial research investigating the phenomenon of "accident proneness" among certain drivers sought to explain this behavioral construct in terms of stable physical and social characteristics, such as aggressiveness, depression, and social maladjustment. 102 As Shuman reports, however, these variables failed to account for variations in accident rates of individual drivers over time. That consideration led psychologists to shift the focus of inquiry to an examination of other situationally conditioned factors, such as the impact of specific life events on accident proneness. This research, in turn, "pointed to a significant correlation between life changes, subjective stress, and accident rates." 103 That situational factors can play a significant role in shaping individual behavior has long been recognized in the legal arena, where such considerations partially underlie the traditional exclusion from evidence of proof of a party's bad character. 104

On the other hand, situationism is not universally accepted among psychologists. While some scholars continue to adhere to trait theory, others point to the importance of considering the manner in which traits and

97. MISCHEL, supra note 92, at 288.
98. Id. at 282.
99. Id. at 283.
100. Id. at 293.
102. Id.
103. Id. at 416.
situational constraints interact to affect behavior. In recent years, several commentators have come to regard Mischel's assertions regarding the low explanatory value of trait theory as an overestimation of the predictive strength of situational variables. At the same time, research indicates that certain identifiable personality traits may be characterized by substantial longitudinal stability. These findings support the notion that dispositions, as well as situational contingencies, influence behavior.

While some personality traits may prove to be more stable than others, the seminal work of Hartshorne and May strongly indicates that dishonesty in particular is very much situationally determined. Thus, the authors conclude that

\[ \text{[t]he consistency with which [an individual] is honest or dishonest is a function of the situations in which he is placed in so far as (1) these situations have common elements, (2) he has learned to be honest or dishonest in them, and (3) he has become aware of their honest or dishonest implications or consequences.} \]

Neither deceit nor honesty, according to Hartshorne and May, constitute a unified character trait; rather, both represent "specific functions of life situations," and in yielding to the temptation to deceive, persons respond primarily to situational stressors. Relevant factors that influence the decision to deceive include "(1) the person . . . or institution deceived; (2) the motive for [deception]; (3) the thing about which the deceiver deceives; (4) the way in which it is done; [and] (5) the consequences to the deceiver, the deceived, and others." The rather severe implications of the conclusion reached by Hartshorne and May that dishonesty has no link to personality attributes have since become the subject of some debate. In a reanalysis of the Hartshorne and May data, Burton found some support for concluding that an underlying trait of honesty might indeed be elicited from the

105. See Bryden & Park, supra note 96, at 562.
106. David C. Funder & Daniel J. Ozer, Behavior as a Function of the Situation, 44 J. PERSONALITY & SOC. PSYCHOL. 107 (1983). Based upon a review of several studies of the influence of situational factors on actual behavior, the authors argue that, in general, situational variables often may not correlate with behavior to a significantly greater degree than do dispositions. Id. at 110-11. They stress the importance of considering other factors (for example, the nature of the situation, the dispositions selected for measurement, and the properties of the subject sample) that affect the relative influence of dispositional and situational factors within any particular study. Id.
108. Bryden & Park, supra note 96, at 562. Aggressiveness, for instance, may at least in certain individuals be marked by a considerable degree of stability. Id. at 562 n.151 (citing LEONARD BERHOWITZ, AGGRESSION: ITS CAUSES, CONSEQUENCES AND CONTROL 128 (1993)).
109. HUGH HARTSHORNE & MARK A. MAY, STUDIES IN DECEIT (1928).
110. Id. at 380.
111. Id. at 411.
112. Id. at 399.
113. Id. at 402.
114. See id. at 412 ("[n]o one is honest or dishonest by 'nature'.")
data. Burton nevertheless agrees with Hartshorne and May that any such character trait cannot be considered in isolation as an “all or none” predictor of behavior. The study therefore does not obviate the central significance of the Hartshorne and May result that dishonest conduct is largely shaped by contextual factors. It should also be noted that, Burton’s findings notwithstanding, “no research to date has isolated such a personality trait.” What is more, even if an “honesty trait” could be identified, it is by no means clear exactly how this, or for that matter any other, personality trait predisposes a person to exhibit certain behaviors or attitudes.

Insofar as honesty test developers justify their approach on the basis of assumptions, derived from trait theory, regarding the stability and permanence of honesty as a personality attribute, the validity of their constructs may be questioned on both theoretical and empirical grounds. Honesty tests are written primarily to obtain information regarding the test taker’s past behavior and current attitudes. Factor analyses of various honesty tests indicate that they tend to revolve around certain themes, such as temptation and thoughts about dishonest behavior, actual or expected dishonest activities, norms about the dishonest behavior of others, and impulse control and reliable tendencies. In thus focusing upon the test taker’s past indiscretions and his or her attitudes toward theft and dishonesty, these tests appear to concentrate exclusively on the subject’s personal predisposition, without taking any account of situational variables or their interaction with personality constructs in influencing actual behavior.

Alternatively, it has been suggested that integrity testing may rest on no particular theoretical framework at all but, rather, functions as a

116. Id. (“Our analyses indicate that one may conclude there is an underlying trait of honesty which a person brings with him to a resistance to temptation situation. However, these results strongly agree with Hartshorne and May’s rejection of an ‘all or one’ formulation regarding a person’s character.”) Id.
117. See also DAVID T. LYKKEN, A TREMOR IN THE BLOOD 203 (1981); but see OTA REPORT, supra note 17, at 35 n.34 (citing P. EKMAN, WHY KIDS LIE: HOW PARENTS CAN ENCOURAGE TRUTHFULNESS (1989) for the proposition that personality may be of greater importance than previously believed).
118. Guastello & Rieke, supra note 9, at 513.
119. Cf. Conley, supra note 107, at 1281 (noting that “[t]he answer to this question will determine the ultimate judgment on the utility of the personality perspective”).
120. OTA REPORT, supra note 17, at 35.
121. O’BANNON ET AL., supra note 7, at 23 (citing an analysis of the Personnel Selection Inventory published in M. M. Harris & P. R. Sackett, A Factor Analysis and Item Response Theory Analysis of an Employee Honesty Test, 2 J. BUS. & PSYCHOL. 122 (1987)).
122. Environmental factors, however, can be expected to be of particular significance regarding employee deviance. See, e.g., LYKKEN, supra note 117, at 203. (“Employee theft is probably more dependent upon situational factors—easy opportunity, resentment and alienation, special need, etc.—than it is on enduring traits of personality that can be measured by any test.”). Indeed, at least some test publishers appear to concede that situational factors do play a role in conditioning counterproductive behavior. See OTA REPORT, supra note 17, at 35. Nevertheless, situational measures, such as organizational variables, are conspicuously absent from integrity tests. Id.
purely predictive model. Such a model relies on empirical validation of test questions only those questions that in experimental situations can be shown to elicit answers that successfully predict actual behavior are retained in subsequent versions of the test. Such an approach not only appears unprincipled, but it also ignores the fact that certain assumptions regarding the predictive value of attitudes or past behavior reported in response to test questions continue to be made and to function as a basis for evaluation. Furthermore, to the extent that honesty tests seek to predict future deception based on attitudes, it is important to note that “behavior predicts attitude about as often as the other way round.” A further factor detracting from the predictive utility of attitudinal constructs is the fact that individuals frequently adjust their attitudes post hoc to reflect and rationalize their conduct. This practice may partly explain the frequently found high correlations between self-admissions of dishonest conduct and attitudes toward dishonesty. All in all, test developers and researchers to date have paid little attention to the range of factors affecting the predictive value of attitudinal measurements. Reported past behavior likewise proves to be a problematic predictor of future action. Not only are admissions of past conduct used as a surrogate for actual past behavior, but, paradoxically, those persons who admit to past dishonesty are now reporting this conduct honestly.

Equally troublesome, for purposes of test validity, is the fact that test publishers do not agree on which behaviors their tests are designed to predict. Honesty tests are extremely diverse and do not necessarily identify a single construct that is purportedly measured. While some publishers indicate that their tests function as direct measures of “honesty” or “integrity,” others make no reference to these terms, but rather claim that the tests work to determine levels of “theft proneness,” “dependability,” “counterproductivity,” or “antisocial tendencies.”

Yet other test marketers present themselves as far more focused in purpose, indicating that their tests are designed to predict a specific problem, such as employee theft. Unfortunately, even the “theft” construct

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123. OTA REPORT, supra note 17, at 34.
124. Id.
125. OTA REPORT, supra note 17, at 33-34.
126. Guastello & Rieke, supra note 9, at 513. The predictive utility of attitudes is in part a function of the specificity of the attitude as well as the extent of the individual's involvement with the attitude target. Id. at 513-14.
128. Guastello & Rieke, supra note 9, at 514.
129. OTA REPORT, supra note 17, at 34; see also Guastello & Rieke, supra note 9, at 514 (since it is presumed that test takers will accurately report prior dishonest activities, honesty tests may actually be measuring candor rather than dishonesty). This means, of course, that honesty tests not only penalize test takers for their present honesty but also fail to take account of the possibility of character reform. The predictive value of past instances of dishonesty is assumed to be stable, regardless of subsequent intervening events in a person's life.
130. APA REPORT, supra note 28, at 12.
131. Id.
132. Id.
proves to be rather vague, for there exists little consensus regarding the particular types of activities subsumed by the concept. Whereas certain researchers would refer strictly to the unauthorized taking of property or cash, others would include various forms of "intangible theft," including such varied behaviors as making personal telephone calls or engaging in theft of time (for instance, by falsifying time cards or abusing sick pay privileges). Moreover, it can be argued that even with respect to the stealing of property, "theft" is not "theft," since rather different motivations and constraints underlie the occasional taking of minor office supplies—such as a pen or pencil—as opposed to the calculated theft of expensive company property. It is hence doubtful that any particular integrity test can accurately predict an across-the-board propensity for workplace deviance.

B. FAKING

Apart from problems with construct validity, honesty tests suffer from a somewhat naive reliance upon self-reporting of prior dishonest conduct. This practice subjects them to the potential for "faking." Thus, the most successful test takers may well be those who answer an honesty test dishonestly. But surprisingly many test takers appear to answer truthfully, so that the problem may not be as marked as might at first blush be assumed. Nevertheless, a recent study indicates that at least a portion of examinees will alter their responses on integrity tests depending upon the purpose of the test. As the case may be, because faking benefits the dishonest job applicant by allowing him to escape detection, it represents a problem above all for the employer. Faking, therefore, does

134. See, e.g., Metzger & Dalton, supra note 63, at 13-14; OTA Report, supra note 17, at 25.
135. The difference between trivial and non-trivial theft (e.g., between taking home a pencil and embezzlement of large sums of money) would at first blush seem of considerable importance in any test seeking to identify high-risk employees. Surprisingly, honesty test researchers rarely emphasize these distinctions, but instead simply speak of such categories as "property theft" or "time theft" as unidimensional aspects of employee deviance. See, e.g., Karen B. Slora, An Empirical Approach to Determining Employee Deviance Base Rates, in Preemployment Honesty Testing 21 (John W. Jones ed., 1991) [hereinafter Preemployment Honesty Testing]. Not only do honesty test publishers appear unconcerned with this distinction, but no showing has been made that honesty testing is capable of detecting the difference in the first place. George A. Hanson, To Catch a Thief: The Legal and Policy Implications of Honesty Testing in the Workplace, 9 L. & Inequality 497, 521 n.99 (1991).
136. Guastello & Rieke, supra note 9, at 513.
137. See APA Report, supra note 28, at 13; HEBERT, supra note 1, § 7:03, at 10 n.35.
139. Id. at 508-10. Most honesty tests caution the test taker that the test is designed to detect dishonest or inconsistent responses. However, it may be expected that, as the public becomes increasingly familiar with the nature and purpose of honesty tests, greater numbers of test takers will resort to faking to achieve a passing score.
not carry with it some of the far-reaching ethical implications that underlie the "false positives" problem discussed below.

C. SELECTION OF CHARACTER PROFILE

Honesty tests have also been criticized for making rather simplistic assumptions about human nature and rewarding punitive, authoritarian personalities, while punishing those who are forgiving and open-minded.\(^{141}\) Honesty testers assume that those who view their social surroundings with cynicism and regard deviance as commonplace are themselves likely to engage in theft and other counterproductive behavior.\(^{142}\) They also assume that thieves will favor lenient punishment.\(^{143}\) Thus, the successful test taker on one hand has faith in his co-workers' honesty, but on the other tends to mete out swift punishment to those who are found guilty of dishonesty.\(^{144}\) Forgiveness, Christian charity, and leniency consequently may lead to rather low test scores.\(^{145}\) Ironically, under this view test designers and employers would appear to be the first to fail honesty tests, since their very reliance on the efficacy of honesty testing reveals an underlying belief in the prevalence of employee deviance and dishonesty.\(^{146}\)

D. THE PROBLEM OF FALSE POSITIVES

Most honesty tests are designed to allow the employer arbitrarily to impose "cutting scores," separating "honest" from "dishonest" employees. As Yamada has noted, "the use of cutting scores strongly encourages employers to engage in easy categorization of job applicants, much to the misfortune of honest applicants who do not meet the cutting score."\(^{147}\) Therefore, even if integrity tests are efficient and effective tools for identifying high-risk employees, they entail the danger of mislabeling as de-

\(^{141}\) Lykken, supra note 117, at 200-01; Yamada, supra note 70, at 1561; Hanson, supra note 135, at 509.

\(^{142}\) Hanson supra note 135, at 510.

\(^{143}\) Id.

\(^{144}\) Id.

\(^{145}\) Id. at 509. A frequently cited example demonstrating the preference for authoritarian, punitive personalities intrinsic to honesty tests is the story of Sister Terressa, a nun who, after taking the Reid Report integrity test, was rejected for a position at a B. Dalton bookstore because of her miserable performance on the test. Lykken, supra note 117, at 195-96. As Lykken indicates:

> Sister Terressa was handicapped by Christian charity, which ensured that she would do badly on the 'punitiveness' items. And she was an intelligent, educated woman, with some experience of the world, and these qualities prevented her from expressing the naive assessment of humankind required to do well on the 'attitude toward theft' items.

Id. at 201. It was in part Sister Terressa's case that prompted the Minnesota legislature to forbid the use of lie detector tests in pre-employment screening. Id. at 196. Nevertheless, as noted above, the Minnesota Supreme Court interpreted this statutory provision as inapplicable to paper-and-pencil tests. State v. Century Camera, Inc., 309 N.W.2d 735, 745 (Minn. 1981).

\(^{146}\) See Hanson, supra note 135, at 510.

\(^{147}\) Yamada, supra note 70, at 1562.
a significant number of job applicants who are in fact entirely honest individuals. Indeed, anywhere from thirty to sixty percent of applicants are thought to fail integrity tests regularly. Even integrity tests possessing demonstrably high levels of validity result in unacceptably high rates of misidentification.

According to Sackett et al., the false positives dilemma may not have a significant effect upon institutional prediction, since the use of honesty tests enables the employer to avoid hiring dishonest employees to a greater extent than if such detection devices were not employed. However, it does have a seriously deleterious effect if the focus shifts toward the individual applicant, who may be rejected as a consequence of his or her test performance, despite the fact that he or she is an entirely honest person. This raises difficulties for employers who cannot afford to turn away large numbers of job candidates, or who must find employees in a scarce market.

E. RELIABILITY

In addition, existing studies disagree over the test-retest reliability of overt integrity tests. As Sackett et al. indicate, test-retest reliability studies show substantial variation in reliability scores. Reliability research
is not available at all for a number of tests, and some scholars suggest that improved research designs would be helpful.\textsuperscript{154} Moreover, although some reliability scores are quite high, time intervals between studies—insofar as these are reported—are generally very short, ranging from several days to several weeks.\textsuperscript{155} Such short intervals produce higher reliability scores but are of less scientific utility.

V. EMPLOYER JUSTIFICATIONS FOR USE OF HONESTY TESTS

Two justifications for using honesty tests as an employee screening device are commonly advanced: (1) the need to control burgeoning employee theft (or, more generally, to enhance productivity);\textsuperscript{156} and (2) the threat of lawsuits alleging liability under a theory of negligent hiring.\textsuperscript{157} Neither of these reasons has to date received much critical examination in the relevant literature.

A. EMPLOYEE THEFT

There is no doubt that employers have a legitimate interest in controlling inventory shrinkage and loss of funds, or that employee theft constitutes a significant source of economic and other losses to American businesses. Estimates of the amount of employees actively involved in stealing from their employers vary widely, from nine percent to an astonishing seventy-five percent, in large part because of the scarcity of reliable empirical data.\textsuperscript{158} One appraisal of internal crime suggests that fifty percent of a business' employees are involved in theft at any given time, with twenty-five percent taking important items, sixteen percent taking unimportant items, and eight to nine percent systematically stealing one hundred dollars per week.\textsuperscript{159} According to the same report, viewed longitudinally, "[s]even out of every ten employees can be expected to steal

\textsuperscript{154} See O'Bannon, supra note 7, at 68.

\textsuperscript{155} See Sackett et al., supra note 71, at 512-13. O'Bannon et al. likewise note that differences in testing intervals employed by different reliability studies make comparisons difficult, and that longer testing intervals are required in some cases. O'Bannon et al., supra note 7, at 68.

\textsuperscript{156} See, e.g., Bemis, supra note 39, at 573.

\textsuperscript{157} See, e.g., Yamada, supra note 70, at 1563 (identifying, as a third reason, employers' desire to ensure a productive work force); Metzger & Dalton, supra note 63, at 15.

\textsuperscript{158} See Hollinger & Clark, supra note 133, at 5; Bernardin & Cooke, supra note 12, at 1105 (estimates based on self-reports, which tend to underestimate actual theft rates, place the rate between 32% and 75% of the work force); Peter D. Bullard & Alan J. Resnik, SMR Forum: Too Many Hands in the Corporate Cookie Jar, 25 Sloan MGMT Rev. 51, 51 (1983) ("about four out of ten unscreened employees will steal when given the opportunity"); William L. Taylor & Joseph P. Cangemi, Employee Theft and Organizational Climate, 58 Personnel J. 686, 686 (1979) ("over fifty percent of those who work in plants and offices steal to some extent, with approximately five to eight percent stealing in volume").

at one time or another.” The true scope of employee theft, however, remains largely indeterminate, because no reliable statistics are available. Retailers usually rely upon assessments of inventory shrinkage, measured in terms of the unaccounted inventory deficit after deduction of sales and remaining stock. Since shrinkage rates are affected by a variety of factors in addition to employee theft (such as customer theft, shoplifting, waste, and clerical errors), which likewise cannot be accurately measured, it is impossible to arrive at exact estimates of the effects of employee theft.

In 1974, the U.S. Department of Commerce indicated that the cost of “ordinary crimes” against business exceeded $20 billion. Although the report contained no data to show what proportion of overall crime should be ascribed to employee theft, it noted that thirteen percent of crimes against retail establishments could be attributed to internal theft. In contrast, according to a 1993 article by Greengard, the annual cost of employee theft had risen to as much as $40 billion. From ten to thirty percent of all business failures, moreover, were linked to employee theft.

A 1980 report for mass merchandisers estimated inventory “shrinkage” (i.e., unexplained losses) to amount to some two percent of sales; fifty percent of those losses were attributed to internal theft, thirty percent to external theft, and twenty percent to paperwork errors. Ernst &

160. Id. It is important to note that such estimates rarely indicate what is meant by “theft” and make no effort to distinguish trivial from non-trivial theft.


162. Id. at 3-4. Hanson likewise points out that “little support exists for the claim that internal shrinkage is on the rise” and cites the remarks of Ernest Dubester, the legislative representative of the AFL-CIO, before the Senate Labor and Human Resources Committee that a study conducted for the Justice Department by the National Institute of Justice in 1982 found that “[d]espite the fact that employee theft is generally viewed as a problem of significant consequences, little reliable data exist regarding the phenomenon. The economic impact figures . . . seldom go beyond the level of alarmist rhetoric.”

Hanson, supra note 135, at 499 n.6 (citing Statements in Use of Polygraphs in the Workplace Before Senate Labor and Human Resources Committee, DAILY LAB. REP. (BNA), June 22, 1987 (available in WESTLAW, BNA-LB Database, No. 119, 1987, at E-1)).


164. Id. at 18.


166. Adkins, supra note 165, at 67; Metzger & Dalton, supra note 63, at 14.

167. See Bullard & Resnik, supra note 138, at 51-52 (citing estimates presented in NATIONAL RETAIL MERCHANTS ASSOCIATION, DEPARTMENT AND SPECIALTY STORE MERCHANDISING AND OPERATING RESULTS OF 1979 (1980)). Adkins, in turn, details the results of an Arthur Young & Co. survey of 127 companies, according to which one half of all shrinkage (or one percent of total sales) was due to employee theft. Adkins, supra note 165, at 71. Among those businesses most vulnerable to theft of cash are banks, small convenience stores and gas stations. Theft of tools and equipment, in turn, is most likely to
Young's survey of retail merchants, conducted a decade later, indicates that shrinkage losses have remained stable at slightly above two percent of sales.\textsuperscript{168} Thus, the magnitude of the shrinkage problem appears to have experienced little change over time.

The Ernst & Young data regarding losses resulting from theft are significant in that they provide factual information with respect to theft apprehension rates for employees and customers, and thus provide a far more reliable basis for assessing the actual scope of employee theft. Given the frequent high estimates of employee theft, it is surprising that, according to the Ernst & Young survey, only 30,000 (or 7\%) of the 406,000 persons apprehended for retail theft in 1990 were employees, whereas the overwhelming majority of theft apprehensions made were of business customers.\textsuperscript{169} As these percentage distributions were identical to those reported for the International Mass Retail Association's 1988 survey,\textsuperscript{170} it appears that the survey results do not merely represent the product of a skewed sample but accurately reflect employee theft apprehension rates within the retail industry. Viewed proportionately, employee theft may therefore constitute far less of a problem than do customer theft or other crimes against businesses.

The survey indicates, however, that even though merely seven percent of those caught were employees, thirty-eight percent of the total dollar value recovered by retail businesses was recovered from apprehended employees.\textsuperscript{171} While this result may lead to the conclusion that dishonest employees tend to steal items of greater value than do customers, it should be approached with some caution. The survey speaks only to funds recovered but is silent regarding the actual losses incurred due to employee versus customer theft. For a number of reasons, it may be easier for retailers to recover damages from current or former employees than from occasional customers.\textsuperscript{172} The survey also assumes that the prevalence of employee theft is exacerbated by the fact that, whereas retailers recovered $164,000 per company from employee apprehensions,
employees admitted to stealing an additional $241,000 per company that was not recovered. Because the survey provides no comparable data for unrecovered amounts stolen by customers, this information is, again, of little value in determining the proportional impact of employee theft on inventory shrinkage rates.

As much as ninety-three percent of all theft in the retail industry, then, may be the product of customer deviance rather than employee misconduct. Moreover, there are other indications that the problem of employee theft may not only often be overstated in the literature, but that its causes may stem from factors quite unrelated to the operation of individual character traits. Thus, Hollinger and Clark, in summing up their detailed study of the phenomenon, conclude:

Taking company property was reported by about one-third of employees in the three industry sectors surveyed: retail, hospital, and electronics manufacturing. Most of the theft reported, however, was not very serious and occurred rather infrequently. In fact, the modal employee did not report any property theft. Even though we recognize that our data are obviously conservative estimates, we nevertheless feel that this book seriously challenges those who declare that everybody is stealing.

The authors add that theft of property amounts to only a small proportion of the employee deviance encountered in the workplace, and that the same circumstances giving rise to theft also tend to foster other counterproductive conduct such as sloppy workmanship, various forms of time theft, and alcohol and drug abuse. Rather than attributing such conduct to particular personality traits or even the life circumstances of specific deviant employees, the authors found that both property theft and counterproductive behavior can be explained best by factors intrinsic, not extrinsic, to the work setting. Even though economic and broader societal variables may help to explain street crime, [the study] could find no corresponding utility/benefit from these variables in understanding employee theft. Continuing to search for scapegoat explanations external to the work organization simply confuses our understanding of this essentially work-place phenomenon.

According to Hollinger and Clark, the most important variable affecting employee theft and counterproductive behavior was the perceptions that individual workers formed of their work environment: employees who were dissatisfied with their jobs and who considered themselves to be exploited by the company tended to exhibit far higher rates of theft than those who believed that the employer was genuinely concerned for their welfare.

173. Ernst & Young Survey, supra note 11, at 54-55.
174. HOLLINGER & CLARK, supra note 133, at 141.
175. Id.
176. Id. at 142.
177. Id.
Research regarding the social and institutional dynamics of employee theft thus shows that its mere existence does not alone justify resort to honesty testing. Insofar as theft is a product of situational factors, including conditions that are internal and specific to the workplace, integrity testing may be of little utility in reducing theft rates because it assumes that the problem is particular to the employee and controllable through the selective elimination of employers who display "counterproductive" tendencies. Such an approach is dangerously deceptive in that it ignores workplace realities and invites the mistaken presumption that a complex, context-specific problem may be solved quickly and inexpensively through the simple administration of a standardized test.

Researchers, however, generally agree that the phenomenon of employee theft is by no means unidimensional. Bullard and Resnik, for instance, suggest that employee theft is the product of an interplay among four primary factors: (1) opportunity, measured in terms of access to money or property; (2) integrity or employee honesty; (3) personal pressures that work to increase the individual's inclination to steal; and (4) organizational climate, relating to the particular qualities of the corporation that serve to encourage or prevent theft. Employers have all too often paid too much attention to the first two factors while failing to give sufficient consideration to the last two. Yet organizational culture and climate can have multifaceted and complex effects upon counterproductive behavior within the work force.

At one end of the spectrum, it has been shown that such objectively measurable variables as compensation levels, the types of compensation provided, employee and management turnover rates, and full-time versus part-time employment can have a significant effect on retail shrinkage. Similarly, the development of a well-defined and well-publicized code of ethics regarding internal theft may have a substantial impact on deterrence of employee theft.

178. Bullard & Resnik, supra note 158, at 53. According to the authors, opportunity occupies a special position, because it functions as a catalyst for the remaining factors: "when there is little opportunity to steal, even the employee with the lowest level of integrity will find it difficult to do so. Hence, opportunity generally is the favorite target of corporate security systems." Id.

179. See Filipowski, supra note 169, at 88. The third factor listed by Bullard & Resnik, relating to personal pressures for the most part lies outside the employer's sphere of influence and is often not amenable to preventive or remedial action. However, management's display of genuine interest in the well-being of individual employees may serve to counteract some personal pressures. Thus, some conclude, if a manager is aware of a particular problem faced by an employee, he may be able to provide assistance, thereby deflecting the impulse to steal. See id.

180. Id. Taylor and Cangemi likewise report that a large proportion of employees steal because of on-the-job irritations, such as "[l]ow and inadequate wage or salary, resentment against the company for alleged unfair or inconsistent policies, inordinately severe disciplinary actions, substandard working conditions, or a deep-seated feeling of not being appreciated by superiors." Taylor & Cangemi, supra note 158, at 687 (quoting United States Chamber of Commerce, A Handbook on White Collar Crime 55 (1974)).

181. See Bullard & Resnik, supra note 158, at 55.
On the other end, in a less quantifiable but equally valid sense, counterproductive conduct can also be seen as a consequence of the normative culture and value systems existing both internally within the organization, and externally within society as a whole. Employee theft, as long as it remains within certain preestablished parameters of acceptability, is rarely viewed as criminal or even deviant behavior either inside or outside of the workplace. Indeed, some argue that the numerous euphemisms available for describing internal theft (such as "unaccounted loss, inventory shrinkage, missing goods, . . . pilferage, tapping the till, borrowing, lifting, . . . fiddling," etc.) themselves reveal the underlying social reluctance to condemn such conduct.

After conducting an in-depth ethnographic study of pilferers at an English bakery, Jason Ditton concluded that "[f]iddling is not morally and normatively supported by a contra-culture[,] one in qualitative opposition to the main themes of society . . . [but is] contextually dependent upon the legitimate structure of 'service' . . . [F]iddling is a subculture of legitimate commerce itself." Fiddlers carefully shape and control their moral identity within the company, and they take pains to borrow from the general cultural value system of their society those values and beliefs necessary to justify their conduct. Ultimately, it is "the weak social reaction to fiddling which preserves the 'partial' self" that the fiddler has created.

Other researchers have noted that both the nature and the degree of employee theft are, in important respects, functions of organizational culture, controlled by group norms as they develop in different occupational settings. Each organizational environment, moreover, may contain its own norms regarding employee theft; as long as pilferers stay within the acceptable limits defined by the group's normative structure, their actions

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182. See, e.g., Tersine & Russell, supra note 159, at 15. The authors also indicate that employees who steal can easily avail themselves of any of a number of different justifications:

Thieves maintain a positive self-concept by using any of the following rationalizations: They feel underpaid and unappreciated; they may have worked overtime without extra pay or been yelled at for something that was not their fault. By stealing, they are only taking what's rightfully theirs. Stealing from the company serves the same purpose as sabotage and yields more personal benefits. Crimes have victims; impersonal businesses don't suffer. . . . The ultimate rationalization is: Everyone is doing it.

183. Id.


185. Id. at 177-79.

186. Id. at 173-77.

187. Id. at 180.

188. Taylor & Cangemi, supra note 158, at 687-88; see also Hollinger & Clark, supra note 133, at 145 (“informal social controls initiated by fellow workers, such as gossip, ridicule, and ostracism are much more effective sanctions”); Greengard, supra note 165, at 84 (discussing corporate culture as a basis for building an honest work force).
will be granted protection by the work group as a whole. The structure of the work group, in turn, largely determines the degree to which employee theft will be considered permissible behavior. Where the organizational climate nurtures cohesiveness, group norms are more likely to focus on performance of tasks rather than on satisfaction of needs. In contrast, organizations that foster low employee morale and worker alienation are more often subject to high pilferage.

A closer analysis of both the prevalence of employee theft within the workplace and of the underlying factors giving rise to such counterproductive behaviors can lead to important conclusions regarding the usefulness and appropriateness of honesty testing as a method of controlling internal theft. Specifically, increasing employer reliance on integrity tests as predictors of real-life behaviors entails two fundamental dangers. First, there is a strong likelihood that honesty tests will unduly objectify and alienate the job applicant by focusing the employer's attention upon his test performance rather than upon his particular qualities as an individual. Cutting scores, which separate the applicant pool into two basic groups and label those who fall below the cutoff as essentially "deceitful" in character, not only offer a false sense of scientific accuracy but also detract attention from a more subjective consideration of other individual qualities that may counterbalance a low test score. Moreover, honesty testing may itself prove counterproductive: to the extent that integrity tests are either perceived as intrusive and offensive by test takers or signal pervasive mistrust of worker integrity on the part of management, they undermine employee morale and thus encourage the very behaviors they are designed to prevent.

Second, by approaching honesty as a fixed and unchangeable characteristic, honesty tests de-emphasize the malleable nature of on-the-job conduct and its dependence upon contextual factors. Because honesty tests result in objective scores based upon presumably scientific standards, they are also deceptive in that they invite undue reliance on test outcomes to the exclusion of other relevant considerations. Employers who adopt integrity testing as a screening mechanism may thus be less inclined to realize their own role in creating the conditions that stimulate employee theft and hence may take less responsibility for maintaining a work environment that actively fosters honesty and productivity. Theft proclivity becomes an externality, a social cost for which the individual company is not accountable and that does not enter the corporate bottom line other than in the form of expenditures for integrity testing. Yet, if employee theft is engendered by the very corporate environment that

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189. Taylor & Cangemi, supra note 158, at 687 (citing D.N.M. Horning, Blue Collar Theft: Conceptions of Property, Attitudes Toward Pilfering, and Work Group Norms in a Modern Industrial Plant, in Crimes Against Bureaucracy (E.O. Smigel & H.L. Ross eds., 1970)).
190. Id. at 687.
191. Id. at 688.
192. Id. at 688, 714.
seeks to avoid it, employers would be well advised to conduct periodic assessments of their own organizational cultures to maintain control over counterproductive behaviors.

B. NEGLIGENT HIRING

Test marketers frequently advance a second justification for using honesty testing as an employment screening device: honesty testing, they contend, provides a solid defense against the ever-increasing number of negligent hiring claims brought by third parties who have been injured by the actions of employees. This rationale is subject to considerable criticism, not only because negligent hiring actions tend to revolve around instances of employee violence, which honesty tests largely are not designed to detect, but also because integrity testing has never been used as a defense in any reported negligent hiring claim. Few commentators, however, have accorded the negligent hiring justification more than a cursory acknowledgement. In light of the growing popularity of this cause of action and its acceptance within an increasing number of jurisdictions, the nexus between negligent hiring liability and employee integrity testing invites closer examination.

Under the doctrine of negligent hiring, an employer may be held liable to third parties for the negligent or tortious conduct of an employee, regardless of whether the latter acted within the scope of his or her employment, if the employer failed to use care in hiring the employee. The

193. See Yamada, supra note 70, at 1564.


195. Rodolfo A. Camacho, How to Avoid Negligent Hiring Litigation, 14 WHITTLER L. REV. 787, 791-92 (1993); Donald J. Petersen & Douglas Massengill, The Negligent Hiring Doctrine—A Growing Dilemma for Employers, 15 EMPLOYEE REL. L.J. 419, 419-20 (1989-90). The doctrine of respondent superior is based upon principles of agency and holds the employer potentially liable for acts committed by the employee within the scope of employment and in furtherance of the employer's business. Negligent hiring differs: [T]he tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual, while the doctrine of respondent superior is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the respondent superior doctrine is not implicit in the wrong of negligent hiring.
doctrine thus conforms to the Restatement (Second) of Agency, which states that "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others."\textsuperscript{196} In order to prevail under a negligent hiring theory, a plaintiff must prove the following six elements:

(1) an employment relationship must have existed between the [employer] and the [employee]; (2) the employee must have been unfit [for the position]; (3) the employer must have known or should have known through reasonable investigation that the employee was unfit; (4) the employee's tortious act must have been the cause-in-fact of the plaintiff's injuries; (5) the negligent hiring must have been the proximate cause of the plaintiff's injuries; and (6) actual damage or harm must have resulted from the tortious act.\textsuperscript{197}

Most negligent hiring claims turn on the issues of duty and foreseeability.\textsuperscript{198} Employers generally owe a duty of care when a special relationship with the third party exists.\textsuperscript{199} But even if no special relationship can be identified, courts will consider the surrounding circumstances to decide whether a duty of care should be imposed.\textsuperscript{200} A central factor influencing the degree of care an employer must exercise in selecting a particular employee relates to the nature and amount of contact the employee is expected to have with the general public in the performance of his or her duties.\textsuperscript{201} The employer breaches its duty of care if it fails to conduct a reasonable background investigation of the employee. What is "reasonable" largely depends on the particular type of job and the possibility that an unfit employee in that position could foreseeably cause harm to a third party.\textsuperscript{202} Some courts have held that an employer's failure to conduct a pre-employment investigation is not unreasonable if the

\textsuperscript{196} RESTATEMENT (SECOND) AGENCY § 213 (1958).

\textsuperscript{197} Cindy M. Haerle, Note, Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments, 68 MINN. L. REV. 1303, 1308 (1984). In addition, the plaintiff must demonstrate that the employer owed the plaintiff a duty of care. Id.


\textsuperscript{199} Special relationships have been found to exist, for instance, on the part of landlords, Kendall v. Gore Properties, 236 F.2d 673, 681 (D.C. Cir. 1956), and common carriers, Burch v. A & G Assoc., Inc., 333 N.W.2d 140, 143 (Mich. Ct. App. 1983). Schools, as well as police and fire departments, likewise have a heightened duty to members of the public. See David L. Gregory, Reducing the Risk of Negligence in Hiring, 14 EMPLOYEE REL. L.J. 31, 33 (1988).

\textsuperscript{200} Odewahn & Webb, supra note 198, at 708; see Di Cosala, 450 A.2d at 514; Carlsen v. Wackenhut Corp., 868 P.2d 882, 887 (Wash. Ct. App. 1994) (advocating use of "a balancing test to determine if the given employment warrants the extra burden of a thorough background check").

\textsuperscript{201} See, e.g., Connes, 831 P.2d at 1325; see also Haerle, supra note 197, at 1308; Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951).

employee’s unfitness could not have been ascertained through a normal or customary investigation. 203 By contrast, others have found failure to investigate a per se breach of duty. 204

The most significant element of the breach-of-duty component, however, is the question of foreseeability, a factor that often also influences the court’s determination of whether a duty existed in the first place. 205 To establish foreseeability, it is not necessary for a plaintiff to demonstrate that the employer should have foreseen the precise injury suffered as a consequence of the employee’s tortious act; rather, a plaintiff must only show that there was a foreseeable risk that some injury might occur. 206 Conversely, if it simply could not be anticipated that an employee in a given job would pose any risk to the general public, the court may hold that no duty to conduct an independent investigation existed in the first place. 207

Because foreseeability is so often regarded as establishing the existence of both a duty and its breach, the theory of negligent hiring places a significant burden on employers. Lacking the benefit of hindsight, employers must resolve complex questions of projected behavior even before they begin to seek applicants for particular positions. In order to minimize their exposure to liability for negligent hiring, employers must carefully analyze the severity and types of third-party risks involved in each available job prior to soliciting applications. Their difficulties are compounded by the fact that courts have been inclined to take a rather sweeping view of the range of outcomes that should be considered foreseeable risks, yet have provided few guidelines to aid employers in defining the elements of employee “fitness,” or in deciding just how probing a “reasonably sufficient” background investigation should be. 208 Since the scope of the investigation that the employer must reasonably undertake is commonly viewed as a function of the degree of risk that an unfit employee might present to the public, the employer often has little option but to embark on an exhaustive search of the employee’s circumstances and qualifications. 209 Not surprisingly, employers might consider honesty

203. See Ponticas, 331 N.W.2d at 912-13; Stone, 386 P.2d at 911.
205. The duty and foreseeability components of the tort are thus closely intertwined. Courts often expressly apply a “foreseeability test,” considering whether a reasonable person would have anticipated that injury might result, in order to establish the scope of the defendant’s duty. See Harry H. Lipsig, Negligent Hiring and Retention, N.Y. L.J., June 3, 1991 (available in WESTLAW, NYLJ Database, 6/3/91 NYLJ 3, (col. 1)).
207. See Connes v. Molalla Transp. Sys., 831 P.2d 1316, 1323 (Colo. 1992) (en banc) (employer had no reason to foresee that person hired as long-haul truck driver would sexually assault or otherwise behave violently toward any member of the public, as driver’s duties did not involve more than incidental contact with third persons).
208. See Haerle, supra note 197, at 1319-20.
209. Id.
testing as a necessary, or at least useful, safeguard against potential liability.

The majority of negligent hiring cases have involved plaintiffs who suffered physical harm as a result of employee violence, and courts consequently have focused above all on the employer's duty to investigate an applicant's prior criminal history. Because honesty tests are not routinely designed to detect aggressiveness or violent tendencies, some suggest that they bear little substantial relationship to the types of conduct at issue in traditional negligent hiring claims and hence are of little benefit as either an empirical precaution or a legal defense.

That point, however, is debatable. Nothing in the nature of negligent hiring as a theory of liability would confine its application strictly to those circumstances where the plaintiff sustained physical injury rather than economic damage. The fact that the negligent hiring doctrine has not often been employed to recover for damages other than physical harm should not be regarded as detracting in any manner from its viability in that respect. Moreover, although they currently remain few in number, several reported cases in different states have involved circumstances under which liability was imposed upon the employer for harm suffered as a result of the dishonest acts of its employees.

In *Welsh Manufacturing, Inc. v. Pinkerton's, Inc.*, for example, a security company was found liable for negligence in the hiring of a security guard who used his position of trust at the plaintiff company to aid accomplices in stealing vast amounts of gold from the plaintiff. The Rhode Island Supreme Court reasoned:

Pinkerton's was offering a service the very essence of which required honest, trustworthy, and reliable personnel. The sensitive nature of the employment, coupled with the opportunity and temptations incident to it, would lead to the conclusion that a prudent employer in these circumstances should rely on more than the absence of specific evidence or statements that a potential employee is dishonest or criminally inclined. We believe that a reasonable investigation would call for affirmative statements attesting to an applicant's honesty, trustworthiness, and reliability and perhaps also require the disclosure of the basis upon which the recommending person has relied.

Although nothing in the court's opinion indicates that Pinkerton's was under any duty to go beyond the customary background and reference check by subjecting its guards to integrity tests, the court's language does imply that the results of an honesty test conducted as part of the application process could present strong evidence that the employer carried out a reasonable investigation.


211. *See Yamada, supra note 70, at 1564-65.


213. *Id.* at 440-41.
Similarly, a Georgia court of appeals, reasoning that a security company is under a duty "to exercise a greater amount of care to ascertain [whether] its employees [are] honest and [are] not likely to commit thefts," imposed liability on a security company for the negligent hiring of a guard who subsequently stole and forged a blank check belonging to the plaintiff.\textsuperscript{214} And finally, in \textit{Pruitt v. Pavelin},\textsuperscript{215} an Arizona court announced that a realty company had been negligent in the hiring of a dishonest real estate salesperson who had defrauded the plaintiff by forging signatures on a sales contract and security documents.\textsuperscript{216}

As the foregoing examples demonstrate, courts can and do hold employers liable for negligence in the hiring of dishonest employees whose crimes of deceit cause damage to third parties. This is not to say, however, that it is likely that courts will impose an affirmative duty upon employers to make use of any available means to detect dishonesty at the pre-hiring stage. As noted previously, the scope and depth of the required investigation is largely a function of the degree of the anticipated risk of harm to others associated with a particular position of employment.\textsuperscript{217} Given the invasive nature of integrity tests, which probe into highly personal thoughts and attitudes and inquire about instances of prior conduct that most individuals would presumably prefer not to discuss with strangers, it is unlikely that honesty testing would be considered a necessary procedure in the great majority of employment situations. Moreover, although courts have exhibited a marked proclivity for imposing a duty to research existing background information (such as criminal records, work history, and employer references) regarding a potential new hire, they have thus far not required that employers actively generate additional data, such as by means of personality testing.\textsuperscript{218}

Although no duty to conduct honesty testing has yet been imposed by the courts, evidence of favorable integrity test results might nevertheless constitute a successful defense against potential future negligent hiring claims involving employee dishonesty. The problem here, however, relates back to the issue of construct validity. Only some "honesty tests" in fact purport to measure "honesty" itself, while many others seek instead

\begin{itemize}
\item \textsuperscript{216} The court was swayed in large part by the fact that the employer had misrepresented the salesperson's trustworthiness to the state licensing department: Instead of assisting the department, the broker actively helped an employee, known to be dishonest, obtain a license to ply a trade which put the employee in a position where the public entrusted her with, and received from her, important documents and relied upon her to deal with them honestly. The employer actively and knowingly put it within the power of a dishonest employee to work a fraud upon the plaintiff. \textit{Id.} at 1354.
\item \textsuperscript{217} See Connes, 831 P.2d at 1321-22, and cases discussed therein.
\item \textsuperscript{218} See, e.g., Lipsig, supra note 205 (arguing that courts are reluctant to require extensive background investigations of employees because of the sizeable burden this requirement would impose upon employers).
\end{itemize}
to assess such diverse constructs as "counterproductivity," "theft proneness," "dependability," or even substance abuse.\textsuperscript{219} Test results showing an employee to rank high on the dependability scale, or to have a low propensity for theft, unfortunately will do little to protect an employer against a claim that the employee has committed fraud or forgery. Thus, the great variability in the content and purpose of honesty tests, coupled with the scientific debate surrounding their validity, renders their likely acceptance by judges and juries questionable.

This proposition derives further support from the federal district court's decision in \textit{Thatcher v. Brennan},\textsuperscript{220} which indicates that courts may well be reluctant to accept the results of personality measures as conclusive proof of foreseeability. In \textit{Thatcher}, the plaintiff claimed that he had been assaulted by a company salesman and argued that the event should have been foreseeable to the employer, since a personality inventory administered to the employee at the time of hiring showed him to be "moody" and of "high aggression." Those results had been interpreted by a clinical psychologist to mean that the employee lacked self-control, socialization skills, and responsibility.\textsuperscript{221} These findings notwithstanding, the court rejected the plaintiff's argument, to rule that the test results alone had not put the company on notice of the employee's violent propensities and that "the total lack of evidence of any violent conduct by [the employee] over the succeeding two years certainly belies any claim of negligent hiring under the circumstances of this case."\textsuperscript{222}

Honesty testing, then, may not prove to be a very dependable or palatable defense against negligent hiring liability for employee dishonesty. Equally relevant to an assessment of the utility of this defense is the fact that the great majority of negligent hiring actions, as mentioned before, involve employee violence rather than dishonesty. In those cases, honesty testing can rarely be expected to provide a satisfactory defense, as integrity tests are neither designed to detect prior criminal or deviant conduct,\textsuperscript{223} nor capable of identifying the kind of violent behavior that typically gives rise to negligent hiring claims.\textsuperscript{224} To date, reliance on honesty testing has not in any reported case been used as a defense to a negligent hiring claim.\textsuperscript{225} Given the continued scientific debate over the validity of integrity tests, and the likelihood that test results may not be unequivocally accepted by the trier of fact, employers would be ill advised to resort to honesty testing as a substitute for other methods of background investigation in order to guard against negligent hiring liability.

\textsuperscript{219} APA \textit{Report}, \textit{supra} note 28, at 12.
\textsuperscript{220} 657 F. Supp. 6 (S.D. Miss. 1986), \textit{aff'd}, 816 F.2d 675 (5th Cir. 1987).
\textsuperscript{221} \textit{Id.} at 11.
\textsuperscript{222} \textit{Id.} at 12.
\textsuperscript{223} Although overt integrity tests frequently rely on a self-admission scale, it is entirely conceivable that employees who wish to conceal their criminal background will not respond truthfully.
\textsuperscript{224} Yamada, \textit{supra} note 70, at 1564-65.
\textsuperscript{225} \textit{Id.} at 1564.
VI. SOCIAL AND ETHICAL IMPLICATIONS OF HONESTY TESTING

Increasing employer reliance on integrity testing entails serious social and ethical concerns that have received only sporadic attention in the relevant literature. As a preliminary matter, it is important to keep in mind that absurd results may result if credence is lent to the claim of some test advocates that up to seventy-five percent of employees will at some time be guilty of stealing from their employers. Employers as well as test developers clearly consider employee theft to constitute deviant conduct. This view, however, leads to the inevitable conclusion that the great majority of the work force should be regarded as aberrant, rendering employee theft an oxymoronic instance of "normative deviance." Yet, if stealing represents the order of the day, honesty testing is of doubtful utility because it can neither cure the underlying causes of employee misconduct nor ensure that the majority of job seekers will not by necessity be eliminated from the eligible work force.226 Clearly, this is not a desirable outcome.

Second, integrity tests have a propensity to label and stigmatize not only the dishonest worker, but, due to the false positives problem, also many workers who are in fact entirely honest individuals.227 Unfortunately, to the extent that honesty tests have the degree of reliability and replicability attributed to them by test publishers, individuals who do not perform well on any given test may be expected to consistently score low on all subsequent honesty tests as well. This fact raises the possibility that paper-and-pencil integrity testing may give rise to an entire class of repeatedly misclassified job seekers, whose test results may ultimately render them entirely unemployable.228

Furthermore, because integrity tests are typically employed to screen applicants for lower-level, unskilled or semi-skilled positions,229 they tend

226. Honesty testers might partially alleviate this problem by distinguishing between instances of trivial and non-trivial theft. It may well be that a large proportion of employees have at one time or another taken home an office pen or failed to report an extended lunch break. Such minor misconduct does not justify classifying the culpable employee as belonging to the same "high-risk" category as the serious delinquent. Nonetheless, honesty tests all too often fail to differentiate between these types of "theft" and to approach all reported behaviors as equally problematic.

227. Hanson, supra note 135, at 520; see also supra subpart IV.D.

228. Hanson, supra note 135, at 522-23. As one commentator aptly puts it: One must never lose sight of the detrimental effect of being labeled as "failing" the honesty test. The stigma associated with being an individual at high risk to commit dishonest acts is devastating to job seekers. To compound this, there does not exist a protection to prevent the disclosure of this highly confidential information to others.


229. Hanson, supra note 135, at 525. Conversely, applicants for management positions tend to undergo more traditional and far more personalized screening procedures. Id.
to have the effect of perpetuating—if not exacerbating—social inequality. Honesty testing, after all, essentially represents a probabilistic numbers game, attractive because it entails minor expenditures of time and money, but imprecise because a significant proportion of those identified as high-risk employees have been erroneously eliminated from the applicant pool. Whereas the risks entailed in integrity testing are low for the employer (who must only ensure that a sufficiently large sample of applicants is available), the risks for the individual worker are substantial. Yet, those wrongly stigmatized will be least likely to alter the outcome because, as unemployed, unskilled workers, they will constitute a class of persons marked by political powerlessness and social marginality. They will prove most vulnerable to stigmatization and least able to defend themselves against abuse.

A third problem is that reliance on honesty testing invites abdication of employers' responsibility for minimizing workplace deviance. Honesty testing, by focusing on the elimination of "bad apples," implies that the blame for employee theft must be placed primarily, if not entirely, at the feet of the individual "deviant" employee; it fails to acknowledge that counterproductive behavior also constitutes the product of organizational culture, and hence is most effectively corrected by addressing institutional needs. Employers should be encouraged to analyze situational factors that either foster or deter employee theft and dishonesty and to study means of improving organizational climate, labor-management rapport, and employee morale.

Finally, although it is unlikely that the judiciary will determine that honesty testing violates the constitutional right to privacy, integrity tests "do implicate notions of individual dignity and ethical concerns which could inspire legislative action." While honesty tests may be perceived as less intrusive than polygraph examinations or certain psychological tests, they nevertheless require that candidates reveal private, innermost thoughts. Test evaluators, moreover, use test takers' responses to draw conclusions regarding fundamental aspects of the latters' character and personal integrity. These ethical concerns underscore the need for regulation, if not prohibition, of integrity testing as a means of employee screening.

VII. PROPOSALS FOR REGULATION

A. THE NEED FOR REGULATION

With only two exceptions, every state continues to place control the manner and conditions for use of honesty tests as an employee screening device solidly within the hands of the employer. The resultant reliance on corporate self-regulation is problematic for several reasons. On one hand, it clearly effects a shift of bargaining power in favor of the em-

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230. See supra notes 62-65 and accompanying text.
231. Hanson, supra note 135, at 525-26.
ployer, as it permits companies singlehandedly to determine the contours and boundaries of employee privacy rights. On the other hand, it places the entire burden of selecting and administering appropriate testing methods on business, while leaving test publishers free to develop and market their products without any supervision. Test publishers have no legal obligation to validate their tests, and their products are rarely screened for compliance with privacy or discrimination laws. Although the Association of Personnel Test Publishers published its suggested Model Guidelines for Preemployment Integrity Testing Programs in 1990, seeking to standardize many of the primary parameters for honesty testing, compliance with these guidelines is optional and in practice varies greatly.

In the absence of licensing requirements for published integrity tests, and given the fact that test developers are free to keep their scoring methods proprietary and inaccessible to peer review, the task of ensuring legitimate, valid, and reliable testing methods rests squarely on the shoulders of individual employers. Yet the majority of employers can scarcely be expected to develop the kind of scientific expertise and resources that would enable them successfully to evaluate the broad variety of tests that are available on the market, or to become fully aware of the proper method of interpreting test results. As a result, self-regulation often amounts to no regulation, as employers may rely upon tests that lack either scientific validity or the necessary guidance from test marketers to enable users to employ test results in an appropriate manner. Unregulated honesty testing not only has the potential of harming the interests of

232. Yamada, supra note 70, at 1578.
233. ASSOCIATION OF PERSONNEL TEST PUBLISHERS, MODEL GUIDELINES FOR PREEMPLOYMENT INTEGRITY TESTING PROGRAMS (1990). For a discussion of the standards established by the Model Guidelines, see John W. Jones et al., Model Guidelines for Preemployment Integrity Testing: An Overview, in PREEMPLOYMENT HONESTY TESTING, supra note 135. The Model Guidelines were intended to be used jointly with other legal and professional guidelines governing personnel selection methods. Id. at 245.
234. Yamada, supra note 70, at 1579. It is true that an increasing amount of validity studies regarding different honesty tests has become available in recent years. See Ash, supra note 4, at 10. Nonetheless, other publishers have conducted little, if any, research. Yamada, supra, at 1578.
235. See Rudner, supra note 6, at 144. Rudner states that “it is doubtful that many employers understand the conditions under which tests are useful, or that they properly select and use assessment instruments.” Id. Employers do not have easy access to non-technical reviews, and there exist “no organizations dedicated to improving employment testing practices. . . . Employers seeking objective, balanced information regarding technical, legal, and practical issues do not have a central source for information.” Id.

Not all honesty test marketers, meanwhile, are entirely straightforward regarding the quality and capabilities of their products. Frequent misrepresentations include claims that a particular test (1) has been “fully validated”; (2) has correctly identified a large percentage of the people who were later found to be dishonest; (3) can screen out large numbers of persons who are dishonest, even though their dishonesty cannot be demonstrated; (4) is “EEOC approved”; (5) can predict violence; (6) or is not truly a psychological test and hence does not require peer review. Robin Inwald, Those “Little White Lies” of Honesty Test Vendors, PERSONNEL, June 1990, at 52. “Debunking” any one of these claims would require considerable knowledge of social science research methodology, psychology, and statistics.
job seekers but may also fail to serve the goals of employers in selecting desirable job candidates. Given the dearth of supervision of any kind within the testing industry, strong reasons exist for enacting federal legislation in order to impose some regulation upon the practice of honesty testing.

B. PROHIBITION

There are compelling reasons for prohibiting paper-and-pencil honesty testing altogether. First, a core consideration underlying Congress' decision to pass the Employee Polygraph Protection Act of 1988 was the fact that polygraph examinations resulted in large numbers of misidentifications of purportedly "deceptive" employees.\textsuperscript{236} Like polygraphs, integrity tests entail substantial social costs because they tend to incorrectly classify a significant number of persons as high-risk applicants, despite the fact that these applicants will likely never engage in counterproductive behavior. As no ready and effective means of remedying this problem have been identified, only a complete ban on paper-and-pencil tests can preserve the rights of individual workers and ensure that they will not fall victim to mislabeling and stigmatization.\textsuperscript{237}

A second reason for prohibiting the use of paper-and-pencil integrity tests is that, like polygraph examinations, they are highly intrusive and invade the privacy of job applicants. Indeed, some note that concern for employee privacy and job security constituted the overarching factor leading Congress to pass the EPPA.\textsuperscript{238} Although polygraph examinations may in some sense be regarded as more intrusive than paper-and-pencil tests because they involve physical invasion of the examinee's body in order to probe his mental processes, this type of distinction is in many ways more artificial than it is real.\textsuperscript{239} Whether by measuring physiological changes or by subjecting examinees to a battery of questions seeking

\textsuperscript{236} S. REP. NO. 284, 100th Cong., 2d Sess. 41 (1988), reprinted in 1988 U.S.C.C.A.N. 726, 728-29. Not all of the reasons impelling the EPPA's ban on mechanical and electrical types of honesty tests may be readily applied to paper-and-pencil tests. One core consideration motivating Congress, for example, was the conspicuous lack of scientific research demonstrating the efficacy of polygraph examinations as valid predictors of employee theft. \textit{Id.}; see also John W. Jones & William Terris, \textit{Selection Alternatives to the Preemployment Polygraph, in Preemployment Honesty Testing, supra} note 135, at 39, 40-41. As noted previously, more extensive—though still far from sufficient—research data are now available regarding paper-and-pencil tests, and the general scientific consensus in favor of rejecting polygraph examinations does not extend to the same degree to written integrity tests. See \textit{Yamada, supra} note 70, at 1580.

237. There are some indications that false positive rates may be reduced by re-screening those who tested positive during the first administration of an honesty test. See Scott L. Martin, \textit{Honesty Testing: Estimating and Reducing the False Positive Rate, in Preemployment Honesty Testing, supra} note 135, at 107, 109-110. It is unlikely, however, that employers would go to the expense and trouble of re-testing low scorers rather than simply to hire those who achieved high scores in the initial testing phase, or that they would be able to disregard the fact that the re-tested candidate originally performed below standard. The suggested solution is therefore unrealistic and does not solve the problem.


239. See Decker, \textit{supra} note 13, at 150.
admissions of past conduct and exploring a variety of views and attitudes, it is the goal of the examiner to elicit information—often of a highly personal nature—that would not otherwise be readily revealed by the examinee. This criticism is especially applicable to veiled-purpose tests, which contain questions that are both personal and often lack any apparent connection to the underlying issue. Just as the polygraph is intrusive because it deprives the subject of control over the content of his responses, so too does the veiled-purpose integrity test, by concealing from the test taker the true meaning of the questions asked, intrude upon the individual's privacy by depriving him of conscious command over the nature and implications of his answers. Moreover, overt honesty tests rob the test taker of a significant measure of volitional control, both because he is not truly free to refuse to answer and because he is frequently told that any untruthful answers given will immediately be detected. The job applicant, then, has no option but to comply with the employer's demand to reveal whatever information is sought by the test; his right to privacy is irreparably compromised.

Despite the fact that public policy considerations seem to militate strongly in favor of imposing a ban on the use of honesty tests, the APA Task Force has spoken out against their prohibition, mainly because "to do so would only invite alternative forms of pre-employment screening that would be less open, scientific, and controllable." This recommendation, however, ignores the fact that none of the customary alternatives (such as personal interviews, background checks, and references) are comparable to honesty tests in the degree to which they invade the applicant's private thoughts or threaten to permanently label the applicant as dishonest. Furthermore, though they may prove less scientifically controllable, traditional methods of pre-employment screening, in contrast to honesty testing, are subject at least to some extent to various legal restraints.

240. Cf. HEBERT, supra note 1, § 7:06, at 24 (psychological tests, because of the personal nature of the questions asked, have been subject to privacy challenges).

241. Hanson, supra note 135, at 527. "[O]nce connected to the machine, a subject [is] denied [the privilege of refusing to answer a given question]; in effect, the subject's physiological response answers for him." Id.

242. An applicant's refusal to answer a question will earn the applicant a lowered score. Id.


244. Unlike integrity tests, most other screening methods do not attempt to classify applicants on the basis of honesty; therefore, no comparison in terms of erroneous classification rates is possible. OTA REPORT, supra note 17, at 67.

245. See, e.g., IRA M. SHEPARD ET AL., WORKPLACE PRIVACY 123-33 (2d ed. 1989). Significantl, some integrity tests may allow employers to obtain information that might otherwise be legally protected from disclosure. For example, the Loss-Prevention Analysis Test contains a scale for "financial security," intended to measure the amount of personal financial pressure reported by the employee. See O'BANNON ET AL., supra note 7, at 144. It is noteworthy that both the Federal Credit Reporting Act and Title VII (as well as many state laws) place severe restrictions on an employer's ability to obtain financial information regarding its employees by means of credit checks. See SHEPARD ET AL., supra, at 140-42. By incorporating such information in an integrity test relying on employee self-reports, some of these legal constraints may be circumvented.
Given the APA Task Force’s conclusions, and forceful attacks launched against the OTA by both industry and certain sectors of the scientific community in the wake of its report criticizing honesty testing, it is doubtful whether a full-fledged proscription of integrity tests can become reality. Yet, as the foregoing discussion has made clear, some regulation of honesty tests is desperately needed, particularly as those most often subject to honesty testing are among the politically most powerless and as workable legal theories, under which those wronged by improper test administration or evaluation might vindicate their rights, do not exist.

C. An Alternative to Prohibition: The “Honesty Testing in Employment Act”

Notwithstanding the troublesome social and legal implications of unregulated honesty testing, only two states have taken any steps to restrict the use of integrity tests, and there are presently no indications that regulatory legislation is contemplated in any other states. Because the development of industry regulation at the state level can thus be expected to continue at an exceedingly slow pace and to result in a legislative patchwork lacking uniform standards, this Comment suggests that regulation is most appropriately undertaken through federal, rather than state, legislation. Federal regulation has the advantage of setting clear guidelines for honesty test merchants. In addition, it may serve to ensure uniformity in the manner in which tests are administered and evaluated by employers and thereby preserve the rights of test takers.

Any federal regulatory scheme should, at a minimum, include clear standards for ensuring that tests meet all requisite validity and reliability requirements. Test publishers should be required to license their tests with a designated regulatory agency, contingent upon compliance with published test standards as recommended by the APA Task Force, such

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246. See Hanson, supra note 135, at 519.
247. Yamada, supra note 70, at 1581-83.
248. See supra Part III.
249. In passing the EPPA, Congress similarly underscored the need for federal legislation by pointing out that inconsistent state laws governing polygraph examinations had given rise to confusion among employees as to the nature of their rights and to frequent circumvention of state standards by employers and polygraph examiners. S. REP. No. 284, 100th Cong., 2d Sess. 41 (1988), reprinted in 1988 U.S.C.C.A.N. 726.
250. The APA Task Force identified lack of documentation and supportive research, as well as test vendors’ reluctance to make information regarding test development and scoring available to the public, as its most serious concerns with regard to integrity tests. APA REPORT, supra note 28, at 25-26. It strongly recommended that test publishers “prepare manuals that provide a clear and detailed account of the development of each measure and a summary of the evidence for its reliability and validity,” and that they “make available to qualified parties complete and detailed reports of research on their tests, including all negative findings.” Id. at 26.
251. See Yamada, supra note 70, at 1584; Bemis, supra note 39, at 596 (suggesting that test publishers be required to file tests with the appropriate state regulatory agency along with statements of purpose and validation studies).
as the Standards for Educational and Psychological Testing\textsuperscript{253} and the Principles for the Validation and Use of Personnel Selection Procedures.\textsuperscript{254}

Most importantly, these regulatory standards mandate full disclosure of all information necessary to permit peer review as well as of all relevant research data.\textsuperscript{255} No test should be licensed that has not been demonstrated, through independent research, to have predictive validity and reliability. Proprietary scoring keys should be prohibited. In order to minimize the risk of error, federal regulation should additionally require that all tests be administered and evaluated by professionals.\textsuperscript{256}

Not only should honesty tests meet basic scientific quality standards, but, when used as pre-employment screening devices, they should also be job-related.\textsuperscript{257} This means that test vendors should clearly identify the purposes for any given test and the particular behaviors that it is designed to predict. Rather than allowing honesty test merchants to rely on vague promises that a test will serve to eliminate potentially "counterproductive" or "high-risk" employees, vendors should be required to describe with specificity the types of conduct the test seeks to identify. The particular behavior, in turn, should be directly linked to the job in question. Thus, if a test's objective is to identify potential thieves, the position for which the test is employed must be one in which employees in fact have access to cash or merchandise and in which there exists substantial exposure to theft loss. Where little opportunity for theft arises within the actual work environment, in contrast, integrity testing is unjustified and should be proscribed.

Test users should be legally entitled to detailed and accurate information regarding the specific constructs the test is designed to measure, the types of work environments and applicant populations for which it is appropriate, test limitations, and scientific evidence supporting test valid-

\textsuperscript{253} American Psychological Association, Standards for Educational and Psychological Testing (1985).


\textsuperscript{255} APA Report, supra note 28, at 26.

\textsuperscript{256} There are indications that even slight variations in test administration can lead to wide disparities in results. O'Bannon et al., for example, report that instructions given by a particular store manager, who served as test administrator, which emphasized that test takers should answer all questions honestly, gave rise to results that were seriously skewed in relation to test results from other stores, because examinees took the instructions seriously. O'Bannon et al., supra note 7, at 38. Subsequent omission of the word "honestly" reportedly rectified the problem. Id. In view of the apparent sensitivity of test results to such environmental factors, it is highly important that tests be administered in a standardized and professional manner.

\textsuperscript{257} See Decker, supra note 13, at 150. "Standing alone, many of the questions that appear on honesty tests would pose problems in any prospective job interview as unrelated to the job." Id. at 146.
In addition, test publishers should provide training in test administration and proper use of test results. In order to reduce the significant potential for erroneous identification of honest individuals as high-risk employees, the employer's reliance on integrity test results should be restricted, and honesty testing should be permitted only if test scores do not serve as the sole criterion for deciding to reject or accept a job applicant, or for taking any other employment action. Employers should, furthermore, be prohibited from using cutting scores to separate those who "pass" an integrity test from those who "fail." Test publishers should not be allowed to provide suggested cutting scores.

According to the APA Task Force, the current dependence on cutting scores is disturbing for a number of reasons: cutting scores frequently appear to have been set arbitrarily, without reference to any scientific principles; they require compression of a continuous distribution of scores into two values, which entails the loss of large amounts of highly important information; any single test score is by nature inherently unreliable; and it is questionable whether a single cutting score can usefully be applied in entirely different industries and businesses. Test publishers, therefore, should be prevented from imposing artificial cutoff points and instead be encouraged to provide employers with overlapping ranges of risks, combined with information about how these scores are to be interpreted jointly with other variables.

Honesty testing of potential and actual employees should not be permitted unless the informed consent of the test taker is first obtained. A valid argument can be made that an applicant's consent to honesty testing is never entirely voluntary, since refusal to submit to testing may seriously lessen his or her chances to be considered for the position, at the very least the principle of informed consent should encompass disclosure of the nature of the test and of its role in the employment decision. In addition, examinees should be entitled to access to their results.

258. See Jones, supra note 233, at 240.
259. Id. at 241.
260. There is considerable consensus in the literature that arbitrarily set cutting scores are at the base of the false positives problem and encourage employers to rely on honesty tests "as litmus tests in the hiring process." Yamada, supra note 70, at 1585.
262. Id. at 20 n.4. The proposal to eliminate cutting scores differs from the standards suggested by the Model Guidelines, which merely require test publishers to assist users in establishing cutting scores. See Jones, supra note 233, at 243. Given the serious negative implications entailed by the use of any cutting score, this Comment argues that only elimination of the practice as a whole can ensure fair results.
263. See OTA REPORT, supra note 17, at 76 (arguing that informed consent is basic to the notion of fairness of a test or test procedures and is required by the Standards for Educational and Psychological Testing).
264. Id. at 77.
265. Id. Bemis points out that this requirement would serve not only to alert test takers to the test's significance but would also enable them to determine the reasons for their rejection. Bemis, supra note 39, at 596.
test results once they become available.\textsuperscript{266} Rejected applicants should be able to formally dispute questionable test results.

Finally, any legislation regulating the use of honesty tests should protect the privacy of test takers by mandating strict confidentiality of test results.\textsuperscript{267} Confidentiality is especially important under these circumstances because of the overwhelming danger that test takers with low scores may become permanently stigmatized and unemployable.\textsuperscript{268} Moreover, examinees are far less likely to give truthful responses to test questions if they cannot be assured of confidentiality.\textsuperscript{269} One commentator has additionally suggested that the right to non-disclosure be made non-waivable to prevent test publishers from circumventing confidentiality rules by incorporating standard waivers in their tests.\textsuperscript{270} Given the great disparity in bargaining power between employers and job applicants (who would most likely feel compelled to sign any requested waiver), this approach seems preferable to the more lenient requirements of the \textit{Standards for Educational and Psychological Testing}, which would permit release of test data with the informed consent of the test taker.\textsuperscript{271}

\textsuperscript{266} See Yamada, \textit{supra} note 70, at 1585. In contrast, O'Bannon et al. argue against such disclosures. O'BANNON ET AL., \textit{supra} note 7, at 40-41. The authors recommend, instead, that the applicant not be given feedback on test results, because raw scores would be meaningless, while interpretations of the results would cause candidates to "react negatively." \textit{Id.} In addition, they suggest that employers refer to the integrity test not as a "test" but rather as a "survey" or "questionnaire" in order to reduce the likelihood that applicants will perceive the test as threatening; that applicants not be told that they must "pass" the test; and that the test results not be cited as a reason for rejecting an applicant so that the potential for legal challenges may be minimized. \textit{Id.} at 39-41. Although the authors' recommendations may certainly be effective safeguards to protect the interests of the employer, they are nevertheless troublesome. By encouraging secrecy, the authors ignore the legal and ethical rights of the individual job seeker, who becomes the subject of deception at the hands of the very persons who set out to test his honesty. Rather than withholding critical information, test administrators should treat test takers with candor and openness, particularly as no valid consent to submit to testing can be given if the test taker has no understanding of either the purpose of the examination or the use to which test results will be put.

\textsuperscript{267} The \textit{Standards for Educational and Psychological Testing} provide:

\begin{quote}
Test results identified by the names of individual test takers should not be released to any person or institution without the informed consent of the test taker or an authorized representative unless otherwise required by law. Scores of individuals identified by name should be made available only to those with a legitimate, professional interest in particular cases.
\end{quote}

\textit{American Psychological Association, Standards for Educational and Psychological Testing} 85-86 (1985) (quoted in OTA \textit{Report}, \textit{supra} note 17, at 75). The \textit{Standards} further state: "Test data maintained in data files should be adequately protected from improper disclosure. Use of time-sharing networks, data banks, and other electronic data processing systems should be restricted to situations in which confidentiality can be reasonably assured." \textit{Id.} at 76.

\textsuperscript{268} See Shepard \textit{et al.}, \textit{supra} note 245, at 158.

\textsuperscript{269} Stone, \textit{supra} note 228, at 403.

\textsuperscript{270} Yamada, \textit{supra} note 70, at 1585.

\textsuperscript{271} See \textit{supra} note 253.
Undoubtedly, honesty testing in employment has become increasingly popular in recent years. In 1989, shortly after Congress passed the EPPA, O'Bannon et al. identified some forty-six different integrity tests marketed to employers. Since that date, the demand for honesty tests has increased dramatically. Yet, as the testing industry has grown, the pace of research exploring the predictive validity of different honesty tests has lagged well behind; and although it is true that significantly more research data are now available than was the case a decade ago, results remain inconclusive. The continued scientific debate is due not only to the proprietary nature of some information and the persistent number of flaws in early research designs, but also in large part to the fact that different test publishers tend to use rather divergent approaches and often may measure quite different constructs.

Recent years, however, have seen more frequent publication of research results, coupled with greater potential for peer review made possible by increased openness among test publishers regarding both test development and scoring methods. Although the underlying validity issues surrounding honesty tests may eventually be resolved, a more fundamental problem revolves around the policy implications and societal consequences of integrity testing. The practice of testing employee honesty solidly rests on the assumption, based in trait theory, that employment deviance is the product of individual character traits, and that the selective elimination of undesirable traits will, in a manner reminiscent of Social Darwinism, lead to optimal workplace behavior. In this view, integrity test publishers function as the social equivalents of genetic engineers, detecting and isolating faulty traits—and, thereby, faulty workers—until only desirable characteristics remain in the work force. Yet, trait theory (the theoretical basis for integrity testing) has long been the subject of substantial criticism within the psychological community. The fact that reliance on honesty testing, with its emphasis on the assessment of individual character, more often than not leads to a consideration of the individual in isolation from his social environment is one of the primary limitations on the utility of integrity tests. In contrast to the implicit suggestions of honesty test vendors that personal predispositions represent the primary source of workplace deviance, much relevant sociological research indicates that employee theft is explainable only if viewed in the full context of its institutional setting. Dishonesty may be as much a management problem as it is one of personnel screening and security.

Because of the intrusive nature of honesty testing and its serious potential for systematic misclassification, this Comment advocates prohibition of integrity tests in most workplace situations. Even if integrity tests continue to play a role in the employee selection process, however, employ-

272. O'BANNON E T AL., supra note 7, at 8.
ers must be reminded of their own role in preventing counterproductive conduct through fostering a work environment that encourages cooperation, loyalty, and honesty. Only by focusing on the interaction of organizational culture with personal predispositions may problems of workplace deviance be managed effectively.