

INTEGRITY TESTS: DO THEY HAVE ANY INTEGRITY?

INTRODUCTION

Job applicants are usually not surprised when a potential employer asks questions or requires that they take a test as part of the application process. The applicants probably assume that most of the questions or tests are related to the individual job. Employers routinely test skills for certain positions, such as administering typing tests to secretarial applicants. Suppose, however, that the application process did not end with the interview or test. What if applicants were followed home to see how neatly they kept their houses? What if employers went to church to check on attendance, or followed applicants into the voting booth, or into the bedroom? This type of behavior would be a flagrant invasion of privacy, but what if employers justified this invasion by their need to evaluate job applicants' character? Employers might claim that those employees who go to church are hard-working, those who are neat at home are neat at work, those who vote are well-adjusted members of society, and those who are sexually "normal" have good relationships with co-workers. Would these explanations justify this kind of surveillance?

This scenario is not as fanciful as it appears. Henry Ford used to send caseworkers to employees' homes to check up on their alcohol consumption, sex lives, and cleanliness.¹ Certain job applications required applicants to "name their political leader, and if they smoked, gambled, swore, used slang, or had ever been divorced."² Modern mores do not allow such overt intrusions into applicants' or employees' lives; however, many employers routinely circumvent this proscription by using questions to find out about similar aspects of applicants' private lives. These questions make up what are known as honesty or integrity tests, and their use is widespread and growing.

Currently integrity tests are subject to little or no regulation. This note argues that regulation is needed. Part I introduces sample questions and outlines the rise in employer use of integrity testing as a pre-screening tool. Part II outlines the legal status of integrity testing, examining both statutory and common law. Parts III and IV analyze the potential harms and benefits of using integrity testing. Part V describes and criti-

¹ David F. Linowes & Ray Spencer, *Privacy: Workplace Issues of the 90s*, 23 J. MARSHALL L. REV. 591, 597-98 (1990).

² *Id.* at 597-98.

cizes the prevalent policy of not taking affirmative action regarding integrity testing, on the grounds that it places the burden of production on the party least able to do so. Finally, part VI offers recommendations that could shift this burden and encourage further study of integrity testing which would allow for more informed policy decisions.

I. GENERAL BACKGROUND

Integrity tests typically consist of a combination of yes/no, true/false, or multiple choice questions.³ They are designed to evaluate the taker's propensity towards honesty, theft, productivity, and compatibility with others.⁴ The tests assume that people's tendencies or inclinations translate into actual behavior. The tests use the presence or absence of certain traits to predict which test-takers are likely to be honest or dishonest. The publishers realize that the test-takers might be tempted to answer the way they think the employer wants them to; therefore, publishers employ a wide range of question types, from overt questions to veiled-purpose questions. In overt questions, the question concerns a work-related trait, and the response the employer wants is obvious:⁵

How honest are you?

How prompt are you?

Have you ever stolen anything from an employer?⁶

In veiled-purpose questions, the question appears unrelated to job performance, and there is no obviously correct or preferred answer.

Do you feel guilty when you do something you should not do?⁷

Do you make your bed?

How often are you embarrassed?

You love to take chances—True or False?⁸

Some tests feature questions that delve into sensitive and personal subjects such as religion and sexuality. While the preferred answer is sometimes clear, there is no obvious relation to job performance.

I go to church almost every week.

I believe there is a God.

I wish I were not bothered by thoughts about sex.

³ David C. Yamada, *The Regulation of Pre-Employment Honesty Testing: Striking a Temporary (?) Balance Between Self-Regulation and Prohibition*, 39 WAYNE L. REV. 1549, 1550 (1993).

⁴ *Id.*

⁵ U.S. Congress, Office of Technology Assessment, *The Use of Integrity Tests for Pre-Employment Screening*, OTA-SET-442. 1 (Washington, D.C.; U.S. Government Printing Office, September 1990) [hereinafter OTA].

⁶ *Id.* at 1.

⁷ Michael B. Metzger, "Just Say No" to Integrity Testing, 4 U. FLA. J. L. & PUB. POL'Y 9, n.2 (1991).

⁸ OTA, *supra* note 5, at 2.

I like to talk about sex.

I have never indulged in any unusual sex practices.⁹

While applicants might find these questions bewildering, they probably do not suspect that their responses will be used to measure their honesty or propensity for undesirable behavior. Applicants also may not realize that a below average score can automatically disqualify them from the job, regardless of how well they performed in other phases of the job screening process.

Psychological testing for employment purposes has existed since the early 1900s,¹⁰ but its use has become widespread since Congress banned lie detector or polygraph tests.¹¹ The number of people subject to integrity tests nationwide is significant. Between 5,000¹² and 6,000¹³ employers use integrity tests in evaluating applicants; the actual number of tests given ranges from 2.5¹⁴ to 5 million.¹⁵ Wholesale and retail companies commonly use integrity tests to screen employees,¹⁶ as do businesses whose "employees have access to cash or merchandise, such as retail stores, financial institutions, and warehouse operations."¹⁷ Integrity tests are "overwhelmingly given to individuals applying for low level positions."¹⁸

II. THE CURRENT LAW

A. FEDERAL LAW

Numerous employers turned to integrity tests to fill in the gap left by the federal ban on polygraph testing. The polygraph was one of the most controversial tools employers used to gather information and pre-

⁹ *Soroka v. Dayton Hudson Corp.*, 1 Cal Rptr. 2d 77, 79-80 (Cal. Ct. App. 1991) (discussing the questions featured on the Psychscreen pre-employment integrity test).

¹⁰ Kimberli R. Black, *Personality Screening in Employment*, 32 AM. BUS. L. J. 69, 71 (1994).

¹¹ Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (1994).

¹² Kurt H. Decker, *Honesty Tests — A New Form of Polygraph?* 4 HOFSTRA LAB. L.J. 141, 145 (1986) (citing Sackett, *Honest Testing for Personnel Selection*, 30 PERSONNEL ADMIN. 67 (1985)); Metzger, *supra* note 7, at 10 (citing *Focus on . . . "Integrity" Tests*, INDIV. EMPL. RTS. (BNA) No. 18, at 4 (Oct. 9, 1990)).

¹³ Metzger, *supra* note 7, at 10 (citing *Focus on . . . "Integrity" Tests*, INDIV. EMPL. RTS. (BNA) No. 11, at 4 (March 26, 1991)).

¹⁴ *Id.* (citing Ed Bean, *More Firms Use Attitude Tests to Keep Thieves Off the Payroll*, WALL ST. J., Feb. 27, 1987, at 41, col. 3).

¹⁵ *Id.* (citing Tim Beardsley, *Mind Reader: Do Personality Tests Pick Out Bad Apples?*, 26 SCI. AM. 154 (1991)).

¹⁶ *Id.* at 5 (citing Jerry Beilenson, *Applicant Screening Methods: Under Surveillance*, 67 PERSONNEL 3 (1990)).

¹⁷ Decker, *supra* note 12, at 144 (quoting Sackett, *Honest Testing for Personnel Selection*, 30 PERSONNEL ADMIN. 67 (1985)).

¹⁸ George Hanson, Note, *To Catch a Thief: The Legal and Policy Implications of Honesty Testing in the Workplace*, 9 LAW & INEQ. J. 497, 525 (1991).

dict behavior. Congress passed the Polygraph Protection Act of 1988¹⁹ in response to concerns about privacy, security of results, reliability, and misuse.²⁰ The Act denied "most private employers the use of the polygraph as a pre-employment screening device."²¹ However, the Act did not explicitly include integrity tests in its statutory ban,²² and there is no case law finding them to be within the Act's reach. "[N]o Federal agency . . . comprehensively regulates or monitors the field of honesty testing, and there is no federal statute that specifically applies to honesty testing."²³

Integrity tests do not appear to be illegal under the federal Constitution, insofar as there has been no Supreme Court case "implicating psychological, aptitude, or honesty testing."²⁴ The Constitution only offers protection against intrusive state questions where state action is implicated.²⁵ Even when state action is implicated, invasions of privacy can withstand constitutional challenge when the government advances a compelling interest to justify the intrusion.²⁶ A constitutional privacy claim is useless against the thousands of private employers who use integrity tests.²⁷ Further, the Supreme Court's "right to privacy cases" are difficult to apply in this context because they concern intrusion into specific rights, such as procreation.²⁸ "Although the Supreme Court has recognized a right to privacy, legislatures and courts have not extended this right to prohibit personality testing by public employers."²⁹

B. STATE LAW

Statutory bans against integrity tests exist in two states, Rhode Island and Massachusetts; these states include integrity tests in their definition of lie detector tests.³⁰ Oregon considered doing the same, but

¹⁹ Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (1994).

²⁰ Metzger, *supra* note 7, at 17-18.

²¹ *Id.* at 18.

²² 29 U.S.C. § 2001(3) (1994).

²³ Yamada, *supra* note 3, at 1552.

²⁴ Black, *supra* note 10, at 91.

²⁵ *Id.* at 92 (citing *McKenna v. Fargo*, 451 F. Supp. 1355, 1381 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979)). See also Donald H.J. Hermann, III, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph & Personality Testing*, 47 WASH. L. REV. 73 (1971).

²⁶ Black, *supra* note 10, at 91.

²⁷ R.M. O'BANNON, ET AL., HONESTY & INTEGRITY TESTING: A PRACTICAL GUIDE, 22-23 (Applied Information Resources 1989) [hereinafter O'Bannon].

²⁸ *Roe v. Wade*, 410 U.S. 113 (1973), *reh. denied*, 410 U.S. 959; *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bowers v. Hardwick*, 478 U.S. 186 (1986), *reh. denied*, 478 U.S. 1039.

²⁹ Black, *supra* note 10, at 92.

³⁰ R.I. Gen Laws § 28-6.1.1 - § 28-6.1.4 (1194); Mass Gen. Laws Ann. ch. 149 §19b (West 1996).

abandoned the bill because of limited information about the tests.³¹ A Minnesota court refused to include integrity tests within the statutory definition of lie detector test absent express legislative intent.³² Other state courts and legislatures have yet to determine whether their state bans on polygraph tests also include integrity tests.

Some state constitutions explicitly protect their citizens' privacy.³³ Furthermore, some state labor codes extend protection to political activities of employees.³⁴ However, these sources of law only serve to prevent particular questions and are not a means of striking down integrity tests altogether. California's constitution and labor code have been the focus of the two leading cases challenging integrity tests, *Soroka v. Dayton Hudson*³⁵ and *Thompson v. Borg-Warner Protective Services Corporation*.³⁶

C. THE CALIFORNIA CASES

California's constitution states that "All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness and privacy."³⁷ In addition, sections 1101 and 1102 of the California Labor Code prevent an employer from influencing, interfering in, or discriminating on the basis of their employees' political activities.³⁸

In *Soroka v. Dayton Hudson*, a California court held that the Psychscreen, an integrity test used by Target Stores, violated both the state "constitutional right to privacy and [the state] statutory prohibitions against improper preemployment inquiries and discriminatory conduct by inquiring into its applicants' religious beliefs and sexual orientation."³⁹ Target had used the Psychscreen to evaluate applicants for the position of security officer. The plaintiffs in *Soroka* were three applicants who had been offended by the test questions. Of the three, only one, Sibi Soroka, was hired. After exhausting the appropriate administrative remedies, the plaintiffs filed suit, claiming that "the test asked invasive questions that were not job-related."⁴⁰ When the lower court

³¹ Comment, *Prohibition of Pencil and Paper Honesty Tests: Is Honesty the Best Policy?*, 25 WILLIAMETTE L. REV. 571, 594 n.119 (1989).

³² *Minnesota v. Century Camera*, 309 N.W.2d 735 (Minn. 1981).

³³ ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

³⁴ See, e.g., CAL. LABOR CODE §§ 1101 & 1102 (West 1996).

³⁵ 1 Cal. Rptr. 2d 77 (1993).

³⁶ 1996 WL 162990 (N.D. Cal. March 11, 1996).

³⁷ CAL. CONST. art. I, § 1.

³⁸ CAL. LAB. CODE. §§ 1101 & 1102 (West 1996).

³⁹ *Soroka*, 1 Cal. Rptr. 2d at 89.

⁴⁰ *Id.* at 80.

refused to issue a preliminary injunction against the use of the Psychscreen, the plaintiffs appealed, arguing that the test violated the California constitutional right to privacy and the California Labor Code.

The appeals court considered whether the Psychscreen tested for "honesty" or some other quality or characteristic. The court found that questions such as "I believe in the second coming of Christ" and "I feel sure that there is only one true religion" inquired into applicants' religious beliefs.⁴¹ The appeals court found that a question such as "I am very strongly attracted to members of my own sex" intentionally inquired into applicants' sexual orientation.⁴² Target's test rated this response in its socialization trait category which measured individuals' identification with traditional morals as an indication of their propensity to act according to society's rules. The court said that "[p]ersons who identify themselves as homosexuals may be stigmatized as 'willing to defy or violate' their norms, which may in turn result in an invalid test. As a matter of law, this practice tends to discriminate against those who express a homosexual orientation."⁴³

The court found that the religious belief and sexual orientation questions violated the privacy clause of the California constitution.⁴⁴ The court first noted that the privacy rights of applicants were indistinguishable from those of employees.⁴⁵ The court went on to state that an employer must show a compelling interest and a job-related purpose to justify any invasions of privacy.⁴⁶ The court found that Target's interest in emotionally stable employees did not justify questions about religious beliefs or sexual orientation, because Target had failed to show that "a person's religious beliefs or sexual orientation have any bearing on the emotional stability or on the ability to perform a [store security officer's] job responsibilities."⁴⁷

The *Soroka* court also found that the questions inquiring into the applicant's sexual orientation violated the California Labor Code,⁴⁸ which guarantees employees' right to be free from employer coercion or intimidation based on political activities.⁴⁹ Under California case law, the "struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."⁵⁰

⁴¹ *Id.* at 79.

⁴² *Id.* at 88.

⁴³ *Id.*

⁴⁴ *Id.* at 85.

⁴⁵ *Id.* at 83.

⁴⁶ *Id.* at 86.

⁴⁷ *Id.*

⁴⁸ *Id.* at 88.

⁴⁹ CAL. LAB. CODE § 1102 (West 1996).

⁵⁰ *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 487 (Cal. 1979).

Thus, under Labor Code section 1101, discrimination against an employee on the basis of sexual orientation is illegal. Under section 1102, using a threat of loss of employment to coerce employees to refrain from expressing their sexual orientation is also illegal.⁵¹

The *Soroka* court's interpretation of the California Labor Code provides the basis for a case pending in the California courts. In *Thompson v. Borg-Warner*, the employee Thompson's cause of action survived the employer's motion for summary judgment.⁵² When Thompson applied for a job as a security guard, Borg-Warner required that he complete a multiple choice test, the PASS-II D.A.T.A. Survey. Thompson alleges that when he returned the completed test to the employer with question marks next to several of the answers, he was told that the marks were "wrong" and would make the possibility of employment with Borg-Warner unlikely.⁵³

The test asked questions about applicants' views on drug use.⁵⁴ The court found views on legalization of drugs to be controversial and political; a reasonable jury could find that using such questions "to evaluate the suitability of applicants . . . tends to influence, control, or direct the political activities of the applicant pool" and violates the California Labor Code.⁵⁵ Therefore, the court denied Borg-Warner's motion for summary judgment.⁵⁶ Thompson's lawyer contends:

Borg-Warner has come up with a test that discriminates against people who obviously come from a particular political orientation without directly asking about party affiliations . . . [o]ne third of the one hundred questions on Borg-Warner's pre-employment test deal with one's views about corporations and employers. These questions are graded on an "alienation index," which tells the employer whether someone has traditional or countercultural values.⁵⁷

Neither *Soroka* nor *Thompson* make integrity testing *per se* illegal. *Soroka* was settled out of court and *Thompson* is pending. In addition, the courts reasoned that certain questions violated the applicant's right to privacy as well as statutory protections, but they did not go so far as to say that all integrity tests would do so. Although these cases indicate

⁵¹ *Soroka*, 1 Cal. Rptr. 2d at 88.

⁵² *Thompson v. Borg-Warner Protective Serv. Corp.*, 1996 WL 162990 (N.D. Cal. March 12, 1996).

⁵³ *Id.* at *2.

⁵⁴ *Id.* at *9.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Nina Schuyler, *Politics Make Strange Hiring Practices*, CAL. LAW., Mar. 15, 1995, at 57.

that California courts are willing to entertain suits challenging integrity tests, the courts have not definitively decided the tests' legality. While both cases represent a job applicant's first steps in challenging the legality of certain integrity tests, their ultimate significance in the overall debate remains to be seen.

III. POTENTIAL HARMS OF PRE-EMPLOYMENT INTEGRITY TESTING

Unless employers or publishers can prove that integrity tests accurately measure honesty and identify individuals likely to steal, they may unfairly eliminate people from the job selection process. Furthermore, the tests may disadvantage members of a protected class and run afoul of employee protections under Title VII of the Civil Rights Act of 1964.⁵⁸ Integrity tests may overinclude honest people in the dishonest classification. If test results are shared with persons inside or outside the business, applicants may be stigmatized. Finally, the tests may offend people in much the same way as the now illegal polygraph test.

A. INTEGRITY TESTS MAY NOT BE ACCURATE

Employers have a legitimate interest in hiring honest workers. Any test administered with the purpose of identifying honest job applicants is job-related and reasonable, as long as the test does not run afoul of employees' legally protected rights. However, if the tests do not measure honesty, then it is not possible to justify their use as job-related. Integrity tests may actually measure other qualities, such as test-takers' willingness to judge and punish others, and label those test-takers dishonest. Therefore, the first inquiry is whether integrity tests do in fact measure what they purport to measure, i.e., honesty.

An analysis of one exam found that the test measured four factors: self-punitiveness, punitiveness towards others, self-projection, and projection toward others.⁵⁹ On this exam, answers that showed the taker's willingness to give others a second chance resulted in a lower honesty score.⁶⁰ This correlation is spurious; there is no necessary connection between unwillingness to judge others and honesty. A Minnesota nun failed an honesty test because she based her answers on her belief that Christianity espouses forgiveness.⁶¹ Two integrity test critics claim that

⁵⁸ 42 U.S.C. § 2000 *et seq.*

⁵⁹ O'BANNON, *supra* note 27, at 22-23.

⁶⁰ Yamada, *supra* note 3, at 9.

⁶¹ Hanson, *supra* note 18, at 504.

they have found that open-minded people consistently fail honesty tests.⁶²

Employers quickly counter that they are not required to show business necessity or job-relatedness for their employment practices. If integrity tests inaccurately label some honest people as dishonest, the pool of applicants is reduced, but the employer ultimately suffers no harm. Employers must only justify a hiring practice if a court finds that this practice violates a statute or a constitutional right; there is no duty to be fair.

Scholars have questioned the basic premise behind honesty testing, i.e., that there is a trait called honesty that these tests measure and use to predict future behavior. According to an American Psychological Association test developer, "There's a tremendous disagreement about whether you can even measure honesty."⁶³ The Office of Technology Assessment (OTA) questions the predictive value of integrity tests: "It is at least theoretically possible for individuals to be identified as possessing a trait called dishonesty without them necessarily committing theft or other counterproductive acts in the workplace."⁶⁴ The OTA also disputes whether answers accurately gauge test-takers' past behavior and thereby indicate propensity to engage in similar behavior in the future. The OTA noted that whether tests are able to accomplish this "depends in large part on whether *admissions* of past acts are a reasonable surrogate for *actual* past acts."⁶⁵

Publishers argue that the tests do measure honesty. Validation studies exist that purport to statistically confirm that integrity tests identify employees who would have been dishonest with the employer. However, most of these validation studies measure a test's ability to identify the group of honest employees, not its ability to identify all test-takers who are in fact liars or thieves.

The OTA task force criticized each of the various validation methods used in these studies. They found that "concurrent" validation studies comparing integrity test results with polygraph exams were inadequate because the polygraph itself has not been proved valid.⁶⁶ In addition, "contrasted" group studies suffer because "the underlying assumption that convicted felons have attitudes and lifestyles similar (in

⁶² Stephen J. Buastello & Mark I. Rieke, *A Review and Critique of Honesty Test Research*, 9 BEHAV. SCI. & L. 501, 513.

⁶³ Christine Gorman, *Honesty, Can We Trust You? Barred From Using Polygraphs, Employers Seek an Integrity Test*, TIME, Jan. 23, 1989, at 44.

⁶⁴ OTA, *supra* note 5, at 33.

⁶⁵ *Id.* at 34.

⁶⁶ *Id.* at 50-51.

construct) to those of normal job applicants or employees 'who pilfer small amounts of merchandise at work' cannot be substantiated."⁶⁷

The APA Task Force report supported validation studies using self-admissions and confessions and urged that the validity of integrity tests not be measured absolutely but compared with the validities of other procedures that would inevitably be used in their stead, such as unstructured interviews or handwriting analyses.⁶⁸ The APA's position is "that for those few tests for which validity information is available the preponderance of the evidence is supportive of their predictive validity."⁶⁹

Although the APA and the OTA differ in their assessment of these validation studies, both strongly emphasize the need for further independent research.⁷⁰ The few validation studies that exist were conducted by the publishing companies who produce the tests.⁷¹ The APA report notes that "[o]ne serious problem in evaluating proprietary tests is the realization that publishers may have no interest in making negative information available."⁷² The OTA concluded that "[g]iven the paucity of independent confirmation of research results . . . in OTA's review of validity studies . . . the existing research is insufficient as a basis for supporting the assertion that these tests can reliably predict dishonest behavior in the workplace."⁷³

B. INTEGRITY TESTS ARE OVER-INCLUSIVE

Employees are concerned about test-takers who register as false-positives. The test publishers primarily focus validation studies on the test's ability to identify dishonest takers. The result is designed to verify the test's ability to predict accurately that all test-takers above a certain score will be honest employees; it is not intended to predict that all test-takers below that score are dishonest. Thus, validation studies typically do not attempt to measure whether integrity tests are over-inclusive, falsely identifying some honest people with the dishonest group. The possibility of false-positives is even more probable when the cut off score for labeling the test-taker as honest or dishonest is arbitrarily set by employers.

Furthermore, if the tests are as reliable as the publishers maintain, a person who fails to make the "honesty cut" will have a similar score on

⁶⁷ *Id.*

⁶⁸ SCIENCE DIRECTORATE, AMERICAN PSYCHOLOGICAL ASSOCIATION, QUESTIONNAIRES USED IN THE PREDICTION OF TRUSTWORTHINESS IN PRE-EMPLOYMENT SELECTION PROCEDURES: AN A.P.A. TASK FORCE REPORT, 6-7 (1991) [hereinafter APA].

⁶⁹ *Id.* at 26.

⁷⁰ APA, *supra* note 68, at 22; OTA, *supra* note 5, at 49.

⁷¹ OTA, *supra* note 5, at 49.

⁷² APA, *supra* note 68, at 21.

⁷³ OTA, *supra* note 5, at 10.

subsequent tests. The effect of this systematic misclassification may have far-reaching consequences. The OTA noted that “[i]f integrity tests are reliable (in the sense that individuals’ scores do not vary significantly over time), as the test publishers claim, then their use could create a population of persons who are repeatedly misclassified, and systematically denied employment without cause.”⁷⁴

The APA Task Force report discounted the dangers of misclassification, asserting that “any fallible selection procedure will result in potentially worthy applicants being rejected. However, *any* valid selection device will result in fewer false-positive errors than a random or quasi-random procedure such as ‘first come, first served.’”⁷⁵ Publishers point to the simple fact that studies exist to support the validity of the tests and the “lack of convincing evidence that such tests have an adverse impact on female or minority applicants.”⁷⁶ Although there are studies that show that the proportion of false-positives is high, there have been no studies that prove that in practice, those people registering as false-positives are either stigmatized or systematically denied employment opportunities.⁷⁷

C. INTEGRITY TESTS MAY HAVE A HIDDEN ADVERSE IMPACT

Employers argue that there is no proof demonstrating that any of the many integrity tests have an adverse impact. They base their argument in part on publishers’ claims that “honesty test scores have no adverse impact on any of the protected racial/ethnic groups” if administered to all potential job applicants.⁷⁸ However, the publishers’ argument suffers from a fundamental logic fault: it is an argument *ad ignoratium*. Employees’ failure to prove that the tests *do* have an adverse impact on a protected group is not alone sufficient to prove that the tests in fact *do not* have an adverse impact.

While commentators are hesitant to assert the existence of adverse impact without any evidence, both the OTA and the APA reports stress the publishers’ responsibility to be vigilant in preventing this result.⁷⁹ The latter also stress the need for more independent research and an exchange of information that the publishers themselves have collected regarding potential adverse impact.⁸⁰ There is a concern that the tests appear non-discriminatory in part because employers do not disclose that failure to pass the cut-off score is the reason that a job is not offered.

⁷⁴ *Id.* at 13.

⁷⁵ APA, *supra* note 68, at 11.

⁷⁶ Metzger, *supra* note 7, at 26.

⁷⁷ APA, *supra* note 68, at 11.

⁷⁸ Decker, *supra* note 12, at 145.

⁷⁹ APA, *supra* note 68, at 14; OTA, *supra* note 5, at 15.

⁸⁰ APA, *supra* note 68, at 14; OTA, *supra* note 5, at 14-15.

"[T]he widespread adoption of these practices by employers essentially precludes legitimate legal challenges to honesty testing, as most rejected applicants will not be informed of the significance of their honesty test results in the hiring decisions."⁸¹ Most studies which claim the tests do not have an adverse impact are proprietary and are not independently verified.⁸²

The secrecy surrounding honesty tests insulates them from scrutiny.⁸³ A business usually defends itself against a plaintiff's adverse impact charge based on applicant statistics if its hiring record stays within the 4/5ths rule.⁸⁴ Under this rule there is evidence of adverse impact if the hiring rate for a minority group is less than 80 per cent (or 4/5ths) of the majority.⁸⁵ Staying within the 4/5ths rule does not necessarily mean that the tests themselves do not disadvantage members of a protected class or unfairly stigmatize them with lower or failing test results. In contrast to an applicant-statistics approach, a "class-statistics approach uses characteristics of the protected class in general to establish adverse impact."⁸⁶ A class-statistics approach may be more pertinent and revealing in the evaluation of the potential discriminatory effects of integrity tests.

If a test regarded certain social or cultural characteristics of test-takers in a protected class as dishonest, the test would adversely impact members of that class. Suppose, for example, that women taking integrity tests are statistically more prone to give a person a second chance. Some integrity tests score this as a negative characteristic.⁸⁷ In this hypothetical, the tests disfavor a protected class by focusing on a class characteristic having no rational link to dishonesty, thereby erroneously branding a significant portion of this class dishonest. Such discriminatory scoring of responses would leave employers vulnerable to an adverse impact charge under Title VII. However, currently, employers tell job applicants neither their test scores nor how much weight they accord these scores. Without this information, applicants are left with little evidence on which to base legal action.

D. BREACHES OF CONFIDENTIALITY AND STIGMATIZATION

No current law prevents an employer from disclosing integrity test results to other employers.⁸⁸ Sharing test results saves an employer

⁸¹ Yamada, *supra* note 3, at 1565-66.

⁸² *Id.* at 1569.

⁸³ *Id.* at 1566.

⁸⁴ OTA, *supra* note 5, at 69.

⁸⁵ *Id.*

⁸⁶ Black, *supra* note 10, at 112.

⁸⁷ Hanson, *supra* note 18, at 509-10.

⁸⁸ Yamada, *supra* note 3, at 1567.

money if the applicant has been tested previously. One estimate said that "sales of pre-employment data are growing as much as 75 per cent per year for some information companies."⁸⁹ Thus, an applicant may not only be eliminated from the job that required the test but also from future jobs based on that single test score. A shared database has the same effect as systematic misclassification; however, the applicant need only fail one test, not a number of them.

Employers argue that there is no real danger of stigmatization if the tests are kept confidential⁹⁰ and that it is in employers' best interest to do so to avoid common law torts such as defamation. The APA Task Report notes that if applicants do not know that failure of these tests was the reason they were not hired, and if employers keep the records confidential, applicants will not feel a resulting stigma.⁹¹ This view presupposes that employers will foresee the risk of a defamation suit and not share information that an applicant failed a test with other employers. In addition, applicants are unlikely to bring defamation suits since they are not told whether they failed the test, let alone that the results were shared. Thus the employer has little reason to fear a suit and a great incentive to minimize costs through sharing test results.

E. INTEGRITY TESTS ARE OFFENSIVE AND INTRUSIVE

One controversial aspect of the banned polygraph test was that "such testing raised serious privacy issues regarding the questions asked by polygraph examiners."⁹² While few studies have measured participants' offense at integrity test questions, many questions are similar to those posed in the polygraph exam. In addition, many questions "would pose problems in any prospective job interview as unrelated to the job."⁹³

One study examined college graduates who had experience in industries that used honesty tests. It found that 42 per cent considered the tests to be an invasion of their privacy, 26 per cent resented having to take the test, and 33 per cent said that using the test gave a poor impression of the company.⁹⁴ Test-takers generally are not aware of the nature and the weight of integrity tests. The public may respond positively to the idea of integrity tests, not knowing their content or their use. There can be no truly representative public reaction poll to integrity tests until people are fully informed about the issues surrounding the tests.

⁸⁹ *Id.* at 1568.

⁹⁰ APA, *supra* note 68, at 11.

⁹¹ *Id.* at 12.

⁹² Metzger, *supra* note 7, at 17.

⁹³ Decker, *supra* note 12, at 145.

⁹⁴ Anne Marie Yean and Paul R. Sackett, *Pre-employment Honesty Testing: Fakability, Reactions of Test Takers, and Company Image*, J. BUS. & PSYCHOL., Spring 1987, at 253-54.

Publishers are quick to point out that their tests do not provoke the same negative reaction as the physically intimidating polygraph.⁹⁵ While the honesty test is not as physically intrusive, many of the test publishers' claims are based on questions applicants answer after completing the main test. Also, the possibility exists that applicants "who have an interest in 'passing' the test and being hired are not entirely candid in their answers."⁹⁶ Furthermore, applicants' general lack of information about the use of the tests may affect their reaction to the post-exam questions. "An applicant may believe that his or her answers to a question or series of questions is legitimate, but if the answers are then interpreted to make specific conclusions about propensity for future behavior, the applicant may feel that his or her privacy has been invaded."⁹⁷ Test-takers have no doubt concerning the purpose of the polygraph. As long as test-takers have no notice of the purpose of integrity tests and how their scores affect their chance of being hired, there is no way to gauge test-takers' true attitudes towards these tests.

IV. POTENTIAL BENEFITS OF INTEGRITY TESTING

Employers argue that integrity tests are a tool that meet several needs: reduction of on-the-job theft,⁹⁸ efficient management of large applicant pools,⁹⁹ and avoidance of potential liability under the negligent hiring doctrine.¹⁰⁰ The following sections examine each of these claims.

A. REDUCTION OF THEFT

One major reason for using integrity testing is the "premise that test use will result in reduced employee theft."¹⁰¹ The Department of Justice requested a 1977 American Management Association study which estimated that "employee pilfering accounted for between \$5 and \$10 billion."¹⁰² A 1991 source estimates the cost of employee theft may reach \$50 billion per year and that "intangible theft, may run upwards of \$230 billion."¹⁰³ Employers obviously have an interest in hiring workers who are not likely to steal and thus contribute to these increasingly high

⁹⁵ OTA, *supra* note 5, at 71.

⁹⁶ *Id.* at 71-72.

⁹⁷ *Id.* at 73.

⁹⁸ APA, *supra* note 68, at 7.

⁹⁹ OTA, *supra* note 5, at 3.

¹⁰⁰ "While integrity test publishers do not necessarily claim that their instruments can detect potentially violent or hazardous behaviors, they do suggest that firms can point to the use of integrity tests as evidence of a broad strategy of conscientious pre-employment screening." *Id.*

¹⁰¹ APA, *supra* note 68, at 7.

¹⁰² OTA, *supra* note 5 at 20-21.

¹⁰³ Metzger, *supra* note 7, at 13.

losses. They want a reliable method to avoid this costly problem, and integrity tests look like one.

However, integrity testing may not be a simple solution to this problem. Behavior may depend more on situation than on personality: "Employers seeking to improve job performance would achieve better results by changing working conditions rather than by hiring employees with certain personality characteristics."¹⁰⁴ Integrity testing is not the only option. More cost-efficient background checks and improved training of interview personnel could assist in improving the screening process and combat on-the-job theft. In addition, employers could reduce theft after hiring by implementing programs to reduce negative attitudes that contribute to theft. Honesty testing may actually lull employers into a false sense of security. They may feel that they have hired honest workers who need little monitoring.

B. EFFICIENT MANAGEMENT OF LARGE APPLICANT POOLS

Given the large number of applicants, employers desire an instrument that will efficiently assess unknown candidates' qualities and qualifications. Integrity tests measure the elusive quality of honesty in an apparently empirical way. Test-takers are assigned numerical scores which can be used as a cut-off or as a means of comparing applicants. Employers' use of integrity tests is a "manifestation of this emphasis on 'efficiency and quantitative measurement.'"¹⁰⁵

Employers like integrity tests because other means of screening job applicants appear even less satisfactory. Reference checks are futile when past employers refuse to provide any meaningful information for fear of defamation lawsuits. Background checks are very expensive. The average employment interview is not reliable.¹⁰⁶ In addition, publishers claim that the tests do not violate current anti-discrimination laws.¹⁰⁷ Employers who want to screen applicants regard the integrity test as the best available alternative among the various choices.

While employers need effective tools to efficiently manage the large labor pool, their needs are not met if the tool used is fundamentally flawed. The result is merely a random simplification of the hiring process. Simplifying hiring with a test bearing the scientific imprimatur of a publishing company may in reality do little more than reassure employers that there is an independent basis for their decisions. If the tests ultimately do not stand up to independent validation studies, then that reassurance may be misplaced. Viewed this way, integrity tests are noth-

¹⁰⁴ Black, *supra* note 10, at 82.

¹⁰⁵ Yamada, *supra* note 3, at 1563.

¹⁰⁶ APA, *supra* note 68, at 9.

¹⁰⁷ Linowes & Spencer, *supra* note 1, at 607.

ing more than an expensive placebo. Integrity tests are just as arbitrary as removing every third applicant from consideration, but the latter is much less costly and involves no stigma.

C. AVOIDING CHARGES OF NEGLIGENT HIRING

Employers wish to scrutinize job applicants not only as an aid in the selection process but also as a defense against a potential negligent hiring lawsuit. The negligent hiring doctrine imposes a duty of care on employers to reasonably foresee dangerous employee conduct.¹⁰⁸ In a negligent hiring claim, courts must determine whether the employer conducted a "reasonable investigation into the employee's background vis-a-vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee."¹⁰⁹ Employers can fulfill their duty of care by investigating job applicants, thus avoiding liability if the employee commits a tort against another employee or a third party. "[J]udicial scrutiny of hiring practices serves as both an incentive for employers to consider honesty tests and a marketing tool for test publishers."¹¹⁰

The argument that employers will want to use honesty testing as a preemptive defense against negligent hiring charges does not withstand close scrutiny. First, the tests are not designed to identify the violent behavior that often forms the basis of a negligent hiring charge. Second, the existence of an "honest" score on an integrity test has never been used as a defense to a negligent hiring charge.¹¹¹

V. CURRENT POLICY

The debate over integrity tests has ended in a stalemate with neither side able to prove their position. Test opponents cannot demonstrate that the test or its effects are or should be illegal. Test proponents cannot affirmatively show that the tests are valid and non-discriminatory. Both critics and supporters have concluded that more information is needed before making a final assessment.¹¹²

Absent proof that the tests do not achieve their purpose or proof that employees' legally protected rights are being violated, the law has not responded to the legality of the tests. Legislators have neither drafted new legislation to cover integrity testing nor have they included it within

¹⁰⁸ Yamada, *supra* note 3, at 1563.

¹⁰⁹ Cathy A. Shattuck, *The Tort of Negligent Hiring and the Use of Selection Devices: The Employee's Right of Privacy and the Employer's Need to Know*, 11 INDUS. REL. L.J. 2, 2-3 (1989).

¹¹⁰ Yamada, *supra* note 3, at 1564.

¹¹¹ *Id.*

¹¹² APA, *supra* note 68, at 21; OTA, *supra* note 5, at 10.

the definition of polygraph under federal or state law. Courts are reluctant to expand current legal protections to this relatively new pre-employment practice, and plaintiffs who oppose these tests find they lack adequate evidence necessary to prove them illegal under traditional legal theories. While the lack of legal intervention may reflect a hesitance to formulate policy without adequate information, the effect of non-interference is to presumptively side with test supporters.

The current law places the initial burden of persuasion upon the party least able to gather information necessary to persuade. This makes little sense. Although test publishers and the employers who use the tests have slim proof that the tests are fair and legal, they need not offer any proof at all to a court unless the plaintiff has shifted the burden onto the employer in the way the *Soroka* decision suggests. Only after an employee establishes that the tests are invasive under an existing law must an employer justify their use. Only at this point would the individual test's validity and job-relatedness come under judicial scrutiny. Unfortunately for plaintiffs, the instances where they can easily shift that burden are rare and are highly dependent on state laws. The employer and test publisher have the greater opportunity to use the information already in their possession, as well as the means to conduct further studies.

The current presumption that the tests are legal until proved otherwise gives publishers and employers no incentive to conduct further study. If additional study supports proponents' position, then publishers would have spent money to put themselves in the same position they are currently in. If further study supports opponents' position, then publishers will have lost a profitable market. Without independent studies, the publishers will continue to sell the tests and employers will continue to use them.

The current policy of inaction allows employers to use the tests in reliance on test publishers' promises, implied or explicit, concerning the effectiveness and validity of the tests. If the tests have not been independently validated, this reliance may be misplaced. The only clear winner is the test publisher whose tests will continue to be created, marketed, and sold on the basis of their own validation studies.

VI. RECOMMENDATIONS

If the overriding problem in assessing the policy considerations of approving or banning the use of integrity tests is information, then any recommendation that presumptively decides the issue without also providing the incentive for more information will suffer from the same failing as the non-interference policy currently in place. For this reason, state-by-state, case-by-case adjudication and simple bans are not satisfactory options. Legislative notice requirements for test-takers could pro-

vide both information as well as the incentive to conduct further studies. Burden shifting devices under a legislative, administrative, or judicial scheme could place the onus on the test publishers and users to affirmatively establish that integrity testing is valid and does not violate employees' protected rights.

A. RECOMMENDATION AGAINST STATE-BY-STATE, CASE-BY-CASE ADJUDICATION

Case and jurisdiction specific judgments expend a great amount of time, energy, and expense to settle small pieces of a large issue. Courts individually focusing on narrow questions or the legality of a specific test will not contribute to a meaningful resolution of the issue. This approach leaves employers and publishers in doubt about the legality of the tests in general without providing a solution for employees affected by the use of other integrity tests.

Even if states follow California's tendency to invalidate certain types of questions, many tests do not ask questions about sex or religion. In addition, publishers could easily delete the portions of any test that did ask such questions. The question of employer interference in employees'/applicants' political activity is based on a specific California statute and may have little effect outside of California. Even if other states were to follow California's lead, it might be difficult to identify which questions go too far.

Many current tests include questions which may be viewed as inquiring into applicants' political views toward police, drugs, or corporate America. Questions such as "You feel disgusted with the law when a criminal gets off because of some legal technicality" and "There should be a lot more police to control the high crime rate" are arguably political.¹¹³ However, a court deciding legality based on the types of questions asked would accomplish little, because publishers would merely revise the questions. Trying to regulate the entire genre of integrity tests through case-by-case battles over different types of questions is inefficient and fails to address other policy issues advanced by opponents of integrity testing.

B. RECOMMENDATION AGAINST A PRESUMPTIVE BAN ON INTEGRITY TESTS

The broad policy issues involving the fairness of the testing and the appropriate balance between employer and employee interests might best be left to legislatures which can examine all available information and evidence. Two state legislatures were persuaded by arguments against

¹¹³ PSE SELECTION INVENTORY, Form #10163, Personnel Decision, Inc., 1994.

integrity testing and included them in their states' bans on lie detector tests.¹¹⁴ Other states may follow suit, or the federal government may likewise decide to include integrity tests in the national polygraph ban. Alternatively, legislatures could choose to treat integrity tests as distinct from the polygraph and enact legislation that would address the particular problems posed by integrity tests.

This option would definitely aid in certainty. Publishers could not market the tests and employers could not use them. However, if the crux of this policy debate centers on the lack of information, this solution has no more support than the policy of non-action. It would simply be legislation favoring employees against employers, rather than a balanced decision either for or against the use of integrity tests.

C. RECOMMENDED EMPLOYER NOTICE REQUIREMENTS

Federal or state legislation could require that any integrity test that lacks extensive independent verification must provide notice to the employer that states that the tests have not been proved to measure honesty or reduce theft. The notice could also warn that the test may be over inclusive and misclassify honest people as dishonest. Such notice would inform the employer that the claims of the publisher have been verified by no one other than the publisher itself. The market for the tests may well be based on a misperception of what they can accomplish. The disclaimer would enable the employer to make an informed decision regarding the investment into testing services. Information about the test's limitations would allow employers to balance the costs versus the benefits of the test. Market forces might operate to effectively curtail or eliminate the tests if employers question their efficacy.

If the tests are as effective as the publishers maintain, the publishers would then have an incentive to conduct independent validation studies in order to avoid this notice requirement. This way the current uninformed presumption that tests are valid is not reversed in favor of another uninformed presumption. Rather, employers would be on notice and have an incentive to encourage the gathering and dissemination of much needed information regarding integrity tests.

D. RECOMMENDED TEST-TAKER NOTICE REQUIREMENTS

State or federal legislation could be enacted that would require notification of all integrity test-takers of (1) the purpose of the test, which is to determine the takers' propensity to be dishonest, (2) the employer's use of the test, which is to eliminate individuals identified as dishonest, and (3) the fact that the results will not be revealed to the test-taker. This

¹¹⁴ See *supra* note 30.

notice would inform the applicant that his honesty is being evaluated and provide an opportunity to decline to take the test. The integrity test process has seldom been challenged in court because the applicants are generally unaware of the test's use and purpose in the hiring process. The two leading cases, *Soroka* and *Borg-Warner*, would not have gone to trial had the test-takers not had access to information regarding the results and the use of their tests.

E. RECOMMENDED LEGISLATIVE BURDEN SHIFTING DEVICES

The United States Congress could shift the burden of proof from requiring the employee to prove that the tests are invasive to requiring that the employer or publisher prove that the tests are job-related and non-discriminatory. The government could place a national moratorium on integrity test use until the publishers/employers with independently verifiable studies in hand can affirmatively persuade Congress that the tests are free from the many unresolved concerns surrounding their use.

F. RECOMMENDED ADMINISTRATIVE BURDEN SHIFTING DEVICES

Administrative regulation offers a less drastic measure of control. Regulations could require that publishers register their tests. Employers could only use tests that met certain government standards. This rule could serve both as a check against tests which have no independent or persuasive validation and as a check against tests which may identify class characteristics as dishonest traits.

Under this approach, the government could effectively regulate integrity test use by employers. The government might administer licenses to employers permitting the use of the test. Guidelines could be set up regarding the scoring and weighting of test results. Employers could be required to keep records to monitor test-takers who are members of protected classes. The government could also establish safeguards protecting the confidentiality of test results.

This solution would involve a great deal of red tape, but it would have the advantage of protecting employees and of allowing employers who complied with the regulations to use the approved tests. The information used to register the tests and to demonstrate compliance with the guidelines could be gathered, providing detailed information on test results. With this information, the government could develop future integrity test policies.

G. RECOMMENDED JUDICIAL BURDEN SHIFTING DEVICES

If Congress is committed to a more individual and judicial oriented approach, the courts should use a burden shifting device similar to that

used in Title VII claims.¹¹⁵ When a plaintiff claims that a defendant misused an integrity test, the defendant should put forth evidence that the test's use was proper. Specifically, the employer must show that the test's use was job-related and that the test was not used in a discriminatory manner. This would allow plaintiffs to advance more easily to the merits of their cases and challenge the tests within the judicial system.

CONCLUSION

Employers and employees have different interests to protect. Employers would naturally like to know everything possible about prospective employees, especially information about what they are like when not at work. Employers consider relevant any information that will help them select the best workers out of a large applicant pool. Employees' reaction to employers' search for personal information is generally that their private lives are none of the employers' business.

Neither extreme view is helpful. A world where employers cannot determine whether applicants for an accounting position have been convicted of embezzlement or applicants for a day care center have been found guilty of child molestation is a world which would unreasonably leave employers liable for employee actions that should have been prevented. Conversely, a world which sanctions unlimited investigation into workers' private lives would provide no privacy protection and allow employers to make arbitrary assumptions about employees based on events completely outside the scope of work.

The solution appears to be somewhere in the middle. A process that meets the real need of the employer for information that is useful and job-related must be balanced against any violation of the employee's legal rights. Unfortunately, in the integrity test context, thoughtful analysis is frustrated by a lack of reliable information concerning both the benefits and the disadvantages of test use. Any policy regarding these tests must take into account the lack of information available to substantiate the benefits or harms of the tests.

The prospect of a test that can weed out dishonest workers is appealing. However, if employers accept this promise too readily, both employers and employees may suffer. Employers may be lulled into a false sense of security; employees may be discriminated against unfairly. The only certain winners are the test publishers. Employers, employees, courts, and legislators should be wary of accepting publishers' assurances that the tests are valid. A public policy is needed to encourage

¹¹⁵ For an explanation of the *McDonnell Douglas/Burdine* burden shifting approach in Title VII cases, see Black, *supra* note 10, at 107-08.

independent validation of these tests and more employer/employee information on their potential uses and abuses.

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