

To Catch a Thief: The Legal and Policy Implications of Honesty Testing in the Workplace

George Allan Hanson*

Search me, oh God, and know my heart!
Try me and know my thoughts!
And see if there be any wicked way in me,
and lead me in the way everlasting!

—Psalm 139: 23-24

I. Introduction

On June 27, 1988, President Ronald Reagan signed into law the Employee Polygraph Protection Act ("EPPA")¹ and dramatically changed the contours of the employer-employee relationship in the United States. Prior to the EPPA, subjecting employees and job applicants to the trials of the polygraph² had become a common, if much maligned, practice.³ Since the EPPA's provisions

* B.A., Oberlin College, 1988; M.A., Hubert Humphrey Institute of Public Affairs, 1992; J.D., University of Minnesota Law School, 1992.

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1. 29 U.S.C.A. §§ 2001-2009 (1988).

2. The House Report which accompanied the proposed EPPA contained this description:

The polygraph, or lie detector, consists of a pneumograph tube, a cardio-cuff and electrodes which records a subject's blood pressure, pulse, respiration and galvanic skin resistance while a series of questions are posed. Polygraph equipment hasn't changed over the years. The polygraph and other lie detectors assume that there is a direct correlation between deception and physiological responses. A lie detector does not register deception; it registers stress through physiological responses—whether out of anxiety, fear, anger or nervousness.

H.R. Rep. No. 208, 100th Cong., 1st Sess. 3 (1987).

3. The Office of Technology Assessment (OTA) estimates that more than 2 million polygraph tests are given each year. The number of tests given has tripled in the last 10 years. The shocking fact is that the bulk of these tests aren't being given by the FBI, CIA, NSA, or state and local police departments—90 percent of these 2 million tests are given by private business. Approximately three-quarters of these tests are given for preemployment testing. The remaining one-quarter are used for examinations of employed workers.

have been in effect, polygraph testing by private employers has been all but eliminated.⁴ In the eyes of many security and business interests, a valuable tool for combatting a perceived epidemic of employee theft and dishonesty has been lost. But from the perspective of labor advocates and civil libertarians, the anti-polygraph legislation represents a major victory for workers' rights and individual liberty in the traditionally authoritarian employment context.⁵

The EPPA does not signal the end of widespread employer inquiry into the honesty of prospective employees, however. Out of the ashes of the polygraph have arisen new instruments designed to measure a job applicant's veracity and potential productivity. Called "paper and pencil" honesty tests, or, more commonly, "integrity" tests, they represent the new weapon in business' war against internal shrinkage.⁶ Performing essentially

Id.

4. The primary effect of the EPPA is to prohibit polygraph testing as a pre-employment screening device. The Act contains a number of exemptions, however, and polygraph testing by the following employers is permitted: public sector employers; national defense and security employers; employers conducting investigations of economic loss or injury; employers authorized to manufacture, distribute, or dispense controlled substances; and employers providing security services. 29 U.S.C.A. § 2006(a)-(f). The EPPA's exemptions have been the subject of some controversy.

While limiting private employers' use of polygraphs because of its inherent unreliability, the Act establishes a double standard allowing the use of the polygraph under certain circumstances. In other words, passage of the Act amounts to at least partial acceptance of the polygraph. By permitting the use of the polygraph in *any* context, Congress implicitly recognizes its reliability.

Yvonne Koontz Senig, *Heads or Tails: The Employee Polygraph Protection Act*, 39 Cath. U.L. Rev. 235, 260 (1989) (original emphasis).

5. See Terry Morehead Dworkin, *Protecting Private Employees from Enhanced Monitoring*, 28 Am. Bus. L.J. 59 (1990). According to Alan F. Westin of Columbia University, "the notion that individual non-union employees have privacy rights is a 'revolution' that has occurred within the last 25 years." *Columbia Professor Contends Monitoring Does Not Breach Employee Privacy Rights*, Daily Lab. Rep. (BNA) No. 44, at A-7 (March 8, 1989).

6. *Shrinkage* refers to loss of merchandise due to theft and negligence. In the past, shrinkage was primarily associated with shoplifting, but employers have become increasingly convinced that employee theft is at the root of the problem. Annual loss due to shrinkage has been estimated to be in the forty billion dollar range, but the numbers are in dispute. See Michael Tiner & Daniel J. O'Grady, *Lie Detectors in Employment*, 23 Harv. C.R.-C.L. L. Rev. 85, 89-90 (1988). As Ernest Dubester, legislative representative of the AFL-CIO, remarked to the Senate Labor and Human Resources Committee:

The Committee has probably heard, and may hear again, astronomical estimates of the losses caused by internal theft. These estimates vary widely, and seem to depend more on the motives of the estimators than on any objective collection and analysis of credible data.

In fact, a study conducted for the Justice Department by the Na-

the same function with substantially less cost⁷ and a seemingly smaller risk of legal liability⁸ than the polygraph, integrity tests have effectively filled the void left by the outlawed lie detector⁹ and are rapidly becoming the preemployment screening device of choice for many industries. As the nation's economy weathers recession and the labor market tightens further, businesses are likely to rely increasingly on integrity tests in the personnel selection process.¹⁰

The link between written honesty tests and the polygraph is

tional 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."

Statements in Use of Polygraphs in the Workplace Before Senate Labor and Human Resources Committee, Daily Lab. Rep. (BNA) No. 118, at E-1 (June 22, 1987).

Although the problems of employee theft have recently attracted much media attention, little support exists for the claim that internal shrinkage is on the rise. Employment testing critic David Lykken asserts:

There is no persuasive evidence that we are any more a nation of thieves now than in 1776. No one can prove the current losses to employee theft are proportionately greater than during the beginnings of the industrial revolution. There is a problem, but it is an old, familiar problem; there is no emergency.

David Thoreson Lykken, *A Tremor in the Blood* 189-90 (1981). Richard Guilmette, security and safety director of Prime Computer, Incorporated, adds, "I don't believe that employee theft is on the rise. I do believe it's ever-present, however." Steven Jones-D'Agostino, *To Catch A Thief*, 6 Bus. Worcester No. 7, § 1, p. 1.

7. Integrity tests range from six to fifteen dollars per exam (R. Michael O'Bannon, Linda A. Goldinger & Gavin S. Appleby, *Honesty and Integrity Testing* 122-209 (1989)) as opposed to forty to fifty dollars per polygraph (David Elsner, *Hiring Tests Make Policy of Honesty*, Chicago Trib., Aug. 19, 1986, § 3, at 1, col. 3).

8. To date, very few lawsuits have been filed which implicate integrity tests, and publishers claim that written honesty tests are legally permissible under both current federal testing guidelines and judicially recognized rights of employee privacy. See John W. Jones, Philip Ash & Catalina Soto, *Employment Privacy Rights and Pre-employment Honesty Tests*, 15 Employee Rel. L.J. 561 (1990). It should be noted that John W. Jones is vice president of research and development with London House, Incorporated, currently the largest integrity test publishing firm.

9. The prevalence of integrity testing cannot be determined precisely because test publishers are reluctant to reveal their clients, but it has been estimated that five to six thousand companies use integrity tests regularly. O'Bannon, Goldinger & Appleby, *supra* note 7, at 2. The annual number administered to prospective job applicants is estimated at five million. Gilbert Fuchsberg, *Integrity-Test Firms Fear Report Card by Congress*, Wall St. J., Sept. 30, 1990, at B1, col. 4. Integrity testing as a whole is a thirty million dollar industry with a reported seventy percent of the market controlled by three firms: Reid Psychological Systems of Chicago, Illinois; London House, Incorporated, of Park Ridge, Illinois; and Stanton Corporation of Charlotte, North Carolina. *Id.* at B7, col. 1.

10. See Elizabeth M. Cosin, *Anti-Thief Tests May Bar Innocents Too*, Wash. Times, July 9, 1990, at B7; Eric Nelson, *Honesty Tests Help in Rating Job Applicants*, 5 San Francisco Bus. Times § 1, at 14 (Oct. 15, 1990); 29 Discount Store News 135 (May 7, 1990).

apparent, both conceptually and in practice. Integrity tests were originally developed as supplements and as more affordable alternatives to the lie detector.¹¹ Given the recent fate of the polygraph, a compelling concern of both business interests and advocates of workers' rights is whether written honesty tests present an improvement over their mechanical forbearers sufficient to permit widespread use unburdened by legislative or judicial restriction. Specifically, the question becomes whether the rationale employed by Congress in banning the polygraph applies with comparable force to the lie detector's written progeny. Is it reasonable to expect Congress to begin drafting an "Employee Integrity Test Protection Act" in the near future? If not, what makes written devices designed to measure honesty more acceptable to law makers and perhaps immune from legislative action?

Responding to these issues will be the primary focus of this article. Several initial caveats are in order, however. First, although psychological and personality testing has been part of the workplace for decades, the widespread use of written honesty tests in the employment context is an extremely recent development. The literature dealing with integrity testing from a scientific and social perspective is sparse;¹² material addressing the legal implications of integrity testing is almost nonexistent. As a consequence, through the course of this article more questions concerning the efficacy and legality of integrity testing will be raised than can be answered definitively.

Secondly, although the approach of this article is narrow, the issues discussed exist in the broader and exceptionally important context of the social phenomenon of testing in general. From cradle to grave and in virtually every facet of life, Americans are bombarded with staggering numbers of tests.¹³ The profound im-

11. In the late 1940's, noted polygrapher John Reid developed the Reid Report—regarded as the "granddaddy of integrity tests"—and initially validated it against the polygraph. O'Bannon, Goldinger & Appleby, *supra* note 7, at 5. As the abuses of the lie detector began to gain the attention of state legislatures, many integrity tests were developed by polygraphers for use in states where the polygraph was restricted; although today, integrity test publishers try to distance themselves as far as possible from polygraphy. Paul R. Sackett, Laura R. Burris & Christine Callahan, *Integrity Testing for Personnel Selection*, 42 *Pers. Psychology* 491, 496 (1989).

12. Four sources provided the primary practical and scientific background for this article: Paul R. Sackett & Michael M. Harris, *Honesty Testing for Personnel Selection*, 37 *Pers. Psychology* 221 (1984); Sackett, Burris & Callahan, *supra* note 11, at 491; O'Bannon, Goldinger & Appleby, *supra* note 7; and Office of Technology Assessment, *The Use of Integrity Tests for Pre-Employment Screening* (1990). Persons interested generally in the phenomenon of integrity testing are advised to consult these sources in their entirety.

13. See *Test: A Comprehensive Reference for Assessments in Psychology, Edu-*

plications of the examined life for society and individuals are only now being explored by scholars.¹⁴ The use of tests is particularly prevalent in the employment context, and, as one's livelihood is often on the line, the consequences potentially severe.

It is no mystery why standardized examinations are popular with employers. Tests make difficult personnel choices easier and the costly screening process more efficient. Employers are often confronted with large numbers of applicants vying for a limited number of positions. Exam scores, with their aura of authority and scientific objectivity, provide a means and lend a rationality to the troubling process of ranking and categorizing otherwise seemingly undifferentiated groups of individuals. These considerations do not, however, release those who rely on tests from the burden of demonstrating their validity and the obligation of using them responsibly. A dominant theme of this article will be an inquiry into whether this burden has been met by those who market and advocate the use of integrity tests.

Finally, and ironically, honesty tests are potential instruments of discrimination, inequity, and fundamental unfairness in the employment context. Presumably, the purpose of using pre-employment exams is to eliminate irrationalities and biases from the screening process and to rely instead on objective measures of ability and potential job suitability as the determinants of selection. Although employment tests might in some abstract sense be "creatures of a meritocracy,"¹⁵ their historical and contemporary impact on individual rights and human dignity has often been anything but meritorious.¹⁶ In many ways, the growing phenomenon of integrity testing has the dangerous propensity to follow in the

cation, and Business (Richard C. Sweetland & Danile J. Keyser eds. 1991); Tests in Print III (James V. Mitchell, Jr., ed. 1983); The Ninth Mental Measurements Yearbook (James V. Mitchell, Jr., ed. 1985).

A recent example of our society's infatuation with tests and faith in their ability to solve problems is the proposal for a national high school test which is currently gaining momentum:

It would be *the* test, a heavy-duty exam taken by every U.S. high school student in the fall of their senior year.

The scores would be published for everyone to see, school by school, district by district, state by state. Colleges and employers might ask to see an individual's results.

Mpls Star Trib., Feb. 14, 1991, at 1A, col. 2.

14. See Allan Hanson, *Testing in America: The Social Consequences of the Examined Life* (forthcoming).

15. Craig Haney, *Employment Tests and Employment Discrimination*, 5 *Indus. Rel. L.J.* 1 (1982).

16. "Many psychologists regard ability and employment tests as their profession's finest and most significant contribution to social and economic progress. Yet these tests represent a formidable barrier to equal opportunity and racial justice in the workplace." *Id.* at 2.

dubious tradition of the polygraph and other employment tests which became tools of inequality in the workplace. Although test publishers and many employers herald the increase in efficiency and productivity which ostensibly attend honesty testing, these claimed benefits are purchased at the expense of large numbers of individuals being mistreated and misclassified by the testing process. Whether the claimed industrywide advantages of pervasive integrity testing outweigh the human cost, and whether legislative action is warranted, will be addressed in the following pages.

II. Integrity Tests: The "Liar" Detector

We used written honesty tests for a while, but quit when we found that the people we were hiring were just *too weird*.

—Texas business owner¹⁷

A. Definition, Substance and Administration of Integrity Tests

Integrity tests are the product of an unusual hybrid of two distinct employment testing traditions: the polygraph and personality or psychological testing.¹⁸ Employment testing of the latter variety is not a recent phenomenon:¹⁹ the twentieth century has witnessed the development of a number of psychological tests designed to assist employers in making personnel decisions.²⁰ A review of the historical development of employment testing reveals two fundamental facts which continue to have important implications for integrity testing: 1) employment testing had its intellectual origins in a theory of psychology which held that human behavior is determined by innate characteristics and that future performance can accurately be measured or predicted;²¹ and 2) applied psychologists immediately had an economic stake in selling their "science" to industry and in advocating the cost-effectiveness

17. Hanson, *supra* note 14, at 39 (original emphasis).

18. O'Bannon, Goldinger & Appleby, *supra* note 7, at 17.

19. See generally Robert Hogan, B.N. Carpenter, Stephen R. Briggs & R.O. Hansson, *Personality Assessment and Personnel Selection*, in *Personality Assessment in Organizations* (H. John Bernardin & David A. Bownas eds. 1985) and Robert Perloff, James A. Craft & Evelyn Perloff, *Testing and Industrial Application*, in *Handbook of Psychological Assessment* (Gerald Goldstein & Michel Hersen eds. 1984).

20. Office of Technology Assessment, *supra* note 13, at 19. Perhaps the best known psychological test which has commonly been employed for personnel selection is the Minnesota Multiphasic Personality Inventory (MMPI). This is not, however, considered an integrity or honesty test and, in fact, was designed not for employment screening, but to identify types of psychosis. Jeffrey L. Kovach, *Psychological Testing Is Fair . . . True or False?*, *Industry Week*, Jan. 20, 1986, at 46.

21. Haney, *supra* note 15, at 12.

of using employment tests in the personnel selection process.²²

Written honesty tests have been developed outside the mainstream of psychological testing.²³ As a consequence, they are more vulnerable than intelligence and other mental tests to attack from the general academic and scientific community²⁴ and have experienced a consistent credibility problem. Much of the criticism and skepticism can be attributed to the inherent tension and incompatibility between economic self-interest and dispassionate scholarship. According to one critic: "Almost from its inception, then, the employment test was a business product as well as a scientific technique. As with all products, its success depended as much on what buyers thought it could do as on what it could, in fact, do."²⁵

An initial difficulty with approaching and evaluating integrity tests is attempting to define precisely what they are. It cannot be done by title as the words "integrity" and "honesty" rarely, if ever, appear in the published name of these examinations; in fact, neither does the word "test."²⁶ The "Big Three" of integrity

22. *Id.* at 3.

23. Sackett & Harris, *supra* note 12, at 222.

24. While IQ and other psychological tests are certainly not free from controversy, the design and scoring techniques of these tests have been open to the scrutiny of independent researchers and peer review. In contrast, the developers of integrity tests have consistently refused to release their methodology to independent researchers and guarded their scoring keys and algorithms as proprietary information. Office of Technology Assessment, *supra* note 12, at 39.

25. Haney, *supra* note 15, at 6. The phenomenon of "selling science" is reflected by the exaggerated, and occasionally blatantly deceptive, advertising and sales techniques in which test publishers engage. Examples of questionable marketing strategies include:

(1) listing as a researcher's affiliation the high-prestige university at which the researcher received his Ph.D. 30 years before rather than the researcher's current affiliation; (2) claiming to be the only integrity test reviewed favorably in the *8th Mental Measurements Yearbook* after the *9th MMY*, containing favorable reviews of other tests, was available; (3) capitalizing on the layman's interpretation of "reliability" as implying accuracy; and (4) presenting the percentage of detected thieves failing a test as a measure of accuracy, ignoring the issue of how many individuals not detected stealing also failed the test.

Sackett, Burris & Callahan, *supra* note 11, at 523.

According to Dr. Robin Inwald, herself a test vendor: "After over ten years of conducting predictive research studies to see exactly how well we test developers can foretell the future, I am truly amazed and embarrassed by what has been going on in the testing industry." Robin Inwald, *How to Detect Those "Little White Lies" or "Seven Deadly Sins" of Honesty Testing Vendors*, reprinted by permission in *Employee Rel. Weekly* (BNA) at II-7 (Oct. 23, 1989).

26. Test publishers advise clients to avoid telling applicants the exact nature of the examination requested or what it purports to reveal. Calling the integrity test something innocuous like a "questionnaire" apparently makes the test less intimidating to applicants and is thought to reduce the risk of legal liability. See O'Bannon, Goldinger & Appleby, *supra* note 7, at 39.

tests²⁷ are labeled the "Personnel Selection Inventory," the "Reid Report," and the "Stanton Survey."²⁸ Other popular designations for integrity tests include "profile," "review," "blank," and "audit."²⁹ Content-based distinctions between integrity tests and other types of questionnaires and tools of psychological evaluation are also difficult.³⁰ For purposes of this article, an employment examination will be regarded as an integrity test if it has the following characteristics:

- 1) written;
- 2) published and marketed by an independent firm for profit;
- 3) given to prospective or current employees;
- 4) used to determine future employment status; and
- 5) inquires into past acts, attitudes about honesty and theft, and/or general thought patterns which will be used to make a determination of honesty or work productivity.

In their 1989 review of integrity tests, Paul Sackett, Laura Burris, and Christine Callahan identified two distinct types of tests which have emerged:

[O]vert integrity tests, which inquire directly about attitudes towards theft and about prior dishonest and illegal acts, and broader, personality-oriented measures, the purpose of which is not as transparent to job applicants, and which view theft as but one aspect of a broad syndrome of deviant behavior at work.³¹

The other team of researchers who have reviewed integrity tests recently have taken a somewhat different perspective. Michael O'Bannon, Linda Goldinger, and Gavin Appleby distinguish integrity tests by types of questions rather than by the overall approach. Most integrity test questions, they conclude, fall into one of four categories: "[1] admissions of illegal or disapproved activities; [2] opinions toward illegal or disapproved behavior; [3] descriptions of one's own personality and thought patterns; and [4]

27. See *supra* note 9.

28. *Id.*

29. See O'Bannon, Goldinger & Appleby, *supra* note 7, at 124-209.

30. See, e.g., Office of Technology Assessment, *supra* note 12, at 36-41:

While there are still some integrity tests that purport to predict theft alone . . . the majority appear to be marketed as instruments designed to assess a wider range of personality traits and to predict a wider range of behaviors . . . [s]ome items on integrity tests, and the constructs they purport to measure, bear some similarity to items and constructs found in other psychological personality tests . . . One is therefore left with the impression that experts continue to sense important differences between integrity tests and other personality tests, but that the differences are difficult to pinpoint.

Id. at 36-37.

31. Sackett, Burris & Callahan, *supra* note 11, at 492.

reactions to hypothetical situations."³² Tests vary as to which generic category of questions they contain and in what combination.³³

Overall, new tests and updated older versions are attempting to become more sophisticated in their approach and the distinction between "overt" and "veiled-purpose" integrity tests is becoming less significant.³⁴ In addition, the constructs integrity tests purport to measure are becoming less precise; in many cases, "theft" is broadening to include "theft and other forms of counterproductive behavior."³⁵ For example, the Personnel Reaction Blank is designed to measure a construct labeled the "wayward impulse," and other publishers market instruments which purport to measure such constructs as "employee deviance" and "organizational delinquency."³⁶

The best way to understand what integrity tests are is to present a sample of the questions they ask. What follows is not taken from any one integrity test per se, and the questions do not necessarily appear in the same order or format as they appear on an actual test. Responses most commonly are in a True-False format, although some tests present multiple choices, e.g., Agree-Disagree-Uncertain.

ADMISSIONS OF ILLEGAL OR DISAPPROVED ACTIVITIES:

- I have never told a lie.
- I have experimented with drugs in the past but it has never been a problem.
- I have done something which has made me feel disgusted with myself.
- I have taken some things from previous employers, but that was when I was younger.
- I have never lied to someone who trusted me.
- How often do you drink alcoholic beverages?
- Which drugs have you tried and how often?
- I have never been convicted of a crime.
- If you could write a check for everything you have taken from a former employer without paying for it, it would be for \$_____

OPINIONS TOWARDS ILLEGAL OR DISAPPROVED BEHAVIOR:

- Every normal person is tempted at times to steal.

32. O'Bannon, Goldinger & Appleby, *supra* note 7, at 18.

33. *Id.*

34. Office of Technology Assessment, *supra* note 12, at 32. See also O'Bannon, Goldinger & Appleby, *supra* note 7, at 21.

35. Office of Technology Assessment, *supra* note 12, at 33.

36. Sackett, Burris & Callahan, *supra* note 11, at 493.

- Most people are too honest to steal.
- Nearly every person that has a job could figure out a way to steal something without getting caught.
- Most people will take a day off from work and lie about it by saying they were sick.
- Do you think company bosses get away with more things than their employees?
- How easy is it to get away with stealing?
- An employer should look to why an employee steals rather than to call him a liar.
- These days, smoking a marijuana cigarette is about the same as drinking a cup of coffee.
- There is a "little thief" in all of us.
- I believe that most of the people are two-faced.

DESCRIPTIONS OF ONE'S OWN PERSONALITY AND THOUGHT PATTERNS:

- I have been disappointed in love.
- I wish I could be as happy as others seem to be.
- I am not afraid of fire.
- My hardest battles are with myself.
- I am sure I am being talked about.
- I like to attend lectures on serious subjects.
- Eating right is important to my health.
- How often do you blush?
- I never say anything dumb.
- What happened in the past is over and done with.
- My philosophy is best described as:
 - a. The meek shall inherit the earth.
 - b. It's a dog-eat-dog world.
 - c. No one owes you anything.

REACTIONS TO HYPOTHETICAL SITUATIONS:

- You are at a fruit stand. A sign says plums are three for sixty-nine cents. When you go to pay for the three plums the clerk says that the plums are really two for sixty-nine cents. You buy two plums. As you walk out, it is alright to take another plum.
- Your boss docks you ten dollars because as a checker you took a ten dollar bad check. It is morally alright to take ten dollars from the company because they took ten dollars from you.
- Tom is a very good employee. One day, however, he smokes marijuana during his lunch break and returns to work too high to do his job. He should be:
 - a. fired

- b. suspended without pay
- c. given a warning
- Mary was fired from the store because she took a candy bar without paying for it. The store should give her another chance.
- John takes a wrench from where he works intending to bring it back, but doesn't. Is this stealing?
- An employer discovers that a long service, trusted employee has been taking a few dollars out of the cash register every week. Should the employer have him arrested?

The above is only a sample of the dizzying array of questions which confront millions of applicants as they seek employment in a wide range of jobs.³⁷ In all but two states,³⁸ employers are free to give integrity tests without restriction, regulation, or oversight, and may use them at any time during the employment process. Statistics are not available to determine at which stage integrity tests are most commonly given, but it is logical to assume that employers use tests at the beginning of the application process as an initial screening tool or at the end as a final hurdle to cross before being awarded a job. The tests are commonly scored either at the test site by an employer with a scoring manual or are sent to the test publisher for mechanical evaluation.³⁹

How test results are utilized by employers is an important and controversial issue. Test publishers consistently warn against relying exclusively on integrity test scores as the basis for personnel decisions.⁴⁰ Several factors compromise the ingenuousness of this caveat and call into question whether it is followed in practice. First, test publishers make sweeping claims about the scientific validity of their product and the cost-effectiveness of using integrity tests to combat employee theft and counterproductivity. Test marketers are in the business of trying to convince employers that the "scientific" authority of a standardized test is a better means of se-

37. These typically include retailers, banks, manufacturers, food service organizations, and the like. O'Bannon, Goldinger & Appleby, *supra* note 7, at 3.

38. Massachusetts prohibits all honesty exams; Rhode Island prohibits employers from using tests scores as the sole criteria in making hiring decisions. See *supra* notes 73-76, and accompanying text.

39. O'Bannon, Goldinger & Appleby, *supra* note 7, at 41-42.

40. In an effort towards self-regulation, the Association of Personnel Test Publishers issued voluntary guidelines which advise clients to "[t]ell applicants that the test is only part of the hiring process." Claudia H. Deutsch, *Pen-and-Pencil Integrity Tests*, N.Y. Times, Feb. 11, 1990, § 3, pt. 2, at 29, col. 4. See also David Clark Scott, *Truth Quiz on Employment Tests Gains Adherents—and Critics*, Christian Sci. Monitor, Feb. 4, 1986, at 25, col. 1. Although it is certainly in the test publishers' best interests to convince employers of integrity tests' efficacy and to urge that they be widely used, publishers are concerned that excessive reliance on test scores by employers may lead to legal complications and restrictive legislation.

lecting employees than the subjective and imprecise traditions of the interview, reference checks, and intuition. If employers believe these claims, it would be foolish not to rely heavily, if not exclusively, on integrity tests.⁴¹

Secondly, the trait of "dishonesty," which integrity tests purport to identify and measure, is not one which rational employers will typically balance against other considerations.

Imagine a situation where a job applicant presents a strong resume, good work experience, and impressive communication skills. But after taking an integrity test the applicant is classified as a potentially dishonest and counterproductive worker. If the employer has faith in the accuracy of the test, a low score will preempt all other factors. An employer is unlikely to say, "This candidate is impressive; let's give her the job despite the test scores which tell us she's dishonest and will probably steal from the company." Such an applicant will almost certainly be dismissed from consideration, regardless of her strengths in other areas.⁴² This situation has a certain asymmetry: although it is probable that a candidate will be dismissed solely on the basis of a low integrity test score, it is doubtful that a candidate will be hired solely on the basis of a passing score. Passing an integrity test becomes a necessary—but not sufficient—condition of employment.

Finally, the traditional methods of reference and background

41. The president of Reid systems relates a story concerning the dangers of not having faith in integrity tests:

A large corporation ordered pre-employment screening for several of its divisions, one of which was a retail jewelry chain. Sometime later, the jewelry chain suffered within one month the loss of uncut jewels worth \$750,000.

Investigators found the two thieves and retrieved most of the loot. The culprits turned out to be two recently hired entry-level employees, both of whom had failed the honesty test but had been hired anyway—one on the orders of the personnel director, who didn't believe in the tests, and the other on orders of the vice president of operations, who was acquainted with the applicant's mother.

In the management shake-up that followed, both executives lost their jobs.

Harry Bacas, *To Stop A Thief*, 75 *Nation's Business* 16 (1987).

In responding to a survey question which asked "How much do you give these paper-and-pencil honesty test in your hiring process," one Fortune 500 company candidly replied, "Too much—failure can halt the employment process. I have a concern [that] they guarantee mediocrity. Independent personalities tend to get screened out." O'Bannon, Goldinger & Appleby, *supra* note 7, at 49.

42. See *Office of Technology Assessment, supra* note 12, at 42. According to Lewis Maltby, head of an American Civil Liberties Union task force on workers' rights, "If you fail an honesty test, no personnel manager in the world is going to hire you." 69 *Progressive Grocer* 51 (Oct. 1990). Barry Neff, loss prevention director of a chain of twenty-one stores in Houston, concedes, "We're going to pretty well eliminate someone if there is a problem [indicated by the test. However,] [w]e will allow department managers to hire someone who is borderline." *Id.*

checks are growing out of favor with some employers,⁴³ and testing is seen as a reasonable alternative. Overall, despite the warnings of psychologists and test publishers, the realities of the personnel selection process and the importance of "honesty" to any job dictates that integrity test scores will often be determinative.

Scoring keys for integrity tests remain proprietary information of test publishers. Consequently the "correct" answers⁴⁴ to many integrity test questions cannot be known with certainty.⁴⁵ Although it is difficult to speculate on the "right" answers to such vapid inquiries as "I like to attend lectures on serious subjects" or "How often do you blush," the type of general character profile that performs best on integrity tests is known.⁴⁶ The most desirable response to questions concerning the prevalence of dishonesty or theft such as "How many people cheat on their income tax" or "How common is employee theft" is a low number, one reflecting a decidedly naive and rose-colored outlook on the world. When the inquiry turns to the test taker's attitudes towards punishment and the appropriate response to dishonest acts, the best answers are usually the most harsh. Hypothetical situations concerning long-trusted employees who transgress should be responded to with justice both terrible and swift: the applicant should advocate the employee's arrest or at least that the employee be fired immediately. Entertaining notions of Christian charity, forgiving trespasses, and offering the old-fashioned "second-chance" do not fit the ideal employee character profile. The model employee, in the

43. According to Tye Smith, a human resources executive, "[o]ne of the best ways [to hire good people] is go out and do a background check, but lately you just can't get any information. You call a previous employer and the best you'll get is how long the person was there and maybe a salary range. But you won't get anything about work habits or honesty. They're all worried about getting sued." Allan S. Papkin, UPI, Dec. 1, 1990 (B.C. cycle). Labor and employment attorney Robert Fitzpatrick echoes these concerns: "Anyone out there in the real world knows that references will often only give name, rank and serial number because of defamation concerns." Lauren Sinai, *Employment Honesty Tests Move to New Frontiers*, Bus. Ins., Sept. 19, 1988, at 3.

44. Test publishers prefer to call the desired response a "neutral selection device" rather than the "right" or "correct" answer. Kovach, *supra* note 20, at 44.

45. Some of the "correct" responses on integrity tests seem to defy logic. Consider these two questions from a Stanton honesty test:

1. "Do you think people who steal do it because they always have?"
2. "Do you agree with this: once a thief . . . always a thief?"

Kovach, *supra* note 20, at 44. In the minds of the test designers, an "honest" person will answer yes to the first question and no to the second. *Id.* These questions are so nearly identical in substance that the rationale behind this scoring strategy is perplexing at best.

46. See Lykken, *supra* note 6, at 200-03; see also Sackett, Buriss & Callahan, *supra* note 11, at 512.

eyes of test developers, has a "punitive, authoritarian personality combined with a worldview like that of the three monkeys who hear-no-evil, see-no-evil, speak-no-evil."⁴⁷

The logic which propels this personality construct is both obvious and simplistic. As honesty test critic David Lykken articulates, "A thief will be unlikely to recommend harsh punishment for acts he might himself commit and [conclude] that most people are as dishonest as he."⁴⁸ This rationale makes some sense. It may well be true that dishonest persons prefer to consider themselves merely average, normal citizens of a basically dishonest world; and they might predictably advocate leniency in punishing those activities in which they commonly engage. But, as Lykken illustrates, this logic does not work in reverse: "It is not true that most people who recommend leniency are thieves. It is not true that all those who see the world as a sinful place are great sinners themselves."⁴⁹ Clearly this is correct. Not all cynics are crooks, nor are those in favor of giving transgressors a second chance motivated only by the hope that they will be treated lightly if caught.⁵⁰

An unavoidable irony in the search for this personality type is that those who support testing—employers, security personnel, and test designers—would quite likely fail the very tests they advocate. These are persons who believe that dishonesty and theft are prevalent, if not rampant in the workplace. Consequently, such a "realistic" perception of human nature would likely result in an unacceptably low integrity test score. Of course, those familiar with integrity tests would know how to shade their answers in order to receive passing marks. The concern that integrity tests fail the truly honest and pass the cleverest prevaricators will be discussed below, as will the issue of whether a work force consist-

47. Lykken, *supra* note 6, at 201. See also Courtland Milloy, *Looking for a Job? Watch out for the "Integrity Test,"* Washington Post, Oct. 11, 1990, District section, at 1, col. 1; Elsner, *supra* note 7, at 6, col. 1; and Lisa Ellis, *Integrity Test Is A Growing Industry,* Providence Journal-Bulletin, June 18, 1990 § D, at 1.

48. *Id.* at 200.

49. *Id.* at 201.

50. David Lykken relates a story about Sister Terressa, a nun from Saint Paul who took a Reid Report integrity test and failed badly.

But 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.

Lykken, *supra* note 6, at 201. It was testimony from Sister Terressa which partly inspired the Minnesota Legislature to pass a statute purportedly prohibiting all honesty tests. *Id.* at 196. See *infra* note 80 and accompanying text.

ing largely of naive sheep with draconian notions of retributive justice is truly within the best interests of employers and society.

B. *Scientific Validity of Integrity Tests*

At the threshold of the controversy over the scientific validity of integrity testing is whether the construct which integrity tests purport to measure actually exists. The debate focuses on two questions: Is "dishonesty" a distinguishable personality trait?; If so, can it be measured in any meaningful way on a standardized test? Many prominent scientists and scholars respond to both of these queries with a resounding "no," and psychologists are pessimistic about the possibility of predicting honesty in any consistent, general way.⁵¹ Furthermore, even if there does exist an innate personality construct called "dishonesty," it does not ineluctably follow that the trait will manifest itself in thievery and commission of counterproductive acts in the workplace. An individual may be tempted to steal but have the discipline to resist,⁵² just as an applicant may find an allure surrounding some dishonest acts but never transgress themselves.

Conceptually, the issue of self-restraint relates back to the intellectual origins of integrity tests and the deterministic view of human nature which holds that traits determine and predict human action.⁵³ This deterministic model is no longer dominant in the scientific community,⁵⁴ and it cannot be assumed that people steal from their employers because of their genetic make-up or as the inevitable consequence of their beliefs and attitudes towards theft. "Employee theft," argues Lykken, "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."⁵⁵ The debate is not over, but there is a viable possibility that integrity tests are chasing a chimera: that "dishonesty" is a fundamentally immeasurable

51. See Lykken, *supra* note 6, at 200-03; and Office of Technology Assessment, *supra* note 12, at 33. According to Walter M. Haney, a senior researcher with Boston College's Center for the Study of Testing, Evaluation, and Educational Policy, "[s]omething like honesty is an attribute that is not hard and fast. Honest versus dishonest behavior is affected by environment." Fuchsberg, *supra* note 9, at B7, col. 1.

52. As an analogy, consider alcoholics who can, and do, refuse to drink.

53. See *supra* note 21 and accompanying text.

54. See Office of Technology Assessment, *supra* note 12, at 43; and Peter Spear, Steven Penrod & Timothy Baker, *Psychology: Perspectives on Behavior* 574-76 (1988).

55. Lykken, *supra* note 6, at 203.

characteristic.⁵⁶

Allowing for the sake of discussion that "honesty" does exist as a personality trait, the next issue becomes whether integrity tests identify potentially dishonest and counterproductive workers accurately and reliably. There are no easy answers to this question. Test publishers consistently make strong claims about the validity of their products, but several concerns seriously compromise these assertions.

First, the validation studies that are currently available have almost all been either conducted "in-house" by test publishers or sponsored by the testing industry.⁵⁷ Although the results of these studies are all fairly uniform in their favorable conclusions concerning the validity of integrity tests, the simple fact that the overwhelming number of studies reported are conducted by those with an economic stake in the outcome necessarily raises caution flags. One reviewer remarked, "as an analogy, would we consider it good science to publish a review of research on the effects of smoking on health when almost every study was supported by the Tobacco Institute?"⁵⁸

A second problem is that many of the publisher-sponsored studies contain serious methodological flaws which undercut their conclusions.⁵⁹

56. If "dishonesty" cannot be measured accurately or consistently, it seems doubtful that such artificial constructs as the "wayward impulse" or "organizational delinquency" will gain acceptance by the scientific community. Cf. Kovach, *supra* note 20; and O'Bannon, Goldinger & Appleby, *supra* note 7, at 115-16.

57. Sackett, Burris & Callahan, *supra* note 11, at 521. The authors list four factors which have contributed to the lack of independent research into the validity of integrity tests:

First, the proprietary nature of scoring keys for many tests makes independent research difficult, as the researcher must either obtain cooperation from a publisher or obtain a source of funds to pay commercial rates for test scoring. Second, and related, cooperation is hard to obtain from some publishers. Martelli (1988) [T.A. Martelli, *Preemployment Screening for Honesty* (unpublished dissertation)] details the difficulty she had in obtaining cooperation from publishers for her dissertation research. Third, the research incentives for academic researchers often revolve around publication, and publication outlets for validation studies are seen as hard to find. Fourth, integrity testing is not a traditional topic for personnel psychologists, and thus researchers may be reluctant to move into this area of inquiry.

Id. According to Bay State psychologist Gerald Borofsky, people do not see honesty test review as "flashy research." Cosin, *supra* note 10, at B7, col. 1.

58. Sackett, Burris & Callahan, *supra* note 11, at 521.

59. In their 1984 article, Sackett and Harris found that after reviewing validation studies, one reasonable conclusion was that "compelling evidence of the validity of honesty tests has yet to be produced." Sackett & Harris, *supra* note 12, at 241. They cite the following factors:

First, comparisons with polygrapher judgments should be dismissed out-of-hand. A criterion which is seriously questioned in the

Without serious independent validation studies and publication in peer-review journals, it remains impossible to reach a definitive conclusion as to the scientific validity of integrity tests. The two major teams of researchers led by Dr. Paul Sackett of the University of Minnesota reach conclusions that are best characterized as cautiously optimistic. In their 1989 update of integrity test validation studies, the researchers conclude, "a more compelling case that integrity tests predict a number of outcomes of interest to organizations can be made today than at the time of the earlier [Sackett and Harris, 1984] review."⁶⁰

However, the most recent overview of integrity testing in the workplace, the congressionally requested Office of Technology Assessment report, reaches a more dubious conclusion concerning scientific validity:

Given 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, OTA finds that the existing research is insufficient as a basis for supporting the assertion that these tests can reliably predict dishonest behavior

scientific community cannot serve as the basis for meaningful evaluation of new instruments, such as honesty tests. Second, studies relying on admissions of past behavior, obtained with or without aid of a polygraph, are flawed. Correlations in such studies are inflated by social desirability, which both inhibits admissions and heightens honesty scores Also, while past behavior may predict future behavior, the relationship between the two is by no means perfect, thus making the use of these correlations questionable as estimates of how well tests predict future behavior. Third, the time series designs reported to date do not have sufficient control of extraneous factors to attribute shrinkage reduction to the selection of honest applicants. A perceived increase in organizational concern about employee theft is one alternative explanation for the results Fourth, mean test score differences between convicts and applicants are not persuasive evidence of validity or of resistance to faking Fifth, while true predictive studies are the most persuasive, most studies to date are flawed by the fact that only a very small number of employee thieves have been detected.

Id. The above is the skeptical view towards integrity tests. Sackett and Harris also present the perspective of the testing advocate who might respond, "While it is acknowledged that each of the validity strategies used to date has flaws, what stands out is the consistency of positive findings across tests and across validation strategies." *Id.*

In their 1989 update of integrity tests, Sackett, Burris, and Callahan found that an increase in studies has bolstered the claims of test publishers, yet significant methodological flaws persisted. These include lack of a control groups for time series studies, problems associated with the fact that little actual theft is detected, and the possibility that answers to integrity test questions can be effectively faked. *Id.* at 501-19.

60. *Id.* at 520.

in the workplace.⁶¹

The American Psychological Association (APA), which has previously announced no official position on integrity testing, will publish its own review and report on written honesty tests in late 1991. Drafts indicate that, similar to OTA's report, the APA assessment will not draw strong conclusions about the validity of integrity tests pending further research, but will take test publishers to task for their siege mentality as well as their abusive marketing and advertising practices. In addition, the APA will urge integrity tests to conform to the organization's testing guidelines which have previously been ignored by many test publishers.

III. The Future of Integrity Testing: Legal Implications and Policy Concerns

He who would distinguish the false from the true must have an adequate idea of what is false and true.

—Benedictus de Spinoza, *Ethics* (1677)

A. *The Current Legal Status of Integrity Tests*

Through the years commentators have argued that employment screening exams should be declared illegal under a number of theories, including invasion of privacy and right against self-incrimination.⁶²

61. Office of Technology Assessment, *supra* note 12, at 10. From the time of its commission in 1988, during numerous drafts, and culminating with its release in September, 1990, the OTA report was subject to intense criticism and hostility from integrity test publishers:

[P]ublishers of the tests have seen draft versions, and the prospect of a negative assessment has panicked them and others who believe the tests are a valid screening tool. Led by a coalition of disgruntled testing firms, supporters of the exams have been frantically goading government researchers and congressional aides for 15 months to postpone and alter the study.

They've had some success. The report is a year past due and has been rewritten dozens of times So now they are intensifying their fight, launching an angry, pre-emptive campaign to undermine the congressional office's credibility.

Fuchsberg, *supra* note 9, at B1, col. 3.

62. The prospective employee increasingly finds himself subject to unilaterally established personnel selection requirements which, for a great many jobs include polygraph and personality testing. The reliability of the polygraph and the validity of personality testing are highly questionable, but the most serious threat posed by the use of the instrument is the invasion of the personal liberty of the worker subjected to interrogation. Polygraph testing is an attempt to overbear the will of the person subjected to testing by measuring uncontrolled physiological responses, while personality testing poses much the same problem by attempting to reach beyond the conscious, articulated response of the person being examined. It is the character of the interrogation it-

The private employer-employee relationship is an area in which courts have consistently been reluctant to tread, however, and the personnel selection process remains one of the least regulated aspects of the employment relationship.⁶³

To date there has been only a handful of court cases implicating the legal status of integrity tests, and in every instance the courts have held in favor of employers' interests. In *Heins v. Commonwealth Unemployment Compensation Board of Review*,⁶⁴ Bruce Heins, a truck driver, refused to take an integrity test (Reid Report) and was subsequently fired. Heins sued for unemployment benefits on a theory that his refusal to submit to the Reid test did not constitute willful misconduct. After noting that "an employee's privacy rights must be weighed against an employer's legitimate desire to prevent theft,"⁶⁵ the court struck the balance in favor of the employer and denied plaintiff's claim.⁶⁶ In upholding an employer's right to use the integrity test the court found that 1) "employee honesty is a genuine and job-related concern for an employer," and 2) "the fact that the test may not have been of the highest reliability does not necessarily render [e]mployer's request or decision to use it unreasonable."⁶⁷

Apart from being the only case to confront the issue of employer abuse of written honesty testing, *Heins* has unfortunate implications for those who would like to see the courts become more active in protecting workers from unreasonable tests.⁶⁸ It is generally accepted that incumbent employees have more rights and should be afforded greater legal protection from unreasonable employer action than applicants.⁶⁹ If courts allow employers to fire current employees for refusal to submit to an honesty test, then the outlook for prospective employees is bleak indeed.

Despite the increasing expansion of workers' rights in the employment context, except for the statutorily carved protection

self—focusing on past acts and associations, ferreting out attitudes, opinions, and beliefs about sex, politics, and religion—which presents the critical threat to individual integrity by the invasion of personal privacy.

Donald H.J. Hermann III, *Privacy, the Prospective Employee, and Employment Testing*, 47 Wash. L. Rev. 73, 153-54 (1971).

63. Mark A. Rothstein, Andria S. Knapp & Lance Liebman, *Employment Law* 102 (1987).

64. 111 Pa. Commw. 604; 534 A.2d 592 (1987)

65. *Id.* at 608, 534 A.2d at 594.

66. *Id.*

67. *Id.* at 610, 534 A.2d at 595.

68. See *Stanton Corp. v. Department of Labor of N.Y.*, 561 N.Y.S.2d 6 (N.Y. App. Div. 1990) (where the court held the Department of Labor's denial of job services to employers using the Stanton Survey to be unauthorized).

69. Rothstein, Knapp & Liebman, *supra* note 63, at 102.

for race, color, religion, sex, age, national origin, and handicap, employers remain free to select their employees on any basis.⁷⁰ According to Terry Dworkin, "courts recognize employee's right to privacy [but] the parameters of the right are unclear and the courts' movement toward according greater protection is slow. The courts appear uncertain where—and how—to balance employer and employee interests."⁷¹ It seems clear that judges prefer to leave to elected representatives the job of striking a balance between the rights of workers and the interests of business. Not surprisingly, "Congress and the state legislatures are taking the lead in protecting employee privacy."⁷²

Only two states have directly confronted integrity tests through legislation: Massachusetts, which prohibits them completely,⁷³ and Rhode Island, which purports to regulate how test scores are used by employers to make hiring decisions.⁷⁴ The effectiveness of these two statutes has been questioned,⁷⁵ and the implications of enforcement difficulties will be discussed below.

A number of states—including Alaska, California, Delaware,

70. *Id.*

71. Dworkin, *supra* note 5, at 61.

72. *Id.*

73. The Massachusetts statute provides in part:

(1) As used in this section the term "lie detector test" shall mean any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual.

(2) It shall be unlawful for any employer or his agent, with respect to any of his employees, or any person applying to him for employment . . . to subject such person to, or request such person to take a lie detector test

Mass. Gen. Laws Ann. ch. 149 § 19B (Lawyers Co-op Supp. 1991).

74. The Rhode Island statute provides:

No employer or agent of any employer shall either orally or in a writing request, require or subject any employee to any lie detector tests as a condition of employment or continued employment.

Provided, however that written examinations . . . may be used as long as the results of such written examinations are not used to form the primary basis for an employment decision.

R.I. Gen. Laws § 28-6.1-1 (1989).

75. In the case of Massachusetts, test publishers are apparently adapting to the prohibition by marketing tests which do not contain questions concerning dishonesty or lying, and deal instead with performance and dependability. Discount Store News, May 7, 1990. These "customized" tests, however, might be even less valid than traditional integrity tests. Alex Beam, *To Tell the Truth*, Boston Globe, Sept. 7, 1990, Economy section, at 25. Rhode Island's regulation appears symbolic at best with effective enforcement an apparent impossibility. An employer can use integrity tests without restraint as long as other "considerations" are taken into account when making personnel decisions.

Idaho, Iowa, Maryland, Michigan, Minnesota, New Jersey, Pennsylvania, Vermont, Washington, and Wisconsin—have polygraph statutes on the books which contain language broad enough to allow arguments that they apply to integrity tests.⁷⁶ At least one commentator has argued that written honesty tests might be in violation of a Pennsylvania statute which prohibits “mechanical lie detector tests,” since integrity tests are generally scored by machine⁷⁷ and their function as a “substitute polygraph” makes them suspect under the “spirit and intent” of the law.⁷⁸ The court in *Heins* made no reference to the polygraph statute but implicitly rejected this analysis in upholding the legitimacy of integrity testing.

The most important state court case to date, and one with potentially broad implications for the future of integrity testing, is *State v. Century Camera, Inc.*,⁷⁹ decided by the Minnesota Supreme Court in 1981. In 1980 the Minnesota legislature enacted an anti-polygraph statute which provided 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.”⁸⁰ The threshold question before the court was whether the language of this statute was unconstitutionally vague. The court held in the affirmative and, rather than void the entire statute, provided an acceptable authoritative construction:

Accordingly, we construe “any test purporting to test honesty” to be limited to those tests and procedures which similarly purport to measure physiological changes in the subject tested. Thus, we exclude from the current prohibitions . . . 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. With this construction . . . [the statute is not] unconstitutionally vague.⁸¹

The Minnesota court clearly wanted to avoid a chilling of any legitimate employer inquiry into the honesty of prospective or current employees as a consequence of the statute’s broad language.⁸²

76. O’Bannon, Goldinger & Appleby, *supra* note 7, at 113.

77. Decker, *Paper-and Pencil “Honesty” Testing May Run Afoul of Pa. Polygraph Law*, Penn. L.J. Rept., Sept. 23, 1985.

78. *Id.*

79. 309 N.W.2d 735 (Minn. 1981).

80. Minn. Stat. § 181.75(1) (1980) (emphasis added).

81. *Century Camera*, 309 N.W.2d at 745.

82. Whether the court did justice to the legislative history behind the statute is another question, and one, unfortunately, outside the scope of this inquiry.

Century Camera may become a trendsetting case as strong arguments support the same potential conclusion in other states with broad anti-polygraph statutes, particularly where such laws were passed prior to the meaningful development of integrity tests.⁸³

Although several other states are reportedly considering legislation to regulate or ban integrity tests,⁸⁴ there has not been the flurry of state legislation in response to written honesty exams as there was to confront the polygraph in the workplace.⁸⁵

B. *The Employee Integrity Test Protection Act?: An Agenda for Legislative Action*

While the EPPA undoubtedly was an economic windfall for the integrity test industry,⁸⁶ the tone of the legislation and the subsequent congressional request for a comprehensive OTA study on integrity tests has given honesty test merchants cause for concern. Early drafts of the EPPA originally included written honesty tests, but they were exempted while the bill was in committee, presumably to be considered at a later date.⁸⁷ With integrity testing rapidly becoming an industry norm, the recent release of the OTA report, and the ACLU gearing up for a major

83. O'Bannon, Goldinger & Appleby, *supra* note 7, at 113.

84. Connecticut, for example, is currently considering two separate honesty test bills: one which would prohibit any device, including written exams which purport to assess integrity, and a second which would ban the use of any personality test for employment screening on the basis of privacy issues. O'Bannon, Goldinger & Appleby, *supra* note 7, at 113.

85. Congress, however, considered state polygraph legislation largely counterproductive:

Through the years, states have made sporadic efforts to control the use of [lie detectors]. Twenty-two States and the District of Columbia have passed legislation prohibiting their use in the private workforce, while 19 States have attempted to regulate their use. However, these separate laws have not proven effective . . . State regulation, while ineffective, has proven to be a "seal of approval" of the gadget, resulting in the explosive rise to more than 2 million tests given per year.

H.R. Rep. No. 208, *supra* note 2, at 4.

86. According to one test publisher, the EPPA should be seen as a blessing in disguise. Sinai, *supra* note 43, at 3.

87. The House Report explained:

The Committee deleted the inclusion of "written or oral honesty tests" from the definition of lie detector test, which was inserted during subcommittee markup. In doing so, the Committee has returned the definition to its original form to include any examination involving the use of any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other mechanical or electrical device used for the purpose of detecting honesty or dishonesty.

In deciding to strike the language from the definition, the Committee concludes that this issue should be handled separately from the lie detector.

H.R. Rep. No. 208, *supra* note 2, at 11.

lobbying effort,⁸⁸ now may be the time for Congress to consider integrity tests.

Written honesty testing implicates many of the same concerns which prompted Congress to ban the polygraph as a preemployment screening device. These include scientific uncertainty, intrusiveness, invasion of workers' privacy, unfairness stemming from misclassification, and questions about the efficacy of testing with respect to worker morale and productivity as a whole. Although many parallels are apparent, integrity tests and the polygraph are not perfectly analogous in the employment context, and the differences between the two screening devices might be sufficient to inhibit a legislative response of the EPPA's magnitude. Both advocates and critics of employment honesty testing should look to the EPPA and the policy concerns which motivated its passage⁸⁹ as a logical framework from which to explore the possibility of future congressional action in response to the ubiquitous rise of integrity testing in the workplace.

Critics are quick to point out that test publishers have yet to demonstrate conclusively the scientific validity and effectiveness of integrity tests. This fact alone, however, seems unlikely to provide the necessary momentum for congressional action. First, the OTA report on integrity tests was equivocal at best. The study certainly did not reflect the type of strong, negative conclusions contained in the Office's 1983 review of the polygraph⁹⁰ that many observers saw as an integral step towards passage of the EPPA. Even with its lukewarm assessment, the OTA came under heavy criticism from industry and segments of the scientific community that accused the Office of shoddy research and a politically-biased approach. An intensive lobbying campaign launched by test publishers on the eve of the report's release may have had some success in undermining the OTA's credibility.⁹¹

Although the EPPA's legislative history demonstrates a strong hostility towards the polygraph on scientific grounds,⁹² some commentators have concluded that scientific validity was not

88. Laura M. Litvan, *ACLU to Push Workers' Rights*, Wash. Times, Dec. 19, 1990, at C1.

89. See generally Brad V. Driscoll, *The Employee Polygraph Protection Act of 1988*, 75 Iowa L. Rev. 539 (1990); Sening, *supra* note 4, at 235; Charles Cullen, *The Specific Incident Exemption of the Employee Polygraph Protection Act*, 65 Notre Dame L. Rev. 262 (1990).

90. Office of Technology Assessment, *Scientific Validity of Polygraph Testing* (1983).

91. See *supra* note 61, and accompanying text.

92. The House Report noted: "For more than 20 years Congress has been interested in the validity of these tests and every study done since 1963 for the United

the primary, or even a major, motivating factor behind the EPPA. According to Terry Dworkin, "It is obvious that in passing the Polygraph Protection Act Congress was concerned primarily about the threat lie detectors pose to employee privacy and job security. This is shown by the fact that Congress exempted from coverage of the act those positions for which it considered screening to be most critical."⁹³ Given the number of unresolved questions and Congress' unwillingness to ban completely even a largely discredited technology, it is doubtful whether Congress will move to restrict integrity testing solely on the basis of scientific uncertainty.⁹⁴

Public policy concerns, however, present a more compelling rationale for legislative action. Even if integrity tests did work as well as supporters claim, widespread use would inevitably result in the misclassification of many honest and potentially productive workers. As the leading reviewers of integrity test validity explain:

[I]ntegrity tests may be useful for institutional prediction but less so for individual prediction. That is, they may be useful to an organization in that as a group individuals passing the tests may be less likely to steal; nonetheless, the chances of erroneous prediction about a single individual may be quite high.⁹⁵

This quotation frames the essential controversy over integrity testing and reveals that an opinion on their efficacy is largely a matter of perspective. From the standpoint of business, integrity tests might provide a better overall class of employees; from the view of applicants, integrity tests present the strong possibility of unfairly being denied a job. Congress was faced with this same dilemma when considering the EPPA. The polygraph arguably provided a more desirable class of workers, but Congress found the resulting inequitable treatment of individuals too high a price to pay for a marginal increase in organizational efficiency. In testimony before the Subcommittee on Employment Opportunities, the American

States Congress has found that there is no scientific basis for polygraphs as lie detectors." H.R. Rep. No. 208, *supra* note 2, at 6.

The report also quoted with approval a 1965 study from the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations which stated: "There is no lie detector; neither machine nor human. People have been deceived by a myth that a metal box in the hands of an investigator can detect truth or falsehood." *Id.* at 7.

93. Dworkin, *supra* note 5, at 65. See *supra* note 4 and accompanying text.

94. Days after the OTA report's release, Representative Pat Williams, the Montana Democrat who requested the study and who sponsored the EPPA in the House, said he would not sponsor legislation restricting use of integrity tests pending further research. Papkin, *supra* note 43.

95. Sackett, Burris & Callahan, *supra* note 11, at 521.

Psychological Association revealed the fundamental unfairness of relying on an employment test of even relatively high accuracy:

Assume that polygraph tests are 85 percent accurate, a fair assumption based on the 1983 OTA report. Consider, under such circumstances, what would happen in the case of screening 1,000 employees, 100 of whom (10 percent) were dishonest. In that situation, one would identify 85 of the dishonest employees, but at the cost of misidentifying 135 (15 percent) of the honest employees. As you can see, in this situation, the polygraph tester identifies 220 "suspects", of whom 61 percent are completely innocent. It can be shown mathematically that if the validity of the test drops below 85 percent, then the misidentification rate increases. Similarly, if the base rate of dishonesty is less than 10 percent, and it most likely is, the misidentification rate increases. It is obvious that in the screening situation it is a mathematical given that the majority of identified "suspects" are in fact innocent!⁹⁶

For precisely the same reasons, integrity tests also produce an unequal ratio of innocents to offenders. It is likely to be even higher as only the most optimistic consider integrity tests to be eighty-five percent accurate in identifying applicants who will be dishonest.⁹⁷

A related concern is that from thirty to sixty percent of job applicants will typically fail integrity tests.⁹⁸ Test publishers claim that the failure rates accurately reflect the incidence of theft and counterproductivity in the work force.⁹⁹ Intuitively, it appears unlikely that thirty to sixty percent of all job applicants would be counterproductive workers, but test publishers have reasons to design tests with high failure rates. First, employers are far more concerned about the consequences of hiring dishonest applicants than they are about the consequences of denying jobs to honest applicants. Accordingly, integrity tests are designed to err on the side of caution. From the business perspective it is better to fail many innocents than to hire even one thief. Second, it is in the economic

96. H.R. Rep. No. 208, *supra* note 2, at 4.

97. Publishers commonly claim "hit rates" (percentage accurately identified as dishonest) as high as eighty-seven percent. *Bus. Ins.*, Sept. 19, 1988, at 3. *See also* Fuchsberg, *supra* note 9, at B7, col. 1. According to Robin Inwald, a New York based industrial psychologist and author of the Inwald Personality Inventory, the best tests are only seventy to seventy-five percent accurate. *San Francisco Bus. Times*, Oct. 15, 1990, at 14. Even moderate claims of test accuracy, however, have yet to be substantiated by independent reviewers.

98. Sackett, Burris & Callahan, *supra* note 11, at 522. *See also* Peggy Schmidt, *Lie Detector Test in a New Guise*, *N.Y. Times*, Oct. 1, 1989, § 3, at 29, col. 2; Elsner, *supra* note 7, at 1, col. 2.

99. Cosin, *supra* note 10, at B7. The problem with this argument is the extreme insensitivity of integrity tests to degrees of counterproductivity. Although both the office worker who takes home a pen or two and the board member who embezzles thousands of dollars from the company are "thieves," it has not been demonstrated that honesty testing can distinguish between the two.

interests of test publishers to fail large numbers. Many failures means more applicants will have to be considered for each position and this creates a demand for more tests. Moreover, by implicitly stating that one out of every two or three applicants will steal, testing firms perpetuate the belief of many employers that dishonesty is rampant in the workplace. In confirming the employers' worst fears, testing firms expand the market for their product.

Publishers and employers concede the possibility that many good workers will be turned away by integrity tests, but they contend that any screening process is imperfect and is bound to make mistakes. Integrity tests, it is argued, at least put the odds in favor of the employer¹⁰⁰ and also provide a certain objectivity to an otherwise inexact and largely subjective process of interviews and reference checks.¹⁰¹ Failing an integrity test, however, implicates concerns that being denied a job for other reasons do not. If integrity tests are valid against each other (in the sense that people who fail one are likely to fail others) and reliable (in the sense that an individual's score does not vary over time), then there exists the possibility that widespread testing could create a population of persons who are repeatedly misclassified and consistently denied employment without cause.¹⁰²

The danger of systematic misclassification is very real, particularly for persons with relatively few skills and little education who are competing for jobs in industries where integrity testing is standard practice. Job interviews and reference checks may not be infallible but they are less likely to deny employment opportunities consistently to deserving individuals.¹⁰³ Given the personality types that tend to do poorly on honesty tests, a conscientious and honest worker who happens to be aware of the realities of crime and kindhearted in her attitude towards punishment¹⁰⁴ may find herself unable to find work in an industry which relies heavily on integrity tests.

Not getting a job is always disappointing, but being denied for reasons of "dishonesty" or lack of "integrity" have particularly severe consequences. Unlike other aptitude or personality examinations, integrity tests by definition make value-laden character assessments, and being labeled a potential thief by a standardized and ostensibly scientific instrument certainly carries with it an un-

100. See Kovach, *supra* note 20, at 44; Discount Store News, Sept. 3, 1990, at 95.

101. Cosin, *supra* note 10, at B7.

102. Office of Technology Assessment, *supra* note 12, at 13.

103. *Id.*

104. A "high-risk" personality type in the opinion of honesty test designers. See *supra* notes 44-50 and accompanying text.

fortunate social stigma.¹⁰⁵ Test publishers respond that test results do not make accusations but merely make predictions. Predictions of dishonesty, however, have the unfortunate possibility of becoming self-fulfilling: "If low scorers are erroneously denied employment, it can be argued that they are paying an unearned economic penalty; if so, they might rationally conclude that they will be no worse off—and possibly be made better off—by engaging in the behavior for which they have already been penalized."¹⁰⁶

It is true that no personnel selection criteria is perfect, and mistakes are inevitable in any process. The essential problem with integrity tests as opposed to traditional screening methods, however, is that integrity tests institutionalize the errors and magnify their consequences under an unjustified scientific imprimatur.

In addition to the danger of systematic misclassification, employment testing inevitably raises the specter of discriminatory impact. Under the existing judicial parameters of employment law, a screening test is legitimate unless there exists a demonstrable adverse impact on a protected class.¹⁰⁷ Although concerns of discrimination have commonly been voiced, both integrity test proponents and critics appear to agree that the available studies do not support claims of adverse impact.¹⁰⁸ In fact, test publishers proudly assert that most minority groups and women actually appear to perform better than white men.¹⁰⁹ No court case has yet challenged the legitimacy of integrity tests under a theory of adverse impact, but test publishers have been cautioned that, as of yet, the "coast is not clear."¹¹⁰

The OTA's report raises four concerns which caution against prematurely concluding that integrity tests are not discriminatory.¹¹¹ First, the studies which have determined that integrity tests do not burden any suspect class raise serious credibility issues. As discussed earlier, this research has been sponsored and controlled by test publishers. The conflict of interests inherent in

105. Office of Technology Assessment, *supra* note 12, at 66.

106. *Id.* at 66-67.

107. Rothstein, Knapp & Liebman, *supra* note 63, at 201.

108. See O'Bannon, Goldinger & Appleby, *supra* note 7, at 93-102; Sackett, Burris and Callahan, *supra* note 11, at 499; Office of Technology Assessment, *supra* note 12, at 68.

109. O'Bannon, Goldinger & Appleby, *supra* note 7, at 100. According to Ryan Kuhn, president of Reid Psychological Systems, integrity tests might even ameliorate problems of sexism and racism in the hiring process because "[y]ou tend to hire people in your own self-image unless you receive information to the contrary." Milloy, *supra* note 47, at 1, col. 3.

110. O'Bannon, Goldinger & Appleby, *supra* note 7, at 101.

111. Office of Technology Assessment, *supra* note 12, at 68-69.

this situation raises suspicions that if any studies demonstrated a negative racial or gender imbalance they might not have been made public. Second, methodological flaws compromise unequivocal conclusions about adverse impact. These include artificial testing environments, small sample sizes, lack of control groups, and the like. Third, current adverse impact research relies on the "4/5th rule."¹¹² Although this convention has gained wide acceptance by the courts and is endorsed by the Equal Employment Opportunity Commission, it is not the only statistical method for determining the existence of adverse impact.¹¹³ A more stringent approach increases the likelihood that integrity tests fail protected groups at a statistically significant rate. Finally, there is uncertainty over whether adverse impact refers to test scores alone or whether it must be demonstrated that the scores lead to differences in hiring.

The internal logic of integrity tests themselves also leads to some serious questions about fairness and equal treatment of diverse groups. Integrity tests are designed to identify and evaluate different personality types and outlooks on the world. Recall that the ideal personality for purposes of passing an integrity test is authoritarian, punitive, and generally optimistic about human nature and the incidence of crime.¹¹⁴ Common sense seems to dictate that this construct is heavily slanted in favor of individuals from secure, middle to upper class backgrounds—persons whose contact with authority figures such as the police has been positive and constructive. Contrast this with an applicant from a lower-class, inner-city environment, for whom crime and violence have been an inevitable part of life. When such a person is confronted with integrity test questions concerning the prevalence of crime and attitudes towards authority and punishment, the truly honest answers will be damaging for purposes of the test.¹¹⁵ Although having done nothing wrong, this applicant will be labeled high-risk, condemned not by guilty acts but by guilty knowledge.

Another possible bias associated with honesty testing might result from differences in educational background. Test taking is a learned skill, and the more familiar an applicant is with the sub-

112. A convention which "stipulates that a hiring rate for a minority group that is less than 80 percent of the rate for the majority will be regarded as evidence of adverse impact of the hiring system." *Id.* at 69.

113. *Id.* See also, O'Bannon, Goldinger & Appleby, *supra* note 7, at 64. In fact, some courts have not relied on statistics at all to reach a finding of adverse impact. *Id.*

114. See *supra* notes 47-50 and accompanying text.

115. See Sinai, *supra* note 43, at 3.

tleties and intricacies of a standardized test, the better the performance. A sophisticated, relatively well-educated applicant can likely figure out integrity tests and select answers to assure a successful outcome. Those with less education, lower reading ability, and less experience with testing are more likely to be victimized as they attempt to respond honestly. It may be that honesty tests actually recruit the best and most sophisticated liars among job applicants.

The most obvious inequality arising from the widespread use of integrity tests is that they are overwhelmingly given to individuals applying for low-level positions.¹¹⁶ Management and corporate decision makers appear largely immune from honesty testing. The reasons for this are not widely discussed in the literature but seem fairly apparent. First, it is often assumed that individuals with extensive education and privileged backgrounds are persons of integrity; therefore, a standardized character assessment is not required when hiring for high-level positions.¹¹⁷ Second, taking an integrity test is a potentially insulting and demeaning experience, and businesses are reluctant to offend their more valued employees. There is an unavoidable irony in this inequity. It is in those places where integrity is most needed and dishonesty most destructive that these types of tests are conspicuously absent. This same inequity existed when the polygraph was the honesty assessment device of choice and Congress made plain the inherent unfairness of a situation where those with the power to do the most harm are, by virtue of status, immune from examination:

The National Institute of Justice estimates that securities fraud, corporate kickbacks, embezzlement and insurance fraud cost employers three times the amount of loss than employee pilferage. However, corporate management which is usually responsible for these types of thefts is not subjected to lie detector tests, while the hourly employees are most likely to be subjected to testing. In fact, the vast majority of the corporate management has never taken a lie detector test.¹¹⁸

Overall, the inaccuracy and potentially offensive nature of integrity tests make them suitable only in situations where large numbers are being screened and the costs of applicant alienation and misclassification are considered to be low.

While integrity tests may, for the moment, be free from narrowly defined judicial protection of privacy, they do implicate notions of individual dignity and ethical concerns which could inspire

116. Investors Daily, Nov. 21, 1990.

117. Recent experiences with the likes of Ivan Boesky, Michael Milken, and Charles Keating might prompt a rethinking of this assumption.

118. H.R. Rep. No. 208, *supra* note 2, at 7.

legislative action. During the debate over the EPPA, a recurring theme was the polygraph's incompatibility with our nation's traditional values. "Our Constitution," commented the House Report, "presumes that an individual is innocent until proven guilty. The polygraph abuses that principle because it requires one to prove one's innocence."¹¹⁹ Integrity testing also does substantial violence to the notion that persons are presumed innocent. Employers who use integrity tests implicitly assume that many applicants are dishonest, and the exam becomes in effect a means for applicants to demonstrate their self-worth and remove suspicion.

Test advocates commonly respond to these concerns by asserting that integrity tests are considered inoffensive by applicants,¹²⁰ and, in any case, no one is forced to take the test. It is true that the majority of integrity tests scrupulously avoid asking questions which might be perceived as highly personal or intrusive. Attitudes about sex, religion, and other delicate areas generally are not probed, and an applicant is unlikely to be offended by the substance of the inquiries.¹²¹ What is offensive and what few applicants fully realize is the extent to which an individual's fate is determined by a capricious technology and the strong possibility that employment opportunities will be denied unfairly.

The argument that "consent" legitimizes the testing process is also suspect. If the concept of "consent" is to have any vitality at all it must reflect an understanding of the consequences of one's action and must also be free from even a hint of coercion. Employers do not tell applicants that their tendencies to lie, cheat, and steal are under examination; rather the common practice is to play down the significance of the integrity test by referring to it as a "questionnaire" which will "supplement the application." Applicants may not protest the exam, but it cannot fairly be said that

119. *Id.* at 5.

120. Recent surveys do not necessarily support test publishers claims, however. The Equifax Report on Consumers in the Information Age found that fifty-five percent of Americans believe it is appropriate for a job applicant to take a written honesty test. When the same question, however, was posed to human resource executives—persons who are more familiar with integrity testing and its potential abuses—only thirty-eight percent thought written honesty tests were appropriate. *Illegal Activities Viewed as Fair Basis for Denying Job, But Not "Lifestyle" Matters*, Daily Lab. Report (BNA) No. 113, at A-13 (June 12, 1990). In a separate survey, only one in five human resource executives responded that privacy concerns "are outweighed by an employer's desire to use medical or honesty testing." *Attitudes About Employee Hiring*, Christian Sci. Monitor, April 3, 1990, at 8, col. 1.

121. In many cases the questions posed are not so much intrusive as trivial. A question from the Beta File, published by General Index Incorporated, asks, "Have you ever made a mark on the spaces marked 'For Official Use Only?'" David Elsner, *Honestly, Reporter Could Pass Some of These Tests*, Chicago Trib., Aug. 19, 1986, § 3, pt. 6, at C6, col. 3.

they are consenting to have the substance of their character evaluated by a twenty-five minute, multiple choice test. In addition, the procedures of integrity testing are inherently coercive. As David H.J. Hermann III explains, "the unequal bargaining position of a prospective employee in face of the economic necessity of employment, and in face of the widespread requirement of submission to testing necessarily removes that voluntary element which is crucial to the concept of consent."¹²²

A related aspect of consent concerns the test takers privilege to refuse to answer a given question. The polygraph was criticized as intrusive because, once connected to the machine, a subject was denied this recourse; in effect, the subject's physiological response answers for him.¹²³ Although an individual taking an integrity test retains volition and may refuse to respond to a question, the motives of such action are undoubtedly viewed as suspect by test administrators and will probably result in a lower score.¹²⁴ If an applicant is serious about getting the job, it is wise to answer all the questions. As with a polygraph interrogation, no response speaks volumes in the eyes of employers.

A final inequity stemming from integrity testing which may create concern among policy makers is the insensitivity of integrity tests to the reformed character. Most integrity tests at some point during the exam ask directly whether the applicant has ever stolen from a previous employer. Responding affirmatively to such a question is a sure way to remain unemployed.¹²⁵ Test designers are convinced that prior acts are the best predictor of future behavior.¹²⁶ While there is undeniably a certain amount of validity in this assumption, it is also true that people are able to recognize mistakes and mend their ways. An individual with a history of

122. Hermann, *supra* note 62, at 137.

123. The compromise of human dignity in the polygraph process is the deprivation of the individual's free will in deciding when and under what conditions his thoughts may be disclosed. Once the polygraph device is engaged and the process begun, physiological responses are recorded continuously throughout the interrogation, regardless of whether the subject's responses are verbalized. Thus, an individual's silence to a particular question he chooses not to answer may provide evidence of 'truth' or 'deception,' depending on how the examiner interprets the data. The individual literally cannot choose those questions to which he will offer a response since he necessarily responds to all. The individual thus becomes an object, stripped of volition, subject to a probe of his essence. It is this process—a process designed to measure uncontrolled physiological responses—that overrides the individual's free will, constituting an egregious affront [sic] to human dignity.

Christine M. Wiseman, *Invasion by Polygraph*, 32 St. Louis U.L.J. 27, 33 (1987).

124. Dworkin, *supra* note 94, at 73.

125. See Elsner, *supra* note 7, at 1, col. 3.

126. Office of Technology Assessment, *supra* note 12, at 34.

wrongs who has truly reformed is faced with an inescapable Catch 22 when confronted with "Did you ever steal" type questions. One can be honest and fail the honesty test, or one can compromise a new commitment to integrity, lie, and pass the exam.

Ironically, the integrity of integrity testers themselves is often lacking. The interviewer's manual which accompanies one popular integrity test consistently advises employers to engage in blatantly deceptive and insincere interview tactics. The manual contains this piece of advice when the issue of prior convictions comes up in an interview:

Many times when inquiring about convictions the applicant will say something like "I was arrested once for breaking into a house, but it was dismissed because of insufficient evidence." The interviewer should smile and say, "They did not have enough on you, huh, Tom?" and wait for his response. The interviewer can readily tell by the subject's behavior whether or not the applicant committed the crime.¹²⁷

When the applicant's educational background is in question, the manual urges the interviewer to ask about attendance records but to "minimize the importance of attendance by saying something like 'I always found something better to do than go to classes, how about you?'"¹²⁸ The test publisher attempts an even more obvious "setup" of the applicant on the written part of the application. One section, prominently labeled as "optional," inquires into an applicant's past wrongful activity and associations. The instructions to the test taker assure that this section may be left blank if the applicant does not wish to answer, but the test administrator's manual cautions that anyone failing to respond in this section should be viewed with suspicion as "probably having something to hide."¹²⁹

Although other test publishers may not believe that entrapment and deceit are the best means to screen for honest workers, the examples above do give insight into the mindset of at least some of those who market honesty tests.

The impact of integrity tests on workplace productivity and employee morale is another area of potential concern for legislators. Test publishers make their living by convincing businesses that integrity testing is the most cost-effective way of responding to employee theft and counterproductivity. But a thoughtful cost-benefit analysis of widespread testing for honesty might generate a

127. Due to confidentiality concerns, the author is unable to reveal the identity of this interviewer's manual. A copy, however, is on file with *Law & Inequality*.

128. *Id.*

129. *Id.*

different conclusion. Many commentators have expressed the idea that employee theft and dishonesty is as much a management problem as a personnel problem.¹³⁰ One compelling criticism of integrity testing is that it deflects attention from more effective measures to counter theft and dishonesty such as promoting a healthy, supportive, and constructive work environment.¹³¹ An employer might succumb to the rhetoric of publisher's claims and rely on the panacea of preemployment screening to solve personnel problems rather than spending the time and energy in improving worker morale. Indeed, morale is likely to be adversely affected by honesty testing because such testing initiates the employment relationship on a suspicious and confrontational note. Workers annoyed at the test and the assumption that employees are dishonest may well live down to those expectations.

Overall, a serious argument can be made that integrity tests are no better than polygraph screening. They can be abused by employers, are potentially biased in effect, and will inevitably result in a great number of persons being treated unfairly. It is not, however, a foregone conclusion that Congress will respond to integrity testing with the same zeal that propelled passage of the EPPA.

Although the validity of integrity tests remains unresolved, it can fairly be said that, as a preemployment screening device, written honesty exams have not been discredited by the scientific community on the scale of the polygraph. Definitional problems also present a formidable barrier to drafting of broad legislation. There is no universally accepted criteria which set integrity tests apart from other, more accepted types of psychological and personality tests.¹³² In addition, as the Massachusetts experience demonstrates, test publishers have already proved to be adept at changing the format of their product in order to avoid legislative restriction.¹³³

130. Office of Technology Assessment, *supra* note 12, at 77-78.

131. *See id.* at 78, note 39. A three year study conducted by the University of Minnesota sociology department found that "those employees who felt that their employers were genuinely concerned with the worker's best interests reported the least theft and deviance." By contrast, when employees felt exploited by the company or their supervisors, they were most likely to commit hostile acts against the organization." Bacas, *supra* note 41, at 16.

A variety of methods are at the disposal of employers to combat internal theft, and concentrating efforts on pre-employment screening may not be the most effective strategy. *See e.g.*, Annette Kornblum, *Some Customers Are Always Wrong*, N.Y. Times, June 10, 1990, § 6, part 2 (Business magazine), p. 57; and Courier-Journal, Feb. 13, 1989, § B, at 10.

132. *See supra* note 26-30 and accompanying text.

133. *See supra* note 75 and accompanying text.

Finally, and perhaps most importantly, written honesty tests do not generate the same intense emotional repugnance that strapping people to a lie detector machine evinces. There are good reasons for this. Integrity tests do not violate an individual's physical integrity as does the polygraph. Nor do written exams depend upon the subjective conduct of an examiner, as the questions asked are standardized and objectively scored. Generally, Americans are desensitized to written exams, and, while the unfortunate impact of integrity tests may eventually touch many more people than the polygraph ever did, they are decidedly more acceptable in the way they are administered.

V. Conclusion

We are entering the age of the infinite examination, and of compulsory objectification.

Michel Foucault, *Discipline and Punish*

The growing phenomenon of screening job applicants through integrity testing presents policy makers with a unique quandary. Attitudes will likely vary according to the scope of one's perspective. From a macro view, integrity tests can be seen as a valid organizational tool designed to create a more honest class of employees. From a micro view, integrity tests are potentially pervasive and insidious instruments of bias, intrusiveness, and fundamental unfairness to individual applicants. Inevitably, the reconciliation of these two standpoints will involve the balancing of employers' legitimate interests with the right of applicants and employees to be treated with equity and dignity. Whether Congress will strike another "blow for fairness" and send integrity tests the way of the polygraph remains to be seen. The general issue of testing in the workplace is a problem Congress will not be able to ignore, however, and how policy makers approach integrity testing will likely be an important part of the shifting parameters of the employer-employee relationship in the years to come.

When Congress confronts integrity testing and weighs the delicate balance between the legitimate interests of business and the individual rights of workers, it would do well to consider the ethical and social implications of a society governed extensively by examinations. As Justice Douglas warned in his prescient dissent in *Osborn v. United States*:¹³⁴

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times

Secret observation booths in government offices and

134. 385. U.S. 323 (1966).

closed television circuits in industry, extending even to rest rooms, are common Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex and the like

Polygraph tests of government employees and of employees in industry are rampant. The dossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified.

These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of a man's life at will.¹³⁵

In many ways, the demands of thoughtful evaluation and responsible application of information have been outstripped and overshadowed by technological advances in the accumulation and processing of data. Integrity testing in the workplace is only one aspect of this general social phenomenon but it asks the inevitable question: Is it truly in the best interest of society to allow the power of deciding what is true and what is false—and who is worthy and who is not—to become the proprietary information of those in authority?

135. *Id.* at 341-43 (Douglas, J., dissenting) (footnotes omitted).

