INTRODUCTION

The costs of making bad hiring decisions and the difficulties of getting meaningful information from reference checks of prospective employees have led many employers to use personality tests as part of their hiring process. Employers choose from a wide variety of tests in an effort to both weed out job candidates with undesirable traits, such as dishonesty, or tendencies toward violence or tardiness, and to judge the "fit" between the
prospective employee and the job by seeking to identify prospective employees possessing personality traits likely to predict success in the job in question. Since the development of the first modern personality tests in the early part of this century, personality assessment has grown to a $400 million-a-year industry. While some employers are convinced that personality tests are akin to astrology and tell no more than an interviewer could learn during a standard interview, other employers swear by them and are convinced that they are hiring better workers as a result of their use.

The widespread use of personality tests as a means of determining which employees to hire raises a number of issues, ranging from the validity and reliability of the tests to concerns about invasion of privacy and discrimination against minorities. These issues raise the question whether the benefits of personality tests outweigh the costs of employing them. This article explores that question, considering whether personality tests are effective hiring tools, as well as the privacy and discrimination concerns implicated by their use. Neither of these concerns has been adequately addressed by the law, which does very little to regulate the use of personality tests.

2. Although I focus on the use of personality tests in the hiring process, such tests are also being increasingly used in the workplace on existing employees, for example, to balance teams and to improve cooperation and communication among co-workers. Jane Adler, Personality Tests Find Fans at Smaller Firms: Why 'Two' May Be Nicer Than 'Eight', CRAIN'S CHI. BUS., Feb. 14, 2000, at SB4, available at 2000 WL 8128016. See also WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN 174 (1956) (describing the significant use of personality tests to "check up" on existing employees, as early as the 1950's). Although testing for these purposes raises some of the same issues and concerns discussed in this paper, my focus is limited to the use of personality tests as a pre-employment tool. Employers are also turning to other aids to assist them in hiring the right employees. For example, there has been an increase in the use of graphology (handwriting analysis) as a means of selecting employees. See Julie A. Spohn, The Legal Implications of Graphology, 75 WASH. U. L.Q. 1307, 1307 (1997) (noting the increase in the use of graphology by American employers in making employment decisions). There is also increasing use of tests of physical capacity for jobs with physical demands. See John S. O'Connor & Carlene Warner, PERSONNEL L., May 1, 1996, at 1, available at 1996 WL 9819935 (stating "[t]he use of pre-employment physical capacity tests for jobs with significant physical demands is becoming increasingly necessary as a way to address the growing problem of worker injury"). Concern has also been expressed by some that employers may use information from genetic testing to screen out potential employees who have genes linked to certain medical conditions. See Paul Steven Miller, Is There A Pink Slip in My Genes? Genetic Discrimination in the Workplace, 3 J. HEALTH CARE L. & POL'Y 225, 232 (2000) (citing surveys documenting the growing public concern over the use of genetic information for discriminatory purposes). The use of hiring tools other than personality tests, however, is beyond the scope of this article.

3. Stephen F. Befort, Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place, 14 HOFSTRA LAB. L.J. 365, 403 (1997) ("Personality tests are largely unregulated by statute.").
I. THE USE OF PERSONALITY TESTS IN THE HIRING PROCESS

A significant number of employers make use of personality tests as a means of screening job applicants. Although personality tests have been around for a long time, their use dramatically increased after 1988, when federal law banned the use of polygraphs by employers.

There are several factors that explain the increasingly widespread use of personality tests. First, bad hiring decisions are costly in several respects. Theft (directly) and drug use (indirectly in terms of absenteeism, sickness, etc.) cause employers to suffer significant economic losses. Thus, the ability to judge an applicant's honesty or to forecast the

4. See Kimberli R. Black, Personality Screening in Employment, 32 AM. BUS. L.J. 69, 69 (1994) (citing a survey of 208 companies showing that forty-six percent of employers use some form of personality testing); Robin Kamen, Psych Selection, I. BUS. STRATEGY, Mar.-Apr. 1997, at 22 (stating that because standard interviews and tests do not give employers "a close look inside the candidate's head," personality tests are "a rapidly expanding trend in hiring practices"); Carla D'Nan Bass, Personality Tests Increasingly Popular Among Employers, KNIGHT-RIDDER TRIB. BUS. NEWS, Dec. 13, 1999, available at 1999 WL 28716660 (reporting that the Society For Human Resources Management reported in 1999 that twenty percent of its members use some type of personality test); Testing Measures Up for Quality Control, 74 HR FOCUS 2, 2 (Oct. 1997) (finding that nineteen percent of employers use personality measurements), See also 1999 AMA Survey on Workplace Testing, MGMT. REV., July 1, 1999, at 44 (citing 1999 annual survey results showing that forty-six percent of employers do some psychological testing).

5. Personality tests were used by the military during World War I to try to identify soldiers who might panic on the battlefield. Kamen, supra note 4, at 24. Indeed, the first modern personality test was developed to help the Army identify prospective soldiers likely to experience shell shock. Margaret Talbot, The Rorschach Chronicles, N.Y. TIMES, Oct. 17, 1999, at 28-29. That test was the Woodward Personal Data Sheet, an objective test designed to identify psychopathology. See Black, supra note 4, at 71.


7. A 1977 American Management Association study estimates that the direct cost of employee theft was between five and ten billion dollars; a 1991 study puts the cost closer to fifty billion dollars. Quentin Collin Faust, Integrity Tests: Do They Have Any Integrity, 6 CORNELL J.L. & PUB. POL'Y 211, 224 (1996); see also David C. Yamada, The Regulation of Pre-Employment Honesty Testing: Striking a Temporary(?) Balance Between Self-Regulation and Prohibition, 39 WAYNE L. REV. 1549, 1563 (1993) (citing a U.S. Chamber of Commerce estimate that more than forty billion dollars per year are lost due to employee theft).

likelihood that an employee will engage in substance abuse would be useful. Similarly, the fear of legal liability for negligent hiring or sexual harassment causes employers to undertake screening designed to identify emotional disorders or to predict whether a job applicant has a tendency towards violence or other harassing behavior. This fear, and the consequent interest in screening, has been spurred by the staggering increase in the incidence of violence in the workplace. Finally, replacing

9. See Shawn M. Mikulay & Richard D. Goffin, Measuring and Predicting Counterproductivity in the Laboratory Using Integrity and Personality Tests, EDUC. & PSYCHOL. MEASUREMENT, Oct. 1998, at 768 (describing the recent trend in testing to "concentrate on the selection of applicants who are least likely to engage in counterproductive behavior"); Michael Delikat & Rene Kathawala, Personality and Aptitude Tests: Insurance Against Hiring Mistakes or Invitation to Litigation?, MANAGING OFFICE TECH., Mar. 1998, at 16 (stating that with the decreasing labor supply and the increasing cost of attracting good workers, employers are turning to personality tests "to predict the existence of potentially counterproductive work behavior").

10. See Befort, supra note 3, at 372 (describing the fear of monetary liability due to negligent hiring as the most significant factor contributing to increased pre-employment testing); Sabrina Jones, Durham, N.C., Charter-Bus Company Requires Thorough Driver Screening, KNIGHT-RIDDER BUS. NEWS, Mar. 14, 2000, available at 2000 WL 16485672 (noting that it is easier to weed out potentially unqualified job applicants than to face suits for negligent hiring); Kamen, supra note 4, at 27 (citing General Counsel and Vice President of Research at Reid Psychological Systems to the effect that many employers give personality tests as a precaution against negligence suits, out of the belief that the failure of tests to detect violent tendencies will provide employers with a defense to a claim of negligent hiring). Companies that market personality tests feed employers' fears. The website of one company that sells pre-employment testing services, in a section discussing "Legal Issues Supporting the Use of Pre-Employment Testing," states "[e]mployers have been forced to defend an ever increasing number of negligent hiring lawsuits that seek redress for crimes committed by their own employees. Those crimes range from rape of a customer in her home by a pizza delivery driver to assaults, homicides, and theft against co-workers and customers." Saterfiel & Associates, Legal Issues Supporting the Use of Pre-Employment Testing, (Mar. 2001), at http://www.saterfiel.com/legal.htm.

11. See Kay Lazar, Employers Test with a New Attitude - Controversial Questionnaires Screen Applicants for Hire Purpose, BOSTON HERALD, Apr. 18, 1999, at 3, available at 1999 WL 3395714 (stating that employers rely on having performed a test as a defense to suits alleging sexual harassment to try to demonstrate that they did their best to avoid hiring potential sexual harassers); Vicky Uhland, Employers Using More Tests: Psychological Profiles Help Them Hire a Good Fit, DENVER ROCKY MOUNTAIN NEWS, Feb. 13, 2000, at 1J, available at 2000 WL 6586978 (citing a Vice President of a workplace testing company, who stated, "employers are just realizing they can't afford to hire some jerk who's going to harass women on the job").

12. See Barford & Tseng, supra note 6, at 76 (noting that violence in the workplace has "reached epidemic proportions in the United States"); Befort, supra note 3, at 373 (describing the increased incidence of workplace violence). Additionally, events like the EgyptAir crash last year, which was attributed to pilot suicide, prompt some people to think that greater applicant testing might be desirable. See Rosemarie Maldonado, Who Are You Really?, Can Tests Tell?: Behavioral Profiling Make Inroads in Financial Firms, INVESTMENT NEWS, Apr. 17, 2000, available at 2000 WL 9430236 (noting that the EgyptAir crash prompted widespread calls for increased psychological testing of job applicants).
employees is costly, encouraging employers to use personality testing as a means of reducing turnover. Recruiting costs—including costs of interviewing and processing costs—are high, as is the cost of training and re-training workers. According to one estimate, the average cost of replacing a bad hire is 1.5 times the worker’s salary and benefits, meaning that it could cost $45,000 to replace someone making $30,000 in salary and benefits.

Second, reference checks fail to provide employers with meaningful information. Prior employers are hesitant to reveal negative information about their departing employees for fear of lawsuits for defamation. Many such employers either refuse to give any references, or will provide only neutral information, such as the dates of employment and job titles. While the fear of defamation liability may be excessive, both because there have actually been very few defamation suits over references and because truth is an absolute defense to a claim of defamation, the potential cost of

13. See Jean Buchanan, Preemployment Testing, Office Systems, Oct. 1, 1999, at 14, available at 1999 WL 13289784 (citing factors that make bad hiring expensive); Kamen, supra note 4, at 22 (asserting that the use of personality tests is fueled by the high costs of recruiting).

14. Lazar, supra note 11, at 3. The costs include time spent recruiting and training the new employee as well as waiting for that new person to come up to full speed. In addition to financial costs, employee morale suffers from excessive turnover. See Buchanan, supra note 13, at 14.

15. See Befort, supra note 3, at 406-07 (1997) (noting that former employers who provide “reference information may run the risk of being sued for defamation”); Markita D. Cooper, Beyond Name, Rank, and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation, 5 Va. J. Soc. POL’Y & L. 287, 295 (1998) (citing a survey finding that sixty-three percent of respondents reported that “they or members of their organization’s human resources staff had refused to provide information regarding a former employee out of fear of a lawsuit”); Metzger & Dalton, supra note 8, at 16 (asserting that checks with prior employers reveal very little information as the fear of defamation liability leads many former employers to adopt “silence policies”); Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of “Overdeterrence” and a Proposal for Reform, 13 Yale L. & POL’Y Rev. 45, 47-48 (1995) (noting that a “significant percentage” of employers have adopted a “no comment” approach or otherwise provide only limited references); Jeffrey L. Seglin, The Right Thing: Too Much Ado About Giving References, N.Y. TIMES, Feb. 21, 1999, at 4 (citing a survey by the Society for Human Resources Management finding that only nineteen percent of respondents would give a reference-seeker a reason why an employee had left and only thirteen percent would say anything about his work habits).

16. See Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their “No Comment” Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1424 (1996) (citing a National Center for State Courts study finding a decline in the volume of tort litigation generally and a recent report that the number of suits against a prior employer for a bad job reference is relatively small); Seglin, supra note 15, at 4 (citing a study of federal and state court records nationwide from 1965 to 1970 and from 1985 to 1990 that found that there were only sixteen defamation cases arising from reference checks, and that the plaintiffs prevailed in only four of the sixteen).

defending such a suit and the attention given to the few big cases that have been lost by employers make the threat real in the minds of employers. Thus, it is difficult for the hiring employer to get an honest appraisal of an applicant's job history from past employers, forcing employers to rely on alternatives such as personality testing. This is a considerable problem, since the best means of evaluating whether someone is right for a job may be how the person has performed in previous jobs.

Third, for some employers, it is desirable to be able to test for specific traits that might predict success in a particular job or, conversely, that might make an applicant unsuitable for a particular job. Thus, for example, it is useful when hiring a firefighter to know that the prospective applicant is not likely to freeze in an emergency. Similarly, in service industries, in which employees will be dealing directly with the public, it is important to have a sense of a prospective employee's service orientation, since the quality of a company is judged by the quality of the service provided. This is compounded by the fact that certain industries

18. See Cooper, supra note 15, at 293 (discussing the effect of a few highly publicized defamation cases).
19. See Adler & Peirce, supra note 16, at 1524-25 (noting that despite the fact that few employment-reference suits are brought, the "costs, trauma, and inconvenience of litigation" affect employers' willingness to provide references).
20. Whyle, supra note 2, at 200 ("What a person has done over a long period of time would seem to be the single most valuable indication of how he will perform in the future."); Befort, supra note 3, at 368 (asserting that past behavior is the best predictor of future behavior); Ramona L. Paetzold & Steven L. Willborn, Employer (Ir)rationality and the Demise of Employment References, 30 Am. Bus. L.J. 123, 125 (1992) (suggesting that former employers are those most capable of providing useful reference information).
21. See Befort, supra note 3, at 367 (suggesting that the ultimate objective of screening is to enhance work productivity); Kamen, supra note 4, at 22 (stating that in manufacturing industries, not hiring the right person for the job raises the risk of damaging contacts in the marketplace); Iris Randall, The Great Debate, BLACK ENTER., Feb. 1992, at 141 (quoting an official of a personnel testing company to the effect that personality tests "speed up the natural selection process by helping employers identify an individual with the skills and abilities that match a position's requirements").
22. There has been a tremendous growth in the service sector compared to the production sector. Today, eighty percent of the workforce is in the service sector, compared to sixty percent in 1950. Herschel N. Chait et al., Measuring Service Orientation with Biodata, 12 J. Managerial Issues 109, 109 (2000). It is expected that the service sector will continue to grow as the producing sector continues to decline. Id.
23. See id. (stating that the shift to a service economy makes it increasingly important to be able to identify and to recognize characteristics contributing to quality service); see also Joseph G. Rosse et al., Combining Personality and Cognitive Ability Predictors for Hiring Service-Oriented Employees, 5 J. Bus. & Psychol. 431, 432 (1991) (citing studies concluding that service orientation, defined as "the willingness to treat coworkers and clients with courtesy, consideration and tact; perceptiveness to customer needs; and the ability to communicate" is an important trait of workers in service industries). Thus, in addition to seeking employees who are competent, companies seek to identify prospective employees possessing such traits as flexibility, adaptiveness, cooperation, self-control,
have experienced a decreased supply of labor,\textsuperscript{24} causing employers to look for every advantage in their attempts to find the right person for the job.

As a result of such factors, the use of personality tests has become widespread.\textsuperscript{25} Although it is not clear which is the cause and which is the effect, the range of the types of available personality tests has also mushroomed\textsuperscript{26} along with their use. The variety of such tests is tremendous.\textsuperscript{27} Some, like the Minnesota Multiphasic Personality Inventory (hereinafter "MMPI")\textsuperscript{28} and the Guilford-Zimmerman Temperament

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\item empathy, and friendliness. \textit{See} Chait, \textit{supra} note 22, at 109.
\item See, e.g., Uhland, \textit{supra} note 11, at 1J (stating that low unemployment is prompting a greater use of personality tests, as employers are more selective about whom they hire). \textit{But see} Jane H. Philbrick et al., \textit{Pre-employment Screening: A Decade of Change}, 17 AM. BUS. REV. 75, 76 (1999) (suggesting that in a labor shortage, employers may feel pressured to hire quickly and avoid a lot of testing).
\item See \textit{infra} sources cited note 4. One indication of the increased prevalence of personality tests is that companies have sprung up whose service is to prepare job applicants to take the tests. \textit{See infra} notes 88 and 89 and accompanying text.
\item Some estimates suggest there are more than 2,500 personality tests on the market. Hooker, \textit{supra} note 1, at 699 (1996) ("At least 3,000 different tests are sold commercially by at least 450 vendors targeted at the workplace."); D'Nan 'Bass, \textit{supra} note 4 (citing Association of Test Publishers estimates that "personality testing is now a $400 million industry, with about 2,500 tests from which to choose"); Talbot, \textit{supra} note 5, at 28, 29 (noting that personality testing is a $400 million/year business, with at least 2,500 new tests on the market). Other estimates are even higher. \textit{See} Maldonado, \textit{supra} note 12 (stating that there are currently 45,000 personality tests available, many of which are accessible through the Internet); \textit{see also} Kamen, \textit{supra} note 4, at 24 ("Test publishers and psychologists have made the process easy and affordable, offering a broad range of tests and prices."). Psychological consulting firms started springing up about half a century ago. \textit{See} \textit{Whyte}, \textit{supra} note 2, at 200. Over the years more and more have come onto the scene. A quick Internet check will reveal the websites at many of these firms. When I did a search for "personality test," I came across cites such as Midwest Occupational Assessments, Inc., which advertises a profiles performance indicator that measures five personality factors (http://www.employmentassessments.com/interest.htm); the Hiring Suite, which offers five different on-line assessments, including a "Personality Plus" profile that measures ten traits, such as imagination, organization, and sensitivity (http://www.thehiringsuite.com); Management Psychology Testing and Research Services, which advertises a Business Check List that provides predictive performance-related personality dimensions (http://www.etest.net); Workforce Management Solutions, which touts a Prevue Assessment that measures twenty-four job-related personality factors (http://www.workforcesolutions4u.com); and Acuity Psychometrics, which sells a ten minute test to measure motivational suitability (http://www.acuittypyschometrics.com).
\item Although there are a number of different tests, they tend to fall into two large categories: objective "self-report" questionnaires and projective tests. Objective tests ask true-false or multiple choice questions, whereas projective tests involve more open-ended tasks. ANASTASI \& URBINA, \textit{supra} note 1, at 348, 411. \textit{See also} infra sources cited note 34.
\item The current version of the MMPI, the MMPI-2, consists of 567 true-false questions covering a variety of subjects and including questions such as "My sleep is fitful and disturbed," "I am worried about sex," and "I believe I am being plotted against." ANASTASI \& URBINA, \textit{supra} note 1, at 352-53.
\end{itemize}
Survey, ask hundreds of questions. Others are much shorter tests, such as the “Plus 32” test, which contains forty multiple-choice questions. Still others, such as the Rorschach inkblots or the Thematic Apperception Test, are projective tests, which eschew an objective question format in favor of asking applicants to identify inkblots or make up stories about a series of pictures. Some tests can be completed in less than a quarter of an hour, while others can take several hours to complete. Some tests are easily administered and scored, while others require special skills and training to administer, score, and interpret.

The law does not prohibit employers from using personality tests as part of the hiring process, although it may have an impact on how personality tests are administered. For example, the Americans with

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29. The Guilford-Zimmerman Temperament Survey asks for a yes-no answer to 299 different items, such as “You like to entertain guests,” or “It bothers you to have people watch you work.” The answers are scored on ten different personality dimensions, such as General Activity, Restraint, and Emotional Stability. Buchanan, supra note 13, at 14.

30. Other tests in this vein include the Hogan Development Survey, which contains 168 true-false questions that can be answered in twenty minutes. The questions include items such as, “Do you feel that you are ambitious?” and “Do you feel that you are witty and entertaining?” Liz Stuart, Why Your Job is All in Your Mind, THE GUARDIAN, Jan. 30, 1999, at 26. Another is the Myers-Briggs test, described infra note 65.

31. See Ruth Bennett, Personality Tests vs. Performance, PORTLAND OREGONIAN, Aug. 20, 1999, at B02, available at 1999 WL 5370690 (describing the “Plus 32” test, which is designed to measure characteristics such as sensitivity, creativity, independence, and confidence). The test and the traits about which the test measures are more fully described at the Internet website of the company that developed and markets the test. See http://www.brgarrison.com/Employment.htm.

32. ANASTASI & URBINA, supra note 1, at 411-12 (stating that Rorschach inkblots is one of the most popular projective tests). Applicants are given inkblots with irregular forms that they must identify and explain. Although the original version of this test fell into disrepute in the 1960’s, subsequent versions continue to be used. See id. at 414-16.

33. See Talbot, supra note 5, at 28 (describing the TAT as “one of the most influential and widely used of personality tests”). The TAT seeks to “measure unconscious preoccupations,” by asking test takers to interpret a picture by telling or writing a story about it. Id.

34. Projective tests are unstructured in the sense that they permit “an almost unlimited variety of possible responses….The underlying hypothesis is that the way in which the individual perceives and interprets the test material or ‘structures’ the situation will reflect fundamental aspects of her or his psychological functioning.” ANASTASI & URBINA, supra note 1, at 411. The test taker is generally given a vague stimulus, which he must explain.

35. For example, there is a ten-to-fifteen-minute test developed by a doctor in Dallas that “requires applicants to rank phrases such as ‘a good meal’ and ‘a fine’ from best to worst. Those are all the instructions they receive.” The doctor then takes the results and describes the strengths and weaknesses of the applicant and predicts how the applicant will respond to certain situations. See sources cited supra note 26.

36. Kamen, supra note 4, at 22 (noting that tests “range from short ‘true or false’ questionnaires to intensive, multiphase examinations that take hours to complete”). For an extensive description of the various types of personality tests and of some of the more common tests employed, see Black, supra note 4, at 72-80.
Disabilities Act (hereinafter "ADA")\textsuperscript{37} prohibits discrimination on the basis of a disability. Among other things, the ADA restricts an employer’s use of pre-employment medical examinations of job applicants.\textsuperscript{38} That means that in order for an employer to be able to use a personality test, the test must not constitute a prohibited pre-offer medical exam.

The term “medical examination” is not defined in the ADA. The EEOC defines a medical examination as “a procedure or test that seeks information about an individual’s physical or mental impairments of health.”\textsuperscript{39} The EEOC uses several factors to determine if a test is medical in nature and therefore constitutes a prohibited medical exam. Those factors include whether a test is designed or used to reveal a physical or mental impairment, whether the test is administered and interpreted by a doctor or other health care professional, and whether the test is routinely used in a medical setting.\textsuperscript{40} Based on those factors, the EEOC would take the position that some personality tests do not qualify as a medical examination, and therefore do not violate the ADA.\textsuperscript{41} However, the use of a test designed to reveal mental illness, when interpreted by a psychologist, constitutes a pre-employment medical test that may only be used in limited circumstances.\textsuperscript{42}

Adopting the EEOC’s approach, courts reached opposing holdings on whether personality tests constitute prohibited medical exams. Generally, tests that are administered and interpreted by someone who is not a health care professional and that are not conducted in a medical setting will not be found to be medical exams.\textsuperscript{43} On the other hand, a battery of psychological tests performed by a psychologist to evaluate job applicants has been held to constitute a prohibited pre-job offer medical examination.\textsuperscript{44} Some

\textsuperscript{38} The ADA provides that before a job offer is made, an employer “shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature of severity of such disability.” Id. § 12112(d)(2)(A).
\textsuperscript{39} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS, 14 (1995). Mental impairment is broadly defined to include “mental or psychological disorder[s], such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h)(2) (1996). It does not, however, include common personality traits. Id.
\textsuperscript{40} U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, supra note 39, at 14.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 15.
\textsuperscript{44} See, e.g., Barnes v. Cochran, 944 F. Supp. 897, 904 (S.D. Fla. 1996) (holding, \textit{inter alia}, that a sheriff’s preemployment psychological evaluation of an applicant constituted a prohibited pre-offer medical examination under the ADA). \textit{See also} Varagatis v. City of
believe that the fact that personality tests are designed to be job-related and predict job performance, rather than designed to be diagnostic of a medical condition, means that the tests should not be considered pre-offer medical examinations.\textsuperscript{45}

Even if a personality test is not a prohibited pre offer medical examination, the ADA may impact the use of a personality test in the case of certain disabled persons.\textsuperscript{46} For example, in the case of a candidate with a disability that prevents the person from taking written tests, it may be necessary to provide such person with a reasonable accommodation in the test process in order to avoid a violation of the ADA.\textsuperscript{47} Similarly, certain questions may create problems if it is found that the purpose of the question is to identify persons with disabilities.\textsuperscript{48} This, however, goes to how a test will be administered and not to whether an employer may use a personality test.

Apart from the ADA, there is very little that interferes with an employer's ability to utilize personality tests. One exception is honesty tests. Some states bar the use of polygraphs, voice stress analyses or other tests purporting to test honesty.\textsuperscript{49} Some other states prohibit or limit

\textsuperscript{45} See, e.g., Richard Klimoski & Susan Palmer, The ADA and the Hiring Process in Organizations, 45 CONSULTING PSYCHOL. J. 10, 27 (1993) (stating that the use of valid personality tests should be permitted under the ADA).

\textsuperscript{46} Black, supra note 4, at 84-86 (discussing the need to accommodate disabled persons in pre-employment testing).

\textsuperscript{47} Yamada, supra note 7, at 1570 (noting that employers who insist on using written tests to select employees for jobs that do not require literacy may be liable for a violation of the ADA).

\textsuperscript{48} See David T. Wiley, If You Can't Fight 'Em, Join 'Em: Class Actions Under Title I of the Americans with Disabilities Act, 13 LAB. LAW. 197, 199 (1997). By analogy, the New York State Division of Human Rights takes the position that questions on a personality test concerning drug and alcohol use implicate the disability provisions of New York's Human Rights Law. See Yamada, supra note 7, at 1571 (discussing the position taken regarding the use of the Stanton Survey honesty test by the Stanton Corporation).

\textsuperscript{49} See, e.g., MINN. STAT. ANN. § 181.75 (West 1946) (banning the use of polygraphs, voice stress analysis, and any other test purporting to test honesty); Wis. STAT. ANN. § 111.37 (West 1997) (barring employer use of polygraphs, voice stress analyses, or psychological stress evaluators). Both the Wisconsin and the Minnesota statutes have been
written honesty tests. Another indirect statutory restriction on the use of personality tests exists where a state's labor code protects the political activities of employees. Such statutes though, do not operate as a ban on personality tests per se, as they merely limit the use of certain questions.

The same is true for common law claims. For example, if an employer discloses false information about an applicant to a third party, the applicant may be able to bring a defamation cause of action. Defamation claims, however, will neither prevent an employer from testing nor limit an employer's ability to share test results so long as the information disclosed is accurate. Similarly, although states are willing to recognize torts of negligent or intentional infliction of emotional distress in the pre-employment context, for the most part those claims will be limited to challenges based on the negligent or abusive administration of a test, rather than the use of the test itself. Thus, none of these common law causes of action will prevent an employer's use of a personality test as a hiring tool.

II. THE PURPORTED BENEFITS OF PERSONALITY TESTS

The first question is whether personality tests work. Are they a good means of screening job applicants? My concerns regarding the answer to that question are divided into two areas. First is the question whether one

held to not prohibit the use of written honesty tests. See Pluskota v. Roadrunner Freight Sys., Inc., 524 N.W.2d 904, 908 (Wis. Ct. App. 1994) (holding that a paper and pencil test did not measure physiological responses of a subject and was not regulated), review denied, 531 N.W.2d 325 (Wis. 1995); State v. Century Camera, Inc., 309 N.W.2d 735, 745 (Minn. 1981) (discussing the statutory prohibition against the use of "any test purporting to test honesty [limited to] tests and procedures which similarly purport to measure physiological changes in the subjects tested"). In Century Camera, the court upheld the constitutionality of the Minnesota statute. Id. at 741.

50. For example, Massachusetts prohibits written honesty tests of applicants and employees. MASS. GEN. LAWS ANN. ch. 149, § 1903)(1) (West 1999). Rhode Island does not prohibit the use of such tests outright, but it does provide that written honesty tests may not be used as the "primary basis for an employment decision." R.I. GEN. LAWS §§ 28-6.1-1 - 28-6.1-4 (2000).

51. See, e.g., CAL LAB. CODE §§ 1101-1102 (West 2001); N.Y. LAB. LAW § 201-d (McKinney 2001); see also Richardson v. City of Saratoga Springs, 667 N.Y.S.2d 995, 995-97 (N.Y. App. Div. 1998) (holding that the political activities of public employees are protected on statutory and constitutional grounds).

52. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

53. Truth is a defense to defamation. Id. at § 581A. See John Bruce Lewis et al., Defamation and the Workplace: A Survey of the Law and Proposals for Reform, 54 Mo. L. REV. 797, 822 (1989) (discussing the truth defense to defamation cause of action).

54. To prevail in a claim of intentional infliction of emotional distress, a plaintiff must demonstrate that the employer's conduct is extreme and outrageous. RESTATEMENT (SECOND) OF TORTS § 46(1) (1977). Presumably if the employer is negligent in administering or scoring a test, there is a potential cause of action for negligence as well.
can correctly identify what personality traits are valid and reliable predictors of success in a particular job. Second is the question whether commonly used personality inventories accurately measure those traits and otherwise have the ability to identify the best candidates for the job.

A. Relation Between Personality Traits and Job Performance

The usefulness of personality tests depends on whether one can correctly identify what personality traits will maximize the likelihood of success in a particular job. However, there is conflicting evidence about the extent to which personality measures are valid predictors of job performance. Some researchers have concluded that personality measures are more effective predictors for some occupations than others, while other researchers are skeptical about the validity of personality measures as predictors of job performance for any occupation. Some are more optimistic about the ability of at least some personality traits to predict job performance.

55. Edwin E. Ghiselli & Richard P. Barthol, _The Validity of Personality Inventories in the Selection of Employees_, 37 J. APPLIED PSYCHOL. 18, 19 (1953) (asserting that personality measures are more effective predictors in jobs where the trait of temperament is not very important); see, e.g., Jeffery S. Schippmann & Erich P. Prien, _An Assessment of the Contributions of General Mental Ability and Personality Characteristics to Management Success_, 3 J. BUS. & PSYCHOL. 423, 425 (1989) (concluding that it is possible to identify personality characteristics of individuals likely to succeed in management); Neal Schmitt et al., _Metaanalyses of Validity Studies Published Between 1964 and 1982 and the Investigation of Study Characteristics_, 37 PERSONNEL PSYCHOL. 407, 420 (1984) (concluding that personality measures are better predictors of professional and managerial jobs than of non-professional and non-managerial jobs).

56. See, e.g., Robert M. Quion & Richard F. Gottier, _Validity of Personality Measures in Personnel Selection_, 18 PERSONNEL PSYCHOL. 135, 160 (1965) (“[I]t is difficult in the face of this summary to advocate, with a clear conscience, the use of personality measures in most situations as a basis for making employment decisions about people.”); G. Stephen Taylor & Thomas W. Zimmerer, _Personality Tests For Potential Employees: More Harm Than Good_, PERSONNEL J., Jan. 1988, at 60 (asserting that personality tests “are generally poor predictors of an applicant’s job performance”).

57. See ANASTASI & URBINA, _supra_ note 1, at 362-67 for a description of personality factors.

58. See, e.g., Murray R. Barrick & Michael K. Mount, _The Big Five Personality Dimensions and Job Performance: A Meta-Analysis_, 44 PERSONNEL PSYCHOL. 1, 17-21 (1991) (finding in a meta-analytic review of literature that conscientiousness is a consistently valid predictor for all occupations, extraversion and openness to experience are valid predictors for certain occupations, and that neither emotional stability nor agreeableness are important predictors of job performance); David V. Day & Stanley B. Silverman, _Personality and Job Performance: Evidence of Incremental Validity_, 42 PERSONNEL PSYCHOL. 25, 33 (1989) (finding that work orientation, ascendance, and interpersonal orientation have the potential to predict job performance of accountants); Rosse et al., _supra_ note 23, at 442 (stating that personality measures account for performance variance beyond that accounted for by ability tests); see also Robert P. Tett et
One can understand why there might be concern about the value of personality characteristics as job performance predictors. First, it is easier to identify what characteristics will predict good performance for some occupations than for others. While it may be intuitive to say that tendencies to agreeableness and patience, as well as to some (but not too much) aggressiveness, will make someone a good sales person, it may not be so easy to identify what personality characteristics will make someone a good pilot, mechanic, or computer programmer. According to the writers of one psychological treatise, "[a]n important issue that still bears further investigation is that of determining the most relevant personality dimensions relative to performance in particular jobs." Second, even if one can list individual traits that seem desirable for a particular position, it may not be clear what mix of tendencies is ideal. In the sales person example, is it so clear how much courtesy versus aggressiveness will produce the best person for the job? Indeed, one study found that while a particular characteristic showed promise as a job predictor, its effects were nonlinear, making measurement difficult.

What is true of personality traits is also true of emotional states that may be revealed by test questions. As one author put it, "it may be assumed that an unhappy home life will interfere with effectiveness at work, but this has not been generally demonstrated; indeed, some men may throw themselves into their work as a compensation for their frustration at home." Therefore, making assumptions about what emotional states should be sought is dangerous.

B. The Capacity of Personality Inventories to Successfully Identify Traits

Even assuming one can successfully identify what personality traits are desired in an employee for a particular position, there are reasons to

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59. I am talking here about the use of tests to identify particular personality traits. The concerns I raise here about the insufficient evidence regarding the extent to which particular personality traits predict performance are not present in the case of attempting to identify honesty or violence, for example, which may be useful to predict for any job.

60. See Taylor & Zimmerer, supra note 56, at 60 (asserting that assumptions about the effect of personality on performance are often incorrect).

61. And even then, intuition may not be correct. According to one meta-analytic review of the literature, agreeableness "is not an important predictor of job performance, even in those jobs containing a large social component," such as sales. Barrick & Mount, supra note 58, at 21.

62. ANASTASI & URBINA, supra note 1, at 506.

63. See Day & Silverman, supra note 58, at 34.

64. ROBERT M. GUION, PERSONNEL TESTING 376 (1965).
doubt the ability of many commonly used personality inventories to identify the best candidates for a job. First, some of the most widely used tests for screening job applicants were not developed for that purpose. For example, the popular Myers-Briggs test was developed not for hiring, but for use in training and development. Additionally, the widely used MMPI was developed for clinical psychologists to test for personality disorders. This makes their application to the workplace questionable.

65. See Jane Adler, supra note 2, at SB4 (describing Myers-Briggs as the most popular and best known form of personality test). The Myers-Briggs test asks 100 questions on which the applicant must choose between two descriptive words and phrases describing the same trait. On the basis of the answers, the test classifies test-takers as one of sixteen personality types based on an evaluation of four different categories. Id. Examples of major employers that have used the Myers-Briggs are Apple, AT&T, Citicorp, Exxon, 3M, Allied-Signal, and Honeywell. Black, supra note 4, at 76 n.37 (1994).

66. See Martin R. Cohen, Cub Chief Laughs Off Ameritech Phone Rate Rationale, CRAIN'S CHI. BUS., Apr. 17, 2000, at 10, available at 2000 WL 8128574 (Letter to the Editor by David W. Arnold, General Counsel, Reid Psychological Systems) (stating that pre-employment personality tests are part of a large growing industry and are used to assess management potential).

67. See Michael Delikat & Rene Kathawala, Personality and Aptitude Tests: A Good Idea for Employers?, N.Y.L.J., Dec. 29, 1997, at 1 (describing MMPI as one of the best known personality tests). It is “an established practice” to use the MMPI for “personnel selection in occupations that involve high levels of stress and responsibility, such as nuclear power plant operator, air traffic controller, and police officer.” Alfred D. Kornfeld, Police Officer Candidate MMPI-2 Performance: Gender, Ethnic and Normative Factors, 51 J. CLINICAL PSYCHOL. 536, 537 (1995); see also James N. Butcher, Psychological Assessment of Airline Pilot Applicants With the MMPI-2, 62 J. PERSONALITY ASSESSMENT 31, 31 (1994) (stating that MMPI and MMPI-2 are widely used in screening for jobs for the police, fire department, air traffic control, and airline flight crews, i.e., positions requiring good psychological adjustment and responsibility). The MMPI is also the basis for many other widely used tests, such as the California Psychological Inventory. ANASTASI & URBINA, supra note 1, at 359. Thus, whatever problems exist in the MMPI may be replicated in such other tests as well. The widespread use of the MMPI and its progeny is unfortunate since personality measures developed for specific purposes appear to be “more predictive than traditional personality inventories scored with standardized algorithms.” Rosse et al., supra note 23, at 433.

68. See Psychological Tests and Constitutional Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 237-38 (1965) (statement of Dr. George K. Bennett, President, The Psychological Corp.) (stating that the MMPI was developed “to assist in the classification of persons to whom various labels were attached denoting degrees of psychological or emotional instability); Butcher, supra note 67, at 31; Talbot, supra note 5, at 29. The same is true of the Woodward Personnel Data Sheet, which is “the prototype of self-report personality inventories.” ANASTASI & URBINA, supra note 1, at 349.

69. As a major proponent of the MMPI observed, “[t]he MMPI is not a test to determine who should be employed in a job.... It does not purport to be a test of a person’s skill, education, or training. It only seeks to measure emotional components to determine the probable state of emotional equilibrium.” Psychological Tests and Constitutional Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 239 (1965) (statement of Dr. George K. Bennett,
One reason to question the application of these tests is provided by evidence suggesting that job performance is "situationally specific," that is, an employee's environment plays a significant role in influencing the employee's behavior.\(^7\) This suggests that the assumption underlying the use of personality testing of job applicants—that personality tendencies are transferable from one environment to another—is simply incorrect.\(^7\) In fact, some argue that situational specificity "is much more characteristic of personality traits than it is of abilities."\(^7\) Another reason to question the application of these tests to the workplace is that a significant factor affecting behavior and performance on the job is motivation, which may be insufficiently reflected in personality tests.\(^7\) Even an applicant's mood may affect the result of his or her test.\(^7\)

Second, how tests are administered should be of increasing concern. To ensure validity, testing should be done by or under the supervision of
experienced industrial psychologists. Many of the traits being tested for are very subjective and the tests require a great deal of interpretation, a skill that is dependent on experience and training. In addition, particularly with the use of projective tests, factors such as slight differences in the phrasing of verbal instructions, the use of different tones in conveying identical instructions, and the examiner-examinee relationship can have a significant effect on test performance. As one doctor noted, "[e]ven the most carefully developed test, when it is administered by an untrained, inexperienced person . . . can produce inaccurate results." Yet, it appears that tests are increasingly being performed by personnel managers and other inexperienced persons. Unfortunately, testing by non-psychologists may actually be encouraged by the Americans with Disabilities Act because it is less likely that the test will be considered a medical examination within the meaning of that statute.

The concern with faulty administration of these tests is also aggravated by the proliferation of tests, including the increasing availability of tests on the Internet, which makes it possible to have tests taken and scored on-line. As early as 1965, it was observed during Senate hearings

75. See id. (statement of Dr. Arthur H. Brayfield, Executive Officer, American Psychological Association) (speaking of the need for tests to be supervised by a qualified psychologist, particularly when trying to identify particular character traits for specific jobs, since that "puts a premium upon clinical judgment and professional skill and knowledge and requires the best available knowledge of the situation in which the individual applicant or employee is to perform").

76. WHYTE, supra note 2, at 185-87 (discussing the importance of interpretation of test results and the danger that the interpreter can adversely affect test results).

77. ANASTASI & URBINA, supra note 1, at 434 (citing several studies that establish that projective tests can be altered in both a good and bad direction and that a skilled examiner is necessary to avoid such alterations).

78. Dr. Kerri McCarthy, Psyched Out, SYDNEY MORNING HERALD, Nov. 10, 1999, at 1, available at 1999 WL 29629242; see also Stuart, supra note 30, at 26 (stating that personality test effectiveness depends on the person administering the test and the person analyzing the result). This is true even with tests that have objective scoring systems, because the final evaluation still depends on the interpreter's skill and experience. See ANASTASI & URBINA, supra note 1, at 434.

79. I do not mean to suggest that this is an entirely new problem. When the federal government conducted hearings thirty-five years ago to assess the privacy concerns implicated by its use of personality tests, the President of the National Federation of Federal Employees testified that "there are case studies on hand to emphasize the injustice to those we consider qualified and capable individuals, who are restricted in promotions and appointments because of 'test scores' subjectively rated by amateur administrators and interpreters." Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 89th Cong. 62 (1965) (statement of Nathan T. Wolkomir, President, National Federation of Federal Employees).


81. See Uhland, supra note 11, at 11 (asserting that the availability of tests on the Internet encourages more employers to use personality tests). See also sources cited supra note 26.
examining the use of psychological tests on federal employees that “[i]n
spite of the best efforts of the American Psychological Association and
responsible test publishing houses, a great many psychological instruments
are put on the market without proper refinement and development.” The
problem has only gotten worse in the intervening thirty-five years. Internet
tests and other new tests now being marketed are cheaper than a test
designed specifically for the company that will be interpreted by}
professionals, and therefore may be more attractive to many employers.
In this context, there is no such thing as a good bargain; cheaper very likely
means less reliable.

Third, personality tests lend themselves to manipulation by the
subjects of the tests. In simple terms, it is possible to cheat on the tests.
There is evidence suggesting that subjects of personality tests try to answer
with what they believe to be correct answers rather than honest ones. Since
“the demand by many human resource managers that tests have face
validity means that many respondents will know what the tests are
supposed to measure,” there is temptation for respondents to seek to
“present the profile they believe the selector is seeking.” In short, these
tests encourage lying. In addition to the common sense approach to

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82. Psychological Tests and Constitutional Rights: Hearings Before the Subcomm. on
Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 270 (1965)
(statement of Professor W. Grant Dahlstrom); see also Special Inquiry on Invasion of
Privacy, Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 89th
Cong. 339-342 (1965) (testimony of Dr. Arthur Brayfield) (discussing the
commercialization of and lack of oversight in the personality testing market).

83. See Buchanan, supra note 13, at 14 (stating that mass-produced, off-the-shelf
personality tests can cost an employer as little as two or three dollars); Kamen, supra note 4,
at 24 (noting that it costs “as little as $8 for a standardized test for an entry-level position”).

84. See Wiley, supra note 48, at 199 (noting that many employers using personality
tests are using “off-the-shelf” personality testing packages not designed to be used as part of
a selection device); Testing, Testing, PRINTING WORLD, June 7, 1999, available at 1999
WL 21035058 (quoting Marie Strehele of the Institute of Employment Studies to the effect
that “[r]eliable tests take a long time to develop as a large sample has to be used to ensure
that there is a positive relationship between a candidate’s test result and subsequent on-the-job performance”).

85. Adrian Furnham & Russell Drakeley, Predicting Occupational Personality Test

86. Id. See also Psychological Tests and Constitutional Rights: Hearings Before the
Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 72
(1965) (testimony of Dr. Brayfield, Executive Director, American Psychological
Association) (describing the desire to put one's best foot forward as a “rather persistent
personality characteristic”); Kamen, supra note 4, at 27 (citing a management consultant
who devises personality tests and claims that “examiners can be fooled” by applicants who
put their best foot forward when taking personality tests). It is also interesting to note that
test takers tend to answer in socially desirable ways almost without awareness (in other
words, without a conscious intent to cheat). ANASTASI & URBINA, supra note 1, at 375.
cheating by giving the answers that test examiners obviously want,\(^87\) there are also books\(^88\) and websites\(^89\) that provide information designed to "coach" applicants to improve their test results. Different tests vary in their susceptibility to cheating\(^90\) and not all personality measures are equally easy to fake. Still, there is ample evidence to show that faking and coaching affect results.\(^91\) Faking and coaching affect the validity, and therefore the utility, of personality tests.\(^92\) They also affect how employees and others perceive the tests.

Fourth, personality tests have the potential to screen out good

\(^{87}\) Anastasi & Urbina, supra note 1, at 374 (stating that most questions on self-report inventories have one answer that is more socially acceptable or desirable than the others).

\(^{88}\) See, e.g., John Wareham, The New Secrets of a Corporate Headhunter: Strategies for Surviving in the New World of Business (1994) (offering tips on how to cheat and avoid being caught cheating on personality tests); Whyte, supra note 2, at 405 (containing an appendix entitled "How to Cheat on Personality Tests").

\(^{89}\) For an example of a site designed to help job applicants prepare for personality tests, see http://www.advantagecareer.com, which helps applicants by letting them test themselves on-line.

\(^{90}\) Some tests, like the MMPI, build in a validity indicator designed to assess the truthfulness of the test-taker's responses. See Psychological Tests and Constitutional Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 71 (1965) (comments of Dr. Vance, the American Psychological Association) (stating that better tests like the MMPI take account of tendency to fake responses); Anastasi & Urbina, supra note 1, at 355. It also appears to be the case that projective tests are more immune to faking than objective type tests. See Anastasi & Urbina, supra note 1, at 433. However, Anastasi and Urbina note that this is because the purpose of the projective tests is disguised, which they believe raises ethical issues. Id. at 433 n.20.

\(^{91}\) Anastasi & Urbina, supra note 1, at 374-75 (citing several studies demonstrating that test takers can successfully cheat on personality tests and concluding that evidence of success of applicant cheating is "plentiful"); Black, supra note 4, at 88 (noting that in addition to being able to fake "good" answers, applicants can "alter entire test results by pretending to be someone else"); George M. Alliger & Stephen A. Dwight, A Meta-Analytic Investigation of the Susceptibility of Integrity Tests to Faking and Coaching, Educ. & Psychol. Measurement, Feb. 1, 2000, available at 2000 WL 15202286 (reporting study results suggesting some measures are more susceptible to faking than others); McCarthy, supra note 78, (suggesting that it is possible to fake answers). Even though projective tests are less susceptible to cheating than objective tests, there is evidence indicating that it is possible to fake results with the Rorschach, Thematic Apperception Test and other projective forms of tests. See Anastasi & Urbina, supra note 1, at 433-34. There is, however, at least one study suggesting that intentional distortion is not a serious problem. See Leaetta M. Hough, et al., Criterion-Related Validities of Personality Constructs and the Effect of Response Distortion on Those Validities, 75 J. Applied Psychol. 581, 593 (1990) (reporting study results indicating that intentional distortion does not seem to be a problem). Faking would seem to be more likely in the employment context than in the clinical setting in which many personality tests were developed. A clinical setting assumes a level of cooperation between doctor and patient, which is less likely to be present when a test-taker is seeking a job.

\(^{92}\) This is true unless, of course, the employer is trying to identify candidates with good studying or manipulation abilities.
candidates. To the extent that personality inventories are looking for mainstream personality types, essentially testing for conformity, creative persons who may potentially become leaders and do extraordinary things for an employer may be weeded out.93 One author has suggested that if personality tests were applied across the board, "half of the most dynamic individuals in our big corporations would be out pounding the streets for a job."94 Additionally, in the case of integrity tests, there is evidence of a significant number of false positives (honest persons labeled dishonest by the test).95 Employers know this but are willing to take a chance of losing some honest applicants in the course of improving their chances of reducing theft. The result is that "the more popular honesty testing becomes, the more likely it is that innocent people who cannot pass an honesty test will encounter extreme difficulty gaining employment."96 There is also evidence that stress has a negative impact on how well an applicant may perform on a test.97

Factors such as these suggest that there is real concern about both the reliability98 and validity99 of personality tests. Not surprisingly, research on personality and job performance has yielded conflicting findings. There

93. See Whyte, supra note 2, at 182 (saying that personality tests "reward the conformist, the pedestrian, the unimaginative — at the expense of the exceptional individual without whom no society, organization or otherwise, can flourish"); Stuart, supra note 30, at 26 (claiming that the danger of personality tests is that they reward bland people with employment).

94. Whyte, supra note 2, at 198. Of course, it is possible that the employer is looking for conformity, in which case tests may be sufficient.

95. See Metzger & Dalton, supra note 8, at 21 (discussing evidence that integrity tests frequently misidentify honest applicants as potentially dishonest employees); Yamada, supra note 7, at 1559-60 (discussing the Office of Technology Assessment conclusion regarding the significance of false positives).

96. Yamada, supra note 7, at 1566. Employers may be less willing to take a chance in a tight labor market. However, our views on the limits of the use of personality tests should not be affected by the particular state of the labor market at a given moment, since that state can and will change over time.

97. See Daniel Sommer & Jean-Claude Lasry, Personality and Reactions to Stressful Life Events, CAN. MENTAL HEALTH, Sept. 1984, at 19 (suggesting that stressful life events, such as unemployment, death in the family, illness, and divorce may have an adverse impact on factors measured by the MMPI); see also Black, supra note 4, at 83-84 (discussing the work of Sommer and Lasry).

98. Reliability refers to the ability of a test to produce consistent results over time. One way reliability may be established is by testing to see if two separate administrations of a test produce the same results. Anastasi & Urbina, supra note 1, at 84; Philbrick et al., supra note 24, at 76.

99. Validity is a concept that refers to how well a test measures what it is supposed to measure. Anastasi & Urbina, supra note 1, at 113; Philbrick et al., supra note 24, at 76. It is important that a test be both valid and reliable. "A test's reliability tells us little about its validity. A test may give eminently consistent results, but the results are worthless unless it can be determined that the test is actually measuring the trait it is supposed to measure." Whyte, supra note 2, at 189.
are some reports of success in the use of personality tests, to reduce employee theft or turnover, or to hire a more effective sales force. However, other reports show a lack of success in the use of such tests. It seems that there is good reason to question evidence of validity. To accurately test validity, one would have to test everyone applying for a job at a particular employer and then, after the passage of a meaningful period of time, match the test scores against the actual performance of those individuals. There is little evidence to suggest this type of testing occurs. As to projective tests, there have simply been insufficient studies on reliability and the majority of studies on validity are inconclusive.

All of these concerns are aggravated by the risk that personality test results may give some employers a false sense of security. The test's use may discourage caution in interviewing and other pre-employment screening techniques, because the employer thinks that he or she is getting an assurance that is not really there. That is, it may be the case that the use of a personality test as a small part of a pre-employment screening package that includes past job performance, interviews, testing, etc., and that looks for a convergence of information from all of those sources is not so harmful. However, overreliance on tests creates problems.

100. See Scott L. Martin & Loren P. Lehnen, Select the Right Employees Through Testing, PERSONNEL J., June 1992, at 46. The authors provide three examples. The first was a battery of tests developed by industrial psychologists for Burger King to predict tenure. The second was testing of prospective employees of Minnesota/Monarch to evaluate candidates for sales potential. The third involved testing by a department store in the Southeast to reduce employee theft. Evidence seemed to suggest that the tests had the desired effects of, respectively, reducing employee turnover, increasing sales, and reducing employee theft.

101. For example, one psychologist concludes that "even under optimal conditions, psychologists and psychiatrists are accurate in no more than one out of three predictions of violent behavior." Barford & Tseng, supra note 6, at 77 (quoting JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981)); see also Psychological Tests and Constitutional Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 243 (1965) (statement of Dr. George K. Bennett, President, The Psychological Corp.) (suggesting that in an ordinary employee selection process, "personality measures have generally proven to be useless," but also arguing that such tests are useful when dealing with specific positions involving special burdens).

102. WHYTE, supra note 2, at 190; see also, McKenna v. Fargo, 451 F. Supp. 1355, 1375-76 (D.N.J. 1978) (discussing the difficulties of proving the validity of personality tests).

103. ANASTASI & URBINA, supra note 1, at 435.

104. Id. at 437 (describing problems with attempts to validate personality tests).

105. Some may argue that such tests are no worse than the alternatives. As one author noted, "[a]lthough personality tests may lack the accuracy and reliability sought by both critics and advocates alike, such tests may be one of the few tools left, at present for an employer seeking to prevent work place violence and problematic behavior." Barford & Tseng, supra note 6, at 77-78.
III. POTENTIAL ADVERSE CONSEQUENCES FLOWING FROM THE USE OF PERSONALITY TESTS

A. Privacy Concerns

Courts and Congress have recognized that a "quintessential zone of human privacy" is the mind, and that privacy means "the right of the individual to decide for himself, with only extraordinary exceptions in the interest of the whole society, when and under what conditions his thoughts, speech and acts should be revealed to others." Almost by definition, personality tests infringe on the privacy of the test subject. Since the purpose of personality tests is to allow an employer to gain information about the job applicant that would not otherwise be apparent and that the job applicant may or may not wish to reveal, privacy concerns are implicated. Personality tests effectively force an applicant to reveal private thoughts, beliefs, and emotions, through his or her responses to questions. Rather than leaving the revelation of these private matters to individual choice, it is made a condition of employment.

According to studies of applicants' reactions to various selection mechanisms used by employers, personality tests generate a greater negative reaction than the other types of testing. Many applicants find the questions invasive, threatening, or obnoxious. They view personality tests "to be unrelated to the job, demanding, invading individual privacy and lacking face value or procedural justice." As a result, employers run

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106. Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 663 (Cal. 1986) (recognizing that an employer-instituted polygraph test intrudes upon an individual's privacy by reading mental thoughts).
107. Psychological Tests and Constitutional Rights: Hearings on Psychological Testing Procedures and the Rights of Federal Employees, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 2 (1965); see also Joseph G. Rosse et al., A Field Study of Job Applicants' Reactions to Personality and Cognitive Ability Testing, 79 J. APPLIED PSYCHOL. 987, 987 (1994) ("Most privacy scholars agree that the essence of privacy is the ability to control information about oneself and the subsequent impressions formed by others as a result of this information.").
109. Rosse et al., supra note 107, at 988. Since the negative reaction results from a threat to the applicant's control over the release of personal information, the possibility of adverse reaction exists whether the information revealed is positive or negative. Id. at 987.
110. Anat Rafaeli, Pre-Employment Screening and Applicants' Attitudes Toward an Employment Opportunity, 139 J. SOC. PSYCHOL. 700, 702 (1999) (suggesting that applicants perceive personality tests as requiring a personal investment that "lack[s] a clear logic or rationale" as well); see also McCarthy, supra note 78, at 1 (stating that the standard response of applicants to personality tests is that the tests are unreliable and unfair, or that
the risk that some good candidates for employment will withdraw from consideration, and that those who do not withdraw may harbor resentment out of fear that the test results will be used against them.

To be sure, the extent to which applicants may perceive or be bothered by the infringement on their privacy varies. One factor that seems to affect the extent to which the applicant has an adverse reaction to personality testing is whether such tests are used in conjunction with tests of cognitive ability. This is ironic, since the evidence is very mixed on whether cognitive ability tests are reliable predictors of job performance. Another factor that may affect the level of adverse applicant reaction is the type of test employed. Some forms of personality tests ask extraordinarily personal questions about an applicant's religious and other views, the answers to which may be embarrassing.

Another factor that seems to affect applicant attitude is the length of the test. At least one study concluded that short personality tests may have

the tests are likely to uncover some deep personal inadequacy that will expose them and prevent them from getting a desired job).

111. See Maldonado, supra note 12 (showing that many job candidates do not like the idea of personality tests and hesitate to go through the hiring process if a test is involved).

112. See Rafaeli, supra note 110, at 702 (stating that even though employees do not like personality tests, employers will continue to use them in the recruiting process because these tests involve an investment of resources that enhances the applicant's commitment to the enterprise). Equally, some candidates desperate to obtain employment may not have the luxury of withdrawing. It is for this reason that it is not persuasive to argue that a job applicant has consented to the invasion of privacy. See Special Inquiry on Invasion of Privacy: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 89th Cong. 349 (1965) (statement of Professor Monroe H. Freedman, Associate Professor of Law, George Washington University) ("[T]he job applicant who wants the job is not truly a free agent.").

113. Adler, supra note 2, at SB4; Kamen, supra note 4, at 24 (citing an employee's concern over who has access to the test results and concern that the test results would be used against employees).

114. See Rafaeli, supra note 110, at 710 (suggesting that testing both personality and knowledge would attenuate the negative impact already felt by employers). But see Rosse et al., supra note 107, at 990 (showing that personality tests used in connection with cognitive tests garnered a more positive reaction than when only personality tests were used). This may be because the applicant may perceive the process to be fairer when other tests are used to supplement a personality test. See id. at 988 (citing work suggesting that "perceptions of fairness or procedures may affect an individual's overall perception of the fairness and attractiveness of an employer").

115. See Day & Silverman, supra note 58, at 25 (documenting recent meta-studies showing that cognitive ability tests are more predictive of job performance when used in conjunction with personality tests); Robert J. Sternberg et al., Testing Common Sense, 50 AM. PSYCHOL. 912, 913 (1995) (noting that the extent to which intelligence tests predict job performance has long been a matter of controversy and that "[e]ven the most charitable view of the relation between intelligence test scores and real-world performance leads to the conclusion that the majority of variance in real-world performance is not accounted for by intelligence test scores").
the effect of generating negative attitudes in applicants.\textsuperscript{116}

There have been some changes that address concerns about privacy. For example, the MMPI has largely been replaced by the MMPI-2, which eliminates some of the more embarrassing and personal questions regarding subjects like sex.\textsuperscript{117} In addition, questions on more recently developed tests tend to emphasize how people will interact at work rather than how they will deal with their non-work-related activities.\textsuperscript{118} Notwithstanding these changes, the tests remain intrusive with regard to many of the questions asked.\textsuperscript{119}

In today’s environment, concerns about privacy are likely to be greater than they were ten or twenty years ago, and the invasion of privacy resulting from the use of personality tests should be troubling even if it does not lead to a negative employee attitude.\textsuperscript{120} Information passes quickly to wide audiences, and there are organizations that exist for the purpose of gathering information about potential applicants for sale to employers.\textsuperscript{121} Thus, test results may adversely affect a job applicant’s future job prospects and, if information is disseminated more widely, may affect other areas of the person’s life as well.\textsuperscript{122}

The law does very little to address these privacy concerns. Although a federal constitutional right to privacy has been found to exist in certain circumstances, that right exists only against state actors, meaning that the Constitution has no impact on the ability of private employers to conduct personality tests of their job applicants.\textsuperscript{123} Furthermore, the federal
constitutional right to privacy has not been held to prohibit the use of personality tests by public employers.\(^{124}\) Instead, in their attempt to balance the employee's privacy right against the state's interest in testing,\(^{125}\) courts have imposed a requirement that the questions have some job relationship and not be unreasonably intrusive. This balance has generally weighed in favor of protecting the state interest.\(^{126}\)

In contrast to the federal constitution, a number of state constitutions have privacy rights that extend to the actions of private employers.\(^{127}\) In some of the states that have such privacy rights, courts have suggested that personality tests may violate those provisions.\(^{128}\) In some states lacking


\(^{124}\) Black, \textit{supra} note 4, at 92 ("Although the Supreme Court has recognized a right to privacy, legislatures and courts have not extended this right to prohibit personality testing by public employers.").

\(^{125}\) See McKenna v. Fargo, 451 F. Supp. 1355, 1381 (D.N.J. 1978), \textit{aff'd}, 601 F.2d 575 (3d Cir. 1979) (upholding the use of personality tests in the hiring of firefighters on the basis that the burden on applicants' right to privacy was outweighed by the city's interest in "identifying applicants whose emotional make-up makes them high risk candidates"); see also Redmond v. City of Overland Park, 672 F. Supp. 473, 473 (D. Kan. 1987) (holding that the city's interest in insuring that police officers were psychologically fit outweighs the officers' privacy interest). Public employees also have a potential challenge to personality testing based on the Due Process Clause of the 14th Amendment, which may be interpreted to grant public employees a property interest in employment. U.S. Const. amend. XIV, § 1, cl. 2. This raises the question whether an applicant who has been denied a job based on a personality test has been deprived of a property interest without due process of law. Even if applicants do not have the same property interest as existing employees, the question exists whether a hired employee has a claim based on the stigma that may be associated with test results.

\(^{126}\) See Redmond, 672 F. Supp. at 473 (addressing challenges to psychological testing where comprehensive testing was ordered after the employer developed concern for plaintiff's judgment based on specific incidents of on-the-job behavior); McKenna, 451 F. Supp. at 1355 (citing the testimony of plaintiffs' experts that the use of personality tests in selecting employees is inappropriate "because clinical techniques and evaluations were not designed for use in industrial settings").

\(^{127}\) ALA. Const. art. I, § 22; ARIZ. Const. art. II, § 87; CAL. Const., art. I, § 1; FLA. Const. art. I, § 23; HAW. Const. art I, § 6; LA. Const. art. I, § 5; MONT. Const. art. II, § 10; S.C. Const. art. I, § 10; WASH. Const. art. I, § 7. See, \textit{e.g.}, Kinsey v. Macur, 165 Cal. Rptr. 608, 612 (Cal. Ct. App. 1980) (holding that no state action is necessary to maintain a claim of violation of the state constitutional right of privacy).

\(^{128}\) For example, in the frequently cited California decision of Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 86 (Cal. Ct. App. 1991), \textit{cert. dismissed}, 24 Cal. Rptr. 2d 587 (Cal. Ct. App. 1993), the court ruled that certain portions of a personality test administered to applicants for security guard positions violated California's constitutional privacy right. \textit{Id.} at 86 (holding that inquiries into religious beliefs and sexual orientation violate the state constitutional right to privacy). The Soroka court also held that the plaintiff demonstrated a likelihood of prevailing on his claim that the testing violated California's anti-discrimination laws. \textit{Id.} at 89. The case was ultimately settled out of court by the parties for two million dollars. \textit{Employers Beginning to Abandon Psychological Tests},
constitutional privacy provisions, statutory\textsuperscript{129} or common law\textsuperscript{130} rights of privacy may exist. However, even where a right of privacy exists as against a private employer, job applicants will not necessarily prevail in litigation. This is true for several reasons. First, courts sometimes view job applicants as having a lower expectation of privacy than existing employees and as consenting to any invasion of privacy by agreeing to take the test.\textsuperscript{131} Second, like the federal courts, state courts tend to employ a balancing approach that gives deference to an employer’s business needs\textsuperscript{132} and “requires an ‘outrageous’ invasion of a ‘reasonable expectation of privacy.’”\textsuperscript{133} Thus, although employees in some states may have the ability to challenge personality tests, those challenges will not succeed in preventing an employer from using a personality test at all, but will merely limit the questions that can be asked.

B. Discrimination Against Certain Classes of Candidates

Personality tests may also have the adverse effect of discriminating against certain job applicants. Ironically, given the fact that one justification for the use of personality tests is a recognition that


\textsuperscript{129} \textit{See, e.g.} MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1999) (“A person shall have a right against unreasonable, substantial or serious interference with his privacy.”).

\textsuperscript{130} \textit{See} RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1989) (explaining that New York courts have recognized a common law right to privacy). Not all courts are willing to recognize a common law claim in the absence of a statutory claim. \textit{See, e.g.}, Howell v. New York Post Co., 81 N.Y.2d 115, 123 (N.Y. 1993) (“[W]hile the courts of other jurisdictions have adopted some or all of these torts, ... we have no common law right of privacy.”) (citations omitted).

\textsuperscript{131} \textit{See, e.g.}, Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194, 195 (Cal. Ct. App. 1989) (holding that employees should have a reduced expectation of privacy); Cort v. Bristol-Meyers, Co., 431 N.E.2d 908, 912 (Mass. 1982) (holding there is no cause of action stated for a violation of right to privacy where the plaintiffs did not respond to “intrusive” questions); William A. Wines & Michael P. Fronmueller, \textit{American Workers Increase Efforts to Establish a Legal Right to Privacy As Civility Declines in U.S. Society: Some Observations on the Effort and its Social Context}, 78 NEB. L. REV. 606, 641 (1999) (stating that job applicants have a diminished expectation of privacy and the notion of consent). Of course, failing to consent by, for example, refusing to answer questions dooms the privacy lawsuit.

\textsuperscript{132} \textit{See} Pauline T. Kim, \textit{Privacy Rights, Public Policy and the Employment Relationship}, 57 OHIO ST. L.J. 671, 698-709 (1996) (suggesting that employees’ expectations of privacy depends on greater societal norms regarding privacy). Neither the federal nor the state cases employing a balancing approach require empirical evidence of a relationship between particular questions and particular job requirements. Testers and courts seem to make a lot of assumptions about whether certain questions can be said to be job-related.

\textsuperscript{133} Wines & Fronmueller, \textit{supra} note 131, at 641.
achievement and aptitude tests have an adverse impact on many minorities, particularly African-Americans, some argue that many of the personality tests being used are biased toward white, middle-class males.

Concerns about bias are easy to understand because scores on many tests are normed. Norms on many tests have been centered around "a white, middle-class population." Obviously, if normative data disproportionately represents one group, that group will fare better on tests. "[O]n the MMPI, for example, members of minority and ethnic religious groups have tended to look disproportionately pathological." This is hardly surprising, since the original MMPI scales were based on a normative sample "composed essentially of white, rural subjects from Minnesota."

There have been some efforts to respond to the concern that personality tests are culturally biased. For example, when the MMPI was replaced by the MMPI-2, one of the changes made was renorming the test. Although the new norms attempt to be more heterogeneous than the older norms, "the representativeness of the sample has been questioned, primarily because of its high levels of occupational and educational

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135. Stuart, supra note 30, at 26; see also Kamen, supra note 4, at 4 (citing the increased concern among employees and civil rights groups that the tests are discriminatory); Randall, supra note 21, at 141 (suggesting that critics are concerned that pre-employment testing discriminates against minority applicants).


137. Black, supra note 4, at 89 (suggesting that the problem with normative tests is that they fail to take into account the culture and subculture of the test subject).

138. Talbot, supra note 5, at 29 (quoting professor of psychology Robert Bornstein). See also Saccuzzo, supra note 69, at 393 (arguing that MMPI norms are outdated and fail to include minorities).


140. The MMPI was revised and replaced with two separate versions of the test, the MMPI-2 and the MMPI-Adolescent. ANASTASI & URBINA, supra note 1, at 351.


142. See Butcher, supra note 67, at 32.
attainment and underrepresentation of Hispanics and Asian Americans. While I have seen no studies demonstrating that the new norms sufficiently represent the previously underrepresented groups, there is some evidence to the contrary. For example, MMPI-2 normative data for police positions underrepresents both minorities and females, running the risk that both will be unfairly treated in the testing process. Another example of an attempt to address this problem is the Symptom Checklist-90-Revised, which has separate norms for male and female adults and adolescents. While separate norms may help, it appears that some of the norms are not sufficiently representative and do not address concerns about minority underrepresentation. Additionally, the increasing number of new tests is likely to aggravate this problem, as new tests may lack sufficient standardization. "Without a comprehensive sample of the performance of individuals from all walks of life on a particular test, the psychologist is in danger of seriously misinterpreting a set of scores due to special regional, socioeconomic, ethnic, or other subcultural biases and effects on these scores."

As a result, groups like the American Civil Liberties Union have long been concerned that some personality tests illegally discriminate against certain groups. However, there is disagreement about the extent of this problem. Some have suggested that "well-constructed personality inventories do not systematically discriminate against any ethnic or national group, persons with disabilities or result in different selection rates by gender or age." Of course, not all employers are using "well-constructed" personality tests, and disparate impact may result from less well-constructed tests and poor administration.

If a personality test has the effect of excluding from job consideration persons of a particular race or religion, persons with physical or mental disabilities, or older persons, there are legal grounds to challenge the test. However, the law as it is currently constructed is unlikely to be effective to

143. ANASTASI & URBINA, supra note 1, at 355.
145. ANASTASI & URBINA, supra note 1, at 350.
146. See id.
147. Psychological Tests and Constitutional Rights; Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong. 270 (1965) (statement of Professor W. Grant Dahlstrom).
148. Lazar, supra note 11, at 3 (citing Lewis Maltby, Director of Employee Rights Office of the ACLU). Such testing may also discriminate against homosexuals. See id.
149. Philbrick et al., supra note 24, at 80.
150. See George C. Thornton III, Disparate Impact in Managerial Assessments: Occurrence, Causes and Remedies, EMP. TESTING, Nov. 1994, at 191 (arguing that disparate impact on protected classes occurs in managerial assessment centers that are poorly constructed or administered, due to both the type of exercises and the biases of the assessors).
address the potential for discrimination.

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex, and national origin in employment decisions, including in the administration of pre-employment tests. The statute does not directly prohibit personality or aptitude tests. However, it does come into play to the extent that an employer's use of a personality test has the effect (intentionally or otherwise) of discriminating against a protected class. To succeed in establishing a Title VII claim, a plaintiff must demonstrate either intentional discrimination or disparate impact, the latter of which requires a showing by an applicant who is a member of a protected class that the employer's personality test had a disproportionate impact upon her class. Proving disproportionate impact requires offering "statistical evidence of a kind and degree sufficient to show that the [personality test] has caused the exclusion of applicants for jobs . . . because of their membership in a protected group." Apart from the difficulties facing all prospective Title VII litigants, succeeding on a claim that the use of a personality test violates Title VII is no easy task. An applicant will generally not be able to claim intentional discrimination because employers generally do not tell applicants whom they reject the reason for the rejection. Therefore, an applicant must attempt to demonstrate disparate impact, which involves difficult issues of proof. One difficulty is the need to prove an adverse impact on a significant sample of applicants. In the absence of a large enough sample size, the fact that "a slight shift of a few scores would greatly alter the overall disparity" may cause a court to reject the sample.

152. Title VII does not make it unlawful "to give and to act upon the results of any professionally developed ability test." 42 U.S.C. § 2000e-2(h). See also Griggs v. Duke Power Co., 401 U.S. 425, 436 (1971) (stating that nothing in Title VII precludes the use of tests so long as they are not discriminatory).
153. 42 U.S.C. § 2000e-2(h) (explaining that a test may be used "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin"); Griggs, 401 U.S. at 431 (holding that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). Thus, by analogy, in Griggs the Court found that the use of aptitude tests that had the effect of excluding blacks from certain positions and that were not related to job performance, constituted a violation of Title VII. Id. at 431.
154. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988). Even then, the test may be used if an employer can demonstrate that the test serves a legitimate employer goal (i.e., the job-relatedness of the test). See also Black, supra note 4, at 110-13 (discussing what is necessary to assert claims of intentional discrimination and adverse impact).
155. See Michael J. Yelnosky, Title VII, Mediation, and Collective Action, 1999 U. ILL. L. Rev. 583, 586-88 (1999) (discussing the difficulty in retaining counsel, fear of retaliation, and intimidation by the litigation process as impediments to the use of litigation to enforce Title VII).
156. Delikat & Kathawala, supra note 9, at 17.
either that a particular test employed was discriminatory or that it was administered in a discriminatory way is not easy.\textsuperscript{157} Plaintiffs have not had huge success in challenging personality tests as racially\textsuperscript{158} or sexually\textsuperscript{159} discriminatory.\textsuperscript{160}

In addition to federal statutory provisions, many states have statutes prohibiting discrimination on the basis of race, national origin, sex, religion, age, or handicap. These state statutes may also serve as a basis for challenging the use of personality tests in certain circumstances.\textsuperscript{161} For example, in \textit{Soroka v. Dayton Hudson},\textsuperscript{162} the court found that the plaintiff demonstrated a likelihood of prevailing on the merits of his claim that the test in that case violated the California Fair Employment and Housing Act because it asked questions about the applicants' religious beliefs.\textsuperscript{163} The court also found that the employer's test violated California's Labor Code because it asked questions relating to sexual orientation.\textsuperscript{164} However, notwithstanding \textit{Soroka}, the same difficulties of proof that exist with

\begin{itemize}
  \item \textsuperscript{157} For example, in \textit{Cuddy v. Wal-Mart Super Ctr., Inc.}, 993 F. Supp. 962 (W.D. Va. 1998), a plaintiff suing for violation of the Age Discrimination in Employment Act alleged that the person administering the personality test "inappropriately instructed him to select answers at the extreme ends of a ten point scale rather than selecting moderate responses." \textit{Id.} at 968. The court took the position that even if the instructions were inappropriate, the plaintiff could neither demonstrate discriminatory intent nor that the incorrect instructions adversely affected his test score. \textit{Id.}
  \item \textsuperscript{158} See, e.g., Colbert v. H-K Corp., 4 Fair Empl. Prac. Cas. (BNA) 529, 530 (N.D. Ga., 1971) (holding that personality tests did not violate Title VII because they were neither designed nor intended as instruments of discrimination and were reasonably related to job performance). In contrast, there have been some successful challenges to the disparate impact of aptitude tests. \textit{See} \textit{Melendez v. Ill. Bell Tel. Co.}, 79 F.3d 661, 667-70 (7th Cir. 1996) (finding that the district court did not abuse its discretion in holding that an aptitude test had a disparate impact on Hispanic job applicants).
  \item \textsuperscript{159} See, e.g., Reynolds v. Arizona, No. 91-16189, 1993 WL 133831, at *3 (9th Cir. Apr. 28, 1993) (rejecting a Title VII claim of sexual discrimination because the test neither intentionally screened out female applicants nor had a disparate impact on such applicants).
  \item \textsuperscript{160} Claims that particular test questions impermissibly address protected characteristics are more likely to succeed. The EEOC guidelines on Title VII enforcement make clear that questions that directly inquire about protected class status, such as religion, national origin, and age, are inappropriate. EEOC Guide to Pre-Employment Inquiries, [8A Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA) 443:65-66 (Aug. 1981). For example, unless an employer can demonstrate a legitimate basis for such questions, questions pertaining to race are likely to be held to be discriminatory. \textit{See}, e.g., Bennett v. County of Suffolk, 30 F. Supp. 2d 353, 354 (E.D.N.Y. 1998) (refusing to grant summary judgment on a Title VII claim where a question of fact existed as to whether the defendant had a legitimate basis for asking questions of a religious nature).
  \item \textsuperscript{161} As a general matter, use of personality or aptitude tests is not an unlawful employment practice unless it is discriminatory. \textit{See}, e.g., N.Y. EXEC. LAW § 296 (McKinney 1996) (listing unlawful discriminatory practices).
  \item \textsuperscript{162} 1 Cal. Rptr. 2d 77, 86 (Cal. Ct. App. 1991), \textit{review dismissed}, 24 Cal. Rptr. 2d 587, 587 (Cal. 1993).
  \item \textsuperscript{163} 1 Cal. Rptr. 2d at 87.
  \item \textsuperscript{164} \textit{Id.} at 88.
\end{itemize}
respect to Title VII claims will come into play when applicants file state law claims.

IV. A SYSTEM IN NEED OF CHANGE?

The foregoing sections of this article demonstrate that employers are making hiring decisions on the basis of tests that not only may be unsuccessful in accomplishing their intended purpose, but that also involve significant infringements on the privacy of applicants and have the potential to unfairly discriminate against certain applicant groups. The arguments that such tests do not work well, and that making hiring decisions on the basis of test results is unwise or unfair, do not present a legally cognizable claim. Nothing in the law imposes on employers a duty of fairness. Employers need not show that their hiring or other employment practices are wise or effective. Even if it were indisputably clear that personality tests are unreliable and invalid,165 that fact would not effect a legal prohibition against their use. Thus, legal challenges may only be successfully raised in limited situations. For example, in some states it may be possible to file a claim based on a violation of privacy rights in the case of tests asking particularly intrusive questions. Furthermore, some tests may be construed as pre-employment medical examinations prohibited by the ADA, and it may be possible to bring (although difficult to win) a case alleging discrimination in violation of Title VII or a state-antidiscrimination law.

I titled this section "A System in Need of Change?" intending emphasis on the question mark because it is difficult to decide how to respond to the concerns I have expressed. Employers operate largely within a system of at-will employment. Arguably, it follows from that legal reality that, with very limited exceptions, employers can—and should be permitted—to hire whomever they wish, for whatever reason, and the law should not interfere with that ability. If one takes that position, the conclusion that personality tests are invalid or unreliable means nothing from a legal point of view. If employers continue to believe the tests have some value and wish to use them they can. Moreover, since the law does not recognize a broad right of privacy applicable to employees of private employers, concerns about invasion of privacy do not generally give rise to a legally cognizable claim. Thus, absent a plaintiff who can prevail in proving discrimination, the adherents to an at-will system of employment will see no reason to change.

On the other hand, if we are willing to think in terms of persons

165. As my earlier discussion indicates, the case is not quite that clear. See supra text accompanying notes 98-101.
having a right to work or a right to livelihood (albeit not currently legally cognizable rights), perhaps we ought to be concerned about intrusion on that right via such an unreliable means. We particularly should be concerned because job applicants are generally a group with little bargaining power and, to the extent that many of the job applicants who are tested are those seeking lower-level job positions, they have even less power.

Assuming that one is inclined to believe that individuals have a fundamental right to work (as I am), what should be done to address some of these concerns? First, courts and legislatures should consider whether there is some greater role for the law in regulating personality testing. Making a case for some legal intervention is not difficult in this area. After all, the law, indirectly, may be responsible for the increase in personality testing, by virtue of both its prohibition on the use of polygraphs and its imposition of defamation liability, which makes obtaining references difficult. Additionally, the ADA’s limitation on pre-employment medical testing that may contribute to employers using tests in a less effective manner. Thus, it is not unreasonable to suggest that the law, having at least contributed to the concerns identified in this article, should play some role in trying to alleviate those concerns.

While I do not advocate an outright ban on personality testing (although the Employee Polygraph Protection Act and state limitations on voice-stress testing do provide some precedent for so radical a

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166. In the United States, we do not recognize a broad right to work or a right to a livelihood. A number of states statutorily recognize only a very limited concept of a “right to work,” which protects employees’ decisions to join or support a union (or not to do so). See, e.g., Nev. Rev. Stat. Ann. § 613.250 (Michie 2000) (prohibiting the denial of work opportunities based on nonmembership in a labor organization); Tex. Lab. Code Ann. § 101.003 (Vernon 1996 & Supp. 2001) (protecting as an inherent right the right to work and to bargain individually or collectively regarding the terms of employment). It is true that people sometimes speak of a historical tradition whereby “[w]ith increased tenure at a firm came certain ‘property rights’ to a job.” Thomas A. Kochan, Reconstructing America’s Social Contract in Employment: The Role of Policy, Institutions, and Practices, 75 Chi.-Kent L. Rev. 137, 138 (1999). “Right” in that context means no more than an expectation. We might feel less tempted to think in such terms during a period of full employment, such as we are currently in, where most people who want jobs can get them. However, even in full employment, people who lose jobs generally replace them with less-well paying ones. Additionally, of course, we will not always be in such a situation.

167. I am clearly not alone in this belief. See Wines & Frommuller, supra note 131, at 610 (“Perhaps, the time has come to dispense with the discredited notion of employment at will and to replace it with a new approach to employment in which workers’ human dignity, job security, and health are paramount.”).

168. This will no doubt be a source of unhappiness for employers, who perceive that there is too much law governing the employment relationship. There may be, but little of it corrects the potential abuses in the use of personality tests.
suggestion), which is not a politically viable suggestion given the current high level of concern regarding workplace violence, there are several possible avenues of legal reform. First, regulators should consider direct regulation of the personality testing industry. Some of the greatest concerns regarding test validity and reliability should be focused on the new companies that have sprung up offering fast, low-cost assessments of applicants. Rather than a *caveat emptor* approach, one could take the position that such companies are essentially offering psychological services and must be licensed or otherwise regulated to do so. This approach would permit some quality control over the tests being used by employers as well as an external check on the impact of such tests on women and minorities. It would also effect change without the need to rely on private lawsuits, which are costly and time-consuming for the individual applicants involved.

Second, in addition to addressing the industry directly, it may be desirable to address one of the important reasons that employers tend to use personality tests — their sense that it provides information they otherwise cannot obtain. That is, another consideration is whether we can improve the availability of other information to the employer. One way would be to make it more likely that prior employers will be forthcoming with information about former employees. In response to fears of defamation lawsuits, a number of states have adopted legislation to provide some type of statutory immunity for employers when they provide a reference. However, not all states have such statutes. The states that do have such statutes vary in the degree of protection they provide to employers, and

169. Banning the use of personality tests as a hiring tool would not require new legislation. Instead, it could be accomplished merely by reinterpreting what constitutes a prohibited pre-offer medical examination (i.e., by defining all personality tests as medical examinations). *See supra* text accompanying notes 38-44.

170. Presumably, regulation of the personality testing industry would not face the same political difficulties that would beset a proposal to ban employer use of personality testing. Indeed, the same political pressures that make the latter suggestion nonviable would operate in favor of a proposal to regulate the industry to improve the quality of the tests. This is not to say there would not be lobbying against it by those in the industry. In 1965, when the House and Senate held hearings to address whether the use of psychological tests on federal employees raised constitutional problems, it heard testimony from industry persons who suggested that legislation to regulate the industry would be costly and administratively difficult. *See, e.g.*, *Psychological Tests and Constitutional Rights; Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary, 89th Cong. 241* (1965) (statement of Dr. George K. Bennett, President, The Psychological Corporation).

they generally do not provide sufficient protection to employees.172 Thus, expansion of the protection provided by such statutes should also be pursued.173

Non-legal actions are also necessary. Notwithstanding the increased attention psychologists have been paying to the issue of personality testing in the workplace, there is also a need for more empirical research in this area. It is clear that more work needs to be done to determine what personality traits relate to performance in particular jobs. Inventories are developed with assumptions about what traits are desirable, but insufficient research has been done with respect to the basis for those assumptions. In addition, there is a need for more long-term tests designed to test the validity of various personality inventories, particularly projective tests. Further, since employers have legitimate concerns that impel them to use personality tests, further work would be desirable comparing the use of personality tests to other means of attaining the desired employee behavior, such as training. For example, studies that compared the cost-effectiveness of predicting disposition to the cost-effectiveness of training might encourage employers to seek alternatives to the use of personality tests.174

Another area requiring further empirical research that has legal implications is the norming of tests. It is difficult to demonstrate disparate impact in individual cases. Nevertheless, if it could be satisfactorily demonstrated to courts that the test norms themselves discriminate on the basis of race, sex or even economic class, plaintiffs might have a greater likelihood of prevailing in federal or state discrimination claims.


173. A number of commentators advanced proposals designed to remedy the effect of fear of defamation liability on employers' willingness to provide references. See, e.g., Adler & Peirce, supra note 16, at 1434-59 (proposing a imposition of an affirmative duty of disclosure on employers and reform of the qualified privilege in defamation suits); Cooper, supra note 15, at 324-28 (proposing combination of qualified immunity with limited affirmative disclosure duty for employers); Susan Oliver, Note, Opening the Channels of Communication Among Employers: Can Employers Discard Their “No Comment” and Neutral Job Reference Policies?, 33 VAL. U. L. REV. 687, 692 n.2 (1999) (proposing a statute granting employers civil immunity for defamation charges by former employees and for claims of negligent misrepresentation by third parties); Saxton, supra note 15, at 76-112 (proposing reforms to encourage employers to be more forthcoming with reference information and model legislation to effectuate the reforms). Not everyone is optimistic about the use of legal reforms in this area. See J. Hoult Verkerke, Legal Regulation of Employment Reference Practices, 65 U. CHI. L. REV. 115, 153 (1998) (arguing in favor of market mechanisms over legal ones).

174. See Rosse et al., supra note 23, at 442 (suggesting that an alternative to using personality measures to identify customer-oriented employees “would be to hire technically competent employees, who would then be trained (and rewarded) to be more service-oriented” and further suggesting that “future research might address the relative cost-effectiveness of the two approaches”).
All of these suggestions could be more effectively implemented if labor organizations decided to make personality tests an issue of concern, and they should be encouraged to do so. While those who are already employed may not view testing of applicants as their issue, that view would be wrongheaded. The widespread and increasing use of personality testing in the hiring process will inevitably lead to their increased use in the workplace for purposes other than hiring decisions, such as promotion and other advancement decisions. The problems that exist with respect to the use of tests in one context will likely exist in the other. Of additional concern to labor organizations, particularly at a time when employers appear increasingly hostile to union organization, should be the fact that there is evidence suggesting that at least some employers have used personality assessments as a means of screening out pro-union job applicants. As the use of personality testing grows, and with it the temptation for employers to pool information about applicants and employees, management may be developing a tool that will give them increased leverage over their employees. Given the lack of bargaining power of job applicants, labor organizations could be a useful force in attempting to effectuate some of these reforms.

CONCLUSION

Despite a plethora of laws governing the workplace, employers often make hiring decisions on the basis of personality tests that, in many cases,
do not do what they are supposed to do, discriminate against certain job applicants, and invade the privacy of all applicants. That employers use such tests is not difficult to understand in an increasingly global and competitive work environment. Indeed, the law has helped move employers in the direction of the use of such tests.

Concerns for both job applicants and employees should move us in the direction of attempting to both decrease employers' reliance on personality tests and improve the tests that are used. Progress along both of those lines will serve the interest of employers by attempting to maximize their chances of making good hiring decisions, as well as the interests of employees in not being unfairly deprived of employment opportunities. It will also help mitigate the potential for other abusive uses of personality tests that might give employers unfair leverage over employees.