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ARTICLES

PRIVACY, THE PROSPECTIVE EMPLOYEE, AND EMPLOYMENT TESTING: THE NEED TO RESTRICT POLYGRAPH AND PERSONALITY TESTING

Donald H. J. Hermann III*

"The secret things belong unto the Lord."
Deuteronomy 4:26

Prospective employees in both the public and private sectors increasingly are finding that employment is conditioned upon their submission to polygraph and psychological testing. A midwestern case is reported in which a brewery made a lie detector test a condition for employment, defending its use of the lie detector as a means of ensuring that alcoholics did not succeed in gaining employment at the brewery.1 A New York based retail chain is reported to have employed two teams of roving polygraph operators who staged surprise visits to stores, lining up employees and questioning them about pilferage.2 More recently, FBI agents are reported to have utilized lie detectors on State Department officials in efforts to locate the sources of news leaks.3

Surveying the prehiring use of the polygraph by federal government agencies, Congressman John E. Moss found that nineteen agencies used polygraphs to administer 20,000 tests during 1963.4 Truth Verification, Inc., a Dallas firm specializing in the administration of poly-

* Assistant Professor of Law, University of Kentucky A.B., 1965, Stanford University; J.D., 1968, Columbia University.


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graph tests, reported that it ran 42,000 tests in 1964, nearly all for private companies.\(^5\)

No less prevalent during hiring procedures is the use of psychological testing. The Department of Defense reported that in a single year it administered 185,000 psychological tests to civilian personnel.\(^6\) A 1964 National Industrial Conference Board survey of 473 businesses indicated that eighty percent of the firms used psychological tests.\(^7\) Of 208 companies replying to another survey, 97 (46.4 percent) replied that they were employing personality tests, a special category of psychological tests.\(^8\)

The Report of the Committee on the Judiciary on a bill "protecting privacy and the rights of federal employees," which was passed by the Senate in 1967, cited instances in which the polygraph interrogation required of prospective government employees included some extremely personal and very irrelevant questions.\(^9\)

Among those psychological tests used for personality assessment is the Minnesota Multaphasic Personality Inventory (MMPI); it and similar tests have seen considerable use in industry and have been utilized for managerial selection purposes.\(^10\) The questions, to be answered by the applicant "whether it is true as applied to you or false as applied to you," describe a state of mind or a feeling about oneself or others and include questions concerning physical conditions and

\(^{5}\) Grimes, supra note 2, at 1. Mr. Lindberg, Associate Director of John E. Reid & Associates, another polygraphing firm, stated that every big company uses lie detectors at least occasionally. Specifically, he named American Airlines, American Photocopy Equipment Company, Armour & Co., Household Finance Corp., and Amphenol-Borg Electronics. Reid & Associates reported that it conducted 5,200 polygraph tests for industry in 1964. Id.

\(^{6}\) 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., 1st Sess., at 186 (1965) [hereinafter cited as 1965 Senate Hearings].


\(^{8}\) A. Westin, Privacy and Freedom 136 (1967) [hereinafter cited as Westin]. The author defines personality tests as [o]ral or written tests that go beyond measurement of intelligence, skills, or attitudes and seek to measure emotional states, traits of character, sociopolitical beliefs or values, sexual adjustment, and general propensities, and to use these measurements to predict future performance.

\(^{9}\) S. REP. No. 534, 90th Cong., 1st Sess. 20-21 (1967) [hereinafter cited as 1967 S. REPORT].

\(^{10}\) J. Miner, Personnel Psychology 168 (1969).
Polygraph and Personality Testing

bodily functions, religious beliefs, and attitudes toward sex and sexual behavior.\textsuperscript{11}

Criticism of personality and polygraph testing has taken three forms: challenges to the reliability and validity of such testing; concern about the dissemination and availability of testing data; and fear of the loss of personal liberties through invasion of privacy, imposition of psychological inhibitions, and compulsion toward conformity.

The question of dissemination of personnel data and the growth of personal dossiers has been dealt with extensively elsewhere, and is generally beyond the scope of this article.\textsuperscript{12} This article will consider legal challenges to the reliability and validity of such testing.\textsuperscript{13}

The scientific criticism of polygraph and personality testing has been extensive, and citation will be made to appropriate reviews of this literature.\textsuperscript{14} A more extensive discussion will consider present restraints imposed by the courts and arbitrators of the use of testing in the employment context and will indicate likely further extensions of existing

\begin{footnotesize}
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  \item \textsuperscript{11} S. Hathaway & J. McKinley, Minnesota Multiphasic Personality Inventory (1943) [hereinafter cited as M.M.P.I.]. Examples of questions involving attitudes toward bodily functions, religion and sex include: No. 542, "I have never had any black, tarry-looking bowel movements;" No. 490, "I read the Bible several times a week;" No. 297, "I wish I were not bothered by thoughts about sex." See generally W. Dahlstrom & G. Welsh, M.M.P.I. Handbook (1960).
  \item \textsuperscript{12} See A. Miller, The Assault on Privacy (1971). Although Miller is highly critical of psychological testing, especially personality testing, he does not favor outright prohibition. He argues that when the safety or well-being of others depends upon the stability and judgment of an employee, it is appropriate to use validated psychological tests to determine his emotional stability. Nevertheless, Miller cautions that once this concession to testing is made, and no matter how precise a standard is formulated, those requiring testing may apply the standard in a conclusory fashion and thus justify their testing practices. \textit{Id.} at 98.
  Miller goes on to formulate guidelines to limit the dangers created by the collecting and storing of test results: procedures should be instituted to insure accuracy of test data; access to test results should be restricted to highly trained professional personnel; test material should be destroyed upon evaluation except where some paramount objective outweighs the risk to the individual's privacy; accuracy of test results should be reappraised periodically; test evaluations should not be used beyond the specific purpose for which the test was administered; computerization of sensitive data should not be undertaken in the absence of clear need; and computer data, where stored, should be protected by security devices, especially where a remote-access system is utilized. \textit{Id.} at 104-05. See generally S. Wheeler, On Record (1969).
  \item \textsuperscript{13} Reliability and validity are words of art when used in the testing context. \textit{Reliability} refers to stability or consistency. Test reliability is the consistency of scores obtained by the same person when retested with the identical test or with an equivalent form of the test. In the context of polygraphy, reliability refers to the accuracy of truthfulness determination. \textit{Validity} is the degree to which the test actually measures what it purports to measure. Validity must be established on a representative sample of subjects.
  \item \textsuperscript{14} See note 55, and text accompanying notes 144-46, \textit{infra}.
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restraints which can result in outright prohibition or a more enlightened approach to testing in the context of labor arbitration. However, it should become clear that a more general approach is probably necessary in order to reach the prospective employee, the individual most susceptible to such testing, and in order to develop uniform control of such testing. The threat to personal liberties will be examined in the context of constitutional protections with the suggestion that a uniform protection from such testing may be constitutionally required. Finally, possible statutory restraints on such testing will be examined as a means to protect effectively the individual from the misuse of employment testing.

The accuracy of polygraph determinations and the predictive value of psychological testing have been examined by the scientific community. Generally, psychologists have concluded that the usefulness of the polygraph test depends upon the technician's method of administering the test and of interpreting the subject's responses. They have also concluded that the accuracy of the standardized personality test depends upon the nature of the validating process. While one cannot demand infallibility in terms of the accuracy of these techniques, some high degree of confidence is required both by the recipient of the results, and by the general community which finds itself increasingly compelled to submit to such testing. Recent criticism of mental ability, scholastic aptitude, and personality tests reflects concern that these instruments may discriminate against racial and ethnic minorities due to a cultural bias in the tests.\(^\text{15}\)

\(^{15}\) See Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969). Cooper and Sobol observe that general patterns of racial discrimination, inferior educational and cultural opportunities for black people, and cultural separatism impede blacks in attaining the background necessary for success on standardized tests. A consequence of this discrimination and segregation is blacks' lower average score on most standardized intelligence tests. Id. at 1640. See also, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1119-45 (1971).

It is equally true that lack of verbal skills and variations in cultural experience have substantial effects on the performance of blacks on standardized personality tests. It has been argued that personality tests, in their self-fulfilling determinations of undesirable character traits, discriminate and perpetuate prejudices.

\([\text{I}]\) It is probable that whenever we use personality tests in selection, we capitalize upon, and perpetuate, all sorts of prejudices, more subtle, less understood, and perhaps more profound and in the very long run even more destructive than those regarding race.

The conflict of polygraph and psychological testing with such civil liberties as freedom from self-incrimination and the right of privacy presents the most serious problem to be resolved by political and legal authorities. While it is conceded even by the proponents of these tests that the consent of individuals should be obtained to the fullest extent possible, a wholly voluntary consent is often precluded by the job applicant's limited employment alternatives. Economic coercion is present even when an employer merely requests test results; the prospective employee feels compelled to satisfy the employer's wishes in order to enhance the possibility of obtaining the job. The problem becomes one of balancing privacy and related rights against the information gained through the use of the test instruments.

Labor unions provide a measure of protection to their members in their dealings with employers and this often includes the protection against submission to polygraph and psychological testing during the term of employment. The prospective employee, however, is often beyond the reach of the collective bargaining contract. It then must be a matter for the legal and political community to determine the extent to which the employer may require submission of a prospective employee to polygraph and psychological testing as a condition of employment. This article will examine the present limitations on such a requirement by employers and the extent to which legal authority mandates further restrictions.

I. POLYGRAPH TESTING

A. The Instrument

Polygraph instruments do not measure lying, or even psychological states that accompany lying; they measure physiological change generated in the subject by emotional stress. Research seems to indicate

Groups, Job Testing and the Disadvantaged, 24 AM. PSYCHOLOGIST 637, 641-42 (1969), calling for studies to determine whether there are in fact differing patterns of test validity for Negroes and whites on standardized tests.

16. Westin, supra note 8, at 212-13. As early as the third century B.C., Erasistratus is reported to have observed that emotion caused a quickening of the pulse. House Comm. on Gov't Operations, Use of Polygraphs as "Lie Detectors" by the Federal Government, H.R. Doc. No. 198, 89th Cong., 1st Sess. 8 (1965) [hereinafter cited as House Report on Polygraphs].

The first reported attempt to use an instrument to detect deception occurred in 1895 when Cesare Lombroso adapted the "hydrosphymograph" (which measured blood pres-
that blood pressure variations most satisfactorily indicate physiological change due to the emotional stress of lying. In 1915, William Moulton Marston, a criminal lawyer, began systematic research at the Harvard Psychological Laboratory into the correlation between lying and changes in blood pressure. Marston hypothesized that the act of deception is accompanied by a release of additional nervous energy which results in measurable increases in the strength of the subject's heartbeat and in his systolic blood pressure. He further assumed that this reaction cannot be voluntarily controlled. However, Marston was aware that other mental and emotional activities tend both to raise and lower the systolic blood pressure.

Marston's experimental work aroused the interest of John A. Larson, a psychologist associated with the Berkeley, California police force. It was Larson who first developed an apparatus which measured both respiration and blood pressure. In 1921 Larson devised an instrument capable of simultaneously recording blood pressure, pulse, and respiratory changes. He theorized, as had Marston, that there are certain physical concomitants of emotion which reflect stress caused by guilt in lying.

Larson was joined in his work by Leonarde Keeler, a psychology graduate of Stanford University, who in 1926 developed a more satisfactory instrument. The modified apparatus consisted of three units:
one recording continuously and quantitatively blood pressure and pulse; another giving a duplicate blood pressure-pulse curve taken from some other part of the subject’s body or, in the alternative, measuring muscular reflexes of the arm or leg; the third recording respiration.25

Keeler attempted to answer early criticism that “much of the success of the blood-pressure technique in detection of deception and guilt” was attributable “to the psychological effect such a test has on the suspect in bringing about confessions.”26 Keeler argued that his experiments showed that emotional tension created by anger or fear of false accusation, which could also produce distolic blood-pressure, could be reduced through a pre-examination session with the examining technician.27 Moreover, in Keeler’s estimation, the pattern of responses and machine measurements throughout questioning, even irrelevant questioning, is related to veracity. Keeler formed the Keeler Polygraph Institute in Chicago in 1938, where he further developed his instrument to include a galvanometer for recording electrodermal or galvanic skin reflex.28 John E. Reid, in 1945, added a device for measuring muscular activity after concluding that such activity could have an effect on the subject’s blood pressure.29 Essentially, however, Keeler’s polygraph remains the instrument most broadly used today as a “lie detector.”

B. Interrogation

It is first necessary to distinguish the polygraph interrogation used for the determination of guilt of a particular crime from the use of the test in the pre-employment situation.30 In criminal interrogations, the

25. Id. at 40-42. A roll of paper is drawn by a sprocket feeder roll which is driven by a synchronous motor; the paper supplies the recording chart, and the curves are recorded by means of combined lever arm and fountain pen.
26. Id. at 42.
27. Id. at 42-46. Keeler conducted two experiments; in the first, subjects were questioned about a playing card which they selected from a group of ten cards, and in the second, they were questioned about a chosen location on a map. These experiments produced recorded curves which indicated an increase in blood pressure preceding and during a disruptive response, followed by a lack of interest and relaxation.
29. Id. at 3.
30. See generally Discussion of Mr. John Reid, of Reid & Associates, a firm specializing in polygraphing, in House Polygraph Hearings, supra note 4, at 37.
examiner is attempting to determine the veracity of the subject with regard to a specific event; in order to avoid any unnecessary increase in tension in the subject, the scope of the examination is restricted to conduct similar in nature to that being investigated. This limitation restricts the inquiry into the personal life of the subject. On the other hand, the employment screening test in industry and government is a broad review of the subject's personal life in order to determine whether there is any basis for not hiring the particular applicant. While the use of the device in criminal investigations poses major problems with regard to reliability and self-incrimination, it presents a narrower case of invasion of privacy, both as to the use of "control" ques-


   The factors which occasion the chief difficulties in the diagnosis of deception by the lie-detector technique may be enumerated as follows:

   (1) Emotional tension—"nervousness"—experienced by a subject who is innocent and telling the truth regarding the offense in question, but who is nevertheless affected by,

   (a) fear induced by the mere fact that suspicion or accusation has been directed against him, and particularly so in instances where the subject has been extensively interrogated or perhaps physically abused by investigators prior to the time of the interview and testing by the lie-detector examiner; and

   (b) a guilt complex involving another offense of which he is guilty.

   (2) Physiological abnormalities, such as

   (a) excessively high or excessively low blood pressure;

   (b) diseases of the heart;

   (c) respiratory diseases, etc.

   (3) Mental abnormalities, such as

   (a) feeblemindedness, as in idiots, imbeciles, and morons;

   (b) psychoses and insanities, as in manic depressives, paranoids, schizophrenics, paretics, etc.;

   (c) psychoneuroses, and psychopathia, as among the so-called "peculiar" or "emotionally unstable" persons—those who are neither psychotic nor normal, and who form the borderline between these two groups.

   (4) Unresponsiveness in a lying or guilty subject, because of

   (a) lack of fear of detection;

   (b) apparent ability to consciously control responses by means of certain mental sets or attitudes;

   (c) a condition of "sub-shock" or "adrenal exhaustion" at the time of the test;

   (d) rationalization of the crime in advance of the test to such an extent that lying about the offense arouses little or no emotional disturbance;

   (e) extensive interrogation prior to the test.

   (5) Unobserved muscular movements which produce ambiguities or misleading indications in the blood pressure tracing.

Henderson, 230 P.2d at 501-02.

32. It can be argued that refusal to submit to a polygraph test is prejudicial, and that the pressure exerted on a suspect by the suspicion or accusation itself means there is never voluntary consent by an accused to a lie detector test. See, e.g., City of Miami v.
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tions and as to the scope of the examination itself, than is presented in
the employment testing context. Reid and Inbau have described the
“control” question as “a question about an act of wrongdoing of the
same general nature as the main incident under investigation, and
about which the subject in all probability will lie or to which his answer
will be of dubious validity in his own mind.” For example, an investiga-
tive control question in a case of robbery is, “Did you ever steal any-
thing?” The examiner assumes, first, that robbery is a form of stealing
and, second, that a subject who denies ever having stolen anything
in his whole life and who does not register as lying is considered either
to be beyond detection by the instrument or to be lying about the
main offense under investigation. While the primary purpose of the
control question and other irrelevant questions is to determine the
subject’s normal reactions—his “norm”—under test conditions, the
questions invade the privacy of the subject and increasingly do so as
the content of the questions becomes more distant from the subject
under investigation.

In criminal investigative polygraphy, where one is primarily inter-
ested in whether a suspect committed a specific offense, the only
factor which broadens the examination is the control question.

Jervis 139 So. 2d 513, 516 (Fla. 1962). In persuading a suspect to submit to a lie detec-
tor test, one of the investigators told the suspect:

I want to point out one other thing with regard to this lie detector. This is my per-
sonal statement. I don’t even know whether it reflects the sentiment of this Board,
but I think whether you consent or do not consent to be tested by the lie detector,
you are, in fact, being tested by it whether you take the test or don’t. If you do take
the test, the polygraph shows certain findings; if you don’t take the test, one has to
surmise there are good reasons why you don’t and that doubt remains in our minds
as to whether or not you have stated the full and exact reason.

Id. at 516 (emphasis added).

33. Reid & Inbau, supra note 16, at 19. Use of a sex-related control question in a
case where no sex offense is under investigation may stimulate a greater emotional re-
sponse than a non-sex question related to the kind of conduct actually involved in the
case. Id. at 19 n.33.

34. Id. at 19.

35. Id. at 19 n.24. According to Reid and Inbau, a truthful person will almost al-
ways admit some kind of stealing during his lifetime, or that he at least attempted or
considered stealing.

36. Id. at 20. For instance, in the “robbery hypothetical,” Reid and Inbau suggest
that the suspect be asked: “Did you ever steal anything?” If the suspect says “no” the
examiner is directed to ask “You mean in your whole life?” This question is expected to
elicit a response such as: “Well, as a kid, but not since then.” In cases where the suspect
insists that he has never stolen anything at anytime in his life, the examiner is instructed
to ask: “Did you ever try to steal anything?” Id. at 19-20.

37. House Polygraph Hearings, supra note 4, at 38.
the other hand, the pre-employment screening examination poses a problem with regard to privacy throughout the examination. The "probing peak of tension" test, which is what pre-employment polygraph examination entails, involves drawing the subject out on numerous background areas and noting reactions in any area which appears particularly bothersome to the suspect.\(^3\) In contrast to criminal investigation, pre-employment screening involves a "fishing expedition." A number of areas are touched upon, any of which may spark a machine reaction which signals the operator to delve more deeply in order to gather as much information as possible about the "problem" area.

One polygraph technician's manual containing instructions for adapting the polygraph device to pre-employment screening includes sample questions indicating the scope of the employment test.\(^3\) The questions, which are accompanied by comments indicating the investigative topics each might lead to, can be loosely fitted into four broad categories: first, questions about past dishonesty or criminal activity, detected or undetected, related or unrelated to work;\(^4\) second, questions about past work record and attitude toward the job for which application is being made, and underlying motives of the person seeking employment;\(^4\) third, questions about mental or physical

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38. Id.
40. The first category is exemplified by the following questions and comments:
77. Have you ever stolen merchandise or materials from a place where you have worked?
   If so, when, where, and how much? (Method of operation, collusion, knowledge of others who were, or are, presently stealing, sale of merchandise for personal gain, contacts or fences, arrested for stealing, fired for stealing, asked to resign, kleptomaniac, shoplifter, job-jumper, falsification of employment background, arrest record, undetected crimes, and many others.)
79. Could you be wanted by the police anywhere for any kind of crime?
   If so, what kind, where, and when, and under what circumstances? (Deserted family; wanted by welfare department. Armed robbery, murder, burglary, auto theft, rape, grand larceny, embezzlement, fraud, bond jumper, arrest record, prison escape, military deserter, and many others.)
Id. at 138.
41. Sample second category questions and comments are:
45. Will you be satisfied with the starting salary?
   Does he know what it is; does he care? (Present bills exceed income; how much does he have to have to get by; bill collectors on his trail, has other source of income, behind in all bills, court judgments outstanding, feels he should have more money due to experience, job-jumper, made more money on similar job, spoiled by war wages and never got over it, not dependable, alcoholic, wife forced to work
problems, or about family difficulties which may affect work activity; and fourth, questions about accident experiences, personal habits, political activity, and personal association, any of which may be tangentially related to the likelihood of accident or indicate personal instability. The questions and the accompanying comments make it clear that the interest of the examiner is much broader than the questions (which are themselves intimately personal) and that the questions are meant to elicit explanatory remarks from the subject from due to economic condition, plant, lack of education, falsification of application, better qualified than job calls for, fallen down and climbing back up the ladder, misfit, theft of money or merchandise under similar salary conditions, and many others.)

46. Are you seeking long term (temporary) employment with this company?
If not, why not? (Other applications pending, job-jumper, needs just enough money to move on, setting up crime, summer employment only, presents opportunity to steal money or merchandise, plant, back injury artist, using job as stepping stone only, close relative on job, has friend stealing from company, really sincere, falsification of application, not qualified, and many others.)

49. Have you ever been asked to resign from a job?
How many times, and for what reasons? (Became involved in a deplorable situation, couldn’t leave women employees alone, pressure from stockholders, criminal associations, drinking excessively on or off job, violation of company policies, theft, collusion, individual dishonesty, and many others.)

70. Do you want this job for any reason other than employment?
Communist activity; seeking trade secrets (setting up for inside theft, setting up for planned safe job, burglary, or armed payroll robbery; job-jumper, temporary employment with other jobs pending, sabotage, hiding from family, wanted by police, undercover agent, plant, and many others).

Id. at 131-32, 133, 137.

42. Ferguson’s third category:

50. Have you had any major operations within the past ten years?
How many, what kind, when, and under what circumstances? (Cured; can recur, prevents applicant from taking some jobs, resulted in nervous condition, ashamed, disfigured, impotent, operation a failure, psychosomatic, psychoneurotic, crippled, loves to talk about operation, thinks he or she is only one with such problems, contagious disease, partial or complete hysterectomy, severely injured, wrong diagnosis by physician, psychopathic, murderer, cancer, and many others.)

53. Have you ever suffered a nervous breakdown?
If so, when; cause and period of treatment; frequency? (Hospitalized or not, family problems, mental maladjustment, service connected, mild or severe, unable to face reality, carries world’s problems on his shoulders, criminal act or tendencies, claustrophobia, afraid of height, insecurity, failed in all endeavors, heavily in debt, amnesia, and many others.)

59. Have you ever filed for, or collected workmen’s compensation insurance from an on the job injury?
If so, when, where, what for, and under what circumstances? (Now collecting for self, or on behalf of dependent relative, court suit, phony claim, injury artist, malingering, legitimate injury, paid off others for causing injury, settled out of court, collusion with unethical lawyer, and many others.)

Id. at 133, 135.

43. Sample fourth category questions and comments:

60. Have you ever had an automobile accident while you were driving?
How many in the past three years? (Location of accidents, chargeable or non-
which the operator can extract an even greater amount of personal data.\(^4\)

Most arguments in favor of the use of the polygraph emphasize its efficiency and its ability to overcome a subject's conscious or unconscious resistance to truthfulness. The efficiency of the instrument contrasts favorably with investigative activity; most of the facts revealed by the test would require weeks of work to discover by ordinary investigative methods.\(^45\) Second, the inherent "coercion" of polygraph testing pierces the outer defenses of conscious deception; lies told to deceive the examiner can be penetrated quickly and the subject can thus be put into the mood for a complete confession. Third, repressed beliefs and guilt feelings can be discovered through the use of the polygraph.\(^46\) The developers of the polygraph, disregarding the invasion

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chargeable, wanted by police for alias tickets, using phony driver's license, driver's license revoked or suspended, reckless driver, irresponsibility, drives while drinking, phony insurance claims, high accident record, bad eyesight, complete disregard for safety laws, road hog, fainting spells, and many others.)

74. Do you belong to any group which advocates overthrow of the American system of government?
Self-explanatory.

75. Are you now or have you ever been a communist sympathizer?
Self-explanatory.

76. Do you actually know anyone who has ever written a threatening letter to the President or Vice-President of the United States?
Self-explanatory.

88. Have you written any bad or insf checks in the past three years?
If so, where, how many, for how much, and under what circumstances? (Arrest record, "kited" checks, writes hold-checks between paydays, family problems, how many out now, alcoholic, showoff, big time "Charlie," gambling, theft of money and merchandise, bunco artist, check writing sickness or compulsion. and many others.)

92. Did you ever try smoking marijuana?
When and under what circumstances? (Frequency, pusher, trying to beat test, criminal record, undetected crimes, psychological maladjustment, adult or juvenile, and many others.)

Id. at 135, 136-37, 138, 140-41.

44. Ferguson presents a hypothetical affirmative response to a question:
For example, if a subject answers yes to having had a rupture or hernia operation, the examiner would possibly make the following notation in the blank spaces allotted:
No. 56. Suffered rupture while lifting barrels of wax while employed for Blank Company, in July of 1956. Was operated on in Allen City Hospital, and did not return to work for six weeks. Filed for, and collected, workmen's compensation insurance. No suit or settlement involved. Returned to work. No such problems since.

Id. at 141.

45. Marston, supra note 18 at 137-38.

46. This very fact has given some pause with regard to the use of polygraph examinations which may be recording feelings of repressed guilt about a matter entirely unre-
of privacy, extoll this creation of self-awareness. By stripping away disguises, mental masquerades, and deceptions, the polygraph examination is said to act as a purgative to the personality, freeing it from all kinds of twists, repressions and emotional conflicts.

Generally, criticism of pre-employment screening by polygraphing can be divided into four categories. First, the polygraph is designed to obtain a response with regard to a specific incident. Its utility for determining a broad question such as the suitability of an individual for a particular position is marginal when the broad inquiry is being made for predictive purposes. It is doubtful that the polygraph is a reliable means of determining whether an individual will be a good worker, or will be dependable, or will steal. Second, the nature of the inquiry during pre-employment screening is to focus on past acts, a focus appropriate for criminal investigation but which is entirely inappropriate in the context of future employee conduct. The pre-employment screening examination extracts information and implicitly executes judgment for the offense. It negates the possibility of reformation. That a person stole some pencils five years previously may or may not be a good indicator that he will steal in industry or business. While criminal polygraph examination verifies past conduct, the polygraph in personnel selection attempts to predict future conduct. It is doubtful that it can do so. Third, the use of the polygraph in pre-employment screening, even in critical areas such as national

47. Congressman Cornelius Gallagher has summarized the overwhelming objections to employment polygraphing: In my opinion, lie detector tests constitute an insidious search of the human mind and are a breach of the most fundamental of human rights. They provide a vehicle of excision into the most private recesses of the human mind. Even if the polygraph testing was trustworthy, there is still no possible justification for such “mental wiretapping.” I believe the lie detector test under any compulsion is a violation of the fourth amendment to the Constitution. Its use upon Federal employees and job applicants is especially repugnant and should be stopped now—today. Complete report on polygraphs, supra note 16, at 43.

48. House Polygraph Hearings, supra note 4, at 304.

49. Id. at 306.
security, is ill-conceived since those individuals who are supposed to be ferreted out by the test often go undetected.50

Finally, there are fundamental civil libertarian objections to the use of the polygraph as a pre-employment screening device.51 The use of polygraphs is degrading and manifests a general distrust for the worker. The dignity of man is the issue. General use of this instrument subjects the majority of innocent, trustworthy employees to testing, yet the lie detector is basically an instrument of distrust, which should be used only where there is a strong suspicion that the individual is not telling the truth. Moreover, the use of the polygraph violates scientific integrity, since the advertised use implies a scientific accuracy that has yet to be proved.

The probing questions of a pre-employment polygraph examination may be injurious to the subject both as a consequence of their "suggestiveness"52 and the danger of the misuse of the record made of the responses. The polygraph screening examination converts the instrument into a blindly probing tool that can damage severely the reputation or even the mental stability of the person tested. The personal and sensitive questions tend very easily to charge the emotions and may be misinterpreted by the operator. A record of the subject's responses may find its way into the personnel file of the company and be transmitted as "reference material" when the worker leaves the employ of the company.53 By stripping away the subject's defenses, exposing his personality and forcing him to confront guilt feelings, pre-employment polygraphy may thereby deny him the opportunity for reformation which comes through denial and rationalization. It

50. See House Report on Polygraphs, supra note 16, at 44. Dr. Stefan T. Possony, of the Hoover Institution at Stanford University, and an authority on international communism, argued that "the Government judges the responses to questions about sexual activity are so victorian that often the active, virile male, who possesses the initiative, creativity, and drive needed for intelligence work, is disqualified. In contrast, the undersexed male, the homosexual, and the communist agent who is instructed in how to beat the machine, are capable of passing the test with flying colors." Id.
51. See generally Testimony of Dr. Joseph F. Kubis, Department of Psychology, Fordham University, House Polygraph Hearings, supra note 4, at 303.
52. The psychological effect of "suggestiveness" results in the subject becoming convinced of his guilt of an offense of which he is innocent, or in the subject becoming preoccupied with the substance of the questions such as feelings of guilt. For an example of "suggestiveness" resulting in a false confession to a homicide see F. Shapiro, Whitmore (1969).
perhaps deprives the subject the refuge of lying, which may be a necessity for stable life in a complex society.54

Since the use of the polygraph screening examination might severely compromise the dignity and impugn the integrity of the subject, it is significant that other, less offensive means are available for obtaining information which may correctly serve as the basis for any employment decision. For the most part, there are available records, or the possibility of developing investigative reports, concerning the past criminal activity and past work experience and attitude. The cost to the employer is, of course, greater than the cost of polygraphing. However, this cost must be weighed against the sacrifice of the individual dignity of the prospective employee who is compelled to undergo polygraphing. Any information relating to mental and physical conditions, a family situation, accident experience, or personal habits, associations or beliefs may be relevant to some degree in making an informed employment decision. Certainly there are risks to the employer and to other employees if a subject possesses personal characteristics or physical defects which are not determined before employment. Yet, these risks may be properly borne by the employer where there is a great sacrifice of human dignity and privacy, as there is in

54. Theologians have recognized a value in truth evasion and have legitimized it by the notion of mental reservation. If for instance a child is asked if his mother is home, and in fact she is but does not wish to be bothered by a salesman, the child may answer, "No," meaning, "No, my mother is not home to you." For a general discussion of morally permissible lying see HIGHER CATECHETICAL INSTITUTE AT NIJMEGAN, DE NIEUWE KATECHISMUS (THE NEW CATECHISM) 442-43 (Eng. transl. 1967), wherein the argument is made:

The lie is opposed to the truth. It is a distortion of reality. It makes a person unreliable. Hence in truth or lying we are concerned with the mutual trust and confidence by which we rely on one another. A complication arises from the fact that mutual confidence also involves the keeping of secrets. There is a natural feeling of reserve about personal matters affecting oneself or others. People do not tell all comers about everything that happens in their homes. Each of us has a certain right to a certain privacy. Hence for instance, there is also the professional secret. Doctors and others whose duties bring them into contact with the private lives of other people are bound to secrecy. . . .

It may sometimes happen, however, that there is a risk of a secret's being revealed, as when tricky or impertinent questions are asked. Only an untruth can preserve secrecy and hence our reliance on one another. If for instance someone asks a doctor in a certain case, from which clear deductions can be made, whether he has had a visit from a certain patient, an evasive answer might only mean, yes, he had. In such a case the doctor may or must simply say No. . . .

It is of the nature of language that men should be able to conceal something from others, and this is something that everyone knows. There is no breach of mutual confidence. And hence it evades the charge of lying. It is not a real lie.
screening polygraphy, in order to obtain what may be only marginally useful information.

C. The Legal Status of the Polygraph

The polygraph has not gone unnoticed by the legal system. The courts have focused primarily on the unproven reliability of the instrument, while arbitration tribunals have considered not only the reliability of the test but also the infringement of civil liberties resulting from its use. The legislatures of several states have limited the use of the "lie detector" following attacks by labor unions on the frequent requirement of polygraph testing as a condition of employment, and also due to widespread concern over the use of an instrument of unproven reliability.55

1. Judicial Treatment of the Polygraph

The earliest and most systematic consideration of the reliability of polygraphy occurred in the courts in the context of criminal prosecutions. Frye v. United States,56 decided in 1923, is the first reported case rejecting the admission of polygraph testimony. After examining the nature and theory of polygraphy, the court in Frye upheld the lower court's exclusion of expert testimony concerning the results of a polygraph test on the basis that "the systolic blood pressure test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in

55. The question of reliability was given extensive attention in Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection, 70 YALE L.J. 694 (1961). Therein the reliability of the polygraph as a lie detector was seriously challenged and found particularly inappropriate for pre-employment screening. The author stated:

The scientific basis for lie detection is questionable. There seems to be little evidence that upholds the claim to a regular relationship between lying and emotion; there is even less to support the conclusion that precise inferences can be drawn from the relationship between emotional change and physiological response.

Whatever the unconditional accuracy of the lie detector, the number of false positives it diagnoses is going to be related to the number of true positives in the population being tested. This fact would make the use of lie detectors, even if they had high unconditional accuracy, questionable in those situations—such as personnel screening—in which there are a few true positives in the population.

Id. at 727.

56. 293 F. 1013 (D.C. Cir. 1923).
admitting expert testimony deduced from discovery, development, and experiments thus far made.\textsuperscript{57} Generally, state courts have followed the \textit{Frye} decision rejecting the admission into evidence of the results of the polygraph test, on the basis of its unproven reliability.\textsuperscript{58}

\textsuperscript{57} \textit{Id.} at 1014. A decade after \textit{Frye}, the Wisconsin Supreme Court upheld a ruling of the inadmissibility of test results, observing:

\begin{quote}
We are not satisfied that this instrument, during the ten years that have elapsed since the decision in the \textit{Frye} case, has progressed from the experimental to the demonstrable stage.
\end{quote}

State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). The Wisconsin court cited Wigmore's recognition of the possible utility of the "blood pressure method of lie detection," noting that:

\begin{quote}
[T]he record of psychometric achievement with testimony is still meager . . . the conditions required for truly scientific observation and experiment are seldom practicable. The testimonial mental processes are so complex and variable that millions of instances must be studied before safe generalizations can be made.
\end{quote}

\textit{Id.}, 246 N.W. at 317.

The admission of polygraph evidence met with momentary success in New York, where a court heard evidence that the device was one hundred percent accurate. People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Sup. Ct. 1938). After considering the testimony of an expert witness as to this phenomenal capacity of the machine, the court concluded:

\begin{quote}
For hundreds of years our courts have deemed the examination and cross-examination of witnesses in open court to be the best method so far devised for the ascertainment of the truth and have used that method for lack of any better approach. It seems to me that the pathometer and the technique by which it is used indicates a new and more scientific approach to the ascertainment of truth in legal investigations.
\end{quote}

\textit{Id.}, 3 N.Y.S.2d at 351. Nevertheless, the Court of Appeals of New York in the same year rejected the admission of polygraph evidence indicating that the condition precedent to the acceptance of polygraph evidence would be expert testimony that the polygraph possesses such value that reasonable certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by qualified experts in respect to the "lie detector," we cannot hold as a matter of law that error was committed in refusing to allow defendant to experiment with it.

People v. Forte, 279 N.Y. 294, 18 N.E.2d 31, 32 (1938).

Other limited uses of the polygraph by investigative and prosecuting authorities are condoned in Commonwealth v. Jones, 341 Pa. 541, 19 A.2d 389, 392-93 (1941). This case held that the use of a lie detector along with prolonged incommunicado questioning, even where trick was used, did not vitiate a confession. See also State v. Dehart, 242 Wis. 562, 8 N.W.2d 360, 362 (1944); LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288, 292-93 (1943). But see Bruner v. People, 113 Colo. 194, 156 P.2d 111, 117, 118-20 (1945).

\textsuperscript{58} Besides the New York and Wisconsin opinions, cited in note 57, \textit{supra}, opinions rejecting the admission of polygraph data are: People v. Becker, 300 Mich. 562, 2 N.W.2d 503, 505 (1942) (on the basis of unreliability); State v. Cole, 35 Mo. 181, 188 S.W.2d 43, 50-51 (1945) (because it was prejudicial to conduct polygraph tests before the judge and because of lack of proof that the instrument had sufficient scientific support); State v. Lowry, 163 Kan. 622, 185 P.2d 147, 149-52 (1947) (holding that, absent argument and stipulation, test records and examiner's interpretation are inadmissible); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (upheld exclusion on the basis of unreliability, although concurring opinion argued that where the defendant voluntarily submitted to testing the results should be admitted); People v. Wochnick, 98 Cal. App.
It is also generally true that parties will not be permitted to introduce indirectly the fact that a witness's testimony has been scrutinized by polygraph testing,\(^5^9\) nor will the courts receive evidence of refusal or willingness to take the test. The underlying reasoning is that the fact finder would be unable to assess the evidence without an as yet unavailable knowledge of the reliability of lie detector tests in general.\(^6^0\)

Statements in several opinions which refuse to permit direct and indirect introduction of polygraph evidence imply that stipulations made before the taking of the examination may be enough to allow admission.\(^6^1\) In *LeFevre v. State*,\(^6^2\) which represents the majority position, the prosecutor prepared stipulations to the effect that either the state or the defendant could use the finding of a proposed lie detector test. When the defendant sought to admit the results of a favorable

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59. See, e.g., People v. Aragon, 154 Cal. App. 2d 646, 316 P.2d 370 (1957) (statements with reference to a lie detector test which had been introduced into a case were held prejudicial); Haynes v. State, 292 P.2d 442 (Okla. 1956) (defendant's testimony that after arrest he voluntarily submitted to a lie detector test was excluded); State v. Veros, 67 N.M. 19, 363 P.2d 629 (1961) (testimony indirectly giving the results of a polygraph test was held inadmissible even though there was no objection).

60. See, e.g., State v. Rowe, 77 Wn.2d 955, 468 P.2d 1000 (1970), wherein the court observed that "[s]ince it is generally held that polygraph tests are not judicially acceptable. . . . it is obvious that a defendant should not be permitted to introduce evidence of his professed willingness to take such a test." *Id.* at 958. 468 P.2d at 1003. Accord, Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); Haynes v. State, 292 P.2d 442 (Okla. Crim. 1956).

61. See, e.g., State v. Rowe 77 Wn.2d 955, 468 P.2d 1000 (1970), in which the court noted that "[t]he examination was given, although there was no stipulation concerning in admissibility of the results." *Id.* at 958. 468 P.2d at 1002.

62. 242 Wis. 416, 8 N.W.2d 288 (1943).
test, the court refused. This exclusionary rule is the only one that can be consistently maintained where polygraph test results are otherwise excluded because of invalidity; no stipulation can remedy the invalidity finding. However, in People v. Houser polygraph evidence, offered by the state was admitted upon first, a stipulation by the defendant, in writing, that the operator was an expert, and second, upon a waiver by the defendant of his right against self-incrimination in answering the examination questions. The court concluded that, given the stipulation and waiver:

It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that, as to the result of the test, such evidence was inadmissible.

It should be observed that the court in Houser substituted self-incrimination as the rationale for the general exclusionary rule rather than unreliability. Nevertheless, the Iowa Supreme Court followed People v. Houser while conceding that reliability of polygraph evidence is still a matter of dispute. The most sophisticated treatment of the acceptance of polygraph evidence upon stipulation is that found in State v. Valdez. Wary of the reliability of polygraph testi-

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63. See Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951), where the appellate court refused admission of stipulated test results obtained by direction of the trial court. In refusing the court stated:

We are not unmindful of the fact that at the direction of the trial court, the parties agreed to submit to the tests, but whether by voluntary agreement, court direction, or coercion, the results of such tests do not attain the stature of competent evidence.

Id. at 174. See also State v. Trimble, 68 N.M. 406, 362 P.2d 788, 789 (1961), where the court held that "[t]he signing of a waiver did not alter the rule with regard to the admissibility of [polygraph] evidence."


65. Id., 193 P.2d at 942.


67. 91 Ariz. 274, 371 P.2d 894 (1962). In Valdez, the Arizona court first reviewed in some detail the chief difficulties in the diagnosis of deception by the lie detector technique, including (1) nervousness of the subject who is innocent and telling the truth, (2) physiological abnormalities, (3) mental abnormalities, (4) unresponsiveness in a lying or guilty subject, and (5) unobserved muscular movements which produce ambiguities or misleading indications. Id., 371 P.2d at 897-98. Second, the court noted the objections to unrestricted use of the polygraph technique: (1) the tendency to treat lie detector evidence as conclusive; (2) the lack of standardization of test procedure; and (3) the difficulty a layman encounters in evaluating the examiner's opinions. Id., 371 P.2d at 898. Finally, the court held that polygraph evidence and expert testimony related to it were admissible upon written stipulation by the prosecutor, the defendant and his counsel, and when the court in its discretion finds that the examiner was qualified and that the
mony, the Arizona court permitted the use of such evidence only where the parties consent by stipulation, the trial court permits challenge of the reliability of the polygraph evidence by the party to whom it is adverse, and the jury is instructed not to consider polygraph evidence as conclusive.

2. The Polygraph and Labor Arbitration

The polygraph becomes an issue in the labor context in many of the same investigatory and accusatory situations faced by the courts. Other labor uses include periodic screening of employees and assisting in promotion decisions. While no reported arbitration decision has involved the use of the instrument in a pre-employment context, and while arbitration decisions are not binding as precedents, they are useful, nevertheless, in assessing the status of the polygraph in industry.

In Marathon Electric Manufacturing Corp. v. Local 1116, UAW,68 the arbitrator, in rejecting polygraph evidence, focused on the challenge to its validity:69

[T]he polygraph is not a reliable scientific instrument for the ascertaintainment of truth. Under favorable conditions, deception may be indicated by a specific response in either blood pressure or respiration. At the present state of development of the polygraph, even its most ardent advocates do not claim that its accuracy is more than 75 percent.

A second basis for ruling that the opinion of the polygraph operator was not admissible was its inferiority to witness testimony or material

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evidence of misconduct. Nevertheless, the arbitrator conceded that the lie detector was useful in compelling self-incriminating statements, and suggested that, "voluntary stipulations would undoubtedly make such tests admissible in Arbitration proceedings..."

Where the results of polygraph evidence have been accepted by the arbitrator, it has not been done without reservation. In *Wilkof Steel & Supply Co. v. Teamsters Local 92*, the arbitrator took the position that all available information and evidence ought to be considered and that appropriate weight would be assigned at his discretion to each piece of evidence. Nevertheless, after observing that polygraph evidence was subjective and at best "indicative," the arbitrator concluded that the test before him was superficial, and that although more probative questioning might be given more weight, such test results would still remain hearsay.

Given the reluctance of arbitrators to admit polygraph evidence on employee misconduct, a related question arises. Can an employee be discharged for refusing to submit to a polygraph examination? In *Lag Drug Co. v. Teamsters Local 723*, the employee, as a condition of employment, signed an agreement to take lie detector tests at any time; the agreement included a proviso that he could be dismissed for refusing. The arbitrators nevertheless concluded:

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70. The arbitrator observed:
Even where opinion evidence is admitted it is necessary that the professional witness testify personally as to his opinion so that his testimony may be evaluated after the acid test of cross-examination has been applied to it.
71. "Their most important use, however, is the psychological effect they produce in inducing admissions from guilty individuals." Id. at 1041.
72. Id. at 1042.
73. 39 Lab. Arb. 883 (1962). Therein the arbitrator ruled that the [w]eight to be given to a polygraph examination can be indicative, at best; it cannot be conclusive . . . but the very nature of the examination is subjective—whether it be affirmative or negative.
Id. at 885. The arbitrator further observed that evidence of failure to take a polygraph examination was weightless.
75. Id. at 1123. See Publishers Ass'n of New York City, 32 Lab. Arb. 44 (1959). The refusal to submit to a polygraph examination was held not prejudicial since the arbitrator was required to judge the credibility of witnesses on the basis of testimony and evidence submitted at the hearing. Id. at 48-49. See also Illinois Bell Tel. Co., 39 Lab. Arb. 470, 479 (1962). A door is opened to possible mandatory submission to polygraphy, not on the basis of consent generally given at the time of employment, but by consent obtained by confronting the employee with other evidence of culpable acts. It should be observed, however, that this poses serious problems of self-incrimination.
In view, however, of the overwhelming weight of impartial scientific authority that these lie detector tests are not accurate and legal authority that they do not constitute competent evidence and invade the right of privacy and the constitutional rights against self-incrimination, this Board cannot uphold such a requirement in this case.

Although the arbitrators did not reach the question of “whether the company could properly refuse to hire an employee based upon his refusal to take a lie detector test or his failure to take the test,” they did refuse to enforce the employer’s contract, reasoning that widespread use of individual contracts would undermine the collective bargaining position of the union. From Lag Drug it can be argued that required polygraph testing is unconscionable in a non-union setting, given the superior bargaining power of the employer.

In Allen Industries, Inc., v. Local 986, UAW, the arbitrators took the contrary position and held that refusal to submit to a polygraph test at the employer’s request was insubordination and grounds for dismissal. The facts and reasoning of the decision, however, warrant its treatment as a special case. The employee was accused of theft on the basis of substantial circumstantial evidence. The refusal to submit to a polygraph examination indicated to the arbitrators “a complete failure to respond affirmatively to requests that appear to us to be reasonable, to cooperate with the Company in its effort to find out who was responsible for what happened.” The narrowness of the Allen Industries holding is evident when viewed alongside the decision in General American Transportation Corp. v. United Steelworkers Local 1133. There, a group of workers had been paid for nonexistent work and the employer sought to recoup by administering polygraph tests to all workers in order to identify the employees respon-

77. 26 Lab Arb. 363 (1956).
78. The arbitrators held that this circumstantial evidence created a prima facie case of guilt and that a burden was placed on the employee to refute it.
79. Allen Industries, Inc., 26 Lab. Arb. 363, 369 (1956). The underlying premises of the decision were: (1) “While a lie detector test is far from perfect and while it may have many shortcomings, it is very difficult to see how the taking of such a test by X could in any way adversely affect his interest if he has no knowledge [of the misconduct];” (2) the employee “should be more eager to take a lie detector test in order to clear himself emphatically;” and (3) “it is the duty of every employee to assist the company in every way to prevent theft. . . .” Id. at 399.
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sible for the falsified reports. In holding that required submission to polygraph testing was unwarranted, the arbitrator observed:81

Although new wonders of technology are brought home to us every day, the time has not come when management can consign to a machine the job of supervision, especially when this machine is to take the employee in its embrace and measure his most intimate vital processes.

The general rule to be derived from Allen Industries and General American is that:82

The arbitrator does not say that in the proper instances the lie detector might not be the reasonable next step, but rather than for it to be used wholesale, there must at least be a basis for a formal accusation against the subject.

Where there is no evidence connecting particular employees with specific misconduct, neither evidence of test results for which consent has been obtained, nor refusal to submit to further tests will be admitted merely on the basis of prior consent to testing. In B. F. Goodrich Co. v. Teamsters Local 743,83 the arbitrator specifically rejected the notion that pre-employment "consent" affected the admissibility of polygraph test results. While conceding possible reliability, the arbitrator viewed the consent as a nullity, observing:84

The implicit social threat to an employee in the setting of a plant community were he to refuse to submit to lie detector testing where crimes have concededly been committed so compels consent that a guiltless but emotionally fearful employee has practically no choice but to consent to a testing procedure where infallibility is not fully present.

Arbitration decisions are instructive in considering two persistent problems of employment screening: first, the broad scope of the inquiry; and second, the compromise of the personal integrity of the prospective employee. The scope of pre-employment examinations was illustrated in United Mills, Inc. v. Central States Jt. Bd., Amal-

81. Id. at 364.
82. Id.
84. Id. at 558.
gamnated Clothing Workers,\textsuperscript{85} where several employees were discharged, "for negligence and not for theft," after large inventory losses were discovered. They were to be rehired if they were cleared by a lie detector examination.\textsuperscript{86} The arbitrator held that the offer of reinstatement on condition of submission to polygraphing was unacceptable.\textsuperscript{87} While the inquiry might be narrower than that involved in a periodic examination of the employee's work conduct or in pre-employment screening, nevertheless, the scope of the inquiry in United Mills was not found to be sufficiently narrow to justify mandatory submission to polygraph testing.

The invasion of privacy which necessarily accompanies polygraphy has furnished an independent ground for holdings of inadmissibility in some arbitration decisions\textsuperscript{88} and has been a significant consideration in others.\textsuperscript{89} Apprehension about the invasion of privacy occasioned by the use of the polygraph was voiced by the arbitrator in General American.\textsuperscript{90}

\textsuperscript{86} Id. at 1261.
\textsuperscript{87} The reported opinion observes: It is at least doubtful that such evidence can be held admissible. Apart from that, it is questionable whether such a test would be of any real value in this case. The purpose of a lie detector test is to determine whether a witness is telling the truth. The grievants here are not charged with theft or making false statements about the inventory losses. they are charged with incompetence, gross negligence or wanton disregard of their responsibilities. The Company does not allege any specific acts of incompetence or negligence to support the general charge. Absent such specificity there can be no proper foundation for a polygraph examination or for meaningful evaluation of responses. Id.
\textsuperscript{88} See Town and Country Food Co., 39 Lab. Arb. 332, 335 (1962). The arbitrators held: "Under such circumstances the Company's demand that the four men take 'lie detector' test or face discharge for insubordination was an invasion of privacy and an unreasonable and unwarranted exercise of management rights." (emphasis added).
\textsuperscript{89} See Lag Drug Co., 39 Lab. Arb. 1121 (1962). The arbitrator, in refusing to require submission to polygraph testing, stated:
The Board is mindful of the serious financial problem confronting this Company as a result of pilferage. In view, however, of the overwhelming weight of impartial scientific authority that these lie detector tests are not accurate and legal authority that they do not constitute competent evidence and invade the right of privacy and the constitutional right against self-incrimination, this Board cannot uphold such a requirement in this case. Id. at 1123 (emphasis added). See also Illinois Bell Tel. Co., 39 Lab Arb. 407, 409 (1962).
If we admit such an encroachment upon the personal immunity of an individual where in principle can we stop? Suppose medical discovery in the future evolves a technique whereby the truth may infallibly be secured from a witness by trespassing his skull and testing the functions of the brain beneath. No one would contend that the witness could be forced against his will to undergo such a major operation at the imminent risk of his life, in order to secure evidence in a suit between private parties. How then can he be forced to undergo a less dangerous operation, and at what point shall the line be drawn? To my mind, it is not the degree of risk to life, health or happiness which is the determining factor, but the fact of the invasion of the constitutional right to privacy.

Just as the employer in General American could not consign to the polygraph his supervisory responsibilities, so management should not surrender to the polygraph its responsibilities in pre-employment screening.

3. Statutory Restrictions on the Use of the Polygraph

The response of state legislatures to polygraphy has taken two forms. Twelve states have made the use of the polygraph in the employment context illegal. Eleven states have chosen to regulate polygraph operators through comprehensive licensing statutes.

The prohibitory statutes generally provide that "no employer," or "no person (or through an agent)," or "no individual, corporation, partnership, firm, or association," shall employ the "polygraph," "lie detector" or "similar device" during hiring procedures. The general

91. Id. at 364.
92. ALASKA STAT. § 23.10.037 (1964); CAL. LABOR CODE § 432.2 (1953); CONN. GEN. STAT. ANN. § 31-51g (1967); DEL. CODE ANN. tit. 19, § 705 (1953); HAWAII REV. LAWS § 378-21 (1965); Md. ANN. CODE art. 100, § 95 (1966); MASS. GEN. LAWS ch. 149, § 19B (1963); N.J. REV. STAT. § 2A:170-90.1 (1966); Ore. REV. STAT. § 659.225, .990 (1963); Pa. STAT. ANN. tit. 18 § 4666.1 (1969); R.I. GEN. LAWS ANN. § 28-6.1-1, -2 (1964); Wash. REV. CODE § 49.44.120 (1965).
94. The prohibiting statutes respectively prohibit the use of the polygraph in the employment context by providing that "no employer" (California, Hawaii, Maryland, Massachusetts, and New Jersey), or "no person or agent" (Alaska, Oregon, and Pennsyl-
prohibition is usually against "requiring or demanding," or even "requesting or suggesting," submission to polygraph testing by an "employee" or a "prospective employee" as a "condition for employment" or as "a condition for continued employment." No state statute explicitly prohibits the utilization of polygraph results submitted to the employer where he has in no way suggested or discussed such testing with an employee or prospective employee. However, proof of voluntary submission would seem so burdensome as to effectively prohibit tests. Moreover, those states prohibiting the "requesting or suggesting" of polygraph testing have placed a substantial burden of proof on any employer who utilizes polygraph test results over the protests of an employee or prospective employee. On the other hand, language merely prohibiting "requiring or demanding" submission to testing permits an employer to utilize "voluntary" tests.

Several of the prohibitory statutes specifically exempt local, state, and federal governmental agencies from coverage; other statutes specifically include governmental agencies. A few of the statutes exempt...
from protection policemen, persons who are entrusted with drugs, and persons involved with national security. A special exemption is granted in a few states to "tests administered by law enforcement agencies in the performance of their official duties." While most states merely prohibit the use of the described test in the employment context, some have made such use a misdemeanor. Many of the prohibitory states have established penalties including a fine or imprisonment or both. It is of course possible that in those states prohibiting required submission to polygraph testing a court might infer a legislative intent to create civil liability on the part of an employer to an employee or prospective employee in any case where testing was used. Even though actual damages in such a case would probably be speculative, a court might award punitive or general damages as well. It is true, however, that there are no reported cases imposing such civil liability.

The only readily available legislative history of any of these statutes is that of California. The California legislature found that the increasing use of lie detectors by personnel departments created suspense and distrust between employers and employees, that such instru-
ments were not accurate, and that their use by inexperienced persons resulted in false findings. Rather than enacting a regulatory or licensing scheme, the California legislature prohibited employers from requiring employees or job applicants to take lie detector tests as a condition of employment and provided criminal penalties for violations. It was the view of the draftsmen that an employee discharged for refusal to submit to such a test might also have an action for breach of contract. It is unlikely, however, that a job applicant, rejected because he refused to take a lie detector test, has a similar cause of action under the California statute.

The eleven states following the regulatory approach have adopted comprehensive acts entitled either “The Polygraph Examiners Act” or “The Detection of Deception Examiners Act,” except that Nevada has chosen to integrate its regulation of polygraph examiners with existing regulation of private investigators, private patrolmen, process servers and repossessors. The obvious intention of these legislatures was to assure the reliability of the polygraph tests administered in their states by limiting the right to administer polygraph tests to those who are capable, trained, and honest.

103. Id. at 733. See California Governor Release No. 585 (July 19, 1963).
105. Id.
106. Those states which have adopted an act entitled “The Polygraph Examiners Act” include Arkansas, Georgia, Mississippi, New Mexico, Texas, and Virginia. Those which have adopted the “Detection of Deception Examiners Act” include Florida, Illinois, Kentucky, and North Dakota. The Nevada prohibition appears in a chapter which includes other nonofficial law enforcement officers.

Other qualifications for a polygraph examiner's license are: United States citizenship, moral fitness, lack of any criminal conviction involving a crime of moral turpitude (including in some states a dishonorable discharge), a college degree, or prescribed examiner experience, graduation from an approved polygraph course, and a minimum of six months internship (although the internship is usually extended to twelve months where there has been no required enrollment in an approved training course), the achievement of a passing grade on an examination administered in conformity with statutory requirements, and the posting of a surety bond. Not all the states which license polygraph
The comprehensive statutes are essentially licensing acts, and provide a regulatory board for the certification of polygraph operators and for the termination of their licenses. They provide for issuance of a polygrapher's license after fulfillment of prescribed conditions, and several require periodic renewal. Most statutes provide for suspension or revocation of a license for misconduct related to the conducting of polygraph examinations, while some merely permit injunctions against continued performance where evidence is presented that an operator has acted in violation of the regulatory statute. Several states further provide criminal penalties for such violations of the statute as misrepresentation that one is a licensed polygraph examiner. All of the comprehensive acts require the polygraph examiner to use an instrument which records visually, permanently, and simultaneously the subject's cardiovascular pattern and respiratory pattern, and which permits the operator to record any other physiological changes of his choosing. Several of the acts require the examiner, upon request of the person examined, to inform him of the test results within a given period of time after the request is made.

It is clear that the main concern of the states regulating polygraph examinations and prescribing operator's qualifications is with the reliability of the polygraph examination. While the regulatory statutes reduce unreliability by insuring a competent operator, this approach

108. The following states have statutes which provide for the issuance of a polygrapher's license: Arkansas, Florida, Georgia, Illinois, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Texas, and Virginia. Florida, Georgia, Illinois, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Texas, and Virginia require "periodic renewal." See statutes cited in notes 92, 93, and 107, supra.

109. Those states providing for suspension or revocation of a license for conviction of any criminal conduct involving moral turpitude, including fraud or misconduct related to the conducting of polygraph examinations, are: Arkansas, Florida, Georgia, Illinois, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Texas, and Virginia. Those providing for the enjoining of examinations by an operator who has acted in violation of the regulatory statute include Arkansas, Illinois, Kentucky, Mississippi, Texas, and Virginia. See notes 92-93, supra.

110. Arkansas, Florida, Illinois, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Texas, and Virginia so provide.

111. The comprehensive acts are part of the sections of the state statutes cited in notes 92, 93, and 107, supra. The New Mexico statute permits galvanic skin resistance and/or reflex recordation.

112. Arkansas, Illinois, Mississippi, North Dakota, Texas. See notes 92, 93, and 107, supra.
does not improve the inherent nature of the instrument, the reliability of which has not yet been established. Moreover, the very real compromise of the dignity and privacy of the employee or prospective employee is not remedied by ensuring the competency of the examiner. Workers can be protected from this invasion of privacy only by prohibitory legislation explicitly forbidding all job-related polygraphy. Only in this way can employees be realistically protected from pressure to submit to polygraphing. The legislation should specifically impose civil liability on the employer for using such tests. This would provide protection to the prospective employee and an incentive to take action beneficial to others as well. Punitive damages are a more effective deterrent than criminal sanctions where, as here, both prosecutor and jury may believe criminal penalties are inappropriate.113

II. PERSONALITY TESTING

A. Test Instruments

The development of psychological testing was spurred by two nineteenth century concerns: first, the humane treatment of the feebleminded and the insane,114 and second, the differentiation of personal characteristics for the purpose of developing a system of human classification.115 James McKeen Cattell, an American psychologist, first used the term “mental test” in describing a series of tests experimen-

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113. For a discussion of proposed federal legislation which would prohibit the use of polygraph testing on federal government employees and job applicants see text accompanying notes 314-21, infra.

114. The establishment of mental institutions created a need to be able to distinguish the insane from the feebleminded. A French physician, Esquirol, developed criteria for making this distinction and created a scale for measuring feeblemindedness based on the subject's use of language. See J. Esquirol, Des Maladies Mentales Consideree Sous les Rapports Medical, Hygienique, et Medico-Legal 340 (1938). For a detailed account of the early days of psychological testing see F. Goodenough, Mental Testing: Its History, Principles and Applications (1949), and J. Peterson, Early Conceptions of Tests of Intelligence (1926).

115. Francis Galton, the English biologist, fostered modern testing by his interest in developing a system of human classification. Galton focused on the measurement of physical traits through the use of tests of vision, hearing, muscular strength, reaction time, and other sensorimotor functions. Galton's premise was that tests of sensory discrimination could serve as a measure of a person's intellect, and therefore, the greater the sensory discriminative capacity the greater the intelligence. See F. Galton, Inquiries into Human Faculty and Its Development 27-29 (1883).
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tally administered to college students to determine intellectual ability.\footnote{Cattell, *Mental Tests and Measurements*, 15 Mind 373-80 (1890). Cattell shared Galton’s view that intellect could be measured by tests of sensory discrimination and reaction time.}

Another American psychologist, Stella Sharp, first included the measurement of verbal and mathematical skills in the “mental test;” later Sharp proposed methods for measuring more complex psychological functions by the inclusion of tests of reading, verbal association, and simple arithmetic.\footnote{Sharp, *Individual Psychology: A Study in Psychological Method*, 10 Am. J. Psychiatry 329-91 (1899).} The heavy reliance on physiological measures of motor skills in early tests came under criticism in 1895 by Binet and Henri, who proposed measurements of such various functions as memory, imagination, attention, comprehension, suggestibility, and aesthetic appreciation on the premise that direct measurement of complex intellectual functions was the best approach to psychological testing.\footnote{Binet & Henri, *La Psychologie Individuelle*, 2 Année Psychologie 411-63 (1895). In 1905 Binet and Simon published a test for the measurement of the intellectual ability of students. Although sensory and perception tests were included, the examination consisted mainly of verbal testing. See Binet & Simon, *Methods Nouvelles pour le Diagnostic du Niveau Intellectuel des Anormaux*, 11 Année Psychologie 191-244 (1905). The Binet scale went through three revisions, but the major modification was performed by L. M. Terman of Stanford University. This resulted in the Stanford-Binet test (a ratio between mental age and chronological age). See L. Terman, *The Measurement of Intelligence* (1961). The Binet tests are administered to one person at a time; some of these examinations require oral responses which are individually timed.}

The first large battery of group psychological tests was developed during World War I for the United States Army to assist in the classification of recruits. Labeled the Army Alpha Examination, the test was administered to over one million servicemen.\footnote{Center for Labor and Management, *University of Iowa, Psychological Testing and Industrial Relations* 2 (G. Hagglund & D. Thompson ed. 1969) [hereinafter cited as Hagglund & Thompson].} This test was considered a successful solution to the problem of finding a method of measuring the potential abilities of military personnel. During World War II, development of “screening tests” continued in the form of such instruments as the Army General Classification Test. The availability to private industry of the test instrument and experience of the War Department resulted in widespread use and acceptance of psychological testing.\footnote{Guilford & Lacej, *Printed Classification Tests*, in Army Air Forces, *Aviation Psychology Program Research Report* ch. 23 (1947).}
Personality testing, a distinct subgroup of psychological testing, measures emotional adjustment, social relations, motivation and interests. The earliest personality assessments utilized free association tests, situational tests, and other projective tests. Most contemporary personality tests may be classified as either inventory instruments (objective tests) or projective tests. Perhaps the most widely utilized inventory measures are those which provide information on the degree of interest in various activities, primarily those of an occupational nature. A second category of inventory measures are tests which yield scores on several personality characteristics. Most inventory instruments are administered on a group basis and scored objectively. A major criticism of these examinations is that they can be faked by sophisticated subjects, for there is a strong motivation to give socially acceptable answers. These self-report devices reveal how a person desires others to think he will behave; they do not necessarily project actual performance. Nevertheless, these examinations have seen considerable use in employment situations, and several studies reveal adequate validities for managerial selection. Other studies reveal that personality inventories have had a rather limited success in predicting employees' performance on the job. In the projective personality

121. Kraepelin, a European psychologist, prepared a series of tests of the basic factors of individual character in order to classify his psychiatric patients. Kraepelin used "free association tests" in which the subject was given specially-selected stimulus words and was required to respond to each with the first word that came to mind. See E. KRAEPELIN, ÜBER DIE BEENEINFLUSSUNG EINFACHER PSYCHISCHER VORGÄNGE DURCH EINIGE ARZNEIMITTEL (1892).

122. The first situational tests were developed by Hartshorne, May and Maller in the 1920's to measure the attitudes of school children toward such behavior as cheating, lying, cooperativeness, and persistence. Situational tests measure skill in solving problems which are disguised as everyday situations. See H. HARTSHORNE, M. MAY & J. MALLER, STUDIES IN SERVICE AND SELF-CONTROL (1929).

123. The 1920's saw the development of a projective test technique first used by Hermen Rorschach which consisted of ink blots which the subject was asked to describe. The assumption underlying this method is that the individual will "project" his character traits through his responses. See H. RORSCHACH, PSYCHODIAGNOSTICS: A DIAGNOSTIC TEST BASED ON PERCEPTION (Eng. ed. P. Lemkau & B. Kronenburg transl. 1941).

124. Interest inventories are exemplified by: the Strong Vocational Interest Blank and the Kuder Preference Record—Vocational. Personality inventories include: the Minnesota Multiphasic Personality Inventory, Bernreuter Personality Inventory, Guilford Zimmerman Temperament Survey, California Psychological Inventory, Activity Vector Analysis, Thurstone Temperament Schedule, Gordon Personal Profile and Personal Preference Schedule, and the Study of Values.

125. Guion & Gottier, Validity of Personality Measures in Personnel Selection, 18 PERSONNEL PSYCHOLOGY 135-64 (1965) [hereinafter cited as Guion & Gottier].

test, on the other hand, the subject is asked to interpret standard stimulus situations which are constructed so that the uninformed person cannot determine what is being measured. Theoretically the number of responses which various people can give to a single stimulus situation is infinite. The projective approach, in conquering the problem of subject anticipation of desired response, introduces the new problem of interpreting the responses. 127

One well known example of the vocational interest inventory, widely used in employee counseling, is the Kuder Preference Record Vocational Test. 128 The major difficulty with this type of examination is that an applicant for a job can, and often does, make his choices in accordance with what he feels is expected for the desired position, rather than on the basis of his real feelings. A second difficulty is that these inventories sample appreciation and interest rather than experience. Studies have revealed that the Kuder test is often unsuccessful when used to select people for initial hiring or promotion. The correlations between supervisors' scores and managerial performance have not proved satisfactory in any significant number of studies. 129

The category of inventory measure of personality characteristics is exemplified by the widely used Minnesota Multiphasic Personality Inventory (MMPI). 130 This personality inventory includes questions

127. The best known projective test instruments include: the Rorschach Test, the Thematic Appreciation Test, the Rosenzweig Picture—Frustration Study, the Tomkins-Horn Picture Arrangement Test, and the Washington Personal History.

128. The Kuder Preference Record consists of 168 items. The subject's responses are totaled to obtain the various area scores. The ten regular scores obtained from the test include the following interest areas: outdoor, mechanical, computational, scientific, literary, musical, social science, clerical, and supervisory. Examples of occupations that are considered to be included within "mechanical" are civil engineer, surgeon, industrial designer, fireman, and stonemason; and within "persuasive" are thought to be advertising manager, clergyman, psychiatrist, lawyer, receptionist, and retail merchant. G. KUDER, MANUAL FOR THE KUDER PREFERENCE RECORD (1943).


130. In the MMPI items are classified into 26 categories as follows: general health; general neurological; cranial nerves; motility and coordination; sensibility; vasomotor; trophic; speech and secretory; cardio-respiratory; gastrointestinal; genitourinary; habits, family and marital; occupational, educational, sexual attitudes; religious attitudes; political attitudes and law and order; social attitudes; affect-depressive, affect-manic; obsessive and compulsive; delusions, hallucinations and illusions; phobias; sadism and masochism; morale; masculinity and femininity; and presentation of self. The directions to the subject read in part:

In this inventory you are asked for information about your feelings, your likes and
on attitudes towards morals, sex, religion and family.\textsuperscript{131} The major criticisms of this test from a psychiatric viewpoint include: the misleading psychiatric labels used in the diagnostic scales; the unreliability of some scales; the limitations in normative samples (700 Minneapolis adults were tested in the original standardization); and the cultural and subcultural differences influencing interpretation and attitudes toward the test itself.\textsuperscript{132}

The second major form of contemporary personality tests, the projective test, is illustrated by the Rorschach ink blot test.\textsuperscript{133} The Rorschach contains ten cards: five include a single ink blot in black,
white, and gray; two contain additional touches of bright red; and the remaining three combine several pastel shades. If the examination is individually given, the subject is asked to describe what he sees in the blot, and all responses produced are recorded. After this initial free response session, the subject is asked to review his responses and to indicate his reasons for the particular description he applied to the particular blot. Group administration of the test, asking for written responses, is also possible. The infinite variety of descriptions made possible by the ambiguous nature of the stimuli prevents the subject from easily giving calculated responses, but analysis of the descriptions is extremely difficult. Rorschach testing, as with all projective testing, reflects Gestalt psychology in its objective of a "global" description of the individual from the integration of fragmented responses and the interrelating of various scores.

The principal criticism of the Rorschach test has concerned the scoring techniques. Studies of the standard and achromatic cards have revealed that color has no effect on most of the response characteristics attributed to it. Moreover, there is substantial evidence that verbal aptitude influences several Rorschach scores used as indicators of personality traits. Finally, the most compelling criticism is that the Rorschach analysis varies significantly from one examiner to another. The results of critical studies of the test suggest that the resulting personality assessment is influenced by factors quite extraneous

134. See S. Beck, RORSCHACH'S TEST (3 Vols. 1945, 1949, 1952). The most common scoring categories employed with the Rorschach include location, determinents, and content. Location refers to the part of the blot with which the subject associates each response (the whole blot, a common detail, or an unusual detail). The determinents include form, color, shading, and "perceived" movement. For example, human movement, animal movement, abstract or inanimate movement. Color and shading are perceived as depth, texture, and as forms such as clouds. Content refers to images perceived by the subject including human figures, parts of human figures, animal figures, animal details and inanimate objects. Analysis of the Rorschach responses is based upon the relative number of responses falling into the various categories, as well as upon certain ratios and interrelationships among different categories. Interpretative relationships include association of "whole" responses with conceptual thinking, of "color" responses with emotionality, and of "human movement" with imagination and fantasy.


137. See Baughman, Rorschach Scores as a Function of Examiner Difference, 15 J. PROJECTIVE TECHNOLOGY 243-49 (1951).
to the personality variables allegedly measured by the Rorschach test.\textsuperscript{138}

B. The Use and Criticism of Personality Testing in Employment

A 1964 study of firms employing two hundred or more workers reported that seventy-seven percent had testing programs; of those using tests, ninety-three percent were using some type of ability aptitude test, seventy-three percent were using intelligence tests, thirty-nine percent were using personality tests, and thirty-one percent were using personal interest tests.\textsuperscript{139} An earlier study indicates that the larger a firm is, the more likely it is to utilize tests in selecting personnel.\textsuperscript{140} Ninety percent of the firms test some or all prospective or new employees, while only forty percent test current employees in making internal decisions.\textsuperscript{141} Employers justify their use of personality tests on three grounds: they provide a scientific basis for efficient personnel placement; they minimize risk of accidents and the placement of incompatible workers, guaranteeing a measure of confidence in current workers; and, finally, prospective employees are provided an apparently objective process through which they may gain suitable employment.

There are several objections to the use of personality testing in the pre-employment context, involving the invalidity of the instrument, interference with the subject's personal life, impermissible discrimination, and unfairness where a more complete assessment of his work potential would result in his being hired. Evaluations of currently-

\textsuperscript{138} See e.g., R. Schafer, Psychoanalytic Interpretation in Rorschach Testing (1954).
\textsuperscript{140} A 1960 study found that 34 percent of responding companies with less than 100 employees used tests in selecting personnel, while 60 percent of firms with more than 1000 employees were using tests for this purpose. Ward, Putting Executives to the Test, 38 Harv. Bus. Rev. 607 (1960).
\textsuperscript{141} J. Campbell, M. Dunnette, E. Lawler, & K. Weh, Managerial Behavior, Performance and Effectiveness 27 (1970). Companies which use tests for personnel selection generally use an extensive battery of tests. While a few companies use only ability tests, most use both ability and personality or interest tests. Those companies using tests tend to use them more extensively at lower level positions and at initial hiring rather than in promotional decisions. For managerial promotion, the personal judgment of the employer or personnel officer is favored as a superior method for selecting good executives.
available personality measuring instruments, both objective inventories and projective tests, suggest that these instruments are not sufficiently sophisticated to obtain accurate predictions of employee performance. Lee J. Cronbach, after reviewing a number of validation studies in connection with employee selection in the British Civil Service, the Veterans Administration, and the Air Force, concluded that evaluations made by those having psychological training were not superior to those obtained from peer ratings; Cronbach went on to observe that "structured group performance work example" tests have a high validity for jobs requiring group acceptance. Psychologists Guion and Gottier, in a comprehensive analysis of published validation studies of both personality inventories and projective tests used for employee selection, concluded that "it 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." The concern with validity was evidenced by John W. Macy, Chairman of the United States Civil Service Commission, who reported to a Subcommittee of the House Committee on Government Operations in 1965 that the Civil Service Commission does not use personality tests as such in any personnel decision.

142. L. Cronbach, supra note 126, at 485, 589-90.
143. Guion & Gottier, supra note 125, at 135-64. Guion and Gottier analyzed ninety-five validation studies on fifteen leading personality inventories, eleven validations on six projective tests, and eleven validation studies on three special inventories. See also Barrett, Guide to Using Psychological Tests, 41 HARV. BUS. REV. 138-46 (1963).
144. House Hearings on Privacy, supra note 132, at 38. Macy suggested that the basic objections to the use of personality tests as a criterion for employment selection were that personality tests are designed for "clinical use, and are not to measure the specific characteristics needed by persons working in particular occupations," that these tests are "subject to distortion, either purposefully or otherwise" so that "the scores are undependable as a basis for employment decisions," that test results "can easily be grossly misinterpreted and misapplied by persons who are not qualified as psychiatrists or psychologists trained to interpret such test results in the light of their total study of the individual." Macy went on to observe that the use of personality tests in the employment context "seriously jeopardize [s] privacy." Id. at 37-38.

Macy explained the nature of personality tests:

I understand your area of interest to be those tests and questionnaires which ask the applicant to reveal personal information, such as his feelings, his likes and dislikes, his personal and social habits and the like.

Incidentally I see no basic distinction between "questionnaires" and "tests:" I use the term "test" to cover the variety of so-called personality traits such as the applicant's behavior toward other people in terms of, for example, aggressiveness or anxiety. They generally yield scores which seek to show the degree to which the applicant has or exhibits such traits.

Id. at 37.
Senator Sam J. Ervin, Chairman of the Senate Subcommittee on Constitutional Rights, observed at the outset of the Senate Hearings on the use of psychological tests by the federal government that the question of the test instruments' validity could pose serious legal questions where the tests were used in the employment context:

[T]he charge has been made that aside from the invasion of privacy, the procedures surrounding the testing, the composition of the tests themselves, and the use made of the test results, present serious due process questions. Competent experts in the field have questioned the validity of the tests being used by government as reasonable services for carrying out the mandates of Congress in the personnel field. They have raised questions concerning the validity, reliability, and accuracy of some of these tests as methods for determining the fitness and suitability of applicants or employees for jobs.

A fundamental criticism of personality testing, therefore, is the validity of the measurements. As Karl U. Smith of the University of Wisconsin argued to the Senate Subcommittee: "The field of personality testing is a hodgepodge of imprecise psychopathological terminology, of limited and biased procedures, and of poorly constructed test situations, designed to probe social non-conformity." Nevertheless, even assuming that the tests were absolutely infallible in predicting behavior, the use of personality tests as screening devices is subject to attack. Mr. Martin L. Gross, author of the book The Brain Watchers, told the House Subcommittee:

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145. 1965 Senate Hearings, supra note 6, at 1-2.  
146. Id. at 123. Smith indict personality testing not merely because of its lack of validity, but primarily because those using such tests create the false appearance of unbiased scientific neutrality in decision making: Personality testing is useful to industry not because it is scientifically valid [and] not because it represents enlightened human relations procedures. All of our experiences with personality tests in industry indicate that industries are interested only in quicker procedure of looking at people. . . . The reason why industry is interested in these procedures, we believe, is that the management of the large industries have found in clinical psychology and its testing procedures, perhaps unwittingly, various techniques to crystallize and strengthen management authority over individual workers and unions. The personality testing situation has provided the means for industrial management to achieve some quasi-medical authority over workers who are individualistic and assertive in social adjustment. The test can be used as an established prestige symbol or scientific device to define the social climate of the industry, to suggest and demonstrate conformity principles and methods of obtaining conformity and to induce loyalty and affiliation.  
148. House Hearings on Privacy, supra note 132, at 79.
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I would oppose them completely on moral grounds in the invasion of privacy, because they are the greatest possible invasion of privacy that can be made. It is probable that the questions that are asked are more intimate than those that a wiretapper would overhear in a normal business conversation. In a normal business conversation, people do not talk about religious attitudes and sex life.

Representative Cornelius Gallagher has argued that where the tests are utilized by the government in its personnel or employment activities the invasion of privacy posed by personality testing is not only a threat to individual liberty but a violation of constitutional protections.149

A great deal of the criticism based on invasion of privacy focuses on the content of the questions employed in inventories, especially questions dealing with religion, sex, and family background, as well as personal habits and interests. Some criticism has been directed at the collection of personality assessments of individuals, their possible availability to others than the immediate tester, and the lack of anything like the "doctor-patient privilege" which is available where tests and test results are utilized by psychiatrists. The accumulation of test records, the compilation of dossiers, and the widespread availability of test results where computer data recovery is possible increases the potential danger of personality testing to the individual.150

One argument proffered as a defense to the use of personality instruments is that the subject "consents" to the invasion of privacy by consenting to take the examination. Professor Monroe Freedman has

149. 1965 Senate Hearings, supra note 6, at 534. In the hearings Congressman Gallagher summarized his argument that personality testing used by government in its employment activity was wrong:

The American people would rise in great protest if the United States conducted a physical search of the homes of public employees as a condition of employment. . . . I do not think anyone would argue that we might find a lot of undesirables working for the government if such steps were taken. Yet the Federal Government has been engaged in a much more insidious type of search. . . . It has been searching the minds of Federal employees and job applicants through personality testing. . . . [T]he means in my view, violates the 1st, 5th, 9th, and 14th amendments. . . .

150. House Hearings on Privacy, supra note 132, at 348. Professor Monroe Freedman of George Washington University reflected such concern in his testimony at the privacy hearings; after observing that the computer makes it possible to analyze great quantities of data and to compile personnel dossiers he concluded:

The ready availability of psychological tests of tens of thousands of our citizens is, therefore, not the least frightening aspect of modern technology on the relationship between State and citizen.
argued that such consent was void on two counts: "[t]he job applicant who wants the job is not truly a free agent;" and "[t]he consent is meaningless unless the examinee knows what he is consenting to."\textsuperscript{151}

This latter objection certainly is true where, as often is the case, the subject does not have an opportunity to preview the examination. Moreover, as Professor Freedman rightly points out, the subject "may know the questions, but he does not know the answers, the purpose for eliciting the answers, or the inferences that may be drawn . . . nor does he know the significance of the inference once he has been plotted to such a scale."\textsuperscript{152}

A second attack on the use of personality testing is that current practices involve a "denial of equal protection." The tests are used only on lower strata personnel, while executives and high level officials are not subjected to the "indignity" of such testing because of anticipated resentment on the part of such individuals.\textsuperscript{153}

A related objection to many of the current test instruments is that they discriminate against individuals on the basis of cultural and social experience. Where this involves race or sex discrimination the objection is significant as it reveals a clear denial of due process and equal protection. Likewise, it is conceded that there is a socioeconomic bias in many of these test instruments which results from the basic reference group which was utilized in establishing the norm.\textsuperscript{154}

A further criticism of personality testing is its influence in estab-

\textsuperscript{151} 1965 Senate Hearings, supra note 6, at 173-74.

\textsuperscript{152} Id. at 174. In these same hearings Congressman Gallagher also rejected the notion that consent vitiates the invasion of privacy:

Remember there was nothing voluntary about these tests when the special inquiry of the House Government Operations Committee started its investigation. Persons could not select their own private psychologists and doctors to conduct and evaluate the tests. Government employees and job applicants are far from the cooperative subjects that even the test publishers admit are necessary to make the test results of any real value. They often resent the questions and admit quite freely that their answers were those they thought would get them the job or promotion.

\textit{Id. at 536.}

\textsuperscript{153} Id. at 212-13. Professor Freedman reflected on this discriminatory use of personality assessments in his statement to the subcommittee:

We might further observe that it is somewhat presumptuous to suggest that only some Government employees are of such vital importance to the national interest to warrant psychological testing. . . . What is the logic that excludes the President's Cabinet from questionings so vital to national welfare? . . . If the tests are all we are assured they are, surely not a single public official should be immune.

\textit{Id. at 174.}

\textsuperscript{154} See testimony of W. Grant Dahlstrom, \textit{id.} at 258.
lishing conformity among employees by selecting an identifiable and single type of worker and, through the influence of test measures, compelling uniform conduct.

The lack of access to test results and the inability of the subject to refute the determinations of the personnel officer or psychologist are arguably denials of due process. Senator Ervin made this argument in his opening statement as Chairman of the Senate Subcommittee: "... if the employee has a right to confront his accusers in some proceedings, then perhaps he should confront the psychological tests and the psychiatric reports which may cast a cloud over his emotional stability and his mental competency."

Early in the Senate hearings, Dr. Arthur Brayfield, Executive Officer of the American Psychological Association, while arguing the validity of the test instruments, conceded that the criticisms discussed above were the concerns of the citizen and the legal system and could not necessarily be abandoned to the professional test examiners themselves:

The general topic of invasion of privacy is one in which our psychologists have an interest. As our ethical code makes clear, we certainly do not wish to see psychological instruments used carelessly or unjustly against the privacy to which a human being is morally and legally entitled. However, psychologists are not competent to make a final judgment whether a given personnel procedure is constitutional or not.

Martin O. Gross summarized the criticism of personality testing as a screening device in the employment context, suggesting that the inter-

155. Congressman Gallagher referred to this first concern when he observed that "The eccentrics, for example, who often bring great creativity and drive to their work, were eliminated, I fear, because they raised doubts in the minds of personnel officers." Id. at 534.

156. Professor Freedman raised the second concern by his description of the "feedback effect" of testing whereby individuals conduct themselves in conformity with the standards which the test instruments appear to consider desirable. For instance, in answering the question, "What magazines are read in your household?" which appears on one personality inventory, people might, in Professor Freedman's estimation start being concerned about whether it is better for their children's benefit in their academic careers that they get U.S. News and World Report around the house instead of Nation, or the New Republic instead of National Review. And in that way there is a degree of political control that is highly undesirable. House Hearings on Privacy, supra note 132, at 356.

157. 1965 Senate Hearings, supra note 6, at 3.

158. Id. at 68.
view and the probationary period were sufficient and satisfactory devices for employment decisions: 159

The old-fashioned method of interviews, checking references and making personal decisions seems to hold up better than anything else. I think the problem is that we Americans tend to be a little mechanical minded. We are looking for a computer. A shortcut that says that “X” is the proper cutoff score that will make the human being easily manipulated. This is one of our bad traits, and we should get over it. Instead we should sharpen our ability to personally evaluate people. This cannot be done by psychologists asking questions off the top of their heads. It can be done by bringing a little personal wisdom to selection and evaluation.

C. The Legal Status of Personality Testing

1. Statutory and Administrative Provisions Regulating Personality Testing

(a) Federal Statutes and Administrative Regulations. The President is vested with authority under article II of the Constitution to control the appointment and removal of officers of the executive department. 160 Further, he is authorized by statute to prescribe regulations for admission to the Civil Service 161 and is directed with the aid of the Civil Service Commission to develop and utilize competitive examinations to test the fitness of applicants for public service. 162 The Civil Service Commission is vested with responsibility for regulating and controlling such examinations and records thereof. 163

The use of personality testing by federal agencies is widespread, 164

159. Id. at 43-44.
162. Id. § 633(2)(I), providing that:
Such examinations shall be practical in their character, and so far as may be shall relate to those matters which fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.
163. Id. § 633(3).
164. John W. Macy, Chairman of the Civil Service Commission, made public the policy of the Commission with regard to the use of personality tests:
The Commission does not itself use and prohibits agencies from using personality tests as such in any personal action affecting employees or position in the competitive service. This does not, of course, relate to the proper use of such tests by a
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especially in those agencies which engage in security-related activities.\textsuperscript{165} The principal concern of the Executive department is that the test instruments do not discriminate against the individual on the basis of "race, color, religion, sex, or national origin" as prohibited by the Civil Rights Act of 1964.\textsuperscript{166} This concern is not limited to the situation where the prospective employee is actually employed by the government, but extends to those situations where an individual is engaged either by an employer operating under a government contract,\textsuperscript{167} or by any employer "engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar

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qualified psychiatrist or psychologist when, in his professional judgment, they would assist in his total study of an individual in connection with medical determinations for employment or fitness for duty.

\textit{1965 Senate Hearings, supra} note 6, at 202. This policy statement must, however, be viewed in relation to the general finding of the Senate Subcommittee on Constitutional Rights of the widespread use of personality testing by government agencies. \textit{Hearings on Privacy and the Rights of Federal Employees Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2nd Sess. (1966)} [hereinafter cited as \textit{1966 Senate Hearings}]. Senator Ervin summed up the Subcommittee's findings with respect to the use of personality testing in his opening statement during the 1966 Senate Hearings:

We were told at our hearings last year that the Civil Service Commission banned all personality testing except that done under medical direction, which is precisely how much of the testing was being done. In addition, this ruling only applied as far as the Commission's jurisdiction ran. The State Department told us they halted the use of one personality test although they were apparently using six or seven. The Peace Corps told us they were dropping the offensive questions on one of the tests they used. Yet, when they sent me a copy of the revised test last March, we found that they ask volunteers such things as these, and they are set out so that the answers are true or false:

17. My father was a good man.
18. I am very seldom troubled by constipation.
20. My sex life is satisfactory.
27. Evil spirits possess me at times.
30. At times I feel like swearing.

These are questions from psychological tests that apparently are still employed by Government agencies.

\textit{Id.} at 5-6.


\textsuperscript{167} This concern is evidenced by Department of Labor regulations for validation of employment tests of government contractors and subcontractors. 33 Fed. Reg.
year."  

Section 703 of the Civil Rights Act of 1964 prevents the latter class of employers from utilizing test instruments which in fact discriminate against prospective employees on the prohibited bases.  

Non-discriminatory testing is clearly exempted.  

It is clear, then, that psychological testing by those employers covered by the Act is not per se forbidden. Nevertheless, it may be the case that personality testing, as a consequence of the validating groups utilized in test preparation, may be by its very nature discriminatory and thereby pro-scribed in certain cases under the 1964 Act.

The recent unanimous decision by the United States Supreme Court in *Griggs v. Duke Power Co.* provides authority for a broad reading of the prohibitory language of section 703. The employer in *Griggs* had required the employee, as a condition of employment or transfer to other jobs in the company, to hold a high school diploma and to obtain satisfactory scores on two professionally prepared aptitude tests: the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennet Mechanical Aptitude Test. Neither test was directed at the measurement of ability to perform any particular job or category of jobs. While the employer had, previous to the enactment of the Civil Rights Act, discriminated in its employment

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14392-94 (1968). While acknowledging that properly validated and standardized tests can provide an "objective basis for employment," the regulations reveal concern that certain test instruments which appear fair on their faces can result in discrimination as they are used in specific cases: 

It has become clear that in many instances contractors are using tests to determine qualifications for hire, transfer, or promotion without evidence that they are valid indices of performance potential. Where evidence in support of presumed relationships between test performance and job behavior is lacking the possibility of discrimination in the application of test results must be recognized. 

*ld.* §1(f). To eliminate such discrimination each contracting agency must require each contractor to have available "evidence that the tests are valid for the intended purpose." *ld.* § 2(a). Evidence of a test's validity is to "consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the jobs for which candidates are being evaluated." *ld.* §2(b). 

170. *ld.* § 703(h), 42 U.S.C. § 2000e-2(h). Therein it is made clear that the intended limitation is of testing which results in the forbidden discrimination, and not of testing generally: 

nor shall it be an unlawful practice for an employer to give and to act upon the results of any professionally developed ability test 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.  
practices, the analysis of the Court was not limited to a situation involving prior discriminatory practices. The Court rejected the Court of Appeals holding that since "there was no finding of a racial purpose of invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike," there was no violation of the Civil Rights Act of 1964.

The Court found that the objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." A narrow reading of the holding of the Court would limit it to the situation where there were prior discriminatory practices on the part of the employer. However, a broader reading of the case would prohibit the use of testing devices regardless of the prior practices of the employer.

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

The Court held that Congress placed on the employer the burden of showing that any given requirement has a manifest relationship to the employment in question:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.

Applying this standard, the Court found that a satisfactory score on the two tests utilized was not shown to be related to successful performance of the jobs at issue.

172. Id. at 429.
173. Id. at 429-30.
174. Id. at 431.
175. Id. at 436. "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Id. The Court based its finding that any test must be "job-related" on the legislative history and the administrative regulations promulgated under the Act. The Senate discussion of section 703(h) shows that the Act was not intended to go as far as a case reprinted in the Congressional
The administrative regulations promulgated by the Equal Employment Opportunity Commission clarify the Commission's view that section 703(h) permits only job related tests:176

The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

The Court in Griggs suggested that the Commission findings should be given great deference and concluded that the findings at issue were supported by the language of the statute and the legislative history. Moreover, the EEOC Guidelines ought to be regarded not only as consistent with the intent of the 1964 Civil Rights Act but also as a proper means of effecting the will of Congress in preventing apparently objective tests from resulting in discrimination.

(b) State Statutes and Regulations. Most states have enacted legis-
lation prohibiting discrimination in employment and promulgated regulations thereunder forbidding inquiries into the “race, color, creed or national origin of the applicant.” California and Colorado have gone further by promulgating guidelines for all pre-employment testing. The California State Fair Employment Commission also has prepared Guidelines for Testing and Selecting Minority Job Applicants. The thrust of the guidelines is that only properly validated examinations directed at determinations of specific skills and abilities to perform specific tasks are to be utilized. The Commission requires that: “Each employer should be certain that the tests he is using are related to his own specific uses,” and that tests “be used as only one indicator of competence.”

In the Commission’s view:

Measures of personality and interests are not “tests” in the sense that they have “right” and “wrong” answers. They are intended to indicate how a person typically acts and feels and the type of activities he likes. Frequent misuse has produced much controversy concerning these inventories. These inventories, like other measuring instruments, should not be used unless validated.

The Commission’s Guidelines require: analysis of the performance of a group of workers who are tested, but whose tests are not used for any employment decision; comparison of test scores of workers currently employed and their work performance; and an inter-industry comparison of test scores of successful workers. Given the generally questionable validity of personality tests, it is unlikely that any employer could provide evidence of validity in conformity with these

177. See, e.g., ARIZ. REV. STAT. ANN. § 41-1462(1): Unlawful discriminatory practice shall be: For an employer, because of the race, sex, religious creed, color, national origin or ancestry of any person to refuse to hire or employ him. . . .


179. The California Guidelines warn against overly rigorous job qualifications; many so-called requirements, such as high school graduation, may not be essential to job performance. While testing may be appropriate for particular jobs, and while good testing provides “objective information on applicant’s abilities and increases the probability that those selected will succeed,” the Commission cautions employers that “improper tests can be a major barrier to employment of competent people, both minority and nonminority.” Id.

180. Id. ¶ 451:158h.

181. Id.
regulations.\textsuperscript{182} Hence, it is likely that the California Guidelines amount to an outright prohibition on the use of personality testing as a pre-employment screening device.\textsuperscript{183}

2. \textit{Labor Arbitration Decisions Involving Psychological Testing}

Federal and state labor law deals specifically with pre-employment testing only in the context of its discriminatory effects. The question of the required use of tests arises primarily in labor negotiation and grievance adjudication. The concern of labor unions with regard to testing practices does not normally extend to the pre-employment situation, since the union does not represent the employee until he has been hired. However, union concern with pre-employment testing may increase as it becomes clear that results of such testing may affect post-employment promotions.

Unions may negotiate specific provisions in the labor contract to limit the use of tests, identify specific tests to be used, and limit the effect of test results.\textsuperscript{184} The expanding notion of "conditions of employment" which are subject to collective bargaining provides the union with ample authority for compelling negotiation on these issues.\textsuperscript{185} The union might thus bargain to include language in the agreement prohibiting the use of any psychological tests and requiring that seniority will be the sole criterion for promotion, lateral transfer, layoffs, or rehiring. Short of prohibition, the union might negotiate specific language to limit the selection and utilization of such tests.\textsuperscript{186}

\textsuperscript{182} See text accompanying notes 142-46, \textit{supra}.

\textsuperscript{183} See also BNA. \textit{FAIR EMP. PRAC. MAN.} \textsection 451:195 (1968). Therein is reported the Colorado Civil Rights Commission's \textit{Policy on Psychological Tests} which parallels the California provisions requiring validation of tests and prohibits sole reliance on tests for the employment decision.

\textsuperscript{184} Newell, A \textit{Union View of Psychological Testing}, in Hagglund & Thompson. \textit{supra} note 119, at 8-17.


\textsuperscript{186} Examples of such limiting language are: 1) the collective bargaining agreement between Match & Merryweather, Co., of Cleveland and Local 2155, IAM, which reads in part:

Tests will be used for the purpose only of determining the eligibility of employees to be trained on tape controlled machinery or on other equipment with new and different characteristics.

and 2) the agreement between Brunswick Corp., Muskegon, Mich., and Local 1813, IAM, which provides:

The Company agrees that psychological tests designated as the Wonderlic Problem
Where the labor union has not specifically negotiated for limitations on the utilization of tests, no specific clause granting the company the right to use "aptitude" or "ability" tests is required before their use can occur. In effect, arbitrators interpret labor contracts to contain an implied term or a reserved power allowing the employer to make decisions on the basis of the workers' skills or aptitudes and to use reasonable means to acquire information for such decisions through the use of tests. In Mead Containers, Inc. v. Pulp, Sulphite and Paper Mill Workers, Local 511 the arbitrator noted that "[o]nly but a few collective bargaining agreements expressly provide for the use of written tests in the selection of job applicants..." While testing itself was not prohibited where the collective bargaining agreement was otherwise silent, the arbitrator attempted to ensure that the tests be appropriate and fair by providing guidelines similar to the following: (1) in the absence of contract prohibition, an employer has the right to administer aptitude tests to determine an applicant's qualifications for a job; (2) an employer may exclude from consideration an applicant who declines to take a test; (3) tests should be reasonably related to the duties required for a particular job and reasonably designed to measure the applicant's aptitude, skill, and ability; (4) tests should be fairly administered and graded and the results should

Solving Test shall not be used for determining an employee's ability to perform under the job application of the layoff and recall procedures of this agreement.

Haggland & Thompson, supra note 119, at 13-14.

187. 35 Lab. Arb. 349, 352 (1960). In Mead Containers the union did not deny the validity of the tests used but had "resisted the use of tests primarily on the grounds that they are not authorized or contemplated by the agreement, and have never previously been used by management." The arbitrator noted, however, that "the instant grievance does not involve any question as regards the nature of the test or the manner in which it is to be administered. An employee is adequately protected in the event he should claim that the test is unreasonable or that the method of scoring was unfair." Id. at 353.

188. Id. at 353.


190. A decision not to promote or transfer for refusal to take a test appears to be permitted by the majority of cases. While the above position is inconsistent with the general rule that test results are to be only one basis for determining ability and that a mechanical reliance on test scores is arbitrary and unreasonable, it is generally based on the premise that refusal to take a test is disobedience of a valid work order. See, e.g., Link-Belt Co., 44 Lab. Arb. 720, 722 (1965). See also St. Regis Paper Co., 40 Lab. Arb. 562 (1963). Contra, American Meter Co., 41 Lab. Arb. 856, 862 (1963).
be evaluated and appraised together with other relevant factors; (5) the claim of any employee that the tests are arbitrary, or that they were administered in an arbitrary manner, or that the results were applied unfairly is subject to the grievance procedure. While it is clear that testing per se is not prohibited, the validity of any specific test can be brought into question. The crucial question is whether the tests are fair and reasonable methods of measuring skill and aptitude.

Where the question of test validity has arisen in labor arbitration, it has been held that the test instrument used must measure particular skills and abilities required. This requirement is represented by *International Tel. & Tel. Corp. v. Communication Workers of America*:\(^{191}\)

Tests, per se, cannot be said to be an improper method for making judgments of the kind here under consideration, provided that the test used in a particular instance is one which reasonably measures the particular aspect of the individual's personality or attainment with which the person, group or organization doing the testing is concerned. The preparation and giving of tests is an endeavor calling for considerable experience, skill and perceptiveness. The so-called standardized tests are the result of much trial-and-error until dependable results can be attained from their use. The fact that use of tests is recognized and accepted procedure in industry and other areas does not provide a blanket validity for any particular test, or of the one here under consideration.

In *Butler Manufacturing Co. v. Steelworkers Local 2629*,\(^ {192}\) where the arbitrator found the test in question not sufficiently related to the

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191. 49 Lab. Arb. 1068, 1070 (1967). The arbitrator concluded that the test in question was not sufficiently related to the work in question. "In short, the test as given does not measure the skills learned by the production Operator in doing her job, but does measure a kind of beyond-the-job exposure to electronic theory. . . ." *Id.* at 1073. *See* Glass Containers Mfrs. Institute, 47 Lab. Arb. 217 (1966) (test in question related to skills and qualifications involved in job position).

192. 52 Lab. Arb. 633 (1969). The Arbitrator in *Butler* stated:

This arbitrator, and others, has sustained management's right to use tests which have been specifically designed to determine an employee's "skill and ability" to perform a certain job. However, arbitrators generally have also held that aptitude tests, not directly related to work in question are properly used by management only on the selection of new employees, and in counseling . . . but such general tests may not be used as a proper guide for denying a senior employee a promotion. *Id.* at 638 (emphasis added). *See also* Central Soya Co., 41 Lab. Arb. 1027, 1031 (1963). Therein the arbitrator observed: "There is no doubt that upon hiring a new employee, the Company unilaterally may give whatever tests and as many as it thinks proper. . . ."
position involved in a promotion decision; it was indicated in dictum that the requirement of job-relatedness was not applicable during the hiring process. The only decision specifically involving personality testing and the issue of job-relatedness, while expressing doubt as to the test's validity, rested on a finding that the personality test had not been relied on in the making of any employment decision.\footnote{193} Nevertheless, applying the general principles of job-relatedness, one can conclude that reliance on such standardized personality testing would not be upheld.

A second criterion of validity is the character of the sample group on which the test itself is validated. The majority view is that the tests must be specifically designed or specifically validated on individuals performing in the specific job category in question. An objective test standing alone or a national mean score will not suffice as a standard for performance; experimentation on workers in like positions performing like tasks is required.\footnote{194} Without specific validation, the significance of test results is speculative and the use of any particular score on a standardized test is indefensible.

Tests must be uniform, fairly graded, fairly administered and non-discriminatory. Where these standards are not met, an employer's decision based on test results will be rejected as arbitrary, capricious and

\footnote{193. Wisconsin Elec. Power Co., 36 Lab. Arb. 1401, 1410 (1961). The arbitrator expressed doubt as to the job related validity of a standardized personality test: The Board, like the union, has some concern over the Minnesota Multiphasic Personality Inventory, there is some hazard in this test if it is given undue weight. It is true that the great majority of successful candidates were "O.K.ed" on this test. But other employees with a favorable rating on this test were not selected. On balance, the Board does not believe there is sufficient evidence to warrant a conclusion that the MMPI unduly guided the selection for the disputed job.}

\footnote{194. National Cooperative Refinery Ass'n, 44 Lab. Arb. 92 (1964). The arbitrator suggested the basis for establishing test norms is a group of individuals in the same occupation as that of the individual being tested: When a test has been given to a large number of candidates for an occupation and the test results correlated with performance in the occupation, and when this correlation reveals a consistent relationship between particular test performances as success (or failure) in the occupation, we may be in a position to affirm with confidence that the tests are a reliable screening device [sic] and that some particular score is critical. Id. at 95. See also Glass Containers Mfrs. Institute, 47 Lab. Arb. 217, 223 (1966) (discussing with approval the extensive efforts on the part of the employer to validate the tests used); United States Steel Corp., 49 Lab. Arb. 1160, 1166-68 (1967) (giving detailed discussion of the establishment of test norms for employment purposes). Contra, American Oil Co., 50 Lab. Arb. 1227, 1232 (1968) (upholding use of standardized tests with general norms as decisional criteria).}
unreasonable. Yet even where properly validated, the general view is that test scores cannot be the sole determinant of an employee's abilities and qualifications. A company judgment based entirely on test scores is generally held to be invalid as being "arbitrary, capricious, and unreasonable." Other assessments of ability, such as acquired knowledge, prior training, and prior work experience, must be considered in making determinations as to ability. National Seal Co. v. Rubber Workers, Local 462 rejected the contention that the employer had the right to deny the grievant a job solely because of her failure to pass an examination designed to test her proficiency in simple mathematics, where the job would involve the making of simple computations. In Containers, Inc. v. Teamsters Local 695 the use of "cut-off" scores was expressly held invalid even where an "industrial norming project" had validated the scores in the industrial work context, on the ground that by using such score standards the company was, in effect, making the result of aptitude tests the sole determinant of ability. Even where workers have similar experience and training it has been generally held that only substantial differences in test scores will suffice for discrimination on the basis of ability.

While arbitrators have conceded the right to make initial employment decisions on the basis of test results and have permitted employers to utilize tests in making determinations of ability where the use of tests is not specifically prohibited by the collective bargaining agreement, the attitude of arbitrators toward testing is cautious. The right of the union to submit the propriety of a particular test or the utilization of test results to arbitration is unchallenged. Some arbitrators have gone so far as to permit the union to participate in selecting, administering, and scoring the tests. Moreover, some arbitrators

197. 29 Lab. Arb. 29, 35 (1957). While the arbitrator noted the widespread use of testing, and its utility in making employment decisions more objective, and conceded the validity of the test in question, he nevertheless concluded:

The use of tests is properly a supplement to other personnel evaluation tools and techniques. Accordingly, there appears no warrant for making a final and conclusive evaluation of each employee's rights to a job solely on the basis of the results of the test.

Id. at 36.
manifest a general apprehension toward tests, suggesting that past work records and probationary evaluation provide a superior basis for employment decisions.\textsuperscript{201} This general distrust of test scores is evidenced by the general rule that the burden of proving the validity of the tests in question rests with the employer.\textsuperscript{202}

The question of whether psychological tests, and personality tests in particular, can be required of employees as a matter of course has not been directly involved in any reported decision. Cases involving questions of mental incompetence suggest a severe limitation on the use of such tests once workers are employed. No specific clause permitting psychological testing is required since it is implicit in every collective bargaining agreement that the company has the right not to employ or retain anyone who might endanger fellow workers or who, by reason of mental impairment, is incapable of properly performing his job.\textsuperscript{203} However, before the company may require the employee to submit to a psychiatric examination as a condition of continued employment, there must be substantial reason to believe that by reason of mental impairment the employee presents a danger to himself or fellow employees or cannot properly perform his work.\textsuperscript{204} Where there is a basis for concern about the employee's mental condition, and both psychological tests and an examination by a psychiatrist reveal that the employee's mental condition provides a serious risk, the employer is justified in removing a worker from a job involving those identified risks.\textsuperscript{205} Where reinstatement has been at issue, it has been clear in several opinions that the examination serving as the basis of the employment decision must be a recent examination: "An employee who is physically or mentally ill may not be forever condemned to be deprived of the right to employment; when the conditions have changed so as to require re-evaluation of the existence of a legitimate reason or basis for denial of employment, he is entitled to further considera-
tion."

On this basis, it would seem indefensible to administer psychological tests, particularly personality tests, as a matter of course and to place the results in the employee's file so that they might be utilized in making future employment decisions. Moreover, one can conclude that the employer generally has no right to subject employees to psychological testing or psychiatric examination without just cause, but the proscription of psychological testing by arbitrators under collective bargaining agreements affords no protection to prospective employees who are beyond the coverage of such agreements.

III. AN ARGUMENT FOR A CONSTITUTIONAL PROHIBITION OF POLYGRAPH AND PERSONALITY TESTING

The congressional committees which considered the use of the polygraph and personality testing by the federal government in its employment activities repeatedly heard sweeping arguments condemning such testing as an infringement of an individual's constitutional rights, particularly the right of privacy. Certainly the concern with privacy is not new nor is there any absence of literature, both popular and scholarly, exploring the concept and efficacy of a right of privacy and examining the threat to personal privacy in modern society. Moreover, a substantial body of literature has been developed on the common law recognition of the right to privacy. Yet little has been written on particular applications of a constitutional right of privacy outside of the context in which it was first clearly applied by the United States Supreme Court, or outside of the area of criminal investigation where it has been most fully developed.

207. See, e.g., Statement of Representative Cornelius Gallagher in 1965 Senate Hearings, supra note 6, at 534.
208. See, e.g., V. PACKARD, THE NAKED SOCIETY (1964); A. WESTIN, PRIVACY AND FREEDOM (1967).
211. See notes 227-56 and accompanying text, infra.
Polygraph and Personality Testing

As early as the end of the nineteenth century, Warren and Brandeis published their landmark article which argued the common law basis of the right of privacy and urged the courts to protect the "right to be left alone." Many state courts gave judicial recognition to a right of privacy, while other states established the right to varying degrees of privacy through legislative action. The common law and legislative recognition of privacy was firmly rooted in property rights: the property interest in the intellectual content of a letter, and the proprietary interest in the use of one's name in advertising. There was a close relationship between invasion of privacy and defamation. There remained a strong strain of judicial opinion, however, which found the right of privacy to be intrinsic to the human personality.

Privacy has been workably defined as:

the right of the individual to decide for himself, with only extraordinary exceptions in the interest of the whole society, when and under

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212. Warren & Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, 205 (1890). Therein the authors stated:

The protection afforded to thoughts, sentiments, and emotions expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.

213. In those jurisdictions which have established a common law right of privacy, a party subjected to such testing as a requirement for employment might well have a cause of action for invasion of privacy, for a claim of actual damages and even for punitive damages. An analogy is provided in the debt collection cases where publication of an owed debt is made in order to coerce payment; such debt collections have been held to invade the debtor's privacy. See Trammel v. Citizen's News Co., 285 Ky. 529, 148 S.W.2d 588 (1951).

The difficulty of such a common law approach is illustrated by the court's opinion in Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962). Therein the court held that an employer's photographing employees for purposes of studies to increase efficiency of operation and promote safety did not violate the state common law right of privacy of the employee.


218. See Foster-Milburn Co. v. Chinn, 134 Ky. 424, 121 S.W. 444 (1909).


220. 1965 Senate Hearings, supra note 6, at 2 (emphasis added).
Privacy is thought to be necessary to assure personal autonomy the ability to withdraw, the opportunity for introspection and the occasion for sharing of confidences and intimacies. Some even view privacy as intrinsic to the integrity of the personality, for "... privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust."  

If there is any vitality in the concept, it is compromised by the use of polygraph and personality tests that are designed to overbear the will of the individual by analyzing uncontrolled physiological responses or by reaching behind conscious articulation in analyzing test responses to determine unconscious feelings and attitudes. This compromise of personal integrity occasioned by an invasion of individual privacy is exacerbated by the nature of polygraph interrogation and the intimate character of the questions utilized in personality testing. To find a constitutional prohibition of polygraph and personality tests requires, first, the establishment of a constitutional right of privacy on which the prohibition can be based and, second, a basis for finding that employers are barred from invasion of that right.

A. The Right of Privacy

While the right of privacy is implicit in "search and seizure" decisions before the turn of the century and its explicit recognition was argued in the first wiretapping case to reach the Supreme Court, the Court did not give explicit recognition to the right until

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221. See 1966 Senate Hearings, supra note 164, at 239. See also Office of Science and Technology, Office of the President, Privacy and Behavioral Research 2 (1967). Therein it was stated: The right to privacy is the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life. It is a right that is essential to insure dignity and freedom of self-determination.


1965 in a case involving dissemination of birth control information. While the right has not received extensive development in subsequent cases, it can be best understood by examining the argument which supported its recognition, and by studying those cases involving criminal investigation, where the right of privacy has received its fullest exposition.

The United States Supreme Court, in *Griswold v. Connecticut*, held unconstitutional a Connecticut statute forbidding the use of contraceptive devices and explicitly recognized a right of privacy. The Court found this right, while not expressly provided in the Constitution, to be the result of the interrelationship of express Constitutional provisions and to be necessary for the implementation of these expressed protections. After reviewing the specific rights enumerated in the Constitution, the Court concluded that these "[v]arious guarantees create zones of privacy." The *Griswold* opinion expressed a concern that to require exposure of one's beliefs, attitudes, and associations would chill the free exercise of first amendment rights. Certainly it is clear that required disclosure of associations, statements or beliefs operates to discourage the exercise of those fundamental civil rights. The chilling principle provides a ready basis for challenging the constitutional use of polygraph and personality testing, which often extracts damaging information about the subject's history, associations, and beliefs.

The two most significant lines of cases which have particular bearing on the right of privacy are those involving the right against

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227. *Id.*
228. *Id.* at 484.
230. See *Schneider v. Smith*, 390 U.S. 17, 25 (1967). *Schneider* involved inquiry into the beliefs, membership, and participation of seamen in organizations on the Attorney General's List of Subversive Organizations. The Court found the general inquiry to be unconstitutional and stated: 

The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of the people. See also *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Watkins v. United States*, 354 U.S. 178 (1957). In reversing a contempt citation the Court in *Watkins* referred to "... the responsibility placed by the Constitution upon the Judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion, or assembly." *Id.* at 198 (emphasis added).
self-incrimination and those involving the prohibition of unreasonable searches and seizures. These decisions lead to recognition that a right of privacy is valuable in itself, and the conclusion that privacy is an intrinsic attribute of individuality.

The fifth amendment cases involving the use of evidence obtained in violation of the right against self-incrimination provide authority for finding mandatory submission to polygraph or personality testing to be violative of basic constitutional protections. The extraction of physiological responses by the polygraph and the recording of unconscious and attitudinal responses by psychological testing find most apt analogies in the extractions of evidentiary information in *Rochin v. California,*231 and *Schmerber v. California,*232 where the constitutionality of obtaining incriminating information through bodily extractions from suspects was considered.

In *Rochin,* where the suspect’s stomach had been pumped to obtain narcotic evidence,233 the Court found no valid distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant’s body by physical abuse. The Court concluded:234

[†]he proceedings by which this conviction was obtained do more then offend some fastidious squeamishness or private sentimentalism. . . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw. . . .

The use of the polygraph which records psychological responses beyond the control of the subject involves a like affront to the integrity of the individual. The probing questions and recording of the unconscious of the subject that is the heart of personality testing likewise invades the privacy of the subject by intruding into his private personality. To permit these devices is merely to approve a “white glove” rack and screw.

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234. Id. The majority opinion emphasized the unreliability of compelled testimony, not that personal liberty and dignity are compromised by compulsion.
Additional authority for this position is provided by *Schmerber*, which upheld the admissibility of a blood-alcohol analysis conducted on a suspect under arrest. The Court took pains to distinguish the extraction of the blood sample from a compulsory polygraph examination which, the Court suggested, would pose significant problems of self-incrimination under the fifth amendment. The court differentiated between compelling a “confession” and subjecting a suspect to “fingerprinting, photographing, or measurements.” In drawing this distinction between communications and testimony, on one hand, and a compulsion which makes the suspect the source of real or physical evidence, on the other, the Court cautiously provided dicta most helpful for determining the status of polygraph and personality testing.235

There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain “physical evidence,” for example, lie detector tests measuring changes in bodily function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

If the *Schmerber* Court is correct in concluding that the physiological responses obtained from the polygraph are testimonial, then compulsory submission to such testing is a violation of the fifth amendment. The written or spoken responses required in personality testing likewise involve the elicitation of opinions, beliefs and feelings which are testimonial in nature and likewise involve problems of self-incrimination. While these decisions involve compelled testimony in the context of criminal interrogation, the nature of an employer’s inquiries about past deeds and guilt is often indistinguishable from criminal interrogation. Moreover, the loss of personal liberty or property which would result from a criminal conviction is often no more significant than the denial of livelihood which may result from compelled testimony concerning past and present activities, associations, and even beliefs during pre-employment or promotion screening via personality and polygraph testing.

The fourth amendment protection against unreasonable searches also provides a foundation for the concept of a right of privacy as well as an independent constitutional limitation upon polygraph and personality testing. An early case, *Boyd v. United States*, held that compelling production of personal business records by a defendant in a criminal action violates the fourth amendment and provided dicta in support of a personal right of privacy creating an immunity from search, which has since been given effect:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his door, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.

The broad reading of the fourth amendment protections projected in *Boyd* was severely restricted in *Olmstead v. United States*, where the Court held that wiretapping was not proscribed by the fourth amendment as an "unreasonable search and seizure." The Court held that the Framers intended only to forbid search of material things and the seizure of tangible items. Ten years later in *Nardone v. United States*, the Court found that protection against wiretapping had been provided in the 1934 amendment to the Federal Communications Act. The question of the permissible scope of electronic eavesdropping under the "physical trespass" requirement continued to trouble the Court; a detectaphone placed against a wall was held not

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236. 116 U.S. 616 (1885).
237. *Id.* at 630.
238. 277 U.S. 438 (1927). In a vigorous dissent Mr. Justice Brandeis anticipated the development and utilization of polygraph and personality testing and argued that it ought to be forbidden, along with wiretapping:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. . . . Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions.

*Id.* at 474.
to violate the fourth amendment, while a spike microphone driven approximately one foot into the wall was found to be a trespass and hence a search proscribed by the fourth amendment. The arbitrariness of this distinction became clear in *Clinton v. Virginia* where the Court in a per curiam opinion reversed a conviction which had been based on eavesdrop evidence obtained through the use of a mechanical listening device "stuck in" the wall with approximately the penetration of a thumb tack, holding that sufficient penetration had occurred to constitute trespass and hence a search in violation of the fourth amendment.

A related series of cases involves the admissibility of testimony obtained through the use of recording devices hidden on agents who engage suspects in incriminating conversations. The general rule has been that where there is no technical trespass—that is, where the suspect consents to the agent's presence or where a warrant is secured—the testimony thus obtained is admissible. In *Osborn v. United States*, Mr. Justice Douglas vigorously dissented from the Court's upholding the admissibility of a recording obtained from such an instrument, urging that the use of the agent "posing in a different role for the purpose of obtaining evidence" compounded "the invasion of privacy by using hidden recording devices to record incriminating statements" in violation of the right of privacy developed in *Griswold*. Justice Douglas went on to express concern with the use of polygraph and personality testing:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times. . . . Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms are common. . . . Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex and the like. . . . Polygraph tests of government employees and of employees in industry are rampant. . . . The dossiers of all citizens mount in number and in-

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246. *Id.* at 341-43 (emphasis added).
crease in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified. These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man’s life at will.

The concern of the dissent in Osborn was alleviated to a great extent by the decision in Berger v. United States,\textsuperscript{247} which required a warrant to wiretap, and particularly by the decision in Katz v. United States,\textsuperscript{248} where conversations overheard by an electronic listening and recording device placed on the outside of a public telephone booth were held to be inadmissible. While not fully developing a right of privacy under the fourth amendment, the Court rejected an analysis limiting the fourth amendment protection to freedom from physical intrusion. In rejecting the doctrine of “constitutionally protected areas,” the Court viewed the fourth amendment not as protection of the home from trespass, but as protection of the privacy of the individual:\textsuperscript{249}

For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

\textsuperscript{247} 388 U.S. 41 (1967). See note 240.
\textsuperscript{248} 389 U.S. 347 (1967). In Katz the Court specifically held that Olmstead and Goldman had been so eroded by subsequent decisions that the “trespass” doctrine was no longer controlling. \textit{Id.} at 353. But see United States, v. White, 401 U.S. 745 (1971). This case specifically limited the effect of the Katz decision so as not to disturb the On Lee holding. The Court in White held that a police agent who engages a defendant in a conversation may, without a warrant authorizing his conversation, take notes of, simultaneously record, or electronically transmit those conversations without disturbing a defendant’s fourth amendment rights. The basic premise is that the defendant freely chooses to speak with the agent and takes the risk, as he does with any conversation, that it will be repeated.

\textsuperscript{249} Katz, 389 U.S. at 351. See also Mapp v. Ohio, 367 U.S. 643, 655 (1961). In Mapp the Court stated:

\textsc{Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.}
While in a recent decision the Court rejected a subjective definition of “privacy expectation,” it reiterated its view that the fourth amendment precludes violations without a warrant of “expectations of privacy [which] are constitutionally ‘justifiable’.250 Compulsory submission to polygraph testing and the “fishing expedition” conducted in the pre-employment screening interrogation, as well as the sifting of the mind and emotions of the subject in personality testing, constitute exposures of the private person which invade objective expectations of privacy. The “search” which is conducted with these test instruments strips the subject bare.

A related objection to the use of these testing devices based on the fourth amendment is that even if the information being obtained is properly the concern of employers, any less intrusive means for obtaining this information must be used first. The Supreme Court in Stanley v. Georgia251 held that a search of a private home for obscene material could not be justified on the basis of the state’s interest in regulating the sale and distribution of pornographic material where there were other means, less intrusive than the search of a private home, to accomplish this legitimate state purpose. Citing with approval Justice Brandeis’s dissent in Olmstead arguing for the recognition and protection of a right of privacy, the Court held the search involved to be unreasonable, and observed that “fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”252 To a great extent, the need to determine a worker’s suitability for employment can be satisfied through the use of the less restrictive pre-employment interview, assessment of references, investigation of prior work history, and probationary work period. The requirement of least restrictive means of achieving a state interest, combined with a strong determination to preserve inviolate the individual’s rights of privacy because of its close proximity to other preferred freedoms, seems to compel, therefore, holding the use of pre-employment polygraph and personality testing unconstitutional.

While the right of privacy has been most fully developed in the

252. Stanley, 394 U.S. at 564.
criminal procedure area, the right to privacy developed by the Court under the fourth amendment limitation on "unreasonable search and seizure" is not limited to criminal prosecutions or utilization of exclusionary rules; unlike the text of the fifth amendment, the fourth amendment does not use the word criminal with reference to its prohibitions. A contrary result had been suggested in *Frank v. Maryland*, in which the Court upheld a longstanding administrative practice of levying a fine against a homeowner who refuses to permit a health inspector to search the premises without a warrant, reasoning that only searches for criminal evidence are prohibited by the fourth amendment. This position was rejected in 1967 in *Camara v. Municipal Court*.

"It is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior." Focusing on the privilege against unreasonable search and seizure rather than on the exclusionary rule, the Court proceeded on the premise that the individual had no means to challenge the inspector's decision to search except by refusing him admittance and risking assessment of a fine: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." The majority went onto consider the availability of less objectionable means of vindicating the valid state interest in health inspection; suggesting that a warrant on a showing of probable cause was necessary and appropriate for health inspections.

It is no great extension of the principle set down in *Camara* to say that if a noncriminal investigatory search without a warrant infringes recognized constitutional protections, then a noncriminal interrogation utilizing devices such as the polygraph and personality test which

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254. 387 U.S. 523, 530 (1967). *But see* Wyman v. James, 400 U.S. 309 (1971). Wyman upheld home visitations under New York welfare laws. The Court suggested that these visitations were not searches, but even if they amounted to searches, they were not unreasonable. The agency was found to be administering a public trust and to be dispensing private charity. The Court held there was no feasible alternative for the purpose of insuring the proper administration of the aid to dependant children program of the state welfare agency.
256. *Id.* at 533.
infringe on protected constitutional rights is not beyond constitutional restriction merely because of the noncriminal character of the interrogation.

B. The Privilege Doctrine

An initial objection to protecting prospective employees from mandatory submission to testing procedures is that by seeking the "privilege" of employment the prospective employee "consents" to such testing as the employer might require. The spurious character of such a consent has already been discussed and it should be sufficient to note that the unequal bargaining position of a prospective employee in face of the economic necessity of employment, and in face of the widespread requirement of submission to testing necessarily removes that voluntary element which is crucial to the concept of consent.

The question of the "privilege" of employment presents a much more difficult constitutional question than that of consent and will be explored in the context of governmental employment. The privilege doctrine was tersely stated by Justice Holmes for the Massachusetts Supreme Judicial Court in McAuliffe v. Mayor of New Bedford: "The petitioner may have a constitutional right to talk politics, but he has no right to be a policeman." The doctrine was broadly applied in Barsky v. Board of Regents where a physician's license was suspended under the New York State Education Law following his conviction for contempt of Congress for declining to produce certain papers for the House Committee on Un-American Activities. The justification for the suspension of the doctor's license was his criminal conviction, even though there was no showing that the acts for which he was convicted were in any way related to his competence or professional integrity as a physician: "The practice of medicine in New York is lawfully prohibited by the State except upon the conditions it

257. See text accompanying notes 244-50, supra.
258. 155 Mass. 216, 29 N.E. 517, 518 (1892). Justice Holmes discussed the notion of privilege in the general context of the employment relationship:
There are few employments for hire in which the servant does not agree to suspend his constitutional right to free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which were offered him.
imposes. Such practice is a privilege granted by the State under its substantially plenary power to fix the terms of admission."

The movement away from the doctrine of privilege was gradual. An intermediate position was the requirement of a substantial state interest before civil liberties could be restricted as a condition of employment. In a case involving a loyalty oath required of all state employees, the United States Supreme Court reasoned: "We need not pause to consider whether an abstract right to employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." While the Court conceded a state's interest in determining the loyalty of its employees, it found the loyalty oath in question to be a violation of due process.

With the rejection of the doctrine of privilege the Supreme Court increasingly recognized that certain abridgments of the substantive rights of public employees are unconstitutional. On the basis of the constitutional privilege against self-incrimination, the court in Slochower v. Board of Higher Education upheld the right of a public employee to refuse to testify before a congressional committee without subjecting himself to dismissal. The Court observed:

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260. Id. at 451. In a dissenting opinion Mr. Justice Douglas argued for the recognition of a "right to work." He stated:

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his Essay on Politics, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive, and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.

The dictum of Holmes gives a distortion to the Bill of Rights. It is not an instrument of dispensation but one of deterrents. Certainly a man has no affirmative right to any particular job or skill or occupation. The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain things shall not be done. And so the question here is not what government must give, but rather what it may not take away.

Id. at 472-73.

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The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities.

The demise of the doctrine of privilege began in a case which involved the use of statements obtained from a defendant policeman under the threat of dismissal. In *Garrity v. New Jersey* the court reasoned "[t]he choice given petitioners was either to forfeit their jobs or incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent." Specifically rejecting the *McAuliffe* privilege doctrine the Court held:

We conclude that policemen like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. There are rights of constitutional stature whose exercise a State may not condition by the extraction of a price.

In *Gardner v. Broderick*, the Court held that public employees, policemen in this instance, could not be removed for refusing to waive their privilege against self-incrimination before grand juries investigating their activities.

Critical in *Gardner* was the Court's restriction of the proper scope of inquiry into the qualifications and performance of public employees to "questions specifically, directly, and narrowly relating to the performance of . . . official duties." Certainly these limits are exceeded by polygraph and personality testing as presently conducted. It has also been seen that to condition public employment on submission to polygraph or personality testing infringes the right of privacy under the fourth and fifth amendments and is therefore permissible only where a substantial state interest is shown to be served. But given the wide availability of recorded data and investigative sources, the unreliability of polygraphy, and the questionable validity of personality

265. Id. at 500.
testing, it is doubtful that the government as employer can bear the burden of showing such a substantial interest that the prospective employee ought to be compelled to relinquish his right of privacy by submission to such testing as a condition of employment.

There can be little doubt that public employment is not a privilege which can be conditioned on the relinquishment of constitutional protections. In Keyishian v. Board of Regents\(^{268}\) the Court observed:\(^{269}\)

[Formerly, the] premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. . . . [However], . . . the theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected.

The Court concluded that it was too late to argue that constitutional protections and liberties "... may be infringed by denial of or placing conditions upon a benefit or privilege."

C. The State Action Problem

A limitation on the private use of polygraph and personality testing must be rooted in a substantive constitutional protection such as the right of privacy discussed above. However, the extension to employees in the "private" sector of protections such as have been accorded public employees encounters difficulty due to the requirement of "state action."\(^{270}\)

Professor Wolfgang Freidman believes corporations (along with labor unions, foundations and charitable institutions), by asserting extensive power over individuals and the economic life of American society, perform as governmental institutions:\(^{271}\)

The corporate organizations of business and labor have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a

\(^{268}\) 385 U.S. 589 (1967).

\(^{269}\) id. at 605-06.


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matter of argument. It is an undeniable fact of daily experience. The challenge to the contemporary lawyer is to translate the social transformation of these organizations from private associations to public organisms into legal terms.

Freidman identifies three areas of concern for legal control over the large corporate groups: excessive concentration and abuse of economic power, excessive control over national policy, and excessive group power over the individual as employee.\textsuperscript{272}

The late Adolf A. Berle argued for constitutional limitations on corporate activity in order to provide protection of personal rights from invasion through economic power.\textsuperscript{273} Berle believed the modern state has ultimate responsibility for the national economy and that one of the devices developed for meeting these economic needs was the corporation. American corporations, Berle observed, are theoretically subject to formal (although in effect nominal) control by the law of the state in which they are incorporated, which is generally exercised, along with federal authority, when conditions become unsatisfactory. Noting that a broad area of concern is the relationship between corporations and the individuals with which they deal, Berle viewed this area as a "field of growing law" where there "is the tendency to give specific constitutional or legal protection by individuals in their dealings with private units wielding great economic power."\textsuperscript{274} This trans-

\begin{itemize}
\item[272.] \textit{Id.} at 179.
\item[273.] Berle, \textit{Constitutional Limitations on Corporate Activities—Protection of Personal Rights from Invasion Through Economic Power}, 100 U. Pa. L. Rev. 933 (1952). See Miller, \textit{The Constitutional Law of the “Security State"}, 10 Stan. L. Rev. 620, 662 (1958). Miller argues for the application of constitutional protections against “private governments” where they “directly affect the value position of individuals;” and sets out the following argument for the application of the state action doctrine to private groups:
\begin{enumerate}
\item The Constitution was framed on the theory that limitations should exist on the formal exercise of power in government but not on control in fact exercised unofficially.
\item The essential problem of individual liberty, is one of freedom from arbitrary restraints, wherever and however imposed.
\item The Constitution should be so construed as to apply to arbitrary applications of power against individuals by centers of private government.
\item The main flow of group decisions in the factory community would not be thrown into litigation or controversy by such a constitutional construction, but only those which directly and substantially affect an individual.
\item It would take only a slight modification of present constitutional doctrine to effect such a constitutional construction.
\end{enumerate}
\textit{Id.} at 662 (emphasis added).
\item[274.] Berle, \textit{supra} note 273, at 942.
\end{itemize}
lation of constitutional law from the field of political to the field of economic rights rests on two premises: that the state has created the corporation and that the corporation now has economic power. It is the abuse of that power which brings the constitutional protections of the individual into play. Berle argued that a private corporation is performing a "public function," and it should therefore be held to the constitutional standards that apply against the state itself. Although noting opinions of the Court to the effect that "...the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce," Berle conceded that contemporary Court opinions have required state action to find a constitutional restriction. The case remains open as to whether "state action" can be found where the corporation is able to enforce its rule, or carry out its practice, without calling on the state to assist in its enforcement.

A pristine formulation of the requirement of state action was provided in United States v. Cruikshank where the Court observed: "The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another." Nevertheless, the concept of state action, which has been most fully ex-

Undue fascination with the supposed structural and power similarities unions and corporations have with government can be misleading...some commentators are motivated by an undisciplined desire to "let the mind be bold". This sort of thinking deserves little sympathy. The Bill of Rights and the fourteenth amendment are the great instruments with which courts protect the people from misused governmental power. The view that because unions and corporations are somehow similar to government they too should be restrained by these same constitutional provisions has perhaps an aesthetic and emotional appeal. Its analytical shortcomings, however, are fatal. The need to regulate unions and corporations is undeniable; but it need not be assumed a priority that the Constitution is the proper regulatory instrument. Other, more appropriate, means may be available to accomplish the same desirable ends.


278. Berle, supra note 273, at 950.

279. Id.

280. 92 U.S. 542, 554 (1875).
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plored in the racial discrimination cases,281 is a developing doctrine of
great vitality. It is possible, for purposes of investigating the presence
of state action, to divide the corporation’s pre-employment activities
into three broad categories: the creation of the “private” organization
by the state, the involvement of the state in the operation of a “pri-
ivate” organization, and the performance of a public function by the
“private” organization.

In *Marsh v. Alabama*,282 state authority was invoked to prosecute a
private trespass action against individuals distributing religious litera-
ture in a company town. Here the Court held that the “managers ap-
pointed by the corporation cannot curtail the liberty of press and reli-
gion of these people consistently with the purpose of the Constitu-
tional guarantees;” the Court explicitly balanced the private property
interests of the corporation against the first amendment liberties of the
alleged trespassers and found that the first amendment liberties “oc-
cupy a preferred position.”283 The Court, however, laid down a more
general proposition: “The more an owner . . . opens up his property for
use by the public in general, the more do his rights become circum-
scribed by the statutory and constitutional rights of those who use it.”284

Amalgamated Food Employees, Local 590 v. Logan Valley Plaza285
extended *Marsh* to protect peaceful picketing of a business enter-
prise located within a shopping center where the picketing took place
on the shopping center property. The Court reasoned:286

[B]ecause the shopping center serves as the community business
block “and is freely accessible and open to the people in the area and
those passing through” the State may not delegate the power, through
the use of its trespass laws, wholly to exclude these members of the
public wishing to exercise their First Amendment rights on the prem-
ises in a manner and for a purpose generally consonant with the use to
which the property is actually put.

Since *Shelley v. Kramer*,287 which involved the enforceability of a ra-
cially restrictive running covenant, there can be no doubt that any act

283. *Id.* at 508-09.
284. *Id.* at 506.
286. *Id.* at 319-20.
287. 334 U.S. 1 (1948).
by any state agency which assists private parties in restricting constitutionally protected activities is prohibited by the fourteenth amendment. In Shelley the Court held "that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the law and that, therefore, the action of the state courts cannot stand." The state creation of an agency and the grant of power to perform its function, without any more state involvement, was held in Steele v. Louisville & Nashville R.R. to place constitutional limitations on the organization created. In Steele, the Court held that a union designated by the legislative branch as exclusive bargaining agent under the Railway Labor Act was compelled to represent all employees in the craft without discrimination. While it might have been argued that the duty of representation is imposed by the terms of the Railway Labor Act and that Steele should not be read as applying the fourteenth amendment to this statutorily created agency, the Court in Brotherhood of Railroad Trainmen v. Howard removed all doubt that constitutional restraints prevented the statutorily-created union from engaging in racial discrimination. There the union had influenced employers to discriminate against non-member Negroes; the Court found this activity to be unconstitutional: "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."

The performance of a public function by a private agency is a sufficient basis for bringing constitutional protections to bear, even where there has been nothing more than "state inaction" in preventing "private" infringement of constitutional liberties. In Smith v. Allwright, the Court held that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the fifteenth amendment since a system of primary laws which required a party to

289. Id. at 20.
290. 323 U.S. 192 (1944).
291. Id. at 198.
292. 343 U.S. 768 (1952).
293. Id. at 774. See also Syres v. Oil Workers, Local No. 23, 233 F.2d 739, rev'd per curiam 350 U.S. 892 (1955) (finding that unions engaged in collective bargaining under the National Labor Relations Act were involved in state action).
follow certain procedures in nominating candidates converted the party into an agency of the state insofar as the party determines the participants in a primary election. The Court concluded: "[The] right to participate in the choice of elected officials without restriction by any state because of race . . . is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." In *Terry v. Adams*, the Court extended constitutional limitations to an unregulated private political association which conducted pre-primary elections. The Court found that the Jaybird Club exerted a strong influence on political activity in Texas, and concluded: "It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." The opinion in *Terry* suggests the general proposition that when an agency becomes responsible for an integral state process, the state becomes bound to see that that agency conducts itself in conformity with constitutional protections as the *Terry* Court noted: "For a state to permit such a duplication of its election process is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment." The notion of "state inaction" amounting to state action received explicit recognition in a concurring opinion in *Bell v. Maryland*, where Justice Goldberg disclosed that correspondence of Justice Bradley, author of the *Civil Rights Cases*, contained the statement that: "Denying includes inaction as well as action. And denying the equal protection of the laws includes omission to protect, as well as the omission to pass laws for protections." Justice Goldberg added: "These views are fully consonant with this Court's recognition that state conduct which might be described as 'inaction' can nevertheless constitute responsible 'state action' within the meaning of the fourteenth amendment."

295. *Id.* at 663.
296. *Id.* at 664.
298. *Id.* at 469.
299. *Id.* (emphasis added).
300. 378 U.S. 226, 286-318 (Goldberg, J.), (concurring opinion).
301. *Id.* at 309-11.
Finally, what may otherwise be private conduct can become so enmeshed in state regulation or state assistance that "state action" invests the private activity. In *Burton v. Wilmington Parking Authority*\(^3\) the Court found the owner of a private restaurant located in a publicly owned and maintained restaurant building dedicated to public use to be subject to constitutional limitations. The Court formulated an important guideline for finding state action: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."\(^3\) The court concluded: \(^3\)

By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

The transformation of private activity into state action was further examined in *Evans v. Newton*,\(^3\) where, in holding that private park property entrusted to the city was "invested with state action;" the Court observed: \(^3\)

What is "private" action and what is "state" action is not always easy to determine. Conduct that is formally "private" may become so enmeshed with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.

The alternative rationales in *Evans v. Newton* illustrate both the state agency concept and the public function notion which provide inde-

\(^{302}\) 376 U.S. 715 (1960).  
\(^{303}\) Id. at 722.  
\(^{304}\) Id. at 725.  
\(^{305}\) 382 U.S. 296 (1966).  
\(^{306}\) Id. at 299. *See also* United States v. Guest, 383 U.S. 745, 755-56 (1965). In Mr. Justice Stewart's opinion in *Guest* the "state action" concept was discussed:

This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.
pendent bases for finding state action. The majority first held that the substitution of trustees did not remove the taint of state action, finding that the city's operation of the park, even though it was governed by private trustees, resulted in the park becoming a state agency. An alternative basis for finding state action was the concept of public function: "This conclusion is buttressed by the nature of the service rendered by a community park. The service rendered even by a private park of this character is municipal in nature." Mr. Justice Harlan in his dissent denominated this a "parallel government function" and properly observed that the concept embraces "a host of other functions commonly regarded as nongovernmental though paralleling fields of government activity." Under the public function approach, constitutional provisions are found to prohibit the government from subjecting its employees to polygraph and personality testing, private employers engaged in the "parallel government function" of employment and economic production would be similarly restricted.

Two recent federal district court decisions indicate the extent to which "private" business concerns will be found to be invested with state action. In Seidenberg v. McSorley's Old Ale House, Inc., the court found a tavern's exclusion of women as patrons violated the fourteenth amendment. Although the only state action involved in the case was licensing under the New York State Alcoholic Beverage Control Law, the court reasoned that, absent the license, the defendant could not sell beer and hence could not discriminate in the sale of beer. The court regarded as significant the fact that liquor licensing involved pervasive regulations and the fact that defendant's license had been repeatedly renewed:

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307. Evans v. Newton, 382 U.S. 296, 301 (1966). But see Evans v. Abney, 396 U.S. 435 (1970). Abney was a continuation of the controversy involved in Newton. The United States Supreme Court dealt with the question of whether park property reverted to the heirs of the donor when the trust which had provided for the maintenance of a segregated city park had become unenforceable. The trial court refused to apply the cy pres doctrine and held that the "sole purpose" of the trust was frustrated by the decision in Newton so that the property reverted to the heirs of the donor. The majority held that the construction of the trust was a question of state law and thus provided an independent ground for the decision. The Court thereby circumvented the constitutional question.

308. Newton, 382 U.S. at 301.

309. Id. at 322.


311. Id. at 604-05.
We deal with property voluntarily serving the public, devoted to a business in which volume of patronage is essential to commercial success. When a state licenses such an enterprise, in an area peculiarly subject to state regulation, pursuant to a statute imposing pervasive controls upon the conduct of the business, and under circumstances in which state licensing practices endow the license with a certain franchise value as well, the state's involvement in the operation of defendant's business, and hence by implication in the exclusionary practice under attack, rises to the level of significance within the meaning of *Burton*, and requires McSorley's to comply with the proscriptions of the Fourteenth Amendment "as certainly as though they were binding covenants written into the [license itself]."

While *Seidenberg* relies on the licensing requirement to which sellers of alcohol are subject, a second district court opinion, *Marjorie Webster Jr. College v. Middle States Ass'n*\(^\text{312}\) emphasizes the economic power and necessity of the enterprise. *Marjorie Webster* involved an action under the Sherman Antitrust Act by a proprietary college to compel its accreditation. While the court found education to be beyond the Act's definition of commerce, the decision evidences increased judicial recognition of the public function performed by "private" associations and of the immense power they wield:\(^\text{313}\)

As a general rule, courts adhere to a policy of noninterference with the internal affairs of private voluntary associations. Membership in such a group is considered a privilege and not a right. However, there is an exception when the association enjoys monopoly power in an area of vital public concern. If the power, because of public reliance upon it, is great enough to make membership a necessity for successful operation, judicial intervention may be justified.

While the question of state action in corporate activities has not been explicitly dealt with as a general proposition in any judicial decision, close analogies to existing state action decisions suggest that corporations are within the purview of the fourteenth amendment. The corporation is a creature of the state, created by statutory authority. The extensive body of statutory and administrative law dealing with labor, fair trade, consumer protection and licensing clearly shows


\(^{313}\) Id. at 469.
state involvement in "private" activities. Moreover, governmental assistance in the form of contracts, grants, and tariff protections, along with the subsidization of transportation systems, postal services, and developmental research, all directly involve the government in business activities. Finally, state inaction in failing to alleviate the tremendous imbalance of power between corporate employers and prospective employees arguably violates the fourteenth amendment just as if affirmative state intervention had produced the same situation. The position of the corporation as the primary unit in the American economy suggests that its production and service activities, if not employment itself, constitute a public function. All of these considerations support the conclusion that the invasion of privacy, self-incrimination, and unreasonable searches incident to pre-employment polygraph and personality testing are prohibited even to private employers by the fourteenth amendment.

While there exists an analytic scheme for extending constitutional protections to the employee of a private entrepreneur, this would clearly require further development in the right of privacy as well as a significant extension of the scope of state action. Thus it may be desirable, given the evils posed by polygraph and personality testing, to provide legislative regulation of pre-employment testing.

314. See Testimony of John B. Connally, Secretary of the Treasury, before the Senate Committee on Banking, Housing and Urban Affairs, urging the grant of a loan guarantee to Lockheed, Corp.

[T]he basic motivation for our recommendation is not simply concern for a particular company or particular industry—although we seem prone to forget the tremendous contributions made by the defense and aerospace industries to our security and preparedness. Rather, the primary motivation is a deep concern for the well-being of the American people. . . . At a time when the Government is spending $1 ½ billion annually on job training programs, it would be ironic to withhold authority for guarantees—guarantees we believe will be costless—that could preserve the jobs of 30,000 fully-trained aerospace workers.

IV. AN ARGUMENT FOR FEDERAL LEGISLATIVE PROHIBITION AND REGULATION OF POLYGRAPH AND PERSONALITY TESTING.

The congressional committees investigating the use of polygraph and personality tests were strongly urged to support legislation regulating or prohibiting such testing.315

A series of bills was introduced in the Senate in the 89th and 90th Congresses which culminated in the Senate’s passage of Senate Bill 1035, “An Act to protect civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of privacy.” This bill died in the House Committee on Post Office and Civil Service during the 90th Congress.316 The bill (S1438) was re-introduced in the 91st Congress and again in the 92nd Congress. It is presently sponsored by fifty-one senators and has been referred to the

315. See 1965 Senate Hearings, supra note 6, at 293-94; House Hearings on Privacy, supra note 132, at 350-51. See also Statement of John F. Griner, President, American Fed’n of Gov’t Employees, 1965 Senate Hearings, supra note 6, at 293-94. Griner urged specific legislation to restrict testing of federal employees, arguing that Civil Service policy is so broad that it is “meaningless as now written.” He urged that where psychiatric examination was deemed necessary by an employer it should be conducted under proper medical conditions.

Monroe Freedman of the George Washington University Law School urged the Senate Subcommittee on Constitutional Rights and the House Subcommittee on Government Operations to propose legislation prohibiting the use of psychological tests and polygraph examinations: “I would respectfully urge that this Subcommittee draft legislation prohibiting interrogation of Federal employees, of private employees under industrial personnel security regulations... by the use of questions relating to religion, politics, personal thoughts or habits, private family matters, and sexual matters. Such legislation is essential. We cannot rely upon self-regulation...” 1965 Senate Hearings, supra note 6, at 293-94. Another witness, James C. O’Brien, Director of the Division of Personnel Management of the Department of Health Education and Welfare, opposed prohibitory legislation, arguing that: “We have felt that the exercise of good administrative judgment can accomplish whatever objectives are needed with respect to the administration of tests or any other internal selection procedures involving the rights of employees.” Id. at 224. An intermediate position was suggested to the Senate Subcommittee by Dr. Zigmond Lebensohn, of the American Psychiatric Association, who outlined a regulatory approach to the problem of the use of these testing devices including: “[a]n effort by appropriate professional organizations and agencies to further public understanding of the usefulness and limitations of psychological testing in [employee] screening and selection”; “[a]ppointment of advisory groups of experts from the behavioral sciences to developing guidelines for the utilization of tests...”; “[f]ormulation of regulations governing the use of tests in the years ahead...”; and the “[e]stablishment of a ‘watchdog committee’ of experts to guide the further development of screening and testing procedures in the light of ongoing experience.” Id. at 94.

Polygraph and Personality Testing

Senate Committee on the Judiciary.\textsuperscript{317} Section 1(e) of this bill would result in a general prohibition of the use of the polygraph and personality testing on federal government employees.\textsuperscript{318}

Enforcement of the proposed act would be accomplished by administrative and civil means, including: special agency procedures not requiring exhaustion of administrative remedies, with a right to institute simultaneously a civil suit (section 20); the pursuit of a complaint before the Board of Employee Rights created under the act (section 5); and direct suit in district court to prevent the threatened violation or to obtain redress against the consequences of the violation (section 4). Only actions before the Board and civil suits are regarded as mutually exclusive.

The Senate committee found a threefold need for such legislation: to preserve the rights and liberties of government employees; to prevent the discouragement of highly-qualified persons from seeking government employment and to provide a good example for state governments, private business, and industry, which might be persuaded to relinquish their own practices which invaded employees privacy.\textsuperscript{319}

The committee noted with apprehension the growth of technology and


\textsuperscript{318} S. 1438, 92d Cong., 1st Sess. (1971). The relevant text of the bill is as follows:
It shall be unlawful for any officer of any executive department or any executive agency of the United States Government, or for any person acting or purporting to act under his authority, to do any of the following things . . . To require or request, or to attempt to require or request, any civilian employee of the United States serving in the department or agency, or any person applying for employment as a civilian employee in the executive branch of the United States Government, to submit to any interrogation or examination or to take any psychological test which is designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters: Provided, however, that nothing contained in this subsection shall be construed to prevent a physician from eliciting such information or authorizing such tests in the diagnosis or treatment of any civilian employee or applicant where such physician deems such information necessary to enable him to determine whether or not such individual is suffering from mental illness: Provided further, however, That this determination shall be made in individual cases and not pursuant to general practice or regulation governing the examination of employees or applicants according to grade, agency, or duties: Provided further, however, that nothing contained in this subsection shall be construed to prohibit an officer of the department or agency from advising any civilian employee or applicant of a specific charge or sexual misconduct made against that person, and affording him an opportunity to refute the charge.

complex business organizations which has resulted in unchecked compromise of individual and personal rights. Moreover, there was an expressed desire to involve the Congress in the preservation of individual rights, rather than leaving the entire burden to the courts. The committee dealt explicitly with the notion of "consent," concluding that economic coercion leaves the voluntary nature of most consent to testing open to serious doubt.\textsuperscript{320}

The prohibitory approach of S1438 appears justified in view of the unreliability of the polygraph and the invalidity of personality testing. Effective regulation would require an extensive scheme prescribing qualifications for operators, test administrators, and test evaluators. Validation of personality tests would necessitate an agency such as the National Bureau of Standards, as was suggested by one of the proponents of testing during the 1965 hearings.\textsuperscript{321} The determination of work-relatedness would require detailed examination of each job in question as well as experimentation with each test instrument on personnel employed on each job where the test is to be utilized.

It is, however, the very real compromise of the integrity of the individual and the invasion of his privacy which compel prohibitory legislation. The employer has an entire battery of information at his command—work references, work record, investigatory procedures, and review of probationary work records—whereas the individual seeking employment in the face of economic necessity frequently has few alternatives.

The proposed legislation specifically exempts certain government employees from the prohibitions where "national security" is at stake. Since these tests can be "beaten" anyway, this exemption seems to open the door unnecessarily to other areas of "sensitive" employment. Moreover, these agencies have even more extensive investigatory tools at their disposal than other employers, and it would seem sufficient for them to rely on these in view of the fundamental personal rights at stake. There seems no good reason to prohibit only polygraph and personality testing by government employers. The Senate committee specifically noted with apprehension the wide-spread private use of these devices and their threat to individual rights. Certainly the need

\textsuperscript{320} Id. at 5.
\textsuperscript{321} See 1965 Senate Hearings, supra note 6. at 270.
of the private employer for the information obtained by these devices is no greater than the need of the government employer; certainly the threat to the individual's integrity and privacy is no less. The Civil Rights Act of 1964 provides a model for vindicating civil liberties through regulatory statutes. The act extends its prohibitions to the private sector employer who is defined as a "person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person." Such a definition of "employer" could be developed for purposes of regulating or prohibiting the use of polygraph and personality testing.

The proposed statute, S1438, relies generally on equitable relief obtained through administrative and judicial proceedings. Additional enforcement devices such as the criminal penalties provided by several state statutes regulating polygraph testing could be added. In order to encourage the individual employee or prospective employee to institute proceedings and to broaden the alternative modes of relief, a civil damages remedy with, possibly, a minimum recovery established in the statute might be provided as well. Such enforcement and remedy alternatives would increase the likelihood of securing and protecting the individual's right to privacy and freedom from interrogation and examination by polygraph and personality testing.

CONCLUSION

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

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

While polygraph testing has been subjected to statutory regulation in some states, and while judicial and arbitration tribunals have prevented its use in specific cases, pre-employment polygraph testing is largely uncontrolled. Likewise, personality testing has been prohibited by federal legislation where it results in discrimination and has been limited to a greater extent under collective bargaining agreements and in arbitration proceedings, but there exists no recognized protection for the prospective employee who faces the requirement of personality testing in the personnel selection process.

Judicial recognition of the right of privacy, together with the demise of the "doctrine" of privilege in government employment and the increasing recognition of the "state action" elements involved in corporate enterprise, provide a possible means for protecting personal employee rights from required subjection to polygraph and personality testing. Yet the most likely route to successful recognition of employees' right of privacy is federal legislation. Protection of the prospective employee's privacy depends on societal recognition of personal privacy as sufficiently important to be guaranteed even at the loss of some ease of personnel administration. As one considers the importance of privacy against the utility of informed judgment and the assurance of accurate decisions, it is well to remember:

For so falls out
That what we have we prize not the worth
Whiles we enjoy it, but being lack'd and lost,
Why then we rack the value, then we find
The virtue that possession would not show us
Whiles it was ours.

Shakespeare, Much Ado About Nothing, Act III, scene V.