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Past and Future in Employment Testing: A Socio-Political Overview

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Employment testing is like the proverbial iceberg tip. It seems to be a comfortable, small topic, focusing on the standards and techniques by which employers (public or private) select among applicants for jobs and then carry out central aspects of personnel administration—evaluation, promotion, security, termination, and so on. Important interests are served by such employer selection and evaluation processes, such as assuring a competent and dedicated work force, creating safe and efficient workplaces, controlling thefts and misconduct, and meeting increasingly sharp foreign competition for both home and foreign markets.

Like the iceberg tip, however, testing turns out to be part of a large, complex, and often obscured mass of economic, social, and political issues. As with a vessel stopped after bumping up against what seemed to be a minor ice floe, we realize very quickly that this "little issue" of testing has become part of a major socio-political debate in American society, one with which we will be struggling for at least the next decade.

Given these realities of the "little testing issue," it is useful to start any legal analysis by appreciating the socio-economic setting and the historical backdrop that frame our current dilemmas. Part I of this article looks at the role that employment plays in the lives of individuals, and at the socio-economic factors influencing that role as it has changed over time. Part II then undertakes an historical analysis of employment relations as a framework for discussion of the problems posed by testing in today's workplace. First and foremost, this overview requires understanding the nature of contemporary work and its impact on the lives of workers.

I. The Nature of Work

A. The Central Importance of Work in Contemporary Society

Work is probably the most important activity that shapes the

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lives of adults in modern society, so much so that we sometimes take for granted the enormous effects that work has on the individual.[1] For example, in terms of the amount of time spent engaged in any one pursuit, work is the adult's longest waking activity of the day. Since most people work forty years or more, it is also the longest single activity of their lifetimes.

Work also represents the fundamental source of one's financial well-being. Work, and payment for it, not only allows individuals to obtain food, clothing, and shelter, and to support families, but it also provides tangible rewards in a highly materialistic, "have-things" oriented society. Work is thus "the ticket to the good life." Similarly, work may also prove critical to an individual's emotional well-being. Satisfaction or discontent at work is a major factor in one's mental health. Unhappy work relationships (whether in the factory or the executive suite) are a major cause of drinking problems, family conflicts, and nervous breakdowns. "Bad" work—boring, monotonous, dangerous, or highly pressured work—also contributes to drug dependency, at both the minimum-wage and executive levels.

Moreover, the workplace is the primary regulator in the lives of most individuals. The rules under which people work—the standards of behavior, evaluation of performance, awarding of promotions and good assignments, and administration of discipline and discharge—represent controls that affect more people than most regulations of government, religious bodies, or other institutions. Employers are the most pervasive authorities in most people's daily lives.

Perhaps most importantly, work defines one's place in society. Despite the supposed decline in the work ethic in the United States, work is still the most self-defining aspect of most people's lives. When individuals are asked the simple question, "Who are you?", most respond with their occupation or work group: "I'm a businessman, a farmer, a steelworker, a professor, a lawyer, a computer programmer, etc." Work gives identity.

Likewise, having work is considered the prerequisite to becoming a "productive" member of society. When one is "out of work," he or she is in a troubled and usually frightening state. To be "unemployable" or "on welfare" is to occupy the lowest-status position in American society. Thus, work is tied closely to maintaining self-

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[1] This discussion draws on Chapter Two, The World of Work and Personnel Administration, in Alan F. Westin, Computers, Personnel Administration, and Citizen Rights, U.S. Nat'l Bureau of Standards (1979).

esteem and to winning social approval.

Furthermore, the higher or more desirable the occupation, the more the employer imposes standards of qualification and disqualification on those who apply. Thus society values people based on their access to good or higher-status jobs. The fight over hiring standards is a fight for access first to the mainstream and then to the privileged enclaves of a society. Groups attain social status—whether they are foreign-born, Catholics, blacks, women, cultural or political dissenters, or homosexuals—when their political pressures open high-status work opportunities to them on a *merit* basis.

Finally, work is an important factor in the process of cultural assimilation. Work traditionally has been the route by which new immigrants (both foreigners and farm-to-city migrants) obtain the resources with which to achieve social mobility for their off-spring; their children move up the ladder of occupations from lower to higher status work. At the same time, socializing such immigrants to the dominant culture's language, dress, customs, politics, and life-style has been substantially aided by the operations of the work place.

B. The Changing Aspects of Work in America

What is equally important as a backdrop to the testing issue is that occupational patterns, worker attitudes, and management of the workplace have been undergoing highly significant changes during the past few decades.

First, employment opportunities have shifted to keep pace with changing economic conditions. Because of the continuing shift away from agricultural work, the move to larger business units, the expansion of government functions, and similar trends, most people today (over 90% of the labor force) are not self-employed but work for others.[2] As a result, most individuals work under the direction of professional managers, in bureaucratically organized settings.

In addition, work in America has been shifting during the past decades from essentially manual and menial jobs to information-handling activities, as a result of both automation and the growth of the service sector in the national economy.[3] At the same time, a

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[2] In 1985, 97,460,000 members of the 107,150,000 civilian workforce were employed by others. See United States Bureau of the Census, Statistical Abstract of the United States: 1987 379 (1986).

[3] There are several different approaches to evaluating the service sector component of

great many jobs in factories and in service occupations such as health-care remain routinized, unpleasant activities; some of these remain quite dangerous.

Moreover, employee attitudes toward the job, particularly among younger workers and professionals, have undergone major changes in the recent past. Workers want more satisfaction in work (usually defined in terms of autonomy to accomplish significant work), demand less authoritarian behavior by supervisors and managers, *and* expect benefits such as health insurance, pensions, paid vacations, and other "perks" once thought to be only for managers.

In fact, health care and retirement benefits beyond minimums provided by government are now administered increasingly through the workplace. This makes holding a job more important for people in our society than in nations where services such as health care are provided for everyone by the government. This involves employers in collecting and maintaining information on the employee's personal or family affairs, and in seeking to contain the sky-rocketing costs of medical treatment and health insurance.[4]

C. The Role of the Legal System in Today's Workplace

The role of government in regulating the internal affairs of business managers has increased sharply in the past several decades, well beyond the supervision of labor-management relations that was the key form of government intervention in the period from 1930 to 1950. The major force has been in the development of equal employment opportunity programs,[5] but there also has been significant government intervention in private workforce affairs dealing with health and safety,[6] retirement and pension programs,[7]

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the economy. Under one measure, service occupations now account for two-thirds or more of all United States employment. See Irving Leveson, Services in the U.S. Economy, in Robert P. Inman, ed., Managing the Service Economy 89 (1985).

[4] See Lance Liebman, Too Much Information: Predictions of Employee Disease and the Fringe Benefit System, 1988 U. Chi. Legal F. 57.

[5] The principal equal employment opportunity program is Title VII of the Civil Rights Act of 1964. Title VII forbids employment discrimination on the basis of race, sex, religion or national origin. Title VII of the Civil Rights Act, 42 U.S.C. sec. 2000e-2000e-17 (1982).

In the year ending June 30, 1986, more than 9,000 employment discrimination suits, brought mostly under Title VII, were filed in federal court. See Annual Report of the Director of the Administrative Office of the United State Courts app. I, table C2 (1986), quoted in Richard A. Posner, The Efficiency and the Efficacy of Title VII, 136 U. Pa. L. Rev. 513, 514 (1987).

[6] See the Occupational Safety and Health Act (OSHA), 29 U.S.C. sec. 651-678 (1982).

[7] See the Employee Retirement Income Security Act of 1974 (ERISA), enacted to cor-

employment of the handicapped,[8] pre-employment investigation of job applicants,[9] and other areas of personnel activity.

At the same time, the legal system has not developed a uniform structure for the protection of workers and the workplace. First, the distinction between public and private employment creates a dichotomy in legal protection. American employment law retains a fundamental distinction between government and private employment. Federal, state, and local governments as employers are bound by the individual rights protections in the United States Constitution and/or individual state constitutions.[10] Private employers, on the other hand, are bound only by collective bargaining agreements (if unionized) or by certain limited kinds of legislation or regulation.[11]

Second, today's workforce divides into a mosaic of different occupations each with different social status and each subjected to very different legal regulation. By type of occupation, for example, there are activities that are licensed by the state and for which special personal and professional standards are imposed, purportedly to protect the public; such jobs range from professionals such as lawyers and doctors, to bartenders, beauticians, jockeys, dock workers, casino dealers, and taxi drivers.[12] In government employment, public expectations and court decisions have traditionally supported the setting of special standards of behavior and personal disclosure for policemen, firefighters, and other groups. Thus there is no simple set of qualifications or disqualifications that operates (or could be prescribed sensibly to operate) for every type of job in the American workforce.

In addition, there are different concepts of rights and proce-

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rect abuses in private employer benefit and pension plans. 29 U.S.C. sec. 1001-461 (1982).

[8] The Rehabilitation Act of 1973, 29 U.S.C. sec. 701-96 (1982), prohibits discriminating against "otherwise qualified handicapped individual[s]" by "any program or activity receiving Federal financial assistance." See also Liebman, 1988 U. Chi. Legal F. at 64 (cited in note 4).

[9] See the Fair Credit Reporting Act of 1970 (FRCA), 15 U.S.C. sec. 1681-1681t (1982).

[10] The First Amendment, for instance, protects government, but not private sector employees, from discharge for speech concerning public matters.

[11] See notes 5-9.

[12] Licenses are required to practice 490 occupations in the United States. Lawyers, doctors and beauticians are licensed in all fifty states. See Benjamin Shimberg, Overview of Professional and Occupational Licensing, in Jim C. Fortune and Associates, Understanding Testing in Occupational Licensing 4 (1985). More often individual states vary as to whether particular occupations require licensing or less stringent regulation such as certification (under which the non-certified may legally practice) or registration (a perfunctory sign-up procedure). See S. David Young, The Rule of Experts: Occupational Licensing in America 5 (1987).

dures for appeal at the different job levels in the business and private-association sectors. In general, the most formal rules and grievance mechanisms operate at the base of the organizational pyramid, where production and clerical workers are found. The least formalized rules of conduct and appeal take place at the upper levels of management.

II. Employment Testing in Historical Perspective: Three Eras of American Employment Law

There are three distinct eras in the development of American employment law which supply the framework for issues of workplace testing in each period. These are: (1) The era of employer prerogative, from the 1890s to the 1950s; (2) the transition to employee rights recognition, from the 1960s to the mid-1980s; and (3) the current era, which may be called one of socially mediated employment administration. Each of these merits a brief description, and a notation of the social and political assumptions on which the legal rules were based.

A. The Era of Employer Prerogative, 1890-1960

In the pre-industrial era, American employment law was based essentially on master-servant concepts. In the late 1800s, the law was transformed from this status-basis to one based on contract. Private (non-governmental) employment was said to be employment-at-will.[13] The employer was free to hire, promote, and discharge at will, for good reason, bad reason, or no reason at all, and courts would not inquire into the sufficiency or basis for such employer action. In what was presented as the parallel right, employees were free to accept a job and to resign at will; they could not be coerced to work.

Under the employment-at-will concept, private employers could set any hiring standards they wished. In practice, American employers mixed objective, job-related criteria (as these were defined at that time) with ideological, moral, racial, gender, and lifestyle requirements. Except for protection of union advocacy and membership installed by labor laws in the 1930s and thereafter,[14]

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[13] The employment-at-will doctrine, representing a distinctly American departure from English common law, developed in the last quarter of the nineteenth century. See Andrew D. Hill, "Wrongful Discharge" and the Derogation of the At-Will Employment Doctrine, 31 Labor Relations and Public Policy Series, Industrial Research Unit, The Wharton School 1 (1987).

[14] Section 7 of the Wagner Act of 1935 (also known as the National Labor Relations

there were no constitutional or legislative controls over employer hiring standards, and the patterns of group discrimination and conformity rules that this allowed are well known.

At the same time, employers were free in the era of employer prerogative to use any tests they wished to measure applicants for jobs or evaluate employees for advancement. Early manual-dexterity and phrenology examinations gave way to intelligence, aptitude, and psychological testing in the post World War I period. In addition, many employers used credit checks, pre-employment reports on lifestyle, and polygraph tests in the hiring process.[15] Under employment-at-will, there was no way to challenge legally the relevance, accuracy, and propriety of such testing in private employment. And, while the distinction between government and private employment noted earlier was in full force in this era, in practice the judicial treatment of government employment as a "privilege" and not a "right" left government agencies virtually as free of restraints as the private employer.

B. The Era of Emerging Employee Rights, 1960-1980s

1. *The Social Forces Behind the Emerging Rights.* For most readers, the shift of American society over the past 25 years from employment-at-will concepts in law and social practice to a new "rights-recognizing" ethos is probably quite familiar. The forces and trends that produced the shift are also well known. Among the causes were the political awakening and successful equality demands of formerly disadvantaged groups, such as blacks, women, consumers, patients, students, homosexuals, senior citizens, and the handicapped. A further cause was the weakening of public confidence in established institutions, ranging from government to business, unions, universities and religious bodies, and the strengthening of public opposition to authoritarian practices by organizational leaders.

The shift was also motivated by the growth of movements for environmental protection, consumer protection, occupational safety and health, and similar causes, for which enforcement of employer compliance with laws and regulation often requires pro-

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Act) guarantees employees the right to organize unions and, in some circumstances, to strike. Section 8 of the Wagner Act limits employer's lawful responses to such union activity. See National Labor Relations Act, 29 U.S.C. sec. 141 et seq. (1982).

[15] The history of use of psychological, polygraph, and other tests in personnel administration down to the 1960s is recounted in Alan F. Westin, Privacy and Freedom ch. 9 and 10 (1967).

tection of employees who "blow the whistle" on employer illegality or misconduct. Moreover, the strong "privacy" movement in American society, based on notions of individual choice and diversity of lifestyles, helped do away with traditional norms in the awarding of rights, benefits, and opportunities—including employment. This privacy movement was also fanned by wide public concerns over abuse and misuse of new technologies of information collection.[16]

Overall, the central importance of work and having a job to the securing of basic material needs and social status in a capitalist society helped fuel the recognition of employee rights in the workplace. Thus, while the American public (and law) still accepted the principle that employees did not have any legally-assertible right to job tenure in the face of reasons such as business adversity or cutbacks in public funds (for government employees), there was growing public opinion that employers ought not be able to terminate employees for reasons that defeated important public policies, such as equal rights and the reporting of employer illegalities.

2. *The New Rights.* What these social trends produced was a gradual transfer into the world of employment, both public and private, of some *adapted* versions of citizen rights against the state. The rights involved comprised five principal areas: equality, privacy, due process, expression and dissent, and rights to information. And, from a sociological perspective, the emergence of these new rights and their legal recognition dramatically reversed three conditions that had been a mainstay of employer prerogative in the employment-at-will era. These were *invisibility*, *informality*, and *finality*.[17] What served employers so well in "the good old days" was that:

(a) Decisions concerning hiring, administration, and termination were "kitchen work" known only to management, and not subjected to the glare (and democratic influences) of public disclosure;

(b) Decisions did not have to be documented heavily, based on objective criteria stated in advance, did not have to be disclosed to the affected employee, and did not have to be subjected to internal challenge;

(c) No "outside authorities"—juries, professional arbitrators, or judges—could review management actions and alter them.

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[16] Such public concern is indicated by the results of the Dimensions of Privacy, a national opinion survey discussed at notes 34-40 and accompanying text.

[17] These conditions were less prevalent, naturally, when employees worked under a union-negotiated collective bargaining agreement.

Each of these three conditions began to change in the new era of emerging employee rights. To assure the exercise of employee rights, many personnel practices had to be made visible, incorporated into formal procedures, and subjected to outside review.

This change was accomplished through an important combination of *new laws* and *voluntary actions* by employers. At the legal level, in addition to the well-known Equal Employment Opportunity laws,[18] federal legislation enacted in this era provided anti-reprisal protections for employees who invoked their rights under equal employment opportunity laws,[19] occupational safety and health laws,[20] employee pension retirement statutes,[21] and other employee-protection laws.[22] Similar federal anti-reprisal guarantees were provided for employees officially reporting alleged employer illegalities under environmental and community protection laws.[23] Federal law also gave employees rights of notice and challenge in pre-employment investigative reporting.[24]

Many similar laws were enacted by state legislatures, but state laws also addressed a broader range of employee-rights issues. Statutes passed in many states between 1975 and 1988, for example, forbade the use of polygraph tests in pre-employment screening or on-the-job investigation;[25] gave employees the right to examine their personnel records;[26] and forbade punishment of

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[18] See 42 U.S.C. sec. 2000e-2000e-17 (1982).

[19] Title VII whistleblowers are protected by 42 U.S.C. sec. 2000e-4(a) (1982).

[20] Job safety whistleblowers are protected by Section 11(c) of the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. sec. 660(c) (1982).

[21] Federal law prohibits retaliation against employees who participate in an ERISA retirement or benefit plan. See Employee Retirement Income Security Act, 29 U.S.C. sec. 1140 (1982).

[22] For instance, whistleblowing mineworkers are protected under the Federal Mine Health and Safety Act (FMHSA), 30 U.S.C. sec. 815(c) (1982).

[23] Whistleblower provisions protect public or private employees who disclose potential environmental and community protection law violations under the Toxic Substances Control Act (TSCA), 15 U.S.C. sec. 2622 (1982); the Clean Air Act, 42 U.S.C. sec. 7622 (1982); the Safe Drinking Water Act (SDWA), 42 U.S.C. sec. 300j-9(i) (1982); the Energy Reorganization Act, 42 U.S.C. sec. 5851 (1982); the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. sec. 9610 (1982); the Solid Waste Disposal Act, 42 U.S.C. sec. 6971 (1982); and the Water Pollution Control Act, 33 U.S.C. sec. 1367 (1982).

[24] See the Fair Credit Reporting Act of 1970, 15 U.S.C. sec. 1681k (1982).

[25] Delaware, Hawaii, Massachusetts, Michigan, Minnesota, Oregon, and Rhode Island laws, for example, ban all polygraph use in private-sector employment. Most other states regulate polygraph examinations to a lesser extent. See generally BNA Labor Rel. Rep., Individual Employment Rights Manual (IERM) 509:301 (1988).

[26] Arkansas, California, South Dakota, Connecticut, Maine, Utah, Illinois, Wisconsin, Washington, and other states have laws mandating employee access to personnel records. Individual states vary as to both the scope of mandated disclosure and the categories of

"whistleblowers" who reported either public or private employers to law enforcement authorities.[27]

In terms of new judicial doctrines governing employment, the courts essentially discarded the "privilege and not a right" characterization for government employment, applying in its place a full-scale "rights" analysis, including a balancing of individual rights against other social interests when government-employer actions were challenged. In the private employment sector, a majority of state jurisdictions adopted public policy exceptions to the traditional employment-at-will doctrine,[28] generating what has become a torrent of employee suits for wrongful discharge or unjust dismissal in the state courts. At the same time, the state courts in the past decade have opened up access to on-the-merits review (often through jury verdicts) in common law actions by employees against employers for invasion of privacy,[29] intentional infliction of emotional distress,[30] defamation,[31] and similar suits.[32]

Applying these new legal opportunities for employees to the issue of employment testing, regulatory and judicial authorities began measuring employment tests of all kinds against the criteria embodied in the new "rights" environment. Were the intelligence,

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employee covered by the law. See id. at 507:401.

[27] California, Connecticut, Maine, Michigan and New York have enacted statutes protecting both public and private sector whistleblowers. Many other states afford more limited protection. See Stephen M. Kohn and Michael D. Kohn, An Overview of Federal and State Whistleblower Protections, 4 Antioch L. J. 99, 110 n. 11 (1986).

[28] Arizona, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin have recognized the public policy exception to the employment-at-will doctrine. See id.

[29] For example, see *Patchogue-Medford Congress of Teachers v. Bd. of Education*, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (compulsory urinalysis of probationary teachers violates federal and state constitutional privacy rights).

[30] See *Rulon-Miller v. International Business Machines Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (employee warned and subsequently fired for romantic involvement with a competitor's employee has a valid claim for intentional infliction of emotional distress).

[31] See *Tyler v. Macks Stores of South Carolina*, 275 S.C. 456, 272 S.E.2d 633 (1980) (successful defamation claim upheld against employer who fired employee who refused to take a polygraph test).

[32] In *Bodewig v. K-Mart*, 54 Ore. App. 480, 635 P.2d 657 (1981), the appellate court reversed summary judgment against an employee who sued her employer in tort for outrageous conduct. The employer required the employee to strip down to her underwear in front of a customer who claimed that the employee had stolen twenty dollars.

The tort of outrageous conduct differs from intentional infliction of emotional distress in that the harm results not from intentional malice, but rather from reckless or wanton disregard of the effects of certain conduct. See generally, Prosser & Keeton, The Law of Torts sec. 12, 64-65 (5th ed. 1984).

aptitude, or psychological tests used by employers really objective and job-relevant or did they embody race and gender biases and violate new equality standards? Did the use of polygraphs for pre-employment screening or in investigations of on-the-job theft violate the accuracy and dignity standards embodied in both the due process and the privacy interests of employees? Does random use of urinalysis testing violate the fourth and fifth amendment rights of government employees, and should legislatures either outlaw or set protective standards for use of such tests by private employers?[33]

In each of these examples, employer conduct no longer enjoys the advantages (to employers) of invisibility, informality, and finality. Judges, legislators, and regulatory agencies now insist upon full revelation of the test objectives, procedures, and outcomes, to satisfy privacy, equality, informational, and due process guarantees. These public authorities, as well as the public, now insist that the question of whether society should allow employers to test is a matter for the balancing of competing social interests, and they no longer passively accept the employer's judgment as to necessity.

3. *Changing Public Perceptions in the Emerging Rights Era.* The notion that legitimate rights of privacy and due process are involved in testing was well demonstrated by the results of a national opinion study published in 1979. *The Dimensions of Privacy* examined attitudes of a national sample of the general public, full-time employees, and business employers toward a wide range of privacy issues, in areas including credit, insurance, employment, law enforcement, and other sectors of personal information collection.[34] After demonstrating that two-thirds of the American public were concerned about invasions of privacy, and strong majorities believed that legal interventions were needed in many areas to safeguard privacy rights,[35] the survey explored the employment relationship. A key question asked the following:[36]

> Now I'd like to ask you some questions about the subject of employment. When someone applies for a job, do you

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[33] See Yale Kamisar, Drugs, AIDS and the Threat to Privacy, New York Times Magazine 108-110 (Sept. 13, 1987), proposing a probable cause requirement for government AIDS and drug testing. See also Allan Adler, Probative Value and the Unreasonable Search: A Constitutional Perspective on Workplace Drug Testing, 1988 U. Chi. Legal F. 113.

[34] The Dimensions of Privacy, A National Opinion Research Survey of Attitudes Toward Privacy, was conducted for Sentry Insurance in 1979 by Louis Harris & Associates, Inc. and Dr. Alan F. Westin.

[35] Id. at 12-14 and 93.

[36] Id. at 33.

> think that it is proper for an employer to ask for the following types of information or not? Please think of most jobs in business and government, not jobs which require security clearances or special moral qualities.

Twenty-four categories were supplied, drawn from the typical kinds of personal information used in personnel selection. Table 1 shows the percentages of the public, employees, and employers that felt the collection and use of such information was *improper*.[37]

TABLE 1 Types of Personal Information Considered *Improper* for Employers to Collect

Type of Information	Total Public	Full-time Employed	Business Employers
What kinds of friends the applicant has	87%	98%	97%
The type of neighborhood in which the applicant lives	84%	86%	96%
Information about the applicant's spouse	77%	78%	85%
Memberships in political and community organizations	74%	76%	83%
Whether the applicant owns or rents residence	70%	73%	81%
Records of arrest without conviction	62%	69%	86%
General credit-worthiness and ability to pay bills	54%	58%	65%
The results of psychological tests	52%	54%	62%
Race	52%	57%	74%
Whether the applicant has ever received psychiatric or psychological counseling	50%	54%	62%
Whether the applicant is pregnant or not	42%	48%	64%
Marital status	42%	45%	57%
Whether the applicant uses illegal drugs	41%	46%	48%
Drinking habits	38%	43%	61%
Height and weight	37%	36%	54%
Evaluations of mental stability	36%	39%	57%
The applicant's military discharge status	36%	38%	40%
Sex	29%	32%	52%
Age	22%	24%	50%
Medical reports on current physical condition and past medical history	21%	21%	17%
References from the applicant's former employer	12%	13%	7%
The results of tests which measure the ability of people to do different types of jobs	11%	10%	18%
Employment history	9%	8%	-
Educational background	6%	6%	-

[37] Id.

Table 1 indicates that 54% of employees and 52% of the public place psychological testing among the types of personal information collection that are considered *improper*. However, aptitude tests, measuring "the ability of people to do different jobs" was considered improper by only 10% of employees and 11% of the public.

The survey's questions about employment then asked whether certain types of employer practices should or should not be "forbidden by law."[38] Table 2 reports the results.[39]

TABLE 2. Whether Various Employer Practices Should Be Forbidden by Law

Employer Practice	Total Public	Full-time Employed	Business Employers
Listening in on the conversations of employees to find out what they think about their supervisors and managers			
Should be forbidden	83%	84%	70%
Should not be forbidden	14%	14%	28%
Not sure	3%	2%	3%
Installing closed circuit television to obtain continuous checks on how fast workers perform			
Should be forbidden	66%	69%	45%
Should not be forbidden	28%	27%	51%
Not sure	5%	4%	4%
Asking a job applicant to take a lie detector test			
Should be forbidden	62%	65%	55%
Should not be forbidden	31%	30%	42%
Not sure	7%	6%	3%
Asking a job applicant to take a psychological test			
Should be forbidden	48%	50%	25%
Should not be forbidden	40%	40%	69%
Not sure	12%	10%	7%
Requiring an employee to take a lie detector test when there is suspicion of theft in his department			
Should be forbidden	43%	47%	42%
Should not be forbidden	48%	46%	56%
Not sure	9%	7%	3%
Keeping a closed circuit television watch on the work or sales floor to prevent theft and pilfering by employees			
Should be forbidden	42%	43%	20%
Should not be forbidden	52%	51%	77%
Not sure	6%	6%	4%

[38] Again, respondents were asked to "think of most jobs in business and government and not jobs which require security clearances or special moral qualities."

[39] Harris and Westin, The Dimensions of Privacy at 35.

The tendency of the public to support privacy claims but also to take a pragmatic approach to weighing employee rights and employer needs is further illustrated in these responses. Note that 65% of employees, 62% of the public, and a majority of employers—55%—believe the law should forbid requiring *job applicants* to take a "lie detector" test. However, the percentages drop slightly below majority level on forbidding employers to require and *employees* to take "lie detector" tests "when there is suspicion of theft in his department." (47% of employees, 43% of the public, and 42% of business employers would forbid this). As for asking job applicants to take a psychological test, close to a majority of the public (48%) and half of employees (50%) would ban this by law, whereas only 25% of employers would do so.

Finally, the 1979 Survey asked how important it was to let employees see and challenge the information that was contained in their files, which would normally include any test results. 85% of the public felt this was "very important," and 10% felt it was "somewhat important." Among business leaders, 61% felt it was "very important" and 21% felt it was "somewhat important."

The 1979 *Dimensions of Privacy* results indicate an emerging consensus as of the late 1970s that employees have certain rights that employers ought to respect in their information-collection and information-use policies. And, as that consensus was forming, the issues of employer testing that were current in the late 1970s—such as polygraph testing, psychological testing, and aptitude testing—were incorporated into a "rights-oriented" but "reality-balancing" kind of approach by the American public.[40]

Having documented the change in public attitudes and legal orientations that American society experienced between the 1950s and the mid-1980s, we turn now to the current era. What can we expect in the late 1980s and the 1990s?

C. The Era of Socially-Mediated Employment Administration: The Late 1980s and Beyond

Several socio-political factors of the late 1980s are causing the side of the legal scale marked "employee rights" to weigh more heavily, compared to the weight of "employer interest." Among

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[40] Because drug and alcohol testing had not, as of 1979, become the issue and the practice it was to become in the mid-1980s, the survey (Table 1) asked if it was proper to inquire whether an applicant used drugs, but did *not* ask whether *testing* was proper. Therefore, the slight majorities accepting such information collection, unspecified as to technique of ascertaining, are not directly relevant to our analysis.

these has been the arrival of "employee rights" as a mass media topic, creating not just the occasional story that appeared in the past decade. There is now a steady flow of coverage about alleged employer abuse of rights, arbitrariness, or use of large institutional power against hardly-equal individual employees. Such a stream of stories portraying the employee as the underdog conditions juries hearing suits against the employer, as well as legislators and regulators.

Another significant factor is the special sense of vulnerability that marks the American employment scene in the late 1980s, as large-scale layoffs and "downsizing"[41] trends have unfolded in American industry and government. Because these trends affect both blue and white-collar workers, and management ranks from supervisor to senior executive, there is a new awareness that virtually anyone can be a casualty of the management ax, and that it is in everyone's interest to adhere to basic fairness in the process. This means that an increasing percentage of employee lawsuits in the 1980s are being brought by professional and managerial employees. These are people with access to records and awareness of real organizational processes, used to consulting lawyers to defend their interests, and with the financial and emotional resources to undertake lengthy lawsuits against employers.

In part as a response to these developments, a new legal specialty has emerged—individual employment rights—and a new cadre of plaintiffs' lawyers ready and (financially) able to take such cases and pursue them to judgment. This has led to the creation of a national organization—the Plaintiff Employment Lawyers Association[42]—as well as a flood of monographs,[43] seminars,[44] and reporting services[45] devoted to the new individual employee rights area.

The inflation of employee recoveries is another unfolding de-

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[41] "Downsizing" trends refer to moves by employers to decrease the size of their workforces in response to changing markets.

[42] See "Support Group Formed For Lawyers of Employees Suing Their Employers" in 49 BNA Daily Labor Report, Current Developments Section A-2 (March 13, 1986).

[43] See, for example, Kurt H. Decker, Employee Privacy Law and Practice (1987).

[44] See, for instance, an EEOC sponsored Title VII seminar, described in BNA Daily Labor Report (Jan. 19, 1985); right-to-know legislation (hazardous substances communication) seminar sponsored by the New England Legal Foundation, described in BNA Daily Labor Report (Jan. 9, 1984); and Cottage Industry of Seminars, Books growing Due to Federal Worker RIFS (Reductions-in-force), BNA Daily Labor Report (May 3, 1982) (outlining several seminars).

[45] See, for example, the Employee Relations Law Journal, published quarterly, and the BNA Individual Employment Rights Manual (IERM).

velopment. When damages awarded for alleged violation of individual employee rights were in the tens of thousands, employers could write off such verdicts as a small cost of doing business. In the mid-1980s, however, jury verdicts in wrongful discharge, age discrimination, and invasion of privacy suits began to reach the high hundreds of thousands, and even the one to three million dollar level. This inflation has already reached the testing area. In 1987, a computer programmer fired for refusing to take a random urinalysis test demanded by the employer was awarded $485,000 by a San Francisco jury in a state court action alleging wrongful discharge, breach of the implied covenant of good faith and fair dealing with employees, and intentional infliction of emotional distress.[46] In another 1987 action, a Boston jury awarded $125,000 for negligent infliction of emotional distress to an oil rig worker who proved he was deeply upset at being forced to provide a urine sample in front of four coworkers.[47]

Finally, there is a growing awareness in the public and among experts of the seriousness of the questions raised by calls for AIDS testing by employers and the potential use of genetic testing to screen out workers with greater statistical risk of contracting various diseases at work.[48] These are questions that relate both to employer health costs if testing is not allowed, and to the avoidance of potential future legal liability for failing to test workers who could be identified as high-risk employees in certain work environments.[49] This heightened awareness will inevitably lead policymakers to create deliberate policies and rules for employer testing, rather than to let this unfold as a matter of employer discretion and individual employee lawsuits.

This greater social acceptability of individual employee rights claims must be merged with the increasing awareness that there are legitimate employer needs. In the next decade, courts and legislatures face the task of balancing these interests.

The Supreme Court can be expected to establish the framework for future government testing programs by defining the constitutional dimensions of individual-rights claims and employer-

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[46] *Luck v. Southern Pacific Transportation Co.*, No. 843230, slip op. (Cal. Super. Ct. Oct. 30, 1987).

[47] *Kelley v. Schlumberger Technology Corp.*, No. 85-4794-Z, slip op. (D. Mass. Sept. 9, 1987).

[48] See generally Gail Appleson, Genes and Jobs: Tests Raise Legal and Ethical Questions, 68 A.B.A. J. 1061 (1982).

[49] See Richard A. Epstein, AIDS, Testing and the Workplace, 1988 U. Chi. Legal F. 33, 45-46, 60-61 and Liebman, 1988 U. Chi. Legal F. at 60-61 (cited in note 4).

need assertions.[50] The seriousness of the need for testing will open the judicial inquiry, followed by a weighing of needs against the alleged violation of privacy, due process, or equality.

Based on the standards laid out by the Supreme Court in such government test cases, we can expect the broad enactment of state legislation to formulate rules and procedures for state government and private employer drug testing, either in accord with the Supreme Court standard or applying a stricter standard. This will give us two or more models of state drug testing regulation to examine in the coming decade, and to compare in terms of efficacy, misuse by employers, acceptability by employees, and so on. And, while the legislation will itself be fairly detailed, we can expect administrative regulations and test cases to develop an even more detailed set of safeguards and procedural requirements.

Such a "first generation" of state drug-testing legislation, which has already begun,[51] can be expected to lead to a revised, "second generation" approach in the middle to late 1990s, as the earlier experiences inform the public and produce more sophisticated legislative proposals for consideration.

This assumes that legislation authorizing employer testing and providing protective safeguards will *not* remain outside the close inspection of the media, academic researchers, and empirical analysis. Precisely because many millions of working Americans will be tested, and many thousands of employees are likely to challenge test results, the outcomes and costs of testing laws can be expected to draw close attention. Studies will be done of the use of employee assistance plans in conjunction with positive test results. Other studies will probe whether employer testing programs are significantly affecting the "demand" side of drug use in the 1990s. Still other studies will look at what happens to the employees who test positive, and whether we are creating recruits for permanent unemployment, a larger welfare underclass, or increased criminal behavior, all of which obviously will depend on what public and pri-

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[50] On February 29, 1988, the Supreme Court granted certiorari in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), a case in which the Court of Appeals upheld drug testing for U.S. Customs Service employees seeking transfer into certain positions.

[51] Maryland has passed a statute enjoining applicant drug testing unless the test is capable of determining present impairment. Annotated Code of Maryland, art. 100, sec. 95, enacted July 1, 1986, reprinted in Employee Testing: A National Reporter on Polygraph, Drug, AIDS and Genetic Testing D-31 (1987) (statute does not apply to federal government or to law enforcement or correctional officers).

California has similar legislation pending. Id. at D-19.

vate treatment programs are available to job applicants or employees who seek help with substance-abuse dependencies. In short, the employer drug testing allowed will be *visible*, *formalized*, and *subject to outside review*, in a socially-mediated process.

Moreover, it is likely that some kinds of employer testing will be completely banned in the coming decade. Use of the polygraph for employee selection and at-work investigations in all but a few exceptional situations has been banned by Congress.[52] I believe that tests that supposedly measure the honesty of employees, by asking detailed questions about whether they have lied, stolen, or misappropriated things in the past, will be similarly forbidden or their use greatly circumscribed by legislation in the next few years.[53] If genetic testing is not completely banned, its use will be heavily controlled to ensure that whole groups are not barred from access to occupations based on race, religion, or sex.[54]

III. CONCLUSION

These broad predictions about judicial and legislative directions in the coming decade, and the impact-measurement that will lead "first-generation" approaches into "second-generation" revisions, explain why the coming era deserves to be called one of "socially-mediated" employment testing. Given our basic political culture and recent social-value trends, society will *not* forbid all employer drug testing. Reducing drug abuse among employees whose jobs involve public safety has great public support, and courts and legislatures understand the futility of trying to require 99.9% accurate tests. On the other hand, the newly-developed concern over individual employee rights will lead courts and legislatures to design privacy, due process, and equality standards for drug testing in various types of employment settings, in the firm conviction that the era of employer prerogative is long past.

This places the debate over employer testing in the troubled middle ground between total bans and total approvals. Genuine

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[52] On June 27, 1988, President Reagan signed into law the Polygraph Protection Act of 1988 Pub. L. No. 100-347. The Act prevents most private employers from using lie detector tests to screen job applicants and prohibits testing of current employees absent reasonable suspicion of theft. BNA Daily Labor Report, Current Developments Section A-10 (June 28, 1988).

[53] In my judgment, these self-completing questionnaires rest fundamentally on deception; measure readiness to lie and project social conformity rather than actual proclivities to wrong-doing; and have as their prime use the screening out of potential pro-unionists and employee-litigants.

[54] See Liebman, 1988 U. Chi. Legal F. at 80-81 (cited in note 4).

employer needs and employment testing problems remain, but there will be heavy pressure to develop more accurate and less privacy-intrusive technologies to carry out approved testing. In sum, we can expect the policy battles to continue to rage over the next decade, toward the goal of second-generation rules that can serve the needs of both society and the individuals that make it prosper.