

**Right and Responsibilities of Test-Takers:  
Legal Issues Raised by the Joint Committee on Testing Practices  
Conference Draft<sup>1</sup>**

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It was the Chinese over 3000 years ago, not the Americans in this century, who first used large-scale psychological testing. As with many other technological developments, however, it was the United States that enthusiastically adopted the method. By now, it is highly probable that every person in our country has been affected in some way by the administration of tests. Testing has become the primary means by which major decisions about people's lives are made in industry, education, the military, hospitals, mental health clinics, and the civil service.

Tests themselves, by and large, are facially neutral. They do not inherently discriminate against those who take them and, undoubtedly, scores derived from tests have been used to admit, advance, and employ. For most people, however, test results have served a . s exclusionary mechanisms--to segregate, institutionalize, track, and deny access to coveted and increasingly scarce employment opportunities. As we slouch toward the millenium with the concomitant increase in the computerization of data, there is the added concern that private information gleaned from testing will be stored and disseminated in ways test takers may not have fully contemplated.

As these uses of tests multiplied so did their potential for causing unjustified negative consequences. When those consequences led to legally cognizable injuries, tests began to be examined by the legal system. Although I am sure there are those in the audience who remember the days when the work of academic and applied psychometricians went virtually unexamined by the law, it is now true that testing is a regulated in-

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dustry. In fact, it may seem that the courts, Congress, and state legislators control the practices of employment, educational, and clinical testing rather than the scientific and professional organizations one assumes would serve that function. In any event, there is probably no current activity performed by counselors, educators, and psychologists so closely scrutinized and regulated by the legal system as testing. I view the Joint Committee's document, *The Rights and Responsibilities of Test-Takers*, as an attempt to remediate some of the causes that has led the legal system to involve itself in the substance and process of testing and to take back the field. I will say more about this in a few minutes.

I have long posited the contention that what appears to be an antitestng movement in the courts and in Congress is not an antitestng movement at all. It is my thesis that, in the main, the law's concern about testing has been evoked by the following three major social developments.

First, our society in the last 40 years has made attempts, albeit unevenly, to undo the effects of a history of de jure segregation and discrimination against racial and ethnic minorities. Many of the more familiar and now historic cases, such as Larry-P. v. Riles affecting individual intelligence scales, Debra P. v. Turlington concerning minimal competency tests, and Watson v. Fort Worth Bank or Wards Cove v. Antonio litigating nuances of employment selection and assessment, flow inexorably from Brown v. Board of Education. They are simply renewed claims by minorities for the fulfillment of the equal protection clause embedded in the U.S. Constitution's fourteenth amendment. These cases reflect more modern challenges to practices that are perceived as attempts to continue, in a more sophisticated manner, the racial and ethnic separation more blatantly used in the early 1950s and 1960s by educational institutions and public and private employers. Most recently, such legislation as the Age Discrimination in Employment Act, the Civil Rights Act of 1991, and the Americans with Disabilities Act, have expanded equal protection rights to older test takers, women, and those with physical and mental disabilities.

The second social development has concerned privacy. The courts have recognized, as a constitutional imperative, the right of the people to be protected against impermissible intrusion by the government into their private lives. Defining the right to pri-

vacy has been difficult for the courts, but the Supreme Court noted 20 years ago that one aspect of the right "is the individual interest in avoiding disclosure of personal matters" (Whalen v. Roe, 1977, p. 598) . If, as Reubhausen and Brim assert, "the essence of privacy is . . . the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others" (pp. 1189-1190), it is not difficult to see why the broad spectrum of testing, but particularly personality and attitude testing, would be the object of legal scrutiny.

Two very recent cases--interestingly enough in the employment arena--exemplify my point and expand the concern about privacy from government to the private sector. They both involve issues covered by the Rights and Responsibilities document we have been discussing during the past two days. In the first case, Soroka v. Dayton Hudson Corporation, Target Stores created a preemployment test by combining multiple choice questions from the MMPI and the CPI. The employer gave the test to applicants for jobs as security guards to determine whether they had good judgment and were emotionally stable. As you may be aware, certain questions from these tests inquire about matters that can be extremely sensitive to many people, including items about test takers, religious beliefs, medical conditions, and sexual conduct. Target Stores had little or no interest in the answers to particular questions on these tests and those who score them are concerned mainly about profiles, not individual responses. Nevertheless, a California appellate court found that the use of the test violated a number of state laws designed to protect privacy and prohibit discrimination. Target Stores appealed the case to the state's highest court. But before the state supreme court could heard the case Target Stores' parent corporation formally settled the case, agreeing not to administer its hybrid employment test for at least five years, as well as to destroying all existing records of test results, paying the four named plaintiffs \$60,000, and establishing a \$1.3 million settlement fund to be divided among all job applicants who had taken its test in California.

The second case, Cleghorn v. Hess, looked at the other end of the testing spectrum. An employee of a company that provides security services at nuclear weapons test facilities in Nevada wanted to upgrade his position to inspector. The company ordered

him to take some psychological tests to see if he was qualified for the promotion. The employee was referred to a psychologist with whom the employer had a contractual arrangement. There was no question here whether the testing was appropriate. Such screening evaluations were agreed to by the employee's union and required by a Department of Energy rule that mandated its contractors to employ only those guards who meet certain medical and psychological standards. What the employee wanted to know was how he did. Eventually, therefore, he asked for copies of his test records and results from the examining psychologist under a Nevada law requiring health care providers to make medical records available to patients. The psychologist refused and the employee sued to compel disclosure. The Nevada supreme court held that a doctor-patient relationship existed between the employee and the psychologist even though the testing was conducted for the sole benefit of the employer and the employee was not seeking clinical help. The court was particularly concerned that maintaining secrecy of the test scores could harm test takers:

Adverse information in the employees' personnel files could, unbeknownst to the employees, materially affect their future, without the employees having had an opportunity to challenge the purported results. Denying access to their own files allows employers to gather secret information on their employees with impunity (p. 7).

The use of tests has been consistently upheld in cases where public safety is a concern. Thus, the outcome in horn is noteworthy because the employer argued that disclosure would endanger the nuclear testing program. Although that argument usually prevails when an applicant for a position involving public safety, such as a firefighter or police officer, challenges a test as discriminatory or does not want to take the test, in this case that argument did not persuade the court to override the privacy rights of the test takers<sup>3</sup>

Lest you forget, I mentioned three influences that have led to greater scrutiny by the legal system of tests and testing. The final social development, unlike the concerns

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<sup>3</sup>It is also worth noting that the court treated the employment test as if it were a test administered by a clinician. Thus disclosure was permitted under a state law that interpreted the role of the industrial psychologist as a health care provider.

for discrimination and privacy which surfaced earlier in this century, has been part of human culture since its beginning. If you will pardon a highly technical psycholegal term, I would like to call this third aspect '-stupidity.' Stupidity may be defined as negligence or, alternatively, the failure to use reasonable care in carrying out one's obligations. Although it does not connote intentional or willful desire to harm, negligent harm can be just as damaging as purposefully inflicted injury. It is my thesis that stupidity, more than modern interpretations of equal protection and privacy, has been responsible for the increased legal regulation of psychological and educational testing. Examples of such stupidity abound--misuse of tests, use of invalid tests, deceptive explanations for the administration of tests, poor scoring, use by unqualified testers, wholesale adoption of computerized interpretations of tests without proper review of the resulting test reports by clinicians, and the beat goes on.

With this exposition as background and framework, I will now turn to the Rights and Responsibilities document. I think it would be helpful to look at it from two perspectives--that of test takers on the one hand and that of test publishers and test users on the other. As I noted earlier, the drafters of the Rights and Responsibilities document appear to have recognized the impact of the three diverse social influences on testing I have discussed. In each of the major provisions and subprovisions one finds sensitivity to issues of discrimination and privacy of importance to test takers. And the entire document can serve as a reminder to those in the testing industry not to act stupidly when they participate in widespread formal testing programs.

Principles 2 and 3 appear to ameliorate the results of certain otherwise discriminatory practices and follow title VII of the 1964 Civil Rights Act, the protection in evaluation provisions of the Individuals with Disabilities in Education Act, and the Americans with Disabilities Act. Principle 9 concerning confidentiality attempts to address privacy concerns. And, if those involved in the testing enterprise follow all of the document's principles there is a greatly lessened probability that test publishers and users will be accused of acting stupidly.

Having said this, it is my view that the Rights and Responsibilities document has only restricted remedial and beneficial value. To me, it is clearly a document preoccupied

by process, not substance. That is, it is basically a document that provides certain procedural safeguards for test takers and informs them of some limits to rights that they may ordinarily believe they possess. Only the provision that informs test takers that they are entitled to be tested using measures that meet professional standards appears to address the substance of testing. I assume that the Joint Committee is relying on the current and future Standards for Educational and Psychological Testing to provide the substantive safeguards concerning reliability, validity, and fairness.

In essence, this is an informed consent document or, more true to its purpose, a disclosure document. In that role the draft is a welcome complement to the 1992 APA Ethical Principles and Code of Conduct, which does not contain a provision concerning informed consent to assessment, although it does have a provision governing consent to therapy- Principle 1.07 of the Code does require psychologists to provide information in a comprehensible form when providing any professional service, including testing, but without any particular emphasis on this aspect of professional practice. The Rights and Responsibilities document goes a long way in fleshing out Principle 1.07's one or two line admonition to fairly inform those who will take tests about the instruments they will be administered and about their access to test results.

Many of the provisions in the document also implement the principle of autonomy and self-determination, which I find very salutary. Informing test takers of the uses and purposes of tests, the uses of the data gleaned from tests and who will have access to them, and the risks of not taking optional tests, among other provisions, not only fulfills basic moral principles but also comports with legal principles of fundamental fairness as well as the presumption that adults are to be presumed capable of making up their own minds about matters important to them.

On the other hand, the document does not explicitly take into account that huge segment of the population who may be among the most tested, i.e., children. There has always been significant tension between the rights of children and the rights of their parents. The U.S. Supreme Court, for the most part, views children, even adolescents, as incompetent to make decisions. At the same time, it has paid lip service at least to the proposition that children do not shed their constitutional rights at the schoolhouse gate.

The draft document is silent in its views about children's rights and responsibilities as test takers. By asserting that test takers "regardless of your . . . age" have the right to be treated with courtesy, respect, and fairness, implies that all of the rights delineated in the document reside in the children. I am not sure, however, that that was the drafter's intent. Bypassing the right of parents to make decisions about whether their children will be tested may be in accordance with the wishes of "kiddie libbers" but it is probably bad practice, a potential violation of the Individuals with Disabilities in Education Act, and, according to a 25 year old decision in the federal court of Pennsylvania, unconstitutional. It may helpful, therefore, to consider adding a provision concerning the respective rights of children and their parents to assent and consent.

Finally, I want to focus my attention on certain issues relevant to the test publishers and test users. I would recommend that the Joint Committee carefully consider the legal status of this document. Is the Rights and Responsibilities document a set of aspirational ideals the testing industry hopes to realize in some distant future? Is it a public relations document meant to cool down irate test takers. or, is it a set of enforceable principles that is meant to delineate the standard of care in the industry? The answers to these questions may determine the prospective and retrospective liability of the testers and test takers.

To prove malpractice, plaintiffs--in cases involving testing in the private sector, test takers--must prove that the test taker was in a professional relationship with the tester triggering a duty to use reasonable care in the assessment process, that this duty was breached, causing some foreseeable and legally cognizable injury to the test taker. Plaintiffs who believe they are harmed by testing will not only sue the test giver but the test publisher as well. What would constitute the test giver's and test publisher's duty in such a case! If the Rights and Responsibilities document is publicized as standards that affirmatively create rights plaintiffs who alleged that one or more of their rights were not honored would be able to introduce the document as evidence of that breach. Conversely, if the defendants could show that the test taker did not fulfill his or her responsibilities under the document, it could be treated as contributory negligence, absolving the defendants of liability.

I would speculate that the drafters working on this document for the Joint Committee did not contemplate that their efforts might become fodder for the litigation mill. In any event, the organizations responsible for its production need to decide just what the document is--a meaningless public relations ploy, a set of aspirational principles, enforceable standards, or something else. Its meaning, use, and legal status should not be thrust on it by third parties. The participating associations have that responsibility. Having said all of this, I strongly support the work of the Joint Committee. There are at least three benefits from the increased involvement of the legal system in testing practices. First, it has made the assessment industry, as well as society in general, more sensitive to racial, cultural, and sexual differences and to how apparently innocent and benign practices may perpetuate discrimination. Second, the attack on psychological testing has accelerated the search for both improved and alternative means of assessment so that what is said about examinees more validly and truly depicts their perceptions of themselves and how they function in all spheres of life. Finally, it has alerted test users and publishers to the fact that they will be held responsible for their conduct. To protect the rights of test takers, to safeguard their own integrity, and in the long run, to serve the legitimate goals of their employers, testers must examine their practices, their interpretations, and their ultimate recommendations. The Test Taker Rights and Responsibilities draft goes a long way in implementing and securing for test takers a fair, informed, and confidential process, thus benefiting us all.