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ABSTRACT

In a speech on the current criticism leveled against testing programs, the speaker states that attacks on testing are partially motivated by the public's reluctance to acknowledge unpleasant truths about society's weaknesses and problems. Some of these weaknesses are described as the inadequacy of public education: the incompetence of a portion of the labor force, due to academic weaknesses, which results in lowered national productivity: middle-class students' inflated expectations, which are not borne out by test results: and individuals' reluctance to be judged by others. The speaker asserts that the attacks on testing are now placing more emphasis on the issue of secrecy and less on racial bias. The speaker also discusses the Detroit Edison case, heard before the United States Supreme Court, involving test security, subject confidentiality, and job-related tests: in this case, the criterion validity method was used to validate the tests. The speaker supports the Court's decision to uphold the confidentiality of the test questions and the answers, and of the names and scores of the test takers, but believes the decision was reached for the wrong reasons and did not predict the precedent for future cases. (MH)

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# THE WAR ON TESTING: *DETROIT EDISON* IN PERSPECTIVE



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# The War on Testing: *Detroit Edison* in Perspective

Barbara Lerner

Tests are under attack today, as they have been throughout most of this decade. The battle over test security is only the latest battle in what is turning out to be a long war, increasingly fought on two main fronts. Struggles in courtrooms continue; struggles in legislative halls are just beginning, and the question we must ask ourselves, the basic, underlying and overriding question, is why.

I believe that the answer is this: Tests are under attack today because they tell us truths about ourselves and our society; partial truths, to be sure, but truths nonetheless and, in recent years, many of these truths have been unpleasant and unflattering. Seen in this perspective, the attack on tests is, to a very considerable and very frightening degree, an attack on truth itself by those who deal with unpleasant and unflattering truths by denying them and by attacking and trying to destroy the evidence for them.

Accordingly, I will begin my presentation here today by briefly listing some of these unpleasant truths and then go on to make a general point about how the war against truth is being fought. After that, I will focus, in as much detail as time permits, on the specifics of one recent battle, the one fought out in the *Detroit Edison* case.

Unpleasant truths in the educational realm center around the fact that our public schools are doing a seriously inadequate job: children of the poor are not learning the basics; children of the rich are not learning much beyond the basics. We know that because we have current literacy test results showing how widespread illiteracy is among the poor in general and the black poor in particular, and because we have long-term SAT results showing the magnitude of the decline in academic preparedness and competence among the college bound.

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Dr. Lerner, a noted psychologist and attorney, presented this paper on September 3, 1979 at a symposium on *Open Versus Secure Testing* at the 87th annual convention of the American Psychological Association in New York City. She was then completing a year as the first ETS Visiting Scholar in Measurement and Public Policy. She is now a public policy consultant in Princeton.

In the employment realm, the problem with school-like paper and pencil tests is not that they do not work, the problem is that too many of them work too well and tell us another unpleasant truth: poor students frequently make poor workers. This is so because the skills needed for competent performance in business, industry, and government are, increasingly, the same skills needed for competent performance in school. Tests tell us this unpleasant truth and they are beginning to tell us some even more unwelcome ones about the relationship between intellectual competence and national productivity, and about the escalating price we are paying for incompetence in an increasingly competitive world market.

On a more personal, individual level, tests tell us that the grandiose self-evaluations and inflated expectations for success and stardom increasingly common among some middle-class youths are just that grandiose and inflated. In focusing on self-indulgent, narcissistic youth of this sort at this point, I do not mean to suggest that they are the only ones who bitterly resent objective evaluations and respond by attacking their evaluators and the instruments they use.

Nader's young raiders are, after all, relatively fresh troops in this war. Leaders of the NEA preceded them in combat, calling for a national moratorium on the very tests that showed what an inadequate educational job they were doing. Leaders of the NAACP also attacked test results early on, and continue to do so, because they show that integration alone cannot solve the problems of illiterate black youth.

It is, however, potentially misleading to concentrate only on these and other self identified opponents of testing and of truth. We all want to be the judges of our own competence, and we all are, to some extent. No one questions our right to be that. The only real question here is whether any of us also have the right to be the sole judges of our own competence, and the answer is no, not if we value truth and want to stay in touch with external reality.

That, in brief, is why the war is being fought. Turning now to the how question, the general point I want to make is this: The war against testing is being fought largely with euphemisms, for reasons that are implicit in the foregoing analysis. Our society does have many troubling problems right now but poll data show that most Americans, black and white, still value truth, competence, and objective evaluation. More heartening still, they have shown an impressive ability to organize themselves to insist on these essentials when

necessary, as the enormous and effective popular support for the minimum competence testing movement shows.

In this climate, no one is yet ready to come out of the closet and march in the open against truth, competence, and objectivity. As a result, those who attack tests and the truths they represent always insist that they are attacking something else. Initially, the something else was "racism." Now, "secrecy" is the main code word, a word made fashionable by the sunshine-in-government and-the-universe boys. I will get to those boys, and girls, in a moment.

First, however, I want to note, for the record, that I have talked and written at length, elsewhere, about the falsity of the charge that valid tests are racist in design or effect, and will not dwell on those issues here, except to make one point. Overprivileged white opponents of testing outnumber underprivileged black ones and always have, not only in absolute numbers but in relative, proportional terms as well. What they have discovered in recent years is that they cannot fully achieve their ends simply by pretending to champion what they claim is the cause of black people.

That was always true, but it became especially clear after the decisions in the *Bakke* and *Weber* cases were handed down. Since the Court has decided, for the moment, to try to help black people with academic and vocational problems by giving them frank special preferences, it is likely to be somewhat less receptive to the pretense that tests do not provide valid measures of at least some important competencies. Hence, the need for a new nonracial code word, "secrecy," and a new line of attack.

Two major battles have been fought under the new euphemism, the one over the LaValle bill in New York and the one over the *Detroit Edison* case in the Supreme Court, and conventional wisdom has it that anti-testing lobbyists won the first battle, but lost the second one. I agree that the LaValle bill is a bad one, and I am sorry that it was enacted into law in New York. I wish I could take comfort from the *Detroit Edison* decision, and offer some, but honesty compels me to report that the comforts it offers are rather cold ones.

In saying that, I do not mean to gainsay the fact that on the day the *Detroit Edison* case was decided, it rained, a little, on the sunshine-in-government-and the universe boys. Now, many of my old friends of both sexes fall into that category. They are people who crusade for openness and full disclosure, from *almost* everyone and about *almost* everything, in what they see as a holy war against the near global

evil of secrecy. Listening to them, over the years, I have become more and more firmly convinced that allowing a little "secrecy" in order to preserve some "privacy" is a wise choice, and an essential one for a free society. Accordingly, I am happy that the Supreme Court made that choice in this particular case, but I am very unhappy about how it was made.

"Privacy" is, of course, the word most people use to refer to what Mr. Justice Brandeis called "the right to be let alone" when it is asserted by persons or organizations they approve. "Secrecy" is what they call that same right when it is asserted by persons or organizations they disapprove. This unprincipled way of making decisions on the basis of whose ox is gored was always deplorable, and it becomes increasingly dangerous as 1984 approaches. Neutral principles, clearly articulated and consistently applied, can save us from the world George Orwell foresaw; piecemeal victories cannot, especially when they rest on an unprincipled basis, as the decision in the *Detroit Edison* case does. Let there be no confusion about my point here. I applaud the *result* the Court reached; what I deplore are the *reasons* the Court gave for reaching it because they set no limit on the personal predilections of individual judges and provide no firm basis for predicting what the Court will do next time.

To understand why the Court should have done what it did but on a different basis, it is necessary to look at all of the relevant facts in that case, to place them in context, and to see them in perspective. Looking first at the most obvious facts, *Detroit Edison* dealt with questions of test security and subject confidentiality and resulted in a temporary victory for those twin interests, albeit a narrow and precarious one. Psychologists and their colleagues in that case upheld the standards of the American Psychological Association with integrity and grace, bending over backwards to make every arguably reasonable concession, but held firm on the essentials, refusing to go public with all of their test questions and answers or to release lists pairing the names of test takers with their scores.

Union officials, backed by the NLRB and by the Sixth Circuit Appellate Court, demanded that they do just that by releasing the aforementioned data to persons not bound by the Code of Ethics of this organization. Colleagues here today were steadfast in their refusal to violate the code and, ultimately, the Supreme Court upheld their right to refuse in a 5-4 decision. The Court reached that decision by weighing and balancing the interests at stake on a purely subjective scale and decided that the company's interest in test security and subject confidentiality outweighed the union's interest in

obtaining those data in this particular case, and that the NLRB had therefore exceeded its remedial discretion in ordering disclosure.

The important point to note here, for those who are concerned, as we all should be, about what the Court may do next time is this. The Court explicitly refused to hold that the union had no legitimate interest in the data it sought, hence, no right to it, substantial or unsubstantial. To understand why, in truth and in fairness, the Court should have held that the union had no right to those data, although it did have a right to a carload of other data which the company and its psychologists willingly supplied, it is necessary to know three additional facts about this case. (1) The test at issue in the *Detroit Edison* case was a validated test; (2) the method used to validate it was the criterion validity method, and (3) the criterion utilized was clearly job-related.

Under these circumstances, what legitimate interest could the union, representing disgruntled workers who failed the test, have in obtaining all of the actual test questions and answers, let alone the scores obtained by each named individual who took it? Data of that sort are useful in attacking the face validity of test items.* Such attacks are fair and relevant when—and only when—test use is justified on the basis of face validity. I personally believe that test use can be justified on that basis in some situations, just as nontest methods of decision-making can be. The Supreme Court has, however, held otherwise, setting what is, in effect, a double standard, requiring stringent validity for decision-making based on tests, but countenancing face validity alone for decisions about the very same matters made on nontest bases.

Faced with this situation, the company in this case nonetheless chose to use tests as a basis for deciding which workers were competent for promotion to the job of instrument-person B, and they expended the time, effort, and money necessary to meet the stringent standards required to establish criterion validity for their test. Apparently, they succeeded only too well from the point of view of the disgruntled workers the union represented.

If they had not, union officials would have been content to attack the validity of the test and the decisions based upon it in fair and relevant terms, and they would have won. Certainly, union officials had every right to data relevant to such an attack and, in fact, they received those data from the company without judicial compulsion.

*See 218 NLRB 1024, 1030 (1975).

Union officials were not, however, content to mount a fair attack on the criterion validity of this test because they rightfully perceived that the relevant data showed that the workers they represented were not competent for the promotions they wanted.

The Court declined to order the company and the psychologists who worked for it to surrender data relevant for an unfair attack on this particular criterion valid test in this particular situation, but it refused to do so on the basis of a legal principle or rule that would prohibit similar attacks on similar tests in future situations. The legal rule they should have adopted is the obvious and obviously fair one. Arguments about the face validity of test items are relevant only when test use has been justified on that basis.

Such a rule would provide a neutral, principled basis for consistent judicial decision-making in future cases. It could not be used as a basis for capricious and arbitrary decisions for or against future plaintiffs or defendants because it would establish a precedent binding upon the Court that issued it and on all lower courts governed by its rulings. That is what legal decisions in general and Supreme Court decisions in particular are supposed to do.

Decisions made by weighing and balancing legitimate and illegitimate interests on the same subjective scale are bad decisions—irrespective of the results reached—because they do not do that. Instead they leave the Court with unlimited, illicit discretion of the sort Mr. Justice Frankfurter condemned when he said, "We do not sit like a Khadi under a tree dispensing justice."

The truth is that the justices of our current Court do something very much like that in a distressingly high proportion of their cases and, as a result, the next few years are likely to be difficult ones. Still, I am convinced that intellectual honesty and integrity will win in the end, as they generally do, in this often troubled but ultimately triumphant country of ours. To make that win more likely, it would be useful if scholars, scientists, and lawyers who have not yet stood up to be counted on this issue did so, soon.

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