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Test Defamation in the Workplace: False Positive Results in Attempting to Detect Lies, AIDS, or Drug Use

Elaine W. Shoben†

Workplace tests given to applicants or employees can be divided into two general types: (1) Tests with results that measure ability or performance on a continuous, comparative scale and (2) tests with essentially dichotomous results indicating the truth or falsity of some fact about the worker. Aptitude tests or quantified supervisorial ratings fall into the first category. They have been the subject of substantial litigation¹ brought primarily² under Title VII of the Civil Rights Act of 1964.³ In contrast, the second category of workplace tests has received comparatively little judicial attention. This group includes drug tests, other medical tests such as those for the AIDS antibody, and truth-detection testing. This second category of workplace testing has engendered social controversy⁴ and litigation concerning invasions of privacy⁵ and constitutional or common law protections against unreasonable intrusions or searches.⁶ A separate issue has not yet received sufficient attention: The problem of injury to reputation through the predictable number of false results on such tests.

This second category of tests is defined here as tests producing results that are "all or nothing" in the sense that the truth sought by the test is an absolute yes or no rather than some shaded judg-

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¹ See, for example, *Connecticut v. Teal*, 457 U.S. 440 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

² But see *Washington v. Davis*, 426 U.S. 229 (1976) (Fifth Amendment due process challenge to aptitude testing).

³ 42 U.S.C. sec. 2000e et seq. (1982).

⁴ See, for example, *Cowboys Testing Players*, *The New York Times* sec. A, 1 (July 30, 1987), discussing unspecified employment implications of any positive results from AIDS tests of football players.

⁵ See Alan Westin, *Past and Future in Employment Testing: A Socio-Political Overview*, 1988 U. Chi. Legal F. 93.

⁶ See Allan Adler, *Probative Value and the Unreasonable Search: A Constitutional Perspective on Workplace Drug Testing*, 1988 U. Chi. Legal F. 113.

ment.⁷ The subject of the drug test either did take drugs or did not; the examinee on the polygraph test⁸ either lied or told the truth; the patient has the AIDS antibody or not. For the purposes of this article, these tests will be called purity/taint tests. This name is chosen because the effect of such tests in the workplace is to affirm the purity (no drugs, no lies, no AIDS antibody) of the worker or to taint the individual with a positive result on the test.⁹

The purity/taint tests pose a special risk of reputational injury through the presence of false positive results.¹⁰ The fact that such tests inherently have some rate of inaccuracy is well accepted;¹¹ the

⁷ Although interpreting polygraph, drug and AIDS antibody tests often requires shaded judgment by the interpreting examiners, the reported result is "positive" or "negative." This article distinguishes only between the manner in which different results are typically reported, not the methods of determining those results.

Conversely, the reported result on an aptitude test is sometimes stated in terms of a cut-off score, thus producing a dichotomous pass/fail result. This form of reporting does not change the essential character of the test as understood by the public, however. An aptitude test-taker might ask how close the score came to the cut-off, whereas one would not ask whether a urine sample came "close" to passing a drug test. The aptitude test result is known to be a scaled, continuous judgment, whereas the drug test is considered either positive or negative.

Sometimes purity/taint tests are deemed "ambiguous" in result, such as an "inconclusive" polygraph test result. Again, the report is not understood to indicate a result "close" to a category; it is simply taken to indicate that the test did not work. The equivalent in aptitude tests would be the inability to administer the test at all because it was written in a different language than that known by the examinee.

⁸ This article focuses on polygraph tests for lie detection in employment, but another device is the psychological stress evaluator. For a factual and legal discussion of this test, see William H. Kenety, *The Psychological Stress Evaluator: The Theory, Validity and Legal Status of an Innovative "Lie Detector,"* 55 Ind. L. J. 349 (1980).

⁹ Many types of such tests may appear in various workplace contexts, such as an x-ray of a baseball player's bat to check for illegal cork. See Peter Alfano, *New Baseball Test: X-Rays for Suspect Bats*, The New York Times sec. A, 1 (Aug. 8, 1987) (x-ray of bat used by Mets third baseman Howard Johnson after he hit a long home run).

¹⁰ Conversely, a false negative result is one incorrectly indicating the absence of the item being tested. A false negative on a drug test is a result showing no drug traces when in fact the traces are there. A false negative on a polygraph test is a result indicating that the truth was told when in fact the examinee lied. A false negative on an AIDS test is the report of no AIDS antibody, when the AIDS antibody is present. See, for example, Andrew Vernon, Melissa H. Hoagland and Elizabeth J. Perlman, *AIDS Wrongly Diagnosed*, 258 J. A.M.A. 2063 (1987) (letter to the editor by doctors at the Johns Hopkins Hospital concerning incorrect diagnosis of patient after positive AIDS test that was subsequently proven to be a false positive).

For an explanation of false negatives and false positives in the context of drug testing, see Philip J. Bigger, *Urinalysis: Issues and Applications*, 53 Federal Probation no. 4, 23 (1979). For an explanation of false positives in the AIDS context, see Taunya Lovell Banks and Roger R. McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 Tulsa L. J. 1, 6-9 (1987). See text at notes 18-34.

¹¹ See the report of the Council on Scientific Affairs in *Scientific Issues in Drug Testing*, 257 J. A.M.A. 3110 (1987) ("Council Report"). But see Editorial, *Toilet Patrol*, The Christian Science Monitor 17 (February 24, 1987) (editorial citing opinion of Attorney Gen-

only question is the level of tolerable error. In addition to the inherent inadequacies of the tests, false reports can occur from incompetent laboratories¹² or from sloppy testing procedures such as sample mislabelling.¹³

The empirical inquiry into the number of individuals who suffer reputational injury from false reports,¹⁴ and the political issue of whether to legislate controls on purity/taint testing,¹⁵ are not the direct subjects of this article. The focus here is on the problem that some inevitable number of individuals will receive incorrect results on such tests. The question is whether a reputational injury from a false positive test result is defamatory and whether it should be compensable at common law. No reported case has squarely addressed this issue, but courts will probably confront the problem as soon as employers increase the use of drug tests. The goal of this article is to assist in the resolution of such cases when they appear.

This article concludes that dissemination of false positive reports from purity/taint tests is simply a modern form of classic defamation.¹⁶ Employers should be liable for common law defamation when they use purity/taint tests creating identifiable victims

eral Edwin Meese, III, that urine tests to detect drug use by federal employees are 100 percent accurate).

¹² See Walt Bogdanich, *Testing Debacle*, *The Wall Street Journal* 1 (July 31, 1987) (laboratory hired to test blood sample of railroad engineer in Amtrak crash did not know how to use the sophisticated equipment needed to perform test). See also Walt Bogdanich, *Lax Laboratories*, *The Wall Street Journal* 1 (Nov. 2, 1987) (pap smears, done in large volume, analyzed by sloppy procedures).

¹³ See Walt Bogdanich, *False Negative: Medical Labs Trusted as Largely Error-Free Are Far From Infalible*, *The Wall Street Journal* 1 (Nov. 2, 1987) (reporting examples of specimens mistakenly switched, improperly calibrated machines, and equipment and chemical misuse).

¹⁴ See generally David T. Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector* (1981).

¹⁵ Many jurisdictions have passed legislation controlling the use of polygraph testing. See, for example, *Perks v. Firestone Tire & Rubber, Co.*, 611 F.2d 1363 (3d Cir. 1979) (applying Pennsylvania law and interpreting state policy underlying anti-polygraph statute). See also *Long Beach City Employees' Assn. v. City of Long Beach*, 41 Cal.3d 937, 227 Cal. Rptr. 90, 719 P.2d 660 (1986) (interpreting California's polygraph statutes). Congress recently passed the Employee Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 648 (1988), to be effective December 27, 1988. The Act prohibits use of polygraph or other lie detection tests by private employers in some circumstances. It eliminates pre-employment screening or general testing of employees without cause, but it allows tests for on-going investigations of employees under reasonable suspicion. In addition to this major exception, the Act also exempts governmental employees and private contractors and consultants involved in various national defense or counterintelligence activities.

¹⁶ See generally Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Calif. L. Rev. 691 (1986); Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 Calif. L. Rev. 743 (1986).

unless such employers take reasonable precautions to avoid false-positive results. The plaintiff's case for defamation is traditionally established by pleading the publication of the damaging accusation. The Supreme Court has yet to reveal definitively whether the Constitution puts limits on a private person's claim in such a case; it may turn on whether an employer's publication of purity/taint test results is considered a matter of public concern.¹⁷ Common law limitations are embodied in privileges, such as the one to communicate matters of common interest among employers.¹⁸ Courts should sensibly interpret such privileges for purity/taint tests. When the employer recklessly or negligently acquires the information through a failure to take reasonable care in the testing process, it should lose the qualified privileges to communicate the false information.¹⁹ Potential tort liability should act as a deterrent to widespread use of cheap testing practices that maximize injuries through false positives.

I. THE FALSE POSITIVE RISK

The purity/taint tests in the workplace pose risks of false accusation because they have known minimum rates of inaccurately recorded positives.²⁰ A false positive is a result incorrectly indicating the presence of the item being tested. A false positive on a drug test is a result showing traces of illegal drugs when in fact the individual used no illegal drugs.²¹ A false positive on a polygraph test is a result that indicates lies were told when in fact the examinee told the truth.²² A false positive on an AIDS test is the indication

¹⁷ See text at notes 61-79.

¹⁸ See text at notes 81-90.

¹⁹ *Id.*

²⁰ False results on purity/taint tests can be either false positives or false negatives. For a description of such results, see note 10. For instances of false negative results on even the best AIDS tests, see Harold A. Kessler, Bernard Blauw, et al., *Diagnosis of Human Immunodeficiency Virus Infection in Seronegative Homosexuals Presenting With an Acute Viral Syndrome*, 258 J. A.M.A. 1196 (1987).

²¹ For an explanation of false negatives and false positives in the context of drug testing, see Bigger, 53 Federal Probation at 30 (cited in note 10).

²² The danger of false findings from polygraph tests was recently noted by the California Supreme Court in *Long Beach City Employees' Assn.*, 719 P.2d 660 (cited in note 15). At issue was state legislation providing for compulsory polygraph examinations of certain public employees. A challenge was brought by representatives of the employees ordered to submit to the tests as a condition of their continued employment. The court held that the examinations intruded upon the employees' constitutionally protected privacy and violated their right to equal protection. In dicta, the court remarked about the unreliability of polygraph results and noted that the statute was based in part upon the legislative finding that polygraph tests are "not entirely accurate and may result in false findings when used by

of the AIDS antibody when in fact the patient is antibody free.²³

Are the risks posed by false positive results on purity/taint tests sufficiently great to justify concern? If, for example, only one percent of all drug tests really do falsely report drug use, is there any problem? The degree of the risk is certainly a meaningful question for public policy debate, but for purposes of this discussion, *any* degree of risk poses the problem of a predictable number of defamation victims. The magnitude of the number is important for assessing group concerns,²⁴ but the individual victim is injured regardless of the amount of company he or she has.

Consider by way of analogy the risk of disease posed by live virus vaccines. A predictable number of individuals annually contract the very diseases they sought to avoid by immunization.²⁵ The magnitude of the probability affects the public health decision of whether the immunization program is for the good of the entire society. The infrequency of the injury, however, does not aid the inevitable victims. Low probability events do happen and, as long as the victims can establish causation,²⁶ they suffer a loss. Should those victims be compensated?

The public health decision to sacrifice such victims for the overall good of society is sound policy. The question is, who should bear this "tough luck" burden for the predictable number of losers in the live vaccine lottery? Rational patients still should consent to the immunizations, because the probability of being an unlucky victim is low and the benefit of successful immunization is high. This consent has left the loss from vaccine injuries with some un-

inexperienced persons." *Id.* at 667.

Numerous opinions, often citing polygraph unreliability, have held that the test results are inadmissible in criminal trials. See *Wilkie v. State*, 715 P.2d 1199 (Alaska Ct. App. 1986); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984); *State v. Antone*, 62 Hawaii 346, 615 P.2d 101 (1980); *State v. Beachman*, 189 Mont. 400, 616 P.2d 337 (1980); *State v. Tulipane*, 122 Ariz. 557, 596 P.2d 695 (1979).

²³ See Donald W. Meyers and Phyllis S. Myers, *Arguments Involving AIDS Testing in the Workplace*, 38 Lab. L. J. 582, 584 (1987).

²⁴ See text discussing Title VII of the Civil Rights Act of 1964 at notes 93-108.

²⁵ See, for example, *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974) (oral polio vaccine). Similar adverse side effects arise for an inevitable number of patients even with vaccines that do not use live viruses. See *Petty v. United States*, 740 F.2d 1428 (8th Cir. 1984) (side effects from Swine Flu vaccine).

²⁶ In *Reyes v. Wyeth Laboratories*, for example, an infant contracted paralytic poliomyelitis approximately two weeks after receiving the oral vaccine, but Wyeth epidemiologists testified that there was a local epidemic of polio in the county at the time. Further expert testimony identified a virus isolated from a specimen of the infant's stool as "probably wild" and not from the live virus in the vaccine. The jury disbelieved this evidence and found for the infant plaintiff. *Reyes*, 498 F.2d at 1271.

lucky victims, as long as the consent was meaningfully attained²⁷ and as long as there was no negligence.²⁸ Legislators may wish to provide an alternative compensation scheme if the public good so dictates.²⁹

Under ordinary negligence analysis, however, one would want to make careful inquiry into the manner in which the vaccine was prepared and administered. The public good may contemplate some victims, but could not excuse procedures that failed to minimize their number.³⁰ A court should examine the availability of additional risk reduction and its cost. If the defendant did not act reasonably to reduce the risk, then the victim should recover. The victim could never prove, of course, that such additional risk reduction would have spared this particular contraction of the disease. This is an actual cause problem that should be treated sensibly.³¹ Failure to take reasonable steps to reduce the risk should suffice for recovery. The same logic applies to purity/taint testing in the workplace. Assume an employer subjects all employees to random drug testing and that any employee who refuses the test is dismissed. A rational employee who is drug-free would agree to the random testing if there is a low probability of a false positive because the benefits of employment outweigh the risk of reputational injury from a false result. Nonetheless, the testing will falsely taint a predictable number of employees. If the overall good of the em-

²⁷ Id. at 1278; see also *Petty*, 740 F.2d 1428.

²⁸ See *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432 (S.D.N.Y. 1968).

²⁹ See, for example, National Swine Flu Immunization Program (Swine Flu Act) of 1976, 42 U.S.C. sec. 247b(j)-(1) (1982).

³⁰ Consider the negligent testing and marketing of the 4-in-1 vaccine Quadrigen. Parke Davis & Co. had previously produced a successful 3-in-1 vaccine, Triogen, that combined pertussis vaccine with diphtheria and tetanus toxoid (known as DPT). When the Salk polio vaccine was developed, it was added to Triogen to produce Quadrigen. The particular procedure used, however, enabled the live pertussis organism to interact with the live polio virus in a few instances. One infant who was given Quadrigen suffered permanent, severe brain damage as a result. The district court found the manufacturer negligent in the testing and marketing of the product. *Tinnerholm v. Parke Davis & Co.*, 285 F. Supp. 432 (cited in note 28).

³¹ The reduction of risk by additional care in preparing and administering vaccines is related to an issue that arises in malpractice cases concerning failure to diagnose diseases that are usually fatal. If the patient would have had a higher chance of survival from early detection, but the doctor failed to diagnose the disease promptly, would that failure have "caused" the ultimate death from the disease? It is usually fatal anyway, but the malpractice reduced the existing chance of survival even further. See *Herskovits v. Group Health*, 99 Wash.2d 609, 664 P.2d 474 (1983). See also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, sec. 41 at 272 (5th ed. 1984) ("Prosser and Keeton").

ployer's efficiency merits this risk, the victims³² should be compensated for their sacrifice.

The risk for any one individual is illustrated by the following hypothetical example. Mary Jones is a drug-free employee subject to random drug testing. She knows her employer will test her one day a year and that there is at least a one-percent possibility that she will be falsely tainted.³³ When she tests positive, she is shocked at the occurrence of this low probability event. More importantly, the employer believes she is a drug user, because in the group testing positive some employees do use drugs. The probability of a drug user—true test result—among those who test positive depends upon the base rate in the population as well as upon the error rate.³⁴ Assume instead that the employer tests Mary Jones every working day of the year. If there are at least two-hundred working days annually, she would falsely test positive an expected average of two of those days.³⁵ Her "lottery" days for false positives might be (in the great unknown "chart" of random events) May 12 and July 28. If the employer's random, once-a-year testing day happens to be July 28, Mary Jones is out of luck.

The smaller the odds of a false positive, of course, the fewer

³² A victim is someone who is not tainted (for example, a drug user) but who tests positive. The identifiability of the innocent victims is discussed in the text at notes 129-33. See also note 37 for a discussion of the Department of Transportation employee who tested positive for drug use but was capable of establishing innocence, apparently through internal procedures.

³³ For purposes of this example, a conservative false positive rate has been chosen to illustrate the problem with even a low probability of error. Estimates of false positive rates on drug tests vary. The Hastings Center Report of December 1986 reported the false positive rates for the radioimmunoassay (RIA) screening of blood for drug abuse as follows: 43 percent false positives for cocaine, 21 percent for opiates, 51 percent for PCP, and 42 percent for barbiturates. For the enzyme multiplied immunoassay technique (EMIT), a urine screening methodology, the false positive rates were reported as: 10 percent for cocaine, 5.6 percent for opiates, 5.1 percent for barbiturates, 12.5 percent for amphetamines, and 19 percent for tetrahydrocannabinol (marijuana's active ingredient). Morris J. Panner and Nicholas A. Christakis, *The Limits of Science in On-The-Job Drug Screening*, Hastings Center Report (December 1986).

³⁴ Consider the false positive rate projected for the ELISA test to detect the AIDS antibody. Sensitivity and specificity data supplied for the Abbott HTLV-III enzyme immunoassay project that in a low-risk population, among 100,000 persons tested 248 will test positive, but only 11.3 percent will be true positives. That means that of the 220 people testing positive, only 28 will be actually infected with HIV. See Legislative Research Commission, Frankfort, Kentucky, *Issues Confronting the 1988 General Assembly*, Informational Bulletin No. 160, 129 (August 1987).

³⁵ The average refers to an average across years. The assumed false positive rate of one percent is a conservative estimate. See note 33. If a five percent rate were assumed, then Mary Jones would test positive on an average of ten days annually when she is tested 200 days each year.

the number of people who will be injured. The degree of injury suffered by those unlucky few, however, will be concomitantly greater because the positive result will be less likely to be false. Consider the possibility of reducing the odds of a false positive by retesting. If, for example, the odds of a false positive on one test were five in a hundred, then the odds of an individual testing falsely positive twice are one in four hundred. The lesser odds nonetheless produce predictable victims, the numbers of whom depend upon the size and nature of the population being tested.³⁶

Assume 2,000 employees are tested annually for drugs and that double testing is done to assure fairness. On average, under the previously assumed odds and double-testing, five employees each year will falsely test positive twice. The total number that test positive after double-testing will depend upon the rate of actual drug use among the employees, but, by chance, five will test positive twice on average with annual testing. If the real drug use rate is about seven percent, and if there are no false negatives exonerating true users, then those five will be among approximately 145 flunkers. The five falsely-tainted employees will be such a small minority that clearing their reputations will be nearly impossible, even if they are fortunate enough to have proof of their innocence.³⁷

There is no perfect solution to the problem of test defamation victims. If there is a large enough group of potential victims, societal interest in permitting the testing for greater efficiency is greatly reduced. Only a legislative body³⁸ should make this policy determi-

³⁶ See Council Report at 3110 (cited in note 11).

³⁷ Compare the recently announced results of the random drug testing done by the Department of Transportation. Of the first 221 employees tested, two tested positive for drug use. One of those two was found to have been treated earlier by a dentist and the drug trace was attributed to a codeine painkiller prescribed by the dentist. The other was removed from the job. The deputy assistant secretary for the Department who reported these results was not quoted as indicating the false positive rate on the test used. The identity of the individual who tested positive was not disclosed, and he or she was required to undergo counselling or face dismissal. Irvin Molotsky, *Transportation Dept. Starts Random Worker Drug Tests*, *The New York Times* sec. A, 16 (Nov. 5, 1987). If that worker is in the position of Mary Jones, would the most sensible course of action be to protest the result or accept the counselling? Moreover, Mary Jones is assumed to be a non-unionized employee in contrast to the Department of Transportation workers who are represented by the American Federation of Government Employees. *Id.*

³⁸ The legislature is best equipped to hold hearings on the reliability of purity/taint tests and the numbers of people likely to be injured by any false positives they may generate. There may be other reasons, however, why a court might prohibit particular tests as a matter of existing law. For example, the Texas Supreme Court has interpreted its state constitution to prohibit mandatory polygraph testing as an invasion of privacy. *Texas State Employees Union v. Texas Department of Mental Health and Mental Retardation*, 746

nation, as Congress and many state legislatures have done for polygraph testing.³⁹ It is submitted here that such a determination should take into account not only the number of potential victims, but the relative inability of those victims to prove their innocence.

Legislatures also should weigh the competing employer interests. They may decide to protect employers from tort liability, even from identifiable victims. If the greatest good is served by sacrificing a few, then such a course is rational. Like the unlucky few who contract disease from immunization,⁴⁰ however, it would be appropriate to require the employers to minimize the risk, within reason, to avoid liability. In the personal injury cases for immunization victims, the case may proceed as straightforward negligence.⁴¹ For the injury to reputation through purity/taint testing, the cause of action is in defamation.⁴²

II. DETERRING TESTING ABUSE WITH DEFAMATION LAW

The magnitude of potential reputational injury from false positive results is far greater for purity/taint tests than for other common employment tests, such as aptitude tests. An individual may be injured by an aptitude test that underpredicts ability, but greater injury is likely from a false drug test result.

Consider, for example, two individuals denied a promotion because each failed a test. Worker One failed an aptitude test even though this individual was highly qualified. Even excellent aptitude tests are not perfect predictors and the ability of this person was underpredicted by this test. Worker Two lost the promotion because of a polygraph test that incorrectly detected dishonesty when Worker Two answered questions concerning company theft.

Worker Two is far more disadvantaged in future opportunities with the company, or with other employers, because of the false report. The underprediction on the aptitude test injured Worker

S.W.2d 203 (Tex. 1987).

³⁹ Some state acts prohibit all use of polygraphs by employers. See, for example, Mass. Ann. Laws ch. 149, sec. 19C (Lawyers' Co-op. 1986 Supp.). Some prohibit employers from using polygraph tests without consent. See, for example, Haw. Rev. Stat. sec. 378-21, 378-22 (1985). Some require licensing of polygraph examiners. See, for example, Tex. Rev. Civ. Stat. Ann. art. 4413 (Vernon 1986 Supp.). Some address only privacy issues by restricting the types of questions that can be asked. See, for example, Ill. Rev. Stat. ch. 111, para. 2415.1 (1987). See note 15 for a description of the new Federal Act.

⁴⁰ See discussion in text at notes 25-31.

⁴¹ See Prosser and Keeton at 688 (cited in note 31).

⁴² There is no duty in negligence to prevent harm to reputation as such; defamation is the refuge for this legally protected interest. Closely related to defamation is the privacy action. See Westin, 1988 U. Chi. Legal F. at 102 (cited in note 5).

One, but it does not stigmatize the employee to the point that the false report can never be overcome. Outstanding performance at this company may overcome the blight on the record, or a different aptitude test at another company may bring other opportunities. Worker Two, however, is unlikely to recover from the taint of dishonesty brought by the false polygraph result. Future honesty is not necessarily inconsistent with a report of dishonesty in the past. Worker Two could try vindication through another polygraph test, but the taint of the first is likely to remain.⁴³ Others are likely to perceive the second test as unreliable if Worker Two selects and hires the examiner. Even if the company retests and finds honesty, the taint will remain unless the first result is expunged from records and memories. As with prejudicial evidence, it is hard to keep negative reports from the minds of those who perceive them.⁴⁴

At the group level, the unfair denial of employment opportunities from the fallacies of these tests may be no different than exclusion of applicants because they fall below the cut-off on the scale of an aptitude test that is not job-related. At the individual level, however, the effect of a denial because of a false positive on a purity/taint test is far more devastating, involving interests in reputation, integrity, and dignity that are the foundation of the common law of defamation.⁴⁵

⁴³ Compare the stories told in an article on drug testing in *The Wall Street Journal*. A bus driver was suspended when a urine test showed evidence of cocaine. The test was done after a minor accident, and the suspension was without pay. With the help of his union, the driver fought the charges; however, another laboratory retested and confirmed the findings. The driver took a lie detector test to support his claim and ultimately consulted a forensic chemist who did hair analysis to detect long-term drug use. The chemist convinced the labor arbitrator that there was no evidence of cocaine use for the last six months in the sample of the driver's hair. David Wessel, *Hair as History: Advantages Seen in New Methods for Drug Testing*, *The Wall Street Journal* 21 (May 22, 1987).

Another example related in the article involved a Marine who faced discharge for failing a urine test. A laboratory director at a Veterans Administration hospital testified that a hair sample revealed no evidence of drug use. Nevertheless, the judge at the court-martial refused to accept the evidence after hearing the testimony of the Los Angeles County chief toxicologist challenging the reliability of hair analysis to establish the lack of drug use. The marine was acquitted only after the judge heard several character witnesses. *Id.*

⁴⁴ See *Houston Belt & Terminal Ry. Co. v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. 1976) (the first, but not the second, drug test revealed methadone; employer reported cause of discharge as first test result). See also the situation of the plaintiff in an early Equal Employment Opportunity Commission decision concerning guilt by association. A white female typist was first accused of a tax arrearage and was later exonerated. Then the local police suspected her of criminal activity because she associated with and dated blacks. Although there was no evidence of her wrongdoing, the company dismissed her because of the resulting embarrassment. EEOC Decision No. 71-1902, 3 F.E.P. Dec. 1244 (April 28, 1971).

⁴⁵ See Laurence H. Eldridge, *The Law of Defamation* 2-13 (1978).

There is no inherent difference, in terms of conveying a defamatory meaning, between a statement that an employee was fired for theft and one that the employee failed a polygraph exam concerning company theft or drug use.⁴⁶ The bald accusation of theft is an elementary example of defamation when communicated;⁴⁷ it can be defended only with truth⁴⁸ or privilege.⁴⁹ If the employer instead reveals that an employee failed a polygraph test concerning company theft, the assertion conveys the same defamatory meaning and effect.⁵⁰ A suit for defamation in this situation should be successful absent truth or privilege.

⁴⁶ In *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986), the First Circuit affirmed a jury award of \$358,000 for lost wages and \$50,000 for defamation when an employee was discharged because he failed a polygraph test concerning his off-the-job use of cocaine. The defamation occurred when drug use as the reason for the termination was disclosed to a prospective employer. The court also found that the real reason for discharge was retaliation for the worker's failure to promote the employer's grandson. See also *Houston Belt*, 548 S.W.2d 743 (cited in note 44) (upholding a jury award of \$200,000 against a former employer who disseminated a false written statement that a fired worker was a drug user, even though stated reason for firing was safety).

⁴⁷ For an older case illustrating the principle with paper and pen communication, see *Ramsdell v. Penna. R.R. Co.*, 79 N.J.L. 379, 380, 75 A. 444, 445 (N.J. 1910), where two conductor employees were injured in reputation by the employer posting a notice of their discharge "for failing to issue meal checks according to instruction." The notice was posted such that it could be read by dining car employees as well as by many other people. The same principle of unprivileged publication of false accusations applies equally well to modern forms of communication, such as computer data banks with insufficiently controlled access.

⁴⁸ Truth was recognized at common law as a defense. See Prosser and Keeton at 804-05 (cited in note 31). For constitutionally protected speech, however, falsity is part of the plaintiff's prima facie case. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). For further development of the constitutional issues, see text at notes 60-79.

⁴⁹ The Seventh Circuit most recently explained the affirmative defense of qualified privilege:

The elements of a qualified privilege are: (1) [G]ood faith by the defendant; (2) an interest or duty to be upheld; (3) a statement limited in its scope to that purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only.

Babb v. Minder, 806 F.2d 749, 753 (7th Cir. 1986) (footnotes and citations omitted). The court further noted that the existence of the privilege is a question of law for the court. Once found, the burden shifts to the plaintiff to show that the defendant abused and lost the privilege. *Id.*

⁵⁰ Compare the allegations in a complaint filed last year in Ohio. An anonymous note was sent to the county health commissioner concerning a worker at Frisch's restaurant. The note said: "[T]hey say Vernon Saxton is suppose [sic] to have aids [sic]. They are handing [sic] food people eat. Our [sic] we to be concerned." The commissioner sent this note to the owner of the Frisch's where the plaintiff, Vernon Saxton, was employed. The owner read the note aloud at a meeting of other employees and fired Saxton. The complaint alleges that Saxton does not have AIDS and that his health "could with the exercise of reasonable care have [been] ascertained." 1 AIDS Policy & Law 3 (April 23, 1986), citing *Saxton v. Vanzant*, No. 86-CIV-59, Fayette Cty, Ohio Ct. Comm. Pleas.

In cases litigating communication of false results from purity/taint tests, the truth defense should relate to the truth of the theft, drug use, or AIDS exposure. Courts should not interpret "truth" here to mean truthful reporting of the test result itself. As for privilege, the principle that it is lost for abuse should govern as well. Malice and excessive publication are well-established occasions of abuse of privilege.⁵¹ Courts should hold that recklessness or simple negligence in the acquisition of the information through testing procedures also destroys the privilege.⁵² Employers would then have an incentive to avoid cheap and careless testing methods that maximize the risk of reputational injury.

When courts begin to apply defamation law to purity/taint tests, the deterrent effect of potential liability will cause employers to contemplate risks. Employers should weigh potential increases in productivity or safety gained from purity/taint tests against the risk of reputational injury and liability. If anticipated productivity and safety gains⁵³ are so low that only cheap testing procedures (with high risk of false positives) are justified, then the cost of potential liability should dictate that the tests should not be undertaken.⁵⁴ Conversely, if the anticipated gains are high,⁵⁵ then the employer should undertake the testing. The potential defamation liability should affect the decision of how much to spend on the tests in order to minimize the risk of false results. Expensive tests that minimize the risk of false negatives will reduce the number of potential defamation plaintiffs. Moreover, common law privileges will protect employers who do not give excessive publication to false results. If tests known to have high error rates are used, however, courts should find that the privilege to make any communication of the false information is lost because the incorrect informa-

⁵¹ See, for example, *Lewis v. Equitable Life Assur. Soc.*, 389 N.W.2d 876 (Minn. 1986); *Babb*, 806 F.2d 749.

⁵² See text at notes 85-89.

⁵³ Consider, as one way of dealing with testing cost-benefit analysis, the Supreme Court's discussion of the reasonableness of a no-narcotics rule (including the plaintiffs' methadone) in *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979).

⁵⁴ The reliability of specific urinalysis drug tests and their approximate costs is discussed in David W. Hoyt, Robert E. Finnigan, et al., *Drug Testing in the Workplace—Are Methods Legally Defensible?*, 258 J. A.M.A. 504 (1987). The authors estimate that the price for a single-procedure method varies from \$5 to \$20. Confirmations vary from \$30 to \$100. The military reportedly has a contract for a two-procedure method (including confirmation) at approximately \$20 per sample for its very large contract. *Id.* at 508.

⁵⁵ In addition to plant safety, companies should consider potential liability to third parties. See *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983) (employer may be held liable to third parties injured in car accident caused by the negligence of a worker sent home from work because of intoxication).

tion was obtained recklessly or negligently.

The potential for defamation liability thus may discourage unprivileged dissemination of test results⁵⁶ and encourage careful administration of the tests as well as discrete preservation of the results. In drug testing, for example, employers would be wise to contract with reputable laboratories and instruct them to use procedures that minimize false positives.⁵⁷

Wide dissemination of results, such as through computer data banks with relatively uncontrolled access by others,⁵⁸ will result in a predictable number of false reports. Traditional defamation law properly makes the dissemination of such false reports actionable, and the privilege to protect the interests of others is lost by excessive publication.⁵⁹ These ancient doctrines adapt well to the modern phenomenon of mass worker testing and could function well to provide compensation in some worthy cases and deter behavior that poses excessive risk of reputational injury relative to productivity and safety gains.

A. Constitutional Protection

Conflicting signals from the Supreme Court in the last quarter century leave uncertain the role of constitutional protection in some areas of defamation law. One such area is suits by workers against employers for written or verbal communications to others. The uncertainty results in part from the lack of any guidance as to which matters are ones of "public interest" that receive constitutional protection.

A series of media decisions beginning in 1964 with *New York*

⁵⁶ See Tamar Lewin, Boss Can Be Sued for Saying Too Much, *The New York Times* sec. B, 26 (Nov. 27, 1987) (many employers dislike the bad publicity associated with defamation suits by former employees even though employers usually prevail in court).

⁵⁷ Dr. George D. Lundberg observes in an editorial in the *Journal of the American Medical Association* that various highly sensitive screening methods are available that could be set to diminish false negatives or false positives. He notes further that once a false positive result is obtained it is "utterly essential" that retesting by a separate technique be done for validation. Such highly sensitive laboratory tests can be done to minimize risks of false results "if one is willing to spend the money." George D. Lundberg, Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism, 256 *J. A.M.A.* 3004 (1986). See also *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (firing employee on basis of single positive drug test done below industry standards and without confirmation was "arbitrary and capricious").

⁵⁸ For related problems with errors in computer data bank use, see Bob Davis, As Government Keeps More Tabs on People, False Accusations Rise, *The Wall Street Journal* 1 (Aug. 20, 1987).

⁵⁹ See text at notes 82-84.

*Times v. Sullivan*⁶⁰ established extensive First Amendment protection for the press against public figures and officials concerning public matters. Ten years later in *Gertz v. Robert Welch*,⁶¹ the Court established that freedom of the press also affects suits by private figures in matters of public interest. Whereas *New York Times* and subsequent cases⁶² required that a public figure prove actual malice, defined as knowledge of falsity or reckless disregard of truth or falsity,⁶³ *Gertz* taught that a private figure suing the press need not establish "actual malice" but must establish at least negligence. Moreover, presumed and punitive damages require the "actual malice" standard.⁶⁴

While commentators and courts pondered whether the protections extended to the press applied to all speech,⁶⁵ the Court in 1985 introduced further complications in *Dun & Bradstreet v. Greenmoss*.⁶⁶ That case concerned a private figure plaintiff who had been injured by a false report about his creditworthiness. A high school student, hired by the defendant credit reporting agency to monitor bankruptcy proceedings, negligently reported the plaintiff's financial condition. This information was disseminated to only a handful of the defendant's customers, but it resulted in financial injury to the plaintiff. The jury found common law malice and awarded punitive damages.

A plurality of the Court held that under these facts there was no constitutional issue. It was not necessary to establish *New York Times* "actual malice" for punitive damages: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"⁶⁷

Dun & Bradstreet reopened many questions that were thought answered, or nearly answered. It refocused attention on the competing interests in the protection of reputation and it added another layer to defamation analysis: Is the subject of the contro-

⁶⁰ 376 U.S. 254 (1964).

⁶¹ 418 U.S. 323 (1974).

⁶² For a provocative, entertaining, and insightful account of suits against the media, see Rodney A. Smolla, *Suing the Press* (1986).

⁶³ *Philadelphia Newspapers*, 475 U.S. at 773-76 (cited in note 48).

⁶⁴ 418 U.S. at 348-350 (cited in note 61).

⁶⁵ For an insightful discussion of these developments, see Paul LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests within the Current Constitutional Framework*, 66 Neb. L. Rev. 249 (1987).

⁶⁶ 472 U.S. 749 (1985).

⁶⁷ *Id.* at 761 (footnote omitted).

versy a matter of public interest?⁶⁸ The financial condition of the building contractor in *Dun & Bradstreet* was not a matter of public interest.⁶⁹ *Gertz* also concerned a private figure, an attorney, who had been involved in the case of a police officer who had shot an unarmed youth in Chicago; yet, under the nomenclature of the subsequent *Dun & Bradstreet* case, such a matter would be considered a "public" one.⁷⁰

Most recently the Supreme Court reaffirmed the *Greenmoss* test in *Philadelphia Newspapers, Inc. v. Hepps*.⁷¹ Without elaboration or clarification of the standard,⁷² a majority embraced the public matter-private matter distinction in a case involving a private figure but a matter of public concern. Lower court attempts to apply the standard have been equally limited and conclusory.⁷³

Is the honesty of an applicant on a form for a job a matter of public interest? Such a case seems to provide the closest parallel to the financial report in *Dun & Bradstreet*. Is it a public matter when an applicant tests positive for the use of illegal drugs? Or tests positive for the AIDS antibody? Perhaps some of the results on purity/taint tests could be considered public matters, although there is good argument that some or all such information falls in the private category.⁷⁴ Crimes are presumably public concerns, however, and drug tests search for traces of illegal substances. Similarly, polygraph tests often probe thefts. Are these criminal matters public even if investigated in a private setting?

⁶⁸ This dimension is "new" only in the sense that it had not been used for awhile. In 1971 the Court embraced a kindred concept of newsworthiness in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), but appeared to later abandon it in *Gertz*. The Court subsequently summarized its own opinions in the area in *Philadelphia Newspapers*, 475 U.S. 676. The Court there noted: "One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern." *Id.* at 775.

⁶⁹ *Dun & Bradstreet*, 472 U.S. at 762.

⁷⁰ The Court's subsequent opinion in *Philadelphia Newspapers*, 475 U.S. at 775 (cited in note 48), characterizes *Gertz* as a case in which "the speech is of public concern but the plaintiff is a private figure."

⁷¹ *Id.*

⁷² The Court summarized its previous holdings and concluded only: "When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.* at 775.

⁷³ See, for example, *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir. 1987); *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987).

⁷⁴ Attempts to assure the privacy of information, such as the result on AIDS tests, would be meaningless if the information is deemed a matter of legitimate public concern for the purposes of defamation law.

Once the information is categorized as a public or private matter, the inquiry does not end. *Dun & Bradstreet* did not clarify the legal consequences of that distinction except with respect to punitive damages.⁷⁵ It is unknown if states are free to impose traditional strict liability for the defamation of private figures on matters of private concern.⁷⁶ Nor is it clear in such cases whether the plaintiff must establish the falsity of the defamatory statement, as *Gertz* requires for cases concerning private figures concerning public matters. The common law tradition held truth to be a defense; the plaintiff needed only to plead publication of a defamatory communication concerning the plaintiff.⁷⁷ *Dun & Bradstreet* suggests that such common law traditions may not be offensive to the Constitution, but the Court left these matters for mysterious unveiling. Subsequently the Court held in *Philadelphia Newspapers* that the First Amendment requires public figure plaintiffs to prove falsity,⁷⁸ but the opinion did not clarify the standard for private figure plaintiffs. Several state courts have asserted considerable freedom from First Amendment constraints when cases concern private figures and private concerns,⁷⁹ but there has been limited opportunity to flex these new muscles in the actual cases.

B. Common Law Privileges

Although it is uncertain whether the constitutional guarantee of freedom of speech provides an umbrella for employers who report false positive results on purity/taint tests, common law privileges are extensive. Many old cases have involved employers who make defamatory statements concerning workers. Injurious statements are protected when they are made without a gratuitous purpose to harm, or when they are for the protection of the employer's interest or third party interest, and when they are made without excessive publication.⁸⁰ These privileges are all conditional ones, however, capable of being lost by abuse.⁸¹

⁷⁵ 472 U.S. at 761 (cited in note 66).

⁷⁶ See note 72.

⁷⁷ Restatement (Second) of Torts sec. 577 (1964).

⁷⁸ 475 U.S. at 776 (cited in note 48).

⁷⁹ See *Connolly v. Labowitz*, 519 A.2d 138 (Del. Super. Ct. 1986); *Brown v. K.N.D. Corp.*, 7 Conn. App. 418, 509 A.2d 533 (1986), rev'd on other grounds, 205 Conn. 8, 529 A.2d 1292 (1987). See also *Dexter's Hearthside Rest., Inc. v. Whitehall Co.*, 24 Mass. App. Ct. 217, 508 N.E.2d 113 (1987); *Dunlap v. Wayne*, 105 Wash.2d 529, 716 P.2d 842 (1986); *Geyer v. Steinbronn*, 351 Pa.Super. 536, 506 A.2d 901 (1986).

⁸⁰ See Eldridge, *The Law of Defamation* at 447-508 (cited in note 45).

⁸¹ See *id.* at 508-536.

A recent defamation case related to employment illustrates these principles. In *Garziano v. E.I. DuPont de Nemours & Co.*⁸² the plaintiff sued his former employer for defamation when the reasons for his discharge, allegations of sexual harassment by a former co-worker, were publicized within the company. Managerial employees, aware of the company's obligation to prevent sexual harassment and its potential liability under Title VII,⁸³ investigated the charges and discharged the plaintiff. They then sent other employees a memorandum explaining the discharge and the policy against sexual harassment. The Fifth Circuit opinion explained that in such situations the employer enjoys a qualified privilege; the limitation is that the employer may not abuse the occasion of the privilege. The presence of malice would abuse the occasion of the privilege, as would excessive publication. In *Garziano* there was insufficient evidence to rebut the presumption of good faith and to prove affirmatively the presence of malice; but the court remanded the case to receive evidence on excessive publication. Although supervisors properly communicated with their employees about the matter, excessive publication may have occurred when the employees of an independent contractor working side-by-side with the defendant's workers overheard a conversation regarding the discharge.⁸⁴

The concept of "abusing the occasion of the privilege" meaningfully adapts to the test defamation context when an employer passes along false data from a purity/taint test. The situations identified at common law as abuses of the occasion of the privilege involved defamers who, although they believed in the truth of their statements, manifested a disregard for the danger of injuring reputations if the statements were false.⁸⁵ This disregard with respect to reputational risk is distinguishable from a reckless disregard for the truth as understood in *New York Times v. Sullivan*. Whereas reckless disregard for the truth has been defined by the Supreme Court as a term of art that means a knowledge of falsity or a reckless disregard of truth or falsity,⁸⁶ recklessness as an abuse of privi-

⁸² 43 F.E.P. Cases 1790 (5th Cir. 1987).

⁸³ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁸⁴ 43 F.E.P. Cases at 1802-03 (cited in note 82).

⁸⁵ See, for example, *Pirre v. Printing Developments, Inc.*, 432 F. Supp. 840 (S.D.N.Y. 1977); *Levesque v. Kings County Lafayette Trust Company*, 293 F. Supp. 1010 (E.D.N.Y. 1968); *Burns v. Smith-Corona Marchant, Inc.*, 36 A.D.2d 400, 320 N.Y.S.2d 869 (1971).

⁸⁶ 376 U.S. 254, 279-80 (1964). The Court has further clarified the concept in *Herbert v. Lando*, 441 U.S. 153 (1979), and *St. Amant v. Thompson*, 390 U.S. 727 (1968). Most recently the Court reaffirmed the standard in a case where a public figure sued for the tort of

lege is measured according to a different standard.⁸⁷ Moreover, many older cases have found simple negligence sufficient to lose the qualified privilege,⁸⁸ although the Restatement rejects this position.⁸⁹

When an employer fails to take reasonable steps to avoid reputational injury from a purity/taint test, there is negligence. The measure of unreasonableness will be a matter to establish by expert testimony in specific cases, but one such example might be a failure to confirm a positive drug test result. Such negligence should be sufficient to lose the privilege of communicating information obtained through testing.

When an employer conducts purity/taint testing without any apparent regard for the risk of reputational injury, the behavior is reckless. The measure of recklessness also will be a matter to be established by expert testimony in specific cases, of course, but one example might be the use of an unqualified or inexperienced examiner on a polygraph test or an unreliable laboratory for a drug or AIDS test. Such reckless behavior should be sufficient to dissolve the privilege of communicating information thus obtained.

If the information obtained on a purity/taint test is indeed truthful, the reputational damage is warranted. There is no legal injury even if a high level of risk of such injury was taken. By analogy, the drunk driver who brakes in time to avoid hitting the pedestrian causes no legal injury despite the risk-taking. Although both the defamer and the drunk driver acted recklessly, there is no injury and thus no legal consequence.

The thesis of this section is that the common law privileges that continue to protect employers from liability for statements such as "Worker X was fired for stealing" should be equally, and sensibly, applied to reports on purity/taint test results. If Worker X is fired for failing a polygraph test concerning theft, the same privileges should attach for dissemination of that information to third parties. The adjustment to modern testing needs to be made only at the point in the analysis concerning loss of the privilege for abuse of the occasion. "Abuse" should be interpreted to mean not only excessive publication or intent to do harm, but also reckless-

intentional infliction of emotional distress rather than defamation. *Hustler Magazine v. Falwell*, 108 S.Ct. 876, 880-82 (1988).

⁸⁷ Compare the discussion of the tort standard of "recklessness" in the context of intentional infliction of emotional distress versus the *New York Times* standard in *Falwell*, 108 S.Ct. at 878-79.

⁸⁸ See Prosser and Keeton at 832-35 (cited in note 31).

⁸⁹ Restatement (Second) of Torts sec. 600 (1964).

ness or even negligence in conducting the purity/taint test. The privilege should be available only if reasonable care is taken to assure the accuracy of the result. Worker X should be retested, for example, by a second highly experienced examiner, and the examinee should have an opportunity to rebut conclusions drawn about the test result.⁹⁰ Even with safeguards intended to minimize the possibility of false positive results on purity/taint tests, some false taints nonetheless will occur. The thesis here is that employers should not be strictly liable for all such losses. The argument instead is that the privilege to communicate the test results should depend upon (1) the purpose of the communication, as with all the common law privileges, and (2) the presence of high care in the testing, applying liberally the common law concept of abuse of the privilege.

III. DEFAMATION OF WORKERS AT STAGES OF EMPLOYMENT

A. Hiring: The Sweep of the Broom

Use of the purity/taint tests poses a particular problem in the area of hiring. Employers with an excess of applicants for a job need to screen them. An economically rational employer chooses to screen applicants to find, at minimal cost, which individuals will be maximally efficient and minimally risky. Absent contrary incentives from the law or some other power group, employers lose nothing if such screening unfairly excludes some individuals who would be equally efficient to those chosen but who are incorrectly perceived as risky.⁹¹

Consider an employer who opens a new plant and hires 600 blue-collar workers. A pool of 1,000 applicants is first reduced with an education requirement and then screened with a battery of aptitude tests. Assume that the tests are not demonstrably related to job performance, but they are highly correlated with general intelligence. Next, the pool is further reduced with a purity/taint test, such as a drug test or polygraph examination for honesty on the

⁹⁰ Compare the Department of Transportation workers in the New York Times article in note 37. One of the two employees who failed the random drug test could have explained that he or she had been to the dentist earlier and had been given a codeine pain-killer.

⁹¹ The employer's use of purity/taint tests with high rates of inaccuracy also creates the risk of hiring individuals who falsely are reported as "pure" when in fact they are "tainted." However, the risk of injury to the employer's efficiency from such individuals is less than the risk of reputational injury from false positives that occur at the same rate, if the employer has additional requirements for employment. The additional screening devices will result in selection of only a few of the false negative individuals, whereas the exclusion of the false positives will be one hundred percent.

application form. The final reduction is made by interviews and subjective evaluation of each remaining applicant's personality and work history.

Assume for convenience that 100 applicants are eliminated at each of these four steps—education requirement, aptitude tests, purity/taint screen, and interview. In each group of 100 there will be exclusion of some presumably inefficient or risky applicants. Conducting an expensive study and design of the best predictors of performance and risk might result in a better choice, but it is a difficult business decision to guess whether that expense will result in a sufficiently superior selection process to justify the cost. The tried and apparently true selection devices of education, intelligence, and “hunch” generally suffice. Even if more expensive selection devices are acquired, they would not be able to guarantee perfect predictive power. All of hiring amounts to a “best guess” of which employees will be the most efficient and the least risky.

At each level of 100 eliminated applicants, there will also be a few unfairly excluded ones because of the inherent limitations of any selection device. The imperfect devices will incorrectly predict some of the time; some applicants will be incorrectly passed and some incorrectly failed. To the wrongly excluded individuals, the loss is one of life's tough breaks that must be endured in an imperfect world. The exception to this “tough break” rule, however, is when society has an interest in keeping the bad luck from falling into a pattern that is counterproductive for the overall good.⁹²

The Civil Rights Act of 1964⁹³ expresses the societal interest in preventing the “tough breaks” from falling unfairly on groups defined by race, sex, or ethnicity. The Title VII *disparate treatment* theory of discrimination focuses primarily on guaranteeing that otherwise qualified candidates are not excluded by intentional discrimination.⁹⁴

The Title VII *disparate impact* theory of discrimination focuses upon disproportionate exclusion by race, sex, or ethnicity. This theory derives from the landmark Supreme Court case of *Griggs v. Duke Power Co.*⁹⁵ If education requirements or the apti-

⁹² The societal interest in monitoring the effect of the “tough breaks” is expressed through law or group action such as union interference. The focus of this article is only on the implementation of societal interest through law.

⁹³ See note 3.

⁹⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁹⁵ 401 U.S. 424 (cited in note 1). Most recently the United States Supreme Court held that disparate impact analysis is also applicable to subjective procedures used in promotion. In a portion of the opinion endorsed by only four Justices there were dicta suggesting that

tude tests have a greater exclusionary effect on a group covered by the Act, then the defendant must establish that the devices are job-related. With regard to our hypothetical employer here, a showing of disparate impact requires the company to undertake the expense of finding and using efficient tests. The use of "best hunch" selection devices are unacceptable if those devices disproportionately exclude historically disadvantaged groups in our society, even if the tests are cost effective given the expense of test validation.

Griggs itself involved a high school diploma requirement and aptitude tests that had the effect of keeping blacks out of the most desirable jobs in the power company.⁹⁶ The *Griggs* disparate impact theory has also been applied by lower courts for hiring requirements such as a clean arrest record.⁹⁷ It would clearly be applicable to purity/taint tests such as the hypothesized drug tests and polygraph examinations for the new company in the example.⁹⁸ If there is proof that these requirements disproportionately exclude on the basis of race, sex, or ethnicity,⁹⁹ then the employer must establish their job-relatedness.¹⁰⁰ Are employees who pass these tests demonstrably more efficient than potential employees who fail them?¹⁰¹

employers may defend such claims under a more flexible standard of business necessity. *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988).

⁹⁶ *Id.* at 427.

⁹⁷ See, for example, *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972).

⁹⁸ In *New York City Transit Authority v. Beazer*, the Supreme Court noted that "statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities" may establish a prima facie violation under Title VII. 440 U.S. at 584 (cited in note 53). The plaintiffs in *Beazer* challenged the Authority's no-narcotics policy, claiming that the inclusion of methadone in the rule unfairly excluded on the basis of race and ethnicity. However, the Court found their statistical evidence of exclusion insufficient. *Id.* at 584-85.

⁹⁹ In *Drayton v. City of St. Petersburg*, minority plaintiffs challenged a rule requiring that firefighter applicants: (1) Certify abstention from marijuana use for a period of six months prior to application and (2) withstand a polygraph examination concerning the truthfulness of the abstention. The individual claims of discrimination failed, and the class claims failed to show a sufficient disparity between the composition of the relevant population and the composition of firefighters. 477 F. Supp. 846 (M.D. Fla. 1979). Apparently plaintiffs had no evidence on the effect of the particular requirements solely on race. The subsequent Supreme Court decision in *Connecticut v. Teal* would have permitted such evidence even with an acceptable "bottom line." 457 U.S. 440 (cited in note 1).

¹⁰⁰ *Griggs*, 401 U.S. at 432 (cited in note 1).

¹⁰¹ Discrimination against persons who show the presence of the AIDS antibody may be a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. sec. 794 (1982). One court has held that a teacher who tests positive for the AIDS antibody has a protected handicap under the Act. *Chalk v. United States District Court Central District of California*, 832 F.2d 1158 (9th Cir. 1987). The court found a high probability of success on the

In such litigation the question should properly be phrased in terms of who passes and who fails the purity/taint tests, because the tests are the issues—not drug use or dishonesty. An employer may be able to ask a court to take judicial notice that honesty is job-related. For some types of work judicial notice might even be taken that arriving at the job with drug traces in the body poses an unacceptable risk of possible impairment or inability to do the job properly. The issue is the tests, however, not the traits. One might have argued in *Griggs* that general knowledge, reliability, and aptitude are clearly job-related. The question there was not just the desirability of the traits, but whether the company could show that the education and testing requirements measured those traits.¹⁰²

The same inquiry is properly directed to the purity/taint tests. Even if one assumes that honesty and no drug use are valid job requirements, do the tests as administered measure those qualities? The answer may be yes; for most people the tests accurately measure honesty and drug use. For the predictable number of times that the test does not accurately reflect honesty or drug use, we say “tough break”¹⁰³ to those falsely reported tainted and “incredible luck” to those falsely reported pure. As long as there are only a couple of people excluded by the purity/taint tests, *societal* interests do not immediately appear to be greatly threatened. The losses are individual in character, like most individual tort cases.

If the pattern of falsely tainted individuals is greater than one or two out of 100, or if those falsely tainted are more likely to be an historically disadvantaged group defined by race, sex, or ethnicity, societal interest seems greater. Title VII would cover the second situation; other current or future statutory schemes could cover the first.¹⁰⁴

merits in this challenge to a reassignment of a teacher who was alleged to be otherwise qualified for the job. *Id.*

¹⁰² For methods of job validation, see Federal Guidelines on Employee Selection Procedures, 41 C.F.R. sec. 60 et seq. (1982).

¹⁰³ Compare the “tough break” notion with observation of the Seventh Circuit in a case where a black worker was unfairly fired for illness because his employer incorrectly believed that an absence for illness was phoney. There was no evidence that the company disciplined differentially by race, so the Title VII claim failed. The Seventh Circuit reversed the trial court’s finding that the lack of a good cause for firing violated the Act. “A reason honestly described but poorly founded is not a discrimination.” *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987), cert. denied, 108 S.Ct. 488 (1987). By analogy, an employer will not violate Title VII for firing workers by reasonably trusting false positive results on purity/taint tests as long as there is no disparate effect on the basis of race, sex, or ethnicity.

¹⁰⁴ See, for example, state and federal polygraph statutes at notes 15 and 39.

If societal interest at the group level is not great enough to justify interference by statute, is the individual interest of the one or two falsely tainted individuals sufficient to justify common law recovery in tort? Assuming there are no problems of victim identification,¹⁰⁶ is it appropriate for such wrongly tainted and excluded individuals to receive compensatory damages for loss of reputation and resulting losses in job opportunity?¹⁰⁶ Is "tough break" the appropriate response to someone wrongly tainted just as it is to someone whose performance is incorrectly underpredicted on an otherwise valid aptitude test?

Underprediction of performance on an aptitude test is not a statement of a defamatory fact in the traditional definition of the tort. A score of 75 percent on a bookkeeping ability test with an 80 percent cut-off score is frustrating and perhaps embarrassing, but there is no false fact conveyed. The failure is unlikely to cause others to shun, ridicule, or avoid the individual.¹⁰⁷ In contrast, failing a purity/taint test is defamatory in the traditional sense. When a polygraph test wrongfully detects "dishonesty," the report accuses the examinee of wrongdoing. When a drug test falsely detects illegal drug traces, the result implicates the worker. When an AIDS test incorrectly identifies the AIDS antibody, the patient is likely to be shunned or avoided, and the report may cause speculation about the patient's sexual habits or drug use. Should tort law treat an individual wrongfully accused by a purity/taint test like any other defamation victim? Retesting is unlikely to vindicate any of these victims.¹⁰⁸ The social policy that affords a defamation remedy to those injured in reputation by false statements applies with equal force to reputational injuries through false purity/taint test results. The remaining question, addressed in the next section, is when the defamation injury actually occurs. Defamation law con-

¹⁰⁶ See discussion of the problem of identification of victims and the problem of strike suits by nonvictims in text at notes 36-37.

¹⁰⁶ Humiliation and distress that flow from the loss of reputation (as opposed to hurt feelings) are also compensable. These elements constitute "actual damages" under the cases decided under the First Amendment. See *Gertz*, 418 U.S. 323 (cited in note 61).

¹⁰⁷ Restatement (Second) of Torts sec. 559 (1964).

¹⁰⁸ The problem remains that "where there is smoke there is fire." Even with respect to the test for the AIDS antibody, a negative retesting is likely to leave doubt, however unfairly. Would most people readily accept a blood transfusion from someone who had *ever* tested positive for the AIDS antibody, even if the result were disproved upon later testing? Positive results appear to be inherently more believable than negative ones, however unscientific that belief may be. Defamation law addresses injuries to reputation even if "right minded" people would not find a statement defamatory. *Grant v. Reader's Digest Ass'n, Inc.*, 151 F.2d 733 (2d Cir. 1945).

cerns only one's interest in reputation, not one's interest in getting a job.

B. Defamation of Applicants After Rejection

Consider a hypothetical applicant, Lee Apple. Apple applies for a job and is rejected because of a false-positive result indicating dishonesty on a polygraph test. The examiner says Apple did not fill out the application form truthfully, but in fact Lee was fully honest. Upon inquiry to the employer, Lee Apple learns about the test result and is outraged.

Lee Apple's anger is not compensable under any existing common law tort theory. There is no common law action for wrongful refusal to hire. A privacy theory may be possible, but may also be barred by consent.¹⁰⁹ These facts are unlikely to meet the typical standards for intentional or negligent infliction of emotional distress; hurt feelings are not otherwise compensable except as parasitic damages to another tort. Defamation law does not protect feelings, only reputation.¹¹⁰ When the employer communicated the test results to Lee Apple, there was no publication in the common law meaning of the term. The examiner communicated to someone in the personnel office, but that exchange is privileged if the person receiving the information is in a position where such knowledge is needed.¹¹¹

Injury to Lee Apple's reputation occurs only at the point when this false information is communicated without privilege to third parties.¹¹² If, for example, the employee enters a "dishonest" notation into a shared computerized network and it is read by other potential employers, Apple's reputation is adversely affected. Without potential tort liability for such entries, employers have little incentive to avoid sharing false information in this fashion.¹¹³

¹⁰⁹ See Westin, 1988 U. Chi. Legal F. at 102 (cited in note 5).

¹¹⁰ Compare with a case not involving reputation, *Bodewig v. K-Mart, Inc.*, 54 Or.App. 480, 635 P.2d 657 (1981) (finding invasion of privacy and emotional distress when employee underwent strip search upon accusation of theft).

¹¹¹ See *Caslin v. General Electric Co.*, 608 S.W.2d 69 (Ky. App. 1980) (with written evaluations, absent publication and respect of privilege, there is no defamation).

¹¹² See, for example, *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (football team physician knowingly conveyed false report to sports writer that player had the disease polycythemia vera).

¹¹³ Congress identified this evil in the context of credit reporting and restricted individual credit information that can be given to employers. Several states have similar statutes covering subjects ranging from arrest records to medical records. A helpful summary of these privacy acts is in Arthur P. Menard and Anne K. Morrill, *The Commoner and the Law of Privacy in the Workplace—The U.S. Model*, 9 N.C.J. Int'l L. & Com. Reg. 93 (1983).

The advent of computers and their enormous potential for individual injury creates a situation traditionally met by common law torts. Possible liability for disseminating false information, even innocently, deters employers from taking risks of injury to reputation.¹¹⁴

The deterrent effect also inhibits employers from transmitting true information as well as false information, because the false positives cannot be definitely identified. If economic interest in sharing true information is sufficiently great, then theoretically the risk will be taken and the cost of compensating the victims of false dissemination will be outweighed by the gain from the activity. Moreover, as argued previously,¹¹⁵ employers should be privileged to share false information if reasonable steps have been taken to minimize the occurrence of tainted reputations through false positive results.

C. Cleaning House: Testing Employees

When current employees are subjected to purity/taint tests, the reputational risks are even greater than those posed by testing applicants. If the results of an applicant's test are never disseminated, there is no injury to reputation. The rejected applicant suffers emotional harm and loss of job opportunity but not reputational harm; the failure to be hired is not necessarily defamatory. Unless the grounds for the failure to hire are disclosed, the applicant's reputation is intact. The applicant can seek another job. Even if there is another purity/taint test, the former false positive result is not relevant because it was never known. In contrast, when current employees are tested, a false taint is likely to be followed by a reputationally injurious act, such as discharge,¹¹⁶ disci-

¹¹⁴ Commercial databanks would also be deterred from dissemination of false data because their innocent attribution of the source of the information does not necessarily protect them under traditional tort law. See Eldridge, *The Law of Defamation* at 332 n. 47 (cited in note 45) ("tale bearers are as bad as tale makers"), citing *Nicholson v. Rust*, 52 S.W. 933, 934 (Ky. 1899).

¹¹⁵ See text at notes 51-55.

¹¹⁶ Common law claims of wrongful discharge are rapidly increasing and are likely to increasingly concern claims related to employer's uses of purity/taint tests. See, for example, *Perks v. Firestone Tire & Rubber, Co.*, 611 F.2d 1363 (cited in note 15) (wrongful discharge claim applying Pennsylvania law and interpreting state policy underlying anti-polygraph statute). But see *Santa Monica Hospital v. Superior Court*, 172 Cal. App. 3d 698, 218 Cal. Rptr. 543 (1985) (no wrongful discharge when hospital fired supervisor for alleged drug use and toleration of drug use by employees under her control).

pline, or changed conditions in employment such as the acceptance of counselling.¹¹⁷

Reconsider the two hypothetical employees who were tested for promotion. Worker One failed an aptitude test and Worker Two failed a polygraph test concerning company thefts. Worker One probably remained on the job. The company was likely to fire Worker Two, absent union protection. If the reason for the discharge is communicated to others, Worker Two suffers reputational injury. Such communication can occur through employer disclosure, or through self-publication by the worker when accounting for work history during subsequent job applications. Even without overt disclosure of the reason for discharge, the discharge itself often conveys the test result. If co-workers or others know that the employer ordered the polygraph test to investigate company theft, the discharge says the worker failed.¹¹⁸

1. *Employer Publication of Reason for Discharge.* Assume Worker Two is fired after failing polygraph test questions concerning company theft. As that worker applies for jobs with other companies, prospective employers contact the former employer for information about the work record. If the reason for discharge is disclosed,¹¹⁹ it should make no difference whether the employer states, "Worker Two failed to pass a polygraph exam concerning company theft," or "Worker Two stole from the company." Both statements convey the same defamatory meaning: Worker Two stole from the company. Consequently, the legal posture of the two situations should be identical. Worker Two can bring a defamation action for the second statement baldly asserting company theft. The defendant can then defend with proof of truth¹²⁰ or with privilege. Similarly, a cause of action for defamation should also lie regarding the first statement concerning the failure of the polygraph test. Here too truth or privilege should be defenses.¹²¹

¹¹⁷ Compare the Department of Transportation approach, discussed at note 37.

¹¹⁸ Compare *Jones v. J.C. Penney Co.*, 164 Ga. App. 432, 297 S.E.2d 339 (1982) (communication of reason for discharge to co-worker privileged), with *Sias v. General Motors Corporation*, 372 Mich. 542, 127 N.W.2d 357 (1964) (published communication of reason for discharge to other employees not privileged).

¹¹⁹ A refusal to disclose the reason for the discharge to anyone would be the "safest" course of action for former employers under current law in most states. The policy question then becomes whether society is better served by encouraging employers to be silent about personnel records that contain both true and false information, or whether the good done by the true information outweighs the injuries caused by the false. Some states have addressed that policy issue in part by enacting "service letter" laws requiring employers to state the specific reason for a worker's discharge. See, for example, Mo. Rev. Stat. sec. 290.140 (1988 Supp.); *Stark v. American Bakeries Co.*, 647 S.W.2d 119 (Mo. 1983).

¹²⁰ But see *Philadelphia Newspapers Inc. v. Hepps*, discussed in text at notes 71-78.

¹²¹ The truth defense should relate to the truth of the theft rather than the truth of the

The truth defense should relate to the truth of the theft rather than the truth of failing the polygraph test. The loss of privilege from abuse also should operate the same way in this context as for dissemination of applicants' test results. The privilege should be lost if the employer was negligent in the administration of the exam. Relevant evidence of such negligence would be, for example, the inexperience of the operator, or the lack of safeguards against misinterpretation of the results or of evidence corroborating theft. The trier of fact would be free to find privilege for statements made in good faith by employers who have used due care in conducting the test. This analysis can be used for any of the purity/taint tests. Negligence in the administration of drug or other medical tests, such as for the AIDS antibody, should cause loss of the privilege to communicate those test results.

2. *Publication by the Discharged Employee.* The falsely tainted employee, rather than the employer, may communicate the false test results. Applications for employment typically require the prospective employee to list prior work experiences and reasons for leaving previous jobs. Prior employers may not supply the information themselves if they fear law suits, but applicants must respond to such inquiries.

When a wrongfully tainted employee explains a prior termination, the honest response accounts for the reason (e.g., failed a drug test) and explains the falsity of the result. The dilemma is that such an honest answer is likely to cast a cloud on the application, and a dishonest answer is likely to have future repercussions.

A few cases have endorsed the concept of "self-publication" as sufficient to support a defamation claim in the employment context. Most notably, the Minnesota Supreme Court embraced this concept in a recent case.¹²² Employees who were terminated wrongfully for a false accusation of "gross insubordination" were obligated to explain the reason for their discharge on future applications. The Minnesota Supreme Court found a basis for defamation on these facts even though the defendant employer never communicated directly with any future employer. The necessity that the workers disclose the cause of discharge was sufficient. Moreover, the qualified privilege was lost for malice. The workers had insisted on reimbursement for legitimate travel expenses. The em-

failure of the polygraph exam. Most importantly, a qualified privilege should defeat liability unless the privilege has been lost from abuse.

¹²² *Lewis v. Equitable Life Assur. Soc.*, 389 N.W.2d 876 (Minn. 1986).

ployer harassed them about it, then fired them for insubordination.¹²³

The self-publication concept is a difficult one for defamation law generally,¹²⁴ but is well suited to the employment context. It is particularly appropriate for the purity/taint tests. A worker falsely accused will need to disclose that fact upon future application. If the previous employer used sloppy testing procedures, there is no meaningful way that the falsity of the result can be established without litigation concerning the quality of the testing procedures. The injury occurs upon the discharge, a statement in itself. The term self-publication is perhaps a misnomer in this context; a better term may be "discharge publication."

Another problem with the publication requirement in defamation is whether communication only among employees of the defendant employer suffices as publication to a "third party."¹²⁵ If the result of a positive drug test, for example, is removal from the job during counselling and then a return to employment, has there been defamation if the worker indeed was always "clean" and the test result false? Supervisors and co-workers will know of the positive test result, and presumably it will appear also on the permanent employment record. Although the fiction of corporate unity might defeat a claim of defamation on the grounds of no publication, this result is unjustified. Reputational injury among supervisors and co-workers is likely to be harmful. The individual may care more about that group than other members of the general community.¹²⁶ The workplace has become too significant a refer-

¹²³ Id. at 890.

¹²⁴ Other jurisdictions have embraced the self-publication concept. Intermediate appellate court cases in Texas and California, for example, have recognized self-publication. See *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980); *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980). Additional states embracing the concept include Massachusetts, Vermont, Michigan, Ohio, Georgia, Washington and North Carolina.

¹²⁵ A few cases have found communication within a corporate structure to be sufficient publication. See *Kelly v. General Telephone Co.*, 136 Cal. App. 3d 278, 186 Cal. Rptr. 184 (1982); *Kelly v. Loew's Inc.*, 76 F. Supp. 473 (D. Mass. 1948). See also *Agarwal v. Johnson*, 25 Cal.3d 932, 160 Cal. Rptr. 141, 603 P.2d 58 (1979) (dicta).

The current majority rule is that a communication among branches of a corporation does not constitute publication for defamation purposes, as long as the communication is in the course of corporate business. See *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982) (applying Wisconsin law), cert. denied 459 U.S. 1205 (1983); *Jones v. Golden Spike Corp.*, 97 Nev. 24, 623 P.2d 970 (1981); *United States Steel Corp. v. Darby*, 516 F.2d 961 (5th Cir. 1975) (applying Alabama law).

¹²⁶ Compare the case *Garziano v. E.I. duPont de Nemours & Co.*, discussed in text at notes 82-84. In that case the qualified privilege of the company prevented liability for communication to the plaintiff's coworkers, but the case was remanded for evidence on any communication to the employees of an independent contractor when they were working

ence point for the identity of the individual for courts to engage in the fiction that intracompany communication is not publication to a third party.¹²⁷ The claim should be defeated only if the defendant has used due care to minimize the chance of false positives—the standard for the qualified privilege.¹²⁸

IV. THE UNCOMPENSATED VICTIMS

If courts accept the application of the common law qualified privileges as argued here, there will be no liability for non-negligent testing as long as the publication of the results is not excessive.¹²⁹ This position means that a few defamed individuals will remain uncompensated. Even when due care is exercised, a small number of people will be falsely accused by the purity/taint tests.¹³⁰ The existence of this small number of uncompensated individuals defamed by carefully administered purity/taint tests is troubling. The injury to those reputations is as tangible as it is for the larger number of individuals tainted by negligently undertaken tests.

The alternative for these victims under tort law would be to eliminate the defense of privilege and keep only the defense of truth. By analogy to injury by disease from live vaccine immunizations,¹³¹ elimination of such privilege would amount to strict liability. The employer would be liable for the predictable number of false results regardless of the due care used to reduce the number of inevitable injuries.

It is urged here that elimination of the qualified privileges is unjustified for the purity/taint tests. Truth as a defense is too difficult a standard for most instances, and the effect of leaving defendants with only the truth defense is to impose liability too easily. Too often workers who were correctly accused by the purity/taint tests would prevail in defamation suits where truth could not

side-by-side with the defendant's employees.

¹²⁷ Compare the history of defamation in the ecclesiastical courts on the 13th Century to punish statements that endangered reputation among other church members by imputing sin. Cecil Herbert Stuart Fifoot, *History and Sources of the Common Law: Tort and Contract* 127 (1949).

¹²⁸ The negligence standard emerges either as the defendant's burden with proof of the qualified privilege, or as part of the plaintiff's prima facie case. See notes 75-89 and accompanying text.

¹²⁹ See text at notes 82-89.

¹³⁰ Even when the standard of forensic confirmation is used, some small number—0.01 percent—of false positives result. See Council Report at 3110-14 (cited in note 11).

¹³¹ See text at notes 25-30.

be proven. Discharged employees would be encouraged to file defamation claims as "strike suits" because of the relatively high probability of liability.

The analogy between victims of live vaccine immunizations and test defamation victims ends at the point of privilege because of the problem of proof of injury. The vaccine victim has a relatively easy causation case to prove; the disease for which the vaccine was received was unlikely to have been contracted in the absence of the vaccine.¹³² In the case of purity/taint tests in the workplace, however, the causation issue is far more difficult. The causation problem is related to the root problem of why positive results are so defamatory; it is difficult to establish that the positive result was false. A false result on a drug test may never be disproved. A false result on a polygraph test has some hope of disclosure. A false result on an AIDS test is most likely to be proven false, but a shadow of doubt is likely to linger for this relatively unknown disease. Nonetheless, the fact remains that the taint from the purity/taint tests may not be false, in which case injury to reputation is entirely justified.

V. CONCLUSION

Tests for the purity or taint of applicants or employees through drug testing, polygraph testing, or AIDS screening are fundamentally different in kind from aptitude or other kinds of scaled tests. The potential for reputational injury is far greater from the dichotomous purity/taint tests.

A statement that a worker has failed a drug test, polygraph test, or AIDS test is different in meaning from a failure to pass a cut-off on an aptitude test because the purity/taint test conveys greater truth value rather than a shaded judgment. Announcing a result of a purity/taint test is the equivalent to a statement that the examinee takes drugs, tells lies, or has the AIDS antibody. It is not just the announcement of a test result, such as: "Jim obtained an average score on his verbal aptitude test." The listener is free to draw conclusions as to the truth value of the aptitude test result. Whether one believes that Jim is verbal depends upon one's beliefs about the aptitude test and about Jim's abilities. Most people have some general experience with aptitude tests and know that they are scaled instruments.

¹³² But see *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (cited in note 25) (polio vaccine taken at time of a local epidemic).

In contrast, failure on a purity/taint test is the equivalent of an affirmative statement of guilt. Communication of false results should be treated like any defamatory statement. The known existence of false positives (false taints) on the purity/taint tests means that a certain number of individuals will be falsely tainted every year.

When employers communicate these false results, there should be liability in defamation unless privilege can be established. The qualified privilege should attach when the employer has taken reasonable precautions to avoid false positive results through care in the testing administration. Without the threat of such liability, employers do not have an incentive to avoid using cheap testing procedures that maximize the risk of reputational injury.

This position recognizes two competing interests: The employer's interest in legitimate uses of purity/taint tests, and the individual's interest in an accurate reputation. To allow the qualified privilege upon a showing of care to minimize false positives is to tolerate a certain number of false taints. Those injured individuals will be fewer in number after the employer has taken precautions to avoid reputational injury, but the few remaining unlucky victims are nonetheless injured. As with other areas of tort law, the inevitable losses that result even upon the exercise of care must rest with the victims.

The opportunity to apply common law defamation to these modern issues¹³³ is an affirmation of tort law as a useful tool to achieve compensation and deterrence in this context. The common law achieves a balance of the interests involved: Not all victims will be compensated, but employers will not be held to a standard of guaranteeing that there will be no reputational injuries when all due care is taken in testing.¹³⁴

Before legislatures undertake to alter the common law,¹³⁵ courts should be given a chance to make this modern application

¹³³ Harry Kalven, Jr., observed that "the greatest fascination of law study is to watch some great event from the real world intersect with existing legal doctrine." Harry Kalven, Jr., *The Reasonable Man and the First Amendment*, 1967 Sup. Ct. Rev. 267, 269, quoting Kalven, *The Negro and the First Amendment* (1965).

¹³⁴ The author hesitates to conclude with a reaffirmation of the common law only because of the danger that such a sensible conclusion will be unappreciated. See Daniel Farber, *The Case Against Brilliance*, 70 Minn. L. Rev. 917 (1986); Farber, *Brilliance Revisited*, 72 Minn. L. Rev. 367 (1987).

¹³⁵ The Utah legislature, for example, has enacted a statute regulating drug and alcohol testing of employees. Utah Code Ann. sec. 34-38-1 et seq. (1986). The statute apparently is an attempt to protect employees from sloppy testing procedures by virtually insulating employers from liability if they follow the statutory provisions for sample collection and testing. See Utah Code Ann. sec. 34-38-10 and 34-38-11. There is no provision for liability,

of the old concepts and social scientists should be given an opportunity to examine empirically the results. Legislators might well inquire about the reliability of specific purity/taint tests, such as polygraph tests,¹³⁶ and may choose to limit or prohibit their use. For reputable tests, however, the common law should be given a chance to function before legislatures enact statutes favoring one side of the competing interests.

however, when employers have not complied with the act. The legislative intent may have been to allow the common law to handle cases of injuries from non-compliance with the statute. Perhaps there is an implied invitation to the courts to curtail the common law protections of employers who cause losses from non-compliance with the statutory safeguards. Confusion is likely to result. This kind of statutory tinkering may retard the development of a coherent body of law on the subject.

¹³⁶ Some state legislatures have prohibited the use of polygraph tests in employment, whereas Congress and some other states have simply restricted their use. See notes 15 and 39.