

# STANDARDIZED TESTS, ERRONEOUS SCORES, AND TORT LIABILITY

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## I. When Scores are Wrong

### A. High Stakes

Hopes and dreams often hinge on the accuracy of standardized test scores. Results frequently determine, or greatly influence, whether a student progresses to the next grade level,<sup>1</sup> attains a diploma,<sup>2</sup> gains admission to a college or university,<sup>3</sup> or can practice a profession after graduation. Prudent expenditure of public and private resources also depends upon the accuracy of standardized test scores. Unless test results are correct, elementary and secondary schools may lose state or federal funding,<sup>4</sup> such as cash bonuses for superior performance,<sup>5</sup> or may incur added costs of providing required remedial programs.<sup>6</sup> If scores are understated, teachers may be

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<sup>1</sup> Perspective, *High Stakes*, ST. PETERSBURG TIMES, Apr. 2, 2006, at 2P, 2006 WLNR 5546251 (stating that wrong standardized scores in Florida can deny “third-grade students the right to advance to fourth grade”).

<sup>2</sup> See Blakely Latham Fernandez, Comment, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal for Redressing Problems with the Standardized Testing in Texas*, 33 ST. MARY’S L.J. 143, 198 (2002) (indicating that in Texas “over a hundred thousand students, primarily minorities, otherwise qualified to graduate have been denied diplomas and other opportunities for economic and social success because they failed to pass” a required standardized test).

<sup>3</sup> See, e.g., CAL. EDUC. CODE § 99150 *et seq.* (2006) (stating the legislature’s finding that “[s]tandardized tests are a major factor in the admission and placement of students in postsecondary education”).

<sup>4</sup> See Sam Dillon, *Most States Fail Demands in Education Law*, N.Y. TIMES, July 25, 2006 (discussing the potential loss of federal funds under a law which emphasizes performance measured by standardized testing).

<sup>5</sup> See Assoc. Press, *Additional Schools Identified as Possible Cheaters on TAKS*, SAN ANTONIO EXPRESS-NEWS, July 24, 2006, at 6B (discussing standardized tests in Texas).

<sup>6</sup> See Tiffany Lankes, *Once, Only Teachers Examined Student Test Results. Today, Everybody’s Watching*, SARASOTA HERALD-TRIB. (FL)., June 18, 2006, at A1, 2006 WLNR 10557105 (stating that under the federal No Child Left Behind law, which requires standardized testing in elementary and secondary education, “schools that receive federal funding because they have a high number of poor students have to pay for mandatory remedial programs if they don’t meet the goals”); Jenny La Coste-Caputo, *Feds See Things Looking Up at Schools in the S.A. Area*, SAN ANTONIO EXPRESS-NEWS, Aug. 18, 2006, at 1 (discussing how schools with bad standardized test results under the federal No Child Left Behind law can be obliged to pay for

paid less<sup>7</sup> or even lose their jobs.<sup>8</sup> Just as importantly, if test scores are inaccurate, scholarship dollars may be awarded to the “wrong” applicants, frustrating oft-painstaking efforts to allocate limited resources wisely and denying students opportunities they otherwise would merit. Because standardized tests are relied upon in professional credentialing, such as teaching certification<sup>9</sup> and admission to the bar,<sup>10</sup> erroneous scores pose a further risk that the public will not be protected from deficient practitioners and that qualified aspirants will be barred from their callings.

## B. Common Ground in Controversial Territory

There are endless disputes over the merits of standardized testing. Critics often argue that such evaluation instruments test the wrong skills or knowledge.<sup>11</sup> Civil rights advocates contend

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tutoring or transporting students to better-performing schools).

<sup>7</sup> Stuart Silverstein, *Standardized Tests Don't Always Make the Grade*, L.A. TIMES, Mar. 19, 2006, at 32, 2006 WLNR 6958920 (stating that in K-12 education, standardized tests “help make such determinations as school rankings, teacher licensing and pay”).

<sup>8</sup> See LaCoste-Caputo, *supra* note 6 (discussing “reconstitution” of a school with bad test result under a process where teachers are fired and forced to reapply for their jobs).

<sup>9</sup> Cf. Daniel Austin Ortiz, Comment, *Innocent Until Proven Guilty? Not If You're Teaching Me: A Texas Teacher's Right to Procedural Due Process*, 8 SCHOLAR 95, 104 (stating that, under an examination administered to current Texas educators, “teachers forfeit their certification if they fail to achieve a satisfactory score on the standardized test”).

<sup>10</sup> See note 36.

<sup>11</sup> See, e.g., Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 598 (2002) (stating that many standardized tests “do not test all relevant skills. The LSAT, for example, only requires verbal and reasoning fluency, not the ability to command probability, scientific reasoning, humanistic thought, historical thought, or knowledge of human motivation and psychology—all skills important for lawyers”); Leigh Jones, *Bar Examiners Craft Key to Lawyers' Fate*, NAT'L L.J., July 28, 2006, <http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1153991134010> (indicating that the Multistate Bar Exam has been criticized on the ground that it “bears little relationship to the practice of law”). See also Michael Winerip, *Standardized Tests Face a Crisis Over Standards*, N.Y. TIMES, Mar. 22, 2006 (discussing concerns over whether requirements under federal law “pressure . . . states to dumb down their tests”).

that standardized examinations are biased against minority test-takers<sup>12</sup> and members of other disadvantaged groups.<sup>13</sup> Critics also plausibly assert that the widespread availability of costly test preparation courses skews results in favor of those who can afford them and thereby undermines the value of standardized testing.<sup>14</sup>

Despite these concerns, everyone agrees that if standardized tests are given they should be scored consistently and accurately. If answer “C” is the “right” choice for a question, then “C” must be the right choice for every student who answers that question.<sup>15</sup> If a hundred students all

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<sup>12</sup> See, e.g., Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 56 (2002) (arguing that it is “clear that much of the divergence in the ‘qualifications’ of minority group members versus ‘Caucasians’ is directly attributable to standardized tests”); David J. Trevino, Comment, *The Currency of Reparations: Affirmative Action in College Admissions*, 4 SCHOLAR 439, 454 (2002) (asserting that “in general minorities do not perform as well as non-minorities on standardized exams” and, therefore, “one may argue that these scores serve as a proxy for race”); *Student Sues Over SAT Scoring Snafu*, 5/1/06 WOMEN HIGHER EDUC. 4, 2006 WLNR 8977903 (quoting a representative of FairTest, a nonprofit group that advocates de-emphasizing the importance of standardized tests, who claims that colleges that do not require the SAT “report getting more applicants and an increase in those from minority and low-income students, without a decrease in academic performance”). See also NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 155-657 (1999) (discussing the “Negro problem” in the development of the Scholastic Aptitude Test); Fernandez, *supra* note 2, at 150-67 (discussing equal protection, due process, and federal civil rights act challenges to “high-stakes testing”).

<sup>13</sup> Cf. Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 242-50 (2004) (discussing standardized testing of bar applicants with dyslexia and other disabilities). See also LEMANN, *supra* note 12, at 227 (stating that Allan Nairn’s 1980 report accused the Educational Testing Service of using standardized testing as “an official way for people with money to pass on their status to their children”); Karen Mellencamp Davis, Note, *Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse*, 69 IND. L.J. 1123, 1159-60 (1994) (asserting that most standardized tests are biased against females).

<sup>14</sup> See LEMANN, *supra* note 12, at 222 (discussing complaints about the Scholastic Aptitude Test in the 1970’s: “[k]ids with rich parents would take Stanley Kaplan’s course and their scores would go up”). See also *Association of Am. Med. Colleges v. Princeton Review, Inc.*, 332 F. Supp. 2d 11 (D. D.C. 2004) (reviewing claims by the provider of medical school aptitude test against a test preparation service).

<sup>15</sup> As the illustration suggests, this article is mainly concerned with the mis-scoring of objective-style standardized questions, which offer alternative answers to a question. However, some standardized tests include an essay component, and, in some instances, mis-scoring

select identical answers on the same standardized test, they should all receive the same scores. Anything else would violate deeply held American ideals of equal treatment,<sup>16</sup> consumer protection,<sup>17</sup> and fair opportunity<sup>18</sup>—not to mention intellectual honesty.

### C. Vast Expansion of Standardized Testing

Standardized testing is today widely employed in the United States<sup>19</sup> and abroad.<sup>20</sup>

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complaints relate to that section of the test. *See, e.g.*, note 74 and accompanying text.

<sup>16</sup> “The search for social equality . . . [was] a dominant theme in twentieth century America.” Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 745 (1999) (hereinafter “*America’s Preoccupation*”). *See generally* Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL’Y 25, 32 & n.33 (2000) (asserting that “[i]n contemporary America, equal treatment is highly prized, as is reflected by the ubiquitous invocations of ‘equal protection,’ ‘equal justice under law’ and ‘equal opportunity’” and citing case law statistics). Today, “in the public sector, anything which gives one person a competitive advantage over another in pursuing the benefits and resources that government can provide is ethically suspect.” *Id.* at 32. “[T]he essence of American greatness was a quality that Alexis de Tocqueville had remarked upon early in the nineteenth century: social equality, of a kind that would be unthinkable in any other country.” LEMANN, *supra* note 12, at 7.

<sup>17</sup> *See America’s Preoccupation, supra* note 16, at 749-50 (1999) (discussing the rise of consumer protection in America during the twentieth century).

<sup>18</sup> “Opportunity is the great onrushing force in American society, the thing that every single person is supposed to have as a fundamental right and whose denial is morally unacceptable.” LEMANN, *supra* note 12, at 155.

<sup>19</sup> *See, e.g.*, Mark Johnson, *N.Y. Senator Subpoenas Execs Over SATs*, AUSTIN AMERICAN-STATESMAN, July 11, 2006, available at [http://www.statesman.com/news/content/shared-gen/ap/National/SAT\\_Scoring\\_Error.html](http://www.statesman.com/news/content/shared-gen/ap/National/SAT_Scoring_Error.html) (last visited July 12, 2006) (stating that the “College Board administered 9 million college entrance exams last year, collecting \$500 million in revenue”). *Cf.* Editorial, *The School Testing Dodge*, N.Y. TIMES, July 2, 2006 (discussing how state and federal standardized tests are used to measure achievement in math and science).

<sup>20</sup> *See* Joseph L. Pratt, *The Two Gates of National Taiwan University School of Law*, 19 UCLA PAC. BASIN L.J. 131, 150-158 (2001) (discussing the series of exams that students take from middle school on to determine what field of study they will pursue); Sang-Hyun Song, *Legal Education in Korea and the Asian Region*, 51 J. LEGAL ED. 398 (2001) (referring to a qualifying exam administered by the Korean national government which is roughly comparable

Although standardized tests have been used in America since at least the 1920s,<sup>21</sup> the field of standardized test preparation, administration, and scoring grew “enormously”<sup>22</sup> after President George W. Bush signed the No Child Left Behind Act<sup>23</sup> in 2002, catalyzing the demand for such evaluative instruments at the state level. This federal law requires that a very wide range of public school students “be annually tested in math and reading.”<sup>24</sup> Forty-five million such tests will be given this year alone.<sup>25</sup> According to some sources, standardized testing is today a “\$2 billion industry,”<sup>26</sup> and “[n]ever has the nation’s education system been so reliant on standardized tests and the companies that make them.”<sup>27</sup> Students and educators focused on access to or performance in higher education are well acquainted with the acronyms which denote a barrage

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to the SAT in the United States); Barry Sautman, *Affirmative Action, Ethnic Minorities and China’s Universities*, 7 PAC. RIM L. & POL’Y J. 77, 86 (1998) (“stating that “[i]n 1996, the national entrance examination had a total of 750 points, but because competition for university places in China is fierce, a single point can make a difference in seeking admission to higher education in general or to a student’s university of choice”); Jin-Ah Yoo, *A Race to Educate Earning Mixed Grades: S. Korean Moms’ Aggressiveness Doesn’t Score High With Critics*, STAR-LEDGER (Newark, N.J.), Nov. 25, 2005, at 59, available at 2005 WLNR 19039743 (referring to the Korean college entrance examination’s ramifications on social status and marital and job prospects).

<sup>21</sup> The SAT was introduced into American life on June 23, 1926. See LEMANN, *supra* note 12, at 32. “The Law School Aptitude Test was first offered in February 1948, two months into the . . . [Educational Testing Service’s] existence, and a few months later ETS was given a contract to develop the Medical Aptitude Test.” *Id.* at 70. “[T]he University of California began requiring all applicants to take the SAT” in 1967. *Id.* at 171.

<sup>22</sup> Karen W. Arenson & Diana B. Henriques, *Company’s Errors on SAT Scores Raise New Qualms About Testing*, N.Y. TIMES, Mar. 10, 2006, 2006 WLNR 4023422.

<sup>23</sup> 20 U.S.C.S. § 6301 (2004).

<sup>24</sup> *CBS Evening News*, Apr. 3, 2006, 2006 WLNR 5683651.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Winerip, *supra* note 11.

of standardized tests, including the SAT,<sup>28</sup> PSAT/NMSQT,<sup>29</sup> ACT,<sup>30</sup> GRE,<sup>31</sup> GMAT,<sup>32</sup> MCAT,<sup>33</sup>

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<sup>28</sup> Scholastic Aptitude Test. *See*

<http://www.collegeboard.com/student/testing/sat/about.html> (last visited July 19, 2006) (stating that “more than two million students take the SAT every year”).

<sup>29</sup> Preliminary Scholastic Aptitude Test/National Merit Scholarship Qualifying Test. *See*

<http://www.collegeboard.com/student/testing/psat/about.html> (last visited July 19, 2006).

<sup>30</sup> *See* <http://www.act.org/aap/> (last visited July 19, 2006) (claiming that “[t]he ACT is

America’s most widely accepted college entrance exam”).

<sup>31</sup> Graduate Record Examinations. *See*

<http://www.ets.org/portal/site/ets/menuitem.fab2360b1645a1de9b3a0779f1751509/?vgnnextoid=b195e3b5f64f4010VgnVCM10000022f95190RCRD> (last visited July 19, 2006).

<sup>32</sup> Graduate Management Admission Test. *See*

<http://www.mba.com/mba/TaketheGMAT> (last visited July 19, 2006) (noting that “[p]eople from all over the world and from all different backgrounds have taken the test”).

<sup>33</sup> Medical College Admission Test. *See* <http://www.aamc.org/students/mcat/> (last

visited July 19, 2006) (indicating that “[a]lmost all U.S. medical schools require applicants to submit MCAT scores”).

DATP,<sup>34</sup> LSAT,<sup>35</sup> MPRE,<sup>36</sup> and MBE.<sup>37</sup> “Nearly two million students now take ACT’s 8th- and 10th-grade assessment tests, and a growing number of states are giving the ACT test to all 11th graders.”<sup>38</sup>

The Educational Testing Service annually administers more than 12 million tests worldwide.<sup>39</sup> But there are other major players. Pearson Educational Management, “a subsidiary of . . . [a] giant publishing company . . . scored more than 300 million pages of answers last year and about 40 million individual tests.”<sup>40</sup>

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<sup>34</sup> Dental Admission Testing Program. *See* <http://www.ada.org/prof/ed/testing/dat/index.asp#overview> (last visited July 19, 2006) (noting that “[t]he Dental Admission Test is administered on computer on almost any day of the year”).

<sup>35</sup> Law School Admission Test. *See* <http://www.lsac.org/LSAC.asp?url=lsac/about-the-lsat.asp> (last visited July 19, 2006) (stating that the LSAT “is a half-day standardized test required for admission to all ABA-approved law schools, most Canadian law schools, and many non-ABA-approved law schools”).

<sup>36</sup> Multistate Professional Responsibility Examination. *See* <http://www.ncbex.org/mpre.htm> (last visited July 19, 2006) (indicating that the vast majority of American jurisdictions require applicants for admission to the bar to pass the MPRE). *See generally* Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 56-58 (discussing the history of the MPRE and opining that “[n]othing was more natural than that calls for increased attention to ethics education in law schools, such as Justice Clark’s, would be followed by a plan to test whether the changes in legal education were producing measurable results”).

<sup>37</sup> Multistate Bar Examination. *See* <http://www.ncbex.org/multistate-tests/mbe/mbe-faqs/jurs/> (last visited Sept. 5, 2006) (indicating that all American states, except Louisiana and Washington, require new lawyers to pass the MBE).

<sup>38</sup> Karen W. Arenson, *For SAT Maker, A Broader Push for the Classroom*, N.Y. TIMES, Aug. 17, 2006.

<sup>39</sup> In re: Educational Testing Service Praxis Principles of Learning and Teaching Grades 7-12 Litigation, MDL-01643, (E.D. La. April 4, 2005), First Amended Class Action Complaint for Damages, 2005 WL 3729540 (alleging that “ETS is the world’s largest private educational testing organization) (hereinafter “Praxis Complaint”).

<sup>40</sup> Arenson & Henriques, *supra* note 22.

### D. Spectacular Mis-scoring

Given the volume of standardized testing, it is not surprising that errors occur, either in scoring tests or reporting results (collectively referred to hereinafter as “scoring errors” or “mis-scoring”). Yet, when those failings are publicized by the media, they are not dismissed as inevitable glitches in an otherwise sound system. Rather, because the magnitude of the interests at stake, news of scoring errors evokes loud and frequent protests, and calls the very enterprise of standardized testing into question.<sup>41</sup> Sometimes the revelation of mis-scoring precipitates law suits, such as recent cases arising from mis-scoring of the SAT<sup>42</sup> and the teacher test PRAXIS.<sup>43</sup> Occasionally, there are even legislative investigations.<sup>44</sup>

Regardless of the original purposes of standardized testing,<sup>45</sup> America has in fact built a society which allocates certain valuable goods (e.g., diplomas, degrees, scholarships, educational funding, and professional opportunities) based to a large extent on standardized test scores. Such examinations act as a sorting mechanism that provides information for determining how those goods should be distributed. Because the stakes are so high, the test scores simply *must* be accurate.

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<sup>41</sup> See, e.g., Editorial, *SAT Credibility: Scoring Errors on the College Entrance Exam Should Result in Better Safeguards and Notification*, GRAND RAPIDS PRESS, Apr. 27, 2006, at A10, 2006 WLNR 7172757 (asserting that mis-scoring affected thousands of students, “as well as the credibility of the entire SAT program”).

<sup>42</sup> See Karen W. Arenson, *Class-Action Lawsuit to be Filed Over SAT Scoring Errors*, N.Y. Times, Apr. 9, 2006 (discussing a class action against the College Board and one of its contractors, quoting a source as remarking that “half a dozen law firms were working on similar suits,” and noting that an earlier case about the mis-scoring of a state test, which kept some students from graduating, was settled for \$12 million in 2002).

<sup>43</sup> *In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation*, 429 F. Supp. 2d 752 (E.D. La. 2005) (discussing monopolization claims brought against a testing services provider in the wake of widespread scoring errors). See also Karen W. Arenson, *Case Involving Teacher Test is Settled*, N.Y. TIMES, Mar. 15, 2006, at A20, 2006 WLNR 4293736 (describing an \$11.1 million class-action settlement).

<sup>44</sup> See Johnson, *supra* note 19 (indicating that a “New York state senator has subpoenaed executives of the College Board over their refusal to release a report on scoring errors in the SAT college entrance exam”).

<sup>45</sup> See LEMANN, *supra* note 12, at 50 (observing that today the SAT is “almost universally taken to be . . . a means of deciding who would reap America’s rich material rewards,” although it was originally intended to be a meritocratic device for selecting a “new elite . . . governing class”).

Yet in recent years, there have been spectacular instances of standardized test scoring errors. One recent failure involved the National Conference of Bar Examiners' (NCBE) distribution of results from the Multistate Bar Examination (MBE). The scoring error involved only one of 200 questions on the exam, but affected the scores of "nearly 7,700 of 20,000 law school graduates who took the bar exam nationwide."<sup>46</sup> "No credit was given for a correct answer on one multiple-choice question because of . . . a 'keying error' during the scoring process."<sup>47</sup> Based on the scores initially reported, some applicants for admission to the practice of law were told they had passed the bar examination and others were told they had failed—although in some states applicants had not yet been notified when the error became known.<sup>48</sup> After some successful test-takers had already been sworn in as new lawyers, the NCBE acknowledged that some of the test scores were wrong. For days, the magnitude of the problem was unclear, and the consequences for the bar applicants was uncertain.<sup>49</sup> For example, in Illinois, "[f]or three weeks, a statement on . . . [a] Web site notified applicants of the error and said scores were being recalculated but provided no further information."<sup>50</sup> Test-takers, who had been told that they had passed, worried that they might have failed.<sup>51</sup> Others, who had been told they had failed, hoped they had passed. Friends and families worried about the consequences for loved ones.<sup>52</sup> In the end, the magnitude of the bar passage problem was relatively small.<sup>53</sup> "For

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<sup>46</sup> Michael Higgins, *Mistake Gives 19 Break on Bar Exam: Passing Score is Lowered by 1*, CHICAGO TRIB., May 30, 2003, at 1, 2003 WLNR 15330655.

<sup>47</sup> Alan Fisk, *Error Discovered in February Bar Exam Scoring*, MIAMI DAILY BUS. REV., May 15, 2006, at 9; Jones, *supra* note 11 (stating that a "question that should have accepted answers 'A' and 'C' was keyed to accept answers 'A' and 'D'").

<sup>48</sup> See Higgins, *supra* note 46 (discussing California and New York).

<sup>49</sup> See Regional Headlines, *Error May Change Bar Results*, DAYTON DAILY NEWS, May 17, 2003, at B2, 2003 WLNR 2156359 (reporting that although bar passage results had been released, a recalculation was underway that "could change whether a small percentage of applicants—5 percent or fewer than 30 people—passed or failed").

<sup>50</sup> See Higgins, *supra* note 46.

<sup>51</sup> See T.C. Brown, *Newest Attorneys Already Put to Test Bar Exam Mistake Kept Many in Limbo*, PLAIN DEALER (Cleve.), May 9, 2003, at B1, 2003 WLNR 457608 (quoting a law graduate as bemoaning that "[t]he last 48 hours have been the most miserable of my life"); Kellie A. Wagner, *Law Students May Not Be Lawyers after All: Clerical Error Forces Re-Grading of All Multistate Tests*, CONN. L. TRIB., May 19, 2003, at 6 (discussing the uncertain fate of the test-takers); Jones, *supra* note 11 (quoting one graduate as recounting that she remembered where she was when the error was publicized: "It was like the day Kennedy was shot").

<sup>52</sup> See Fisk, *supra* note 47 (quoting an associate dean at Ohio State University as saying that "[s]tudents are scared about taking the bar exam anyway, so it's terrible to be thrown into

the vast majority of test-takers, the error made no difference.”<sup>54</sup> However, at least one state “uncertified” a new lawyer that it had already sworn in.<sup>55</sup> It reasoned that regardless of what applicants for admission to the bar had been told, if they had not really passed the bar examination, they were not qualified to practice law. Other states took an opposite course and allowed applicants who had erroneously been told that they had passed to keep their licenses.<sup>56</sup> In Illinois that meant that, because persons with the same score were treated similarly, nineteen additional law school graduates, who were originally told they had failed the exam, were also allowed to be licensed.<sup>57</sup>

More recently, the College Board<sup>58</sup> mis-scored “more than 5,000”<sup>59</sup> of the 495,000 exams<sup>60</sup> from the October 2005 Scholastic Aptitude Test (SAT). “The erroneous scoring was uncovered when two alert Minnesota students protested their scores and asked that they be

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doubt”).

<sup>53</sup> See, e.g., *Region in Brief; Error Won’t Affect Bar Exam Passes*, BOSTON HERALD, May 17, 2003, at 14, 2003 WLNR 646292 (stating that “400 would-be lawyers from Massachusetts who were told that their passing grade on the state bar exam was in question because of a scoring error were told yesterday that their passing grades stand”); *Bar Exam Results Unchanged*, COM. APPEAL (Mem. TN), May 10, 2003, at 10, 2003 WLNR 8891213 (discussing Mississippi).

<sup>54</sup> See Higgins, *supra* note 46.

<sup>55</sup> See *id.* (indicating that “the Ohio Supreme Court decided to rescind . . . [one] person’s passing score”).

<sup>56</sup> See *id.* (discussing three test-takers).

<sup>57</sup> See *id.* (discussing actions by the state Supreme Court).

<sup>58</sup> “The College Board is the nonprofit association of colleges and high schools that oversees and administers the exam [Scholastic Aptitude Test] that is a key factor in the consideration of college admissions officers in determining those who will be admitted to their institutions.” Murray Light, *Viewpoints, SAT Errors Should Not be Tolerated*, BUFF. NEWS, Mar. 26, 2006, at H3, 2006 WLNR 5152369.

<sup>59</sup> See Karen W. Arenson, *SAT Group Can Do Better, Says Report It Commissioned*, N.Y. TIMES, July 21, 2006.

<sup>60</sup> See Press Release, *College Board Announces Changes to a Fraction of October SAT Test Scores*, Mar. 8, 2006 (updated Mar. 14, 2006) at <http://www.collegeboard.com/press/releases/50519.html> (last visited July 19, 2006) (proffering number).

recalculated by hand.”<sup>61</sup> “The score difference for the vast majority of students was less than 100 points across all three sections of the test,”<sup>62</sup> but some students received scores that were “too low . . . by as much as 450 points of a maximum possible 2,400 points.”<sup>63</sup> In addition, about 600 of the students received scores “too high, by as much as 50 points.”<sup>64</sup> The problem with the test results was discovered by the College Board in January 2005<sup>65</sup> after the College Board asked the Pearson Measurement Company, which originally scored the examinations, “to hand-score some tests”<sup>66</sup> from the October administration. However, the error was not made public until March 2006.<sup>67</sup> Ultimately, the College Board decided that it would report to colleges and universities higher scores for students whose exams had been scored too low, but that it would not lower the scores of students whose tests had been scored too high.<sup>68</sup> This solution did not please everyone. Students whose initial scores were erroneously low feared that during the interim they had been denied admissions opportunities and scholarships to which they were rightfully entitled. Students whose exams had been scored accurately worried that they had been disadvantaged by being forced to compete with some applicants whose scores were erroneously too high and never corrected.<sup>69</sup> Colleges and universities were forced to address a myriad of inquiries and, in many

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<sup>61</sup> Light, *supra* note 58.

<sup>62</sup> Press Release, *supra* note 60.

<sup>63</sup> Arenson, *supra* note 42.

<sup>64</sup> *Id.*

<sup>65</sup> *Additional Detail about October 2005 SAT Scores*, at [http://www.collegeboard.com/student/testing/sat/scores/oct\\_sat\\_scores.html](http://www.collegeboard.com/student/testing/sat/scores/oct_sat_scores.html) (last visited Aug. 29, 2006) (acknowledging that “hand score requests were received from students in December” which took three to five weeks to complete).

<sup>66</sup> *Minnesota Roundup*, GRAND FORKS HERALD (N.D.), Apr. 9, 2006, 2006 WLNR 5964533.

<sup>67</sup> See Karen W. Arenson, *Technical Problems Cause Errors in SAT Test Scores*, N.Y. TIMES, Mar. 8, 2006 (providing chronology).

<sup>68</sup> Arenson, *supra* note 42.

<sup>69</sup> See Karen W. Arenson, *Class-Action Forms Over SAT Blunder*, HOUS. CHRON., Apr. 9, 2006, at A6, 2006 WLNR 5989629 (hereinafter *SAT Blunder*) (quoting a lawyer with a firm that filed a class action as stating, “[i]t is unfair that regular students have to compete against those students with inflated scores for admission, scholarships and financial aid”).

instances, review applicant files yet another time<sup>70</sup> as the truth played out in the critical winter-spring time period of the admission season.<sup>71</sup> Because many offers of admission or scholarship assistance had been made and accepted between December and March,<sup>72</sup> it is likely that the erroneous information had an impact on some of those decisions. A class action arising from the errors in scoring the SAT is now pending.<sup>73</sup>

In yet another recent case, the Educational Testing Service acknowledged that it had graded some essay answers on PRAXIS, a teacher test, “too stringently.”<sup>74</sup> “About 27,000 people who took the exam received lower scores than they should have, and 4,100 of them were wrongly told they had failed.”<sup>75</sup> The resulting class action was eventually settled by creation of an \$11.1 million fund to provide cash payments to plaintiffs for “lost wages, decreased earning capacity, and other damages.”<sup>76</sup>

There are other reports of standardized test scoring errors. Such problems have occurred

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<sup>70</sup> See Karen W. Arenson, *Officials Say Scoring Errors For SAT Were Understated*, N.Y. TIMES, Mar. 9, 2006, 2006 WLNR 3936243 (quoting the dean of admissions at the University of Pennsylvania as lamenting, when the SAT scoring errors were disclosed, “[w]e’ve been through half the admitted class already, and now we have to stop everything and review those students who were affected”).

<sup>71</sup> See Johnson, *supra* note 19 (reporting that “[t]he scoring problem forced many colleges to reopen admissions files just as they were trying to make final decisions”); Arenson, *supra* note 67 (stating that college admissions officials said that errors in scoring the SAT “would force them to review the admissions and financial aid decisions for all of the affected students”).

<sup>72</sup> See Arenson, *supra* note 67 (asserting that “[t]he disclosure came at the height of the college admissions season, at a time when many colleges have already made many of their decisions about which students to accept, reject or defer”).

<sup>73</sup> See *Russo v. NCS Pearson, Inc.*, No. 0:06-CV-1481 (D. Minn. Apr. 21, 2006), 2006 WL 1829534.

<sup>74</sup> See Arenson, *supra* note 43.

<sup>75</sup> See *id.* But see *In re Educational Testing Service PRAXIS Principles of Learning and Teaching: Grades 7-12 Litigation*, 429 F. Supp. 2d 752, 754 (E.D. La. 2005) (disclosing that test scores were “too low for about 40,000 test takers”).

<sup>76</sup> See Arenson, *supra* note 43.

in “state after state,”<sup>77</sup> including mis-scoring in California, Minnesota, New Jersey, New York, Virginia, and Washington,<sup>78</sup> as well as lost answer sheets in Florida.<sup>79</sup> The Minnesota problems resulted in the settlement of “a multimillion-dollar lawsuit regarding scoring errors . . . that affected more than 8,000 students.”<sup>80</sup>

A CBS report suggested that the mis-scoring of the October 2005 SAT was part of “a much bigger problem . . . with scoring accuracy [that goes] right down to the grade school level.”<sup>81</sup> The report quoted the “principal author for more than two decades of the highly regarded Iowa basic skills test” as describing the state of standardized testing in this country as “overburdened.”<sup>82</sup> According to one count, there were at least “137 publicly disclosed cases of large-scale testing errors by educational testing companies from 1976 through early 2004, with most of them occurring since 1997.”<sup>83</sup>

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<sup>77</sup> *CBS Evening News*, *supra* note 26 (claiming that “in the years since No Child Left Behind took effect, scoring blunders have been discovered in state after state”).

<sup>78</sup> *See* Arenson & Henriques, *supra* note 22 (discussing the Minnesota litigation and referring to “substantial” scoring errors in Virginia and Washington); Silverstein, *supra* note 7 (indicating that in California, a company now known as Harcourt Assessment Inc. miscalculated the results of 19,000 students and 22 schools on a Stanford 9 achievement test” in 2000); Jerry Gray, *13 Told They Didn’t Pass Bar Exam After All*, N.Y. TIMES, May 19, 1999, at B5, 1999 WLNR 3022406 (describing a “mix-up [that] occurred when the scores from essay questions on property law in the national section of the examination were mistakenly applied to questions on New Jersey’s property law when the results were being typed into a computer”); Press Release, <http://www.nybarexam.org/jul2001.htm> (announcing that on the July 2001 New York bar examination, “due to a computer program error, the results of the two readings of the written portion of the examinations of applicants who fell within the reread range . . . were not averaged” and therefore the Board, “for this examination only, . . . will pass all applicants who achieved a passing score on either the initial grading or the regrading, thus demonstrating minimum competence on one reading of the examination”).

<sup>79</sup> *High Stakes*, *supra* note 1 (discussing Florida, Minnesota, Virginia, and Washington).

<sup>80</sup> Editorial, *supra* note 41.

<sup>81</sup> *CBS Evening News*, *supra* note 26.

<sup>82</sup> *Id.*

<sup>83</sup> Silverstein, *supra* note 7. *See also* James P. Durling, *Testing the Tests: The Due Process Implications of Minimum Competency Testing*, 59 N.Y.U. L. REV. 577, 616 (1984) (indicating that “a high school administering a minimum competency test in Tattall County, Georgia, reported scoring errors on over half of the examinations”).

### E. Litigation Follows Innovation

It is not surprising, or necessarily undesirable, that erroneous standardized test scores are beginning to generate tort litigation. This is the natural course of development in America. Innovation is frequently followed by litigation because new or expanded practices often cause harm. When losses occur as a result of such developments, lawsuits offer a public mechanism for compensating injured persons,<sup>84</sup> forcing innovators to internalize the costs of their endeavors,<sup>85</sup> and creating incentives for measures that minimize future harm by reducing activity levels<sup>86</sup> or increasing precautions.<sup>87</sup> Within proper limits, litigation can, and frequently does, provide a healthy check on market excesses by forcing persons who benefit from selling goods or services to bear the burden of incidental losses<sup>88</sup> or at least spread those losses broadly among

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<sup>84</sup> Cf. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 9 (3d ed. 2005) (noting that it frequently has been argued that “[t]here is a strong public interest in insuring that accident victims obtain the financial resources needed to overcome the injuries they have sustained”).

<sup>85</sup> See Vincent R. Johnson, *Economic Analysis of Injury to Persons, Property, and Relations*, in *ENCYCLOPEDIA OF LAW AND SOCIETY* (David S. Clark ed.) (2006) (stating that “[t]ort rules may be used to . . . create a legal incentive for the actor to determine whether the activity is worthwhile—whether the costs outweigh the benefits. . . . Forcing actors to internalize the costs of their endeavors helps to promote responsible decision making about what types of activities and safety precautions should be undertaken”).

<sup>86</sup> See *Turner v. New Orleans Public Service Inc.*, 476 So.2d 800, 807 (La. 1985) (Dennis, J., assigning additional reasons) (citing G. CALABRESI, *THE COSTS OF ACCIDENTS*, pp. 24-33 (Yale University (1979)) (asserting that “[a]ccident law generally should pursue four primary goals: (1) reduction of the total cost of accidents by deterrence of activity causing accidents; (2) reduction of societal cost of accidents by spreading the loss among large numbers; (3) reducing the cost of administering the accident system; and (4) doing all of these by methods consistent with our sense of justice”). Johnson, *supra* note 85, at \_\_\_ (opining that if it is “costly for a person to engage in an activity because liability will be assessed for resulting losses . . . some persons who might otherwise participate in the activity may elect not to do so”).

<sup>87</sup> See JOHNSON & GUNN, *supra* note 84, at 7 (stating that the “[d]eterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage”).

<sup>88</sup> See *id.*, at 8 (arguing that American tort law has been shaped in part by the idea that those who enjoy the benefit from injury-producing activities, rather than innocent third persons, should bear the losses resulting from those activities).

those who enjoy the goods or services.<sup>89</sup>

In the early and mid-twentieth century, mass production of automobiles was soon followed by car-accident lawsuits,<sup>90</sup> and mass-marketing of consumer goods gave rise of products-liability litigation.<sup>91</sup> More recently, the widespread use of computerized databases has produced lawsuits related to data security and identity theft,<sup>92</sup> and the expansion of international

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<sup>89</sup> Loss-spreading is a concept that runs throughout tort law, influencing causes of action, such as products liability (*see, e.g.*, *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 285 n.14 (3d Cir. 1994) (stating that court recognized strict liability for manufacturing defects because “[m]anufacturers were deemed to be in the best position to provide ‘insurance’ against accidents by spreading the cost of accidents among all consumers of the product”); *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 547 (N.J. 1982) (discussing risk-spreading in products liability)), as well as general tort principles, such as *respondeat superior* (*see, e.g.*, *Nelson on Behalf of Hirschfeld v. Corporation of Presiding Bishop*, 935 P.2d 512, 513 (Utah 1997) (stating that an “employer’s liability under *respondeat superior* ‘arises not as a result of any actual negligence by the employer,’ but because the employer reaps the benefits of the employee’s acts and may more easily spread the cost of accidents”). “The idea underlying the ‘spreading’ rationale is that the financial burden of accidents may be diminished by spreading losses broadly so that no person is forced to bear a large share of the damages.” JOHNSON & GUNN, *supra* note 84, at 7. “Risk-spreading is often desirable—that is why people buy insurance.” *Id.* at 703. However, the concept has limits. Even “the most expansive possible system of tort liability could not make the private purchase of insurance (or a public equivalent, such as Social Security disability insurance) unnecessary—most people die from causes like sickness, old age, or accidents that are entirely their own fault, causes for which no potential defendant could be found.” *Id.* *See also* *Carley v. Wheeled Coach*, 991 F.2d 1117, 1135 (3d Cir. 1993) (Becker, J., concurring and dissenting) (recognizing that the government contractor defense thwarts “both the policy of compensating injured persons and the policy of risk-spreading”).

<sup>90</sup> “[I]n 1905 all of American automobile case law could be contained within a four-page law review article, but three decades later, a ‘comprehensive, detailed treatment [of automobile law] would call for an encyclopedia.’” Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 77 (2003), *citing* Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476 (1936).

<sup>91</sup> *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 744 (2003) (asserting that “it was the dramatic development of the mass-marketing of consumer goods in the twentieth century that spawned modern products liability law”).

<sup>92</sup> *See* Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 261 (2005) (discussing database security cases).

education programs is now generating claims by students injured while studying in foreign countries.<sup>93</sup> It is entirely natural, from the perspective of more than a century of American legal history, for the recent vast expansion of standardized testing<sup>94</sup> to be followed by lawsuits seeking to balance the sometimes conflicting<sup>95</sup> goals of compensating victims<sup>96</sup> and deterring bad practices<sup>97</sup> with the need to craft liability rules that facilitate the types of innovative practices and products that promote growth and progress<sup>98</sup> and assist societal achievement and personal fulfillment.

Tort litigation, like litigation generally, often serves useful purposes.<sup>99</sup> To begin with, it

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<sup>93</sup> Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J. COLL. & U.L. 309, 359 (2006) (stating that “[l]ike many laudable activities that were once conducted with little thought of civil liability, international education programs must now be operated with due regard for the legal principles that impose a general duty of reasonable care, that punish misrepresentation, and that award compensation for injuries attributable to blameworthy conduct. This is a good development, for it discourages irresponsible practices and creates incentives for safety”).

<sup>94</sup> See note 21 and the accompanying text.

<sup>95</sup> See JOHNSON & GUNN, *supra* note 84, at 9 (discussing the “sometimes antagonistic policies underlying modern tort law). Cf. Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481, 499 (2005) (analogizing the “competing and sometimes complementary policies of modern tort law . . . [to] orreries—the clockwork, astronomical apparatuses of eighteenth century natural philosophers”).

<sup>96</sup> See *id.*, at 9 (asserting that “[t]here is a strong public interest in insuring that accident victims obtain the financial resources needed to overcome the injuries they have sustained”).

<sup>97</sup> See Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILLANOVA L. REV. 311, 319-25 & n.33 (2006) (discussing deterrence and the policy of preventing future harm).

<sup>98</sup> See JOHNSON & GUNN, *supra* note 84, at 8 (stating that “there is continuing concern that tort liability not be so readily imposed that industrial creativity is stifled, that entrepreneurship is chilled, that professionals are unwilling to render important services, or that American businesses become globally uncompetitive”).

<sup>99</sup> Cf. *Zauderer v. Office of Discip. Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 643 (1985) (stating “we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the

forces companies and other enterprises to examine harmful practices that might otherwise receive inadequate attention. For example, the College Board's president dismissively said that it "did not really matter" why SAT exams became wet before they were mis-scored."<sup>100</sup> But preventing losses in the future often depends on determining precisely why a certain type of problem occurred in the first instance.

Tort litigation also plays a vital role in addressing the problems that legislatures, too factionalized or subject to pernicious lobbying practices,<sup>101</sup> and administrative agencies, too underfunded, politically manipulated, or "captive" to the interests they are supposed to regulate,<sup>102</sup> often fail to address. Indeed, without a fair forum in which to litigate disputes about conduct that causes harm, or other governmental avenues for redress, victims of intentional or accidental injuries might resort to violence and other undesirable practices, as they sometimes do in other countries. For example, in China, students who had been defrauded by a university recently rioted<sup>103</sup> because China presently has no tort system or other mechanism offering a

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courts for a remedy").

<sup>100</sup> Karen W. Arenson, *What Organizations Don't Want to Know Can Hurt*, N.Y. TIMES, Aug. 22, 2006, at C1, 2006 WLNR 14497398 (hereinafter "*Don't Want to Know*").

<sup>101</sup> See generally Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL'Y \_\_\_\_, \_\_\_\_ (2006) (discussing pernicious lobbying practices).

<sup>102</sup> See Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1048-53 (1989) (discussing how administrative agencies are subject to budgetary limitations, political manipulation, and pressure from special interests). "Administrative capture" occurs when an administrative agency is dominated by those it is supposed to regulate and thereby made less effective. See Ian Ayres & F. Clayton Miller, "*I'll Sell It to You at Cost*": *Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U.L. REV. 1047, 1070 n.87 (1990) (asserting that "[c]aptured agencies have been the source of many inefficient regulations"); Christopher Wyeth Kirkham, Note, *Busting the Administrative Trust: An Experimentalist Approach to Universal Service Administration in Telecommunications Policy*, 98 COLUM. L. REV. 620, 623 (1998) (stating that "[a]dministrative capture by special interests leads to policy approaches that often fail to account for the interests of the less influential public").

<sup>103</sup> Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y. TIMES, June 22, 2006, at A1, 2006 WLNR 10749995 (discussing demonstrations on campus at Shengda College in central China). The students, if their story is true, had been defrauded. They had been told that their diplomas would bear the name of a prestigious university. The promise seemed plausible because Chinese schools were being reorganized. Relying upon the representation, the students paid top-dollar tuition. When graduation came, the students' diplomas bore the name of a different, less prestigious school. As professional credentials, the

realistic opportunity for resolving such disputes.<sup>104</sup>

The American tort system is not perfect—but neither is any other legal system. “[O]ne should not lose sight of the fact that in America at the beginning of the twenty-first century life is relatively safe from risks of accidental harm, and that the victims of the accidents that do occur have a reasonably fair chance of obtaining redress.”<sup>105</sup> This is due in large part to the relief afforded by common-law and statutory tort principles.

Standard-test mis-scoring lawsuits can provide redress to injured parties in circumstances where justice demands such relief. In one recent case, a test-taker who had erroneously been told that he had failed an exam used to determine eligibility for teacher licensing in many states, had difficulty finding a job because the failure “was a real albatross hanging around . . . [his] neck.”<sup>106</sup> However, after the error was corrected “he quickly landed” a high school teaching position.<sup>107</sup> Not surprisingly, he “applauded” the class-action settlement in the standardized test

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degrees were not worth what the students had paid. In simple terms, the students allegedly had been lied to and cheated. If these events had occurred in the United States, there would not have been riots. The students would have hired a lawyer on a contingent-fee basis and sued the university for fraud. If their claim had merit, they would have recovered damages. If it didn’t, the suit would have been dismissed.

<sup>104</sup> The absence of a viable tort system in China is the legacy of old-style communism. When China was really communist (1949 to roughly 1980), there was no need for tort law. The work unit provided everything. A job, education, medical care, a place to live, retirement. Everyone was equally poor. No one had anything to lose either as a result of a tort or as the result of a tort lawsuit. See Vincent R. Johnson & Brian T. Bagley, *Fighting Epidemics with Information and Law: The Case of SARS in China*, 24 PENN STATE INT’L L. REV. 157, 173 (2005) (explaining why, in China, “there was traditionally little need for a tort system”). China is now experiencing vast changes. See Vincent R. Johnson, Book Review, *Chinese Law on SARS by Chenglin Liu*, 7 ASIAN-PAC. L. & POL’Y J. 32, (2006) (discussing the pace of physical changes to the physical and legal environment in China). New-style Chinese communism is essentially capitalism with amounts calculated in yuan, the Chinese currency. While there is still much poverty in China, there is plenty of new wealth, too. Many Chinese now have something to lose, like the students who paid tuition five times the going rate because they were promised a prestigious degree. The Chinese students had no real opportunity to take their dispute to court. Not only is there is no tort law in China, but contingent-fee representation is uncommon.

<sup>105</sup> Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. L. REV. (China) 237, 264 (2000).

<sup>106</sup> Arenson, *supra* note 43.

<sup>107</sup> *Id.*

mis-scoring lawsuit in which he was a named plaintiff.<sup>108</sup>

## F. Viability of Tort Remedies

This article explores whether American tort law offers viable remedies for persons harmed by erroneous scoring of standardized tests. The focus here is narrow. The article does not address the merits of standardized testing, the coherence and reliability of test questions, or even the correctness of “correct” answers.<sup>109</sup> Rather the discussion focuses on two things: first, cases involving questions that were scored inconsistently or according to the wrong scale; and second, cases where correct and incorrect answers were totaled inaccurately or were otherwise reported erroneously to those who received the results.

Part II begins by briefly considering several important preliminary matters. Part II-A considers the many types of damages which may be at issue in standardized test score tort litigation for the purpose of clarifying just what is at stake. Part II-B addresses the “truth-in-testing” laws that have been passed in some jurisdictions, and concludes that they offer no real recourse for test-takers and institutions harmed by erroneous standardized test scores. Part II-C argues that while contract remedies are sometimes (but not always) available to incorrect-test-score victims, such relief should not bar redress under tort theories. Part II-D considers the economic-loss rule in tort law, which generally holds that negligence is not actionable if it causes only economic harm, unaccompanied by personal injury or property damage. The discussion concludes that the economic-loss rule is only a partial obstacle to suits based on erroneous standardized test scoring because many potential causes of action are not based on mere negligence, and other causes of action (such as negligent misrepresentation) fall within exceptions to the rule.

Part III next examines an array of tort claims that might arise from erroneous scoring of standardized tests, including negligent infliction of emotional distress (Part III-A), misrepresentation (Part III-B), defamation and false-light invasion of privacy (Part III-C), tortious interference with prospective advantage (Part III-D), and injurious falsehood (Part III-E). The analysis finds that while some of these theories will rarely offer a viable avenue for recovery, other theories, on particular facts, may provide a basis for relief.

Part IV concludes by arguing that although courts should be cautious in entertaining tort

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<sup>108</sup> *Id.*

<sup>109</sup> *Cf.* *Lewin v. Medical Coll. of Hampton Roads*, 931 F. 443, 445-46 (E.D. Va. 1996) (holding that the Family Educational Rights and Privacy Act did not permit a former medical student to challenge the correctness of answers on a pharmacology exam). *See also* Delgado, *supra* note 11, at 598 (asserting that on “one administration of the SAT, four out of forty five verbal test answers turned out to be wrong, and many other wrong answers were as plausibly correct as the ones ETS keyed correct”).

claims based on erroneous scoring of standardized tests, the courthouse doors should not be closed. Suits relating to erroneous scoring of standardized tests will sometimes have merit. Tort law offers a useful mechanism for compensating the harm caused by certain types of erroneous-scoring claims. It can also create incentives for good practices in standardized testing.

## II. Preliminary Considerations

### A. Damages in Erroneous Scoring Cases

Standardized test scoring errors cause many types of losses, not all of which will be equally compensable under tort law. The key variables in determining whether a particular element of damages will be awarded are the strength of the causal link between the mis-scoring and the alleged harm, and whether the amount of the loss can be quantified with reasonable certainty. If there is serious doubt as to either causation or amount, recovery of an element of damages may be denied.

The fact and magnitude of some mis-scoring losses will be able to be established with a high degree of certainty if the losses are the direct result of foreseeable out-of-pocket expenditures. For example, a test-taker who receives an erroneously low score may quite predictably spend readily ascertainable amounts on: securing a re-scoring of the initial exam;<sup>110</sup> registering to take the test again;<sup>111</sup> enrolling in a test preparation course;<sup>112</sup> purchasing study aids;<sup>113</sup> securing professional tutoring or diagnostic assistance;<sup>114</sup> traveling to the repeat test site;<sup>115</sup> or perhaps even enrolling in test-related academic offerings.<sup>116</sup>

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<sup>110</sup> Praxis Complaint, *supra* note 39, at para. 31 (seeking compensation for test- re-scoring).

<sup>111</sup> *See id.*, at para 31 (seeking compensation for costs related to “taking the tests on multiple occasions” and “paying late registration fees”).

<sup>112</sup> *Cf.* Arenson, *Tests Escaped Check*, *supra* note 126 (indicating that some families pay “thousands of dollars to raise their children’s scores by 50 or 100 points”).

<sup>113</sup> *See* Praxis Complaint, *supra* note 39, at para. 31 (seeking compensation for “purchasing study guides to assist in future tests”).

<sup>114</sup> *See id.*, at para. 31 (seeking compensation for “diagnostic evaluations to understand why” test-takers failed).

<sup>115</sup> *See id.*, at para. 31 (seeking compensation for “travel related expenses to take the tests out of town”).

<sup>116</sup> *Id.*, at para. 30 (alleging that mis-scoring of a teacher test caused “additional tuition expenses”); *id.* at para. 31 (seeking compensation for “performing additional course work”).

Certain other types of losses, involving reduced income rather than expenditures, may be so likely to result from an erroneously low score that their legitimacy cannot readily be doubted. The only uncertainty in such cases will reside in fixing the amount, but even then the jury may find guidance in what many would regard as reliable evidence, such as average earnings figures for new employees in a particular field. Reduced income for a test-taker who is the victim of erroneous scoring may result in a variety of ways, including: time away from work to sit for the repeat test or to take related courses;<sup>117</sup> denial of necessary professional certification or licensing;<sup>118</sup> and otherwise delayed entry into the job market.<sup>119</sup>

Reduced income resulting from lost scholarships will often be easy to quantify. Several states employ merit scholarship programs that “use specific SAT scores to determine awards.”<sup>120</sup> Also, at many colleges and universities, scholarships are awarded based simply on a matrix formula, where the variables are grade point average (GPA) and test score.<sup>121</sup> At a particular school, an admitted law student with an LSAT score of 160 and an undergraduate GPA of 3.5, might be routinely awarded a \$10,000 scholarship, since that is the amount awarded to every student in the matrix category. However, a student with the same undergraduate GPA and a test score of 155 might be normally awarded \$5,000, according to the matrix. If a law student who is the victim of erroneous standardized test scoring can point to such evidence, it may be possible for the student to quantify the student’s economic loss with sufficient persuasiveness to permit recovery of that element of damages.<sup>122</sup> Of course, if a college or university is the plaintiff, it

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<sup>117</sup> *See id.*, at para. 31 (seeking compensation for wages lost as a result of time away from work).

<sup>118</sup> *Id.*, at para. 29 (alleging that mis-scoring of a teacher-test “prevented some Plaintiffs and Class members from receiving or timely receiving their professional credentials, and thus, have prevented them from retaining or obtaining employment as certified teachers [and] . . . caused . . . a loss of income, benefits, seniority, [and] tenure”).

<sup>119</sup> *Id.*, at para. 30 (alleging that mis-scoring of a teacher test “delayed the graduation from Bachelor’s or Master’s degree programs for some Plaintiffs and Class members, and . . . [a]s a result, some Plaintiffs and Class members . . . lost wages and job benefits as a result of their delay in entering the job market”). *See also id.* at para. 33 (alleging that “some Plaintiffs and Class members who were given a passing, yet incorrect score” were potentially “barred from certification as a teacher in a state” to which they wish to move that required a higher passing score, with the necessity of having “to re-take the Praxis test and pay all associated fees”).

<sup>120</sup> Karen W. Arenson, *Colleges Say SAT Mistakes May Affect Scholarships*, N.Y. TIMES, Mar. 26, 2006 (stating that a recent survey found that 7 out of 14 states followed the practice).

<sup>121</sup> *Id.* (describing a similar state program in New Jersey)

<sup>122</sup> *Id.* (indicating that an erroneous SAT score—later corrected—would have dropped one student at a Pennsylvania college from a \$12,500 scholarship to a \$5,000 one).

should be able to use similar evidence to show that but for the test score error, it would have offered a student a lower scholarship.

There may be other cases of compelling evidence that the plaintiff suffered economic harm. A student might be able to show, for example, that but for a test score error, the student would have fallen into the “presumptive admit” category at the state university, and that by enrolling there the student would have saved a certain amount of money each year by qualifying for in-state tuition. If the student in fact applied to the state university, this type of argument may be quite reasonable and sufficient to support a jury award.

Some of the losses that undoubtedly result from standardized test scoring errors may be so difficult to quantify that the law will be reluctant to permit recovery. Into this category may fall compensation for the value of: missing a graduation ceremony;<sup>123</sup> suffering embarrassment and other forms of emotional distress;<sup>124</sup> and (depending on the precise facts) losing the opportunity to attend an educational program to which the test-taker either applied and was rejected<sup>125</sup> or decided not to apply because the erroneous score appeared not to be competitive.<sup>126</sup>

Finally, some asserted losses may be so dubiously linked to standardized test scoring errors that it will be difficult or impossible for a court to find, by a preponderance of the evidence, that but for the mis-scoring, the loss would not have occurred. This may be true, for example, where a test-taker argues that because of an erroneous score a job offer was not extended.<sup>127</sup> Similarly, a student who contends that, but for the defendant’s misrepresentation,

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<sup>123</sup> Editorial, *supra* note 41 (discussing harm caused by mis-scoring of a Minnesota state text, which resulted in a multi-million dollar settlement).

<sup>124</sup> See Praxis Complaint, *supra* note 39, at para. 34 (alleging that test-takers who received erroneous scores suffered “devastating effects on their careers” and “experienced personal injuries, including serious and severe emotional distress . . . and have sought medical and psychological assistance”).

<sup>125</sup> Cf. Arenson, *supra* note 70 (discussing reject of early admissions applications).

<sup>126</sup> See Arenson, *1,600 SAT Tests Escaped Check for Scoring Errors*, N.Y. TIMES, Mar. 14, 2006, at A 21, 2006 WLNR 4230255 (hereinafter “Tests Escaped Check”) (describing one student who “slashed Harvard and Yale off her list of college applications” after her SAT total “plunged 180 points, to 1,890 out of a possible 2,400” as a result of a scoring error). See also Arenson, *supra* note 70 (indicating that when SAT scoring errors were announced months after scores had been distributed to students and colleges, “a vice president and dean of admissions at Pomona College in California . . . questioned how many students had altered the lists of colleges they were applying to because their scores had been reported as lower than they really were”).

<sup>127</sup> Cf. Praxis Complaint, *supra* note 39, at para. 32 (alleging that mis-scoring may have caused employers to use erroneous scores “to differentiate between or rank job applicants”).

the student would have been admitted to a better school, gotten a better job, and made higher lifetime earnings will be hard pressed to establish the requisite level of certainty to sustain an award of those damages.<sup>128</sup>

## B. Truth-in-Testing Laws

In response to complaints about the “arbitrariness and exaggerated importance”<sup>129</sup> of standardized test scores and the impact of professional coaching on test-taker performance,<sup>130</sup> California<sup>131</sup> and New York<sup>132</sup> passed truth-in-testing laws in 1978 and 1979, respectively. Today, such legislation also exists in other states.<sup>133</sup> The chief impact of truth-in-testing laws is to require certain (typically large) test agencies to: (1) disclose, with respect to certain exams,<sup>134</sup> statistical research<sup>135</sup> and previously used test questions;<sup>136</sup> (2) make individual performance data

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<sup>128</sup> *But see* DeJesus v. U.S. Dept. of Veterans Affairs, 2005 WL 2175174, \*2-\*6 (E.D. Pa. 2005) (taking standardized test scores into account in wrongful death calculations).

<sup>129</sup> LEMANN, *supra* note 12, at 224.

<sup>130</sup> *Id.*, at 223.

<sup>131</sup> CAL. EDUC. CODE § 99150 *et seq* (Westlaw 2006).

<sup>132</sup> N.Y EDUC. L. §340 *et seq.* (Westlaw 2006). *See* LEMANN, *supra* note 12, at 225-26 (discussing the chaotic path to adoption in New York).

<sup>133</sup> *See, e.g.*, ARIZ. REV. STAT. §§ 15-741 & 15-747 (2006) (requiring the state board of education to adopt procedures “to allow parents of pupils and the general public to view the nationally standardized norm-referenced achievement test” required by state law).

<sup>134</sup> *See* N.Y EDUC. L. §342(5)-(5)(b) (Westlaw 2006) (stating exceptions relating to GRE Advanced Tests, MCAT, and SAT II).

<sup>135</sup> *See id.*, at §341 (Westlaw 2006) (requiring disclosure by a test agency of “any unpublished study, evaluation or statistical report cited in memoranda of support or opposition to legislation or proposed rules and regulations relating to standardized testing written or published by the test agency”).

<sup>136</sup> *See id.*, at §342(1) (Westlaw 2006) (stating that “[w]ithin thirty days after the results of any standardized test are released, the test agency shall file or cause to be filed with the commissioner: a. a copy of all test questions used in calculating the test subject’s raw score; b. the corresponding acceptable answers to those questions; and c. all rules for converting raw scores into those scores reported to the test subject together with an explanation of such rules”).

available to test subjects;<sup>137</sup> and (3) collect demographic performance information relating to such groups as women and minorities.<sup>138</sup>

Following passage of the New York legislation, the Educational Testing Service (ETS) “decided to treat the New York truth-in-testing law as if it were federal legislation, since it would be too difficult to make up one set of tests for New Yorkers that would be made public later and another set for everyone else that wouldn’t.”<sup>139</sup> The New York law contains no provisions offering compensation to a victim of standardized test scoring errors. Rather, the law merely provides that a violation of its various regulatory provisions may result in “a civil penalty of not more than five hundred dollars for each violation.”<sup>140</sup> Thus, the New York law, like its counterparts in other states, does not obviate the need for tort law remedies.

### C. Contract Law

If a test-taker whose score is reported incorrectly paid a fee to take the test, the mis-scoring could be treated as a breach of an express or implied contractual promise to correctly grade the exam, and the test-taker could then sue for contract damages.<sup>141</sup> However, in many instances, the test-taker does not pay a fee, as when students in a public school system are required to pass a state-mandated achievement test. In that case, no breach-of-contract claim is feasible. Similarly, test-score recipients, such as colleges and universities, typically have no

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<sup>137</sup> *See id.*, at §342(2) (Westlaw 2006) (mandating that each test agency, for a nominal fee, “provide to the test subject the opportunity to secure: a. a copy of the test questions used to calculate the test subject’s raw score; b. a copy of the test subject’s answer sheet, or answer record where there is no answer sheet, together with a copy of the correct answer sheet to the same test with questions used to calculate the test subject’s raw score so marked; and c. a statement of the raw score used to calculate the scores reported to the test subject”).

<sup>138</sup> *See id.*, at § 341-a(2) (Westlaw 2006) (requiring collection of data relating to race or ethnicity, gender, and household language); *id.* at § 341-a(4) (requiring reporting “by race or ethnicity, linguistic background and gender” of “the mean-scaled scores of test subjects, the standard deviation of scaled scores, and the distribution of scaled scores”).

<sup>139</sup> LERMANN. *supra* note 12, at 227.

<sup>140</sup> N.Y EDUC. L. § 347 (Westlaw 2006).

<sup>141</sup> *Cf. Murray v. Educational Testing Service*, 170 F.3d 514, 516-17 (5th Cir. 1999) (holding that a standardized test administrator did not breach its contract with a student who took test by refusing to release suspicious test scores because the contract clearly and explicitly reserved the right to withhold suspect scores, and the administrator fulfilled its sole contractual duty by conducting a good faith investigation).

contract with testing agencies. Except perhaps on a third-party-beneficiary theory,<sup>142</sup> contract law offers those institutions no relief for losses they sustain as a result of incorrect scores.

Even if a contract claim is available to persons harmed by erroneous standardized test results, that does not foreclose a tort-law analysis (except, perhaps, under the economic-loss rule, discussed below).<sup>143</sup> In many areas of the law, such as products liability, a plaintiff has the option of asserting a breach-of-contract claim, or tort claims based on negligence or strict liability, or all of those theories.<sup>144</sup> Similarly, a client harmed by the conduct of a lawyer, ordinarily may sue for breach of contract, as well as on a tort theory, such as professional negligence, fraud, or breach of fiduciary duty.<sup>145</sup> The categorization of the claim will have many important consequences. It will determine, for example, the applicable statute of limitations, pertinent defenses, dischargeability of a judgment in bankruptcy, insurance coverage, and the appropriate standards for calculating damages.<sup>146</sup> American law has often recognized that relief afforded by contract law (expectation<sup>147</sup> or reliance<sup>148</sup> damages) is sometimes inadequate in comparison to tort principles,<sup>149</sup> and there is certainly no general rule that, merely because a contract claim can be stated, tort law remedies are unavailable. Thus, it is not surprising that in the Praxis teacher-test

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<sup>142</sup> See generally RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (discussing intended and incidental beneficiaries).

<sup>143</sup> See Part II-D.

<sup>144</sup> See W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS (5th ed. 1984) (discussing theories of recovery for harm caused by product defects).

<sup>145</sup> See Vincent R. Johnson, “*Absolute and Perfect Candor*” to Clients, 34 ST. MARY’S L.J. 737, 742-51 (2003) (discussing theories of attorney liability, including breach of fiduciary duty, negligence, fraud, and breach of contract).

<sup>146</sup> Cf. JOHNSON & GUNN, *supra* note 84, at 26-30 (discussing the consequences of classifying a tort action as intentional, negligent, or strict liability).

<sup>147</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (discussing expectation damages).

<sup>148</sup> See *id.* at § 349 (1981) (discussing reliance damages).

<sup>149</sup> When the College Board mis-graded nearly 5000 SAT tests and revised upward the scores of students whose exams it had graded too low, it said that it “regretted any further worry or inconvenience that this problem caused students and families” and that it was “refunding those students’ test registration fees as well as any other fees associated with sending scores” to educational institutions. Press Release, *supra* note 60.

mis-scoring litigation,<sup>150</sup> the plaintiffs alleged multiple claims for breach of contract, negligence, and negligent misrepresentation.<sup>151</sup>

#### **D. The Economic-Loss Rule in Tort Law**

In some respects, providing remedies for economic losses (as opposed to personal injuries and property damages) is more properly the concern of contract law than tort law. Reflecting this view, courts often hold (at least in the products-liability context) that negligence which causes economic losses unaccompanied by personal injuries or property damages is not actionable under tort principles.<sup>152</sup> These rulings are sometimes summed up as the “economic-loss rule.”<sup>153</sup> However, the full contours of the “rule” are far from clear,<sup>154</sup> and there exist so many exceptions and limitations<sup>155</sup> that some scholars doubt whether there is a “rule” at all.

The economic-loss rule was not commonly discussed until “the last quarter of the 20th century.”<sup>156</sup> Presumably, some of the uncertainties relating to the rule will be resolved, or at least illuminated, during the drafting of the *Restatement (Third) of Torts: Liability for Economic Loss*,<sup>157</sup> which is now underway in the American Law Institute. At present, it seems

<sup>150</sup> See the text beginning at note 74.

<sup>151</sup> Praxis Complaint, *supra* note 39, at para. 36-63.

<sup>152</sup> See, e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (discussing the risk that “contract law would drown in a sea of tort”).

<sup>153</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS § 8 (P.D. No. 1 2005) (discussing the economic-loss rule). See generally Johnson, *supra* note 92, at 296-303 (discussing the economic-loss rule).

<sup>154</sup> See generally John J. Laubmeier, Comment, *Demystifying Wisconsin’s Economic Loss Doctrine*, 2005 WIS. L. REV. 225, 225-26 (describing the economic-loss rule as “a constantly developing area of law, which may not be fully understood by judges, lawyers, or the public at large”).

<sup>155</sup> See Johnson, *supra* note 92, at 302-03 (discussing exceptions and limitations to the economic-loss rule).

<sup>156</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS § 8 cmt. c (P.D. No. 1 2005). See also *In re General Motors Corp.*, 2005 WL 1924331, \*3 (W.D. Okla. 2005) (stating that “the economic loss doctrine, which was created by the California Supreme Court in *Seely v. White Motor Co.*,” 403 P.2d 145 (Cal.1965)).

<sup>157</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS (P.D. No. 1 2005).

possible—perhaps likely—that the economic-loss rule will be deemed to bar recovery for purely economic losses caused by standardized test mis-scoring, if the case is litigated on a simple negligence theory. That is the heart of the economic-loss rule: negligence which causes solely economic losses is not actionable. However, it may nevertheless be possible to argue cogently that the rule *should not* apply to such cases. As explained by the Florida Supreme Court:

The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort. . . . Underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement.<sup>158</sup>

Standardized test-takers often have no realistic opportunity to bargain over the compensation for harm that might be caused by mis-scoring. The terms of the test contract are typically offered on a take-it-or-leave-it basis, and in many instances the test is an essential step in building a career—a step which the test-taker cannot forego or circumvent. It seems plausible that many agreements between test-takers and testing agencies can be fairly viewed as adhesion contracts,<sup>159</sup> and that some courts might therefore decline to hold that injured test-takers are relegated to recovery under the terms of the take-it-or-leave-it standardized test contract.<sup>160</sup>

Moreover, courts sometimes hold that the economic-loss rule does not bar a negligence claim against a person not in privity of contract.<sup>161</sup> That interpretation of the rule might be extended to the standardized testing context, for, as noted above,<sup>162</sup> some test-takers are in privity

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<sup>158</sup> *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, 536-37 (Fla. 2004).

<sup>159</sup> *See* Johnson, *supra* note 102, at 1044-45 (discussing adhesion contracts).

<sup>160</sup> An adhesion contract may be unconscionable and to that extent unenforceable. *See* Susan Rabin & Christopher Q. Pham, *Contracts of Adhesion*, L.A. LAWYER, Feb. 2006, at 11, 28-FEB L.A. Law. 11 (discussing Cal. Civil Code § 1670.5).

<sup>161</sup> *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, 541 (Fla. 2004) (holding that the rule did not bar action against a company, which was neither a manufacturer nor distributor of a product, because the parties were not in privity).

<sup>162</sup> *See* Part II-C.

(e.g., students who pay to take the SAT) and other are not (e.g., high school students who are required to take a state-mandated standardized test in order to graduate). Of course, it makes little sense to say that a negligence claim by a test-taker who was in privity with the testing agency, but without power to bargain over the terms of the contract, is barred from suing for negligence by the economic-loss rule, if negligence claims are allowed by persons not in privity with the testing agency, and therefore also not able to bargain. The better course would seem to be for courts to recognize that neither category of plaintiff has any real opportunity to negotiate protection from economic harm caused by mis-scoring, and that tort remedies should therefore not be foreclosed.

However, even if the economic-loss rule applies to a mis-scoring case, it is possible to escape the force of the rule by framing a claim as one not for mere negligence, but for negligent misrepresentation.<sup>163</sup> Liability for negligent misstatements is an important and well-established exception to the economic-loss rule.<sup>164</sup> In addition, emotional distress is not simply a form of economic loss (even if the distress results in out-of-pocket expenditures), but rather a type of personal injury. Therefore, the rule does not bar claims for negligent infliction of emotional distress,<sup>165</sup> although those claims may fail for other reasons.<sup>166</sup> Actions for defamation, which are sometimes based on negligence as to the falsity of a defamatory statement (and other times based on more culpable conduct),<sup>167</sup> routinely allow recovery for economic losses,<sup>168</sup> and such recoveries are obviously not barred by the economic-loss rule.<sup>169</sup> Various other theories

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<sup>163</sup> See Part III-B-2.

<sup>164</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS § 10 (P.D. No. 1 2005) (discussing liability for negligent misstatements); RESTATEMENT (SECOND) OF TORTS § 552B cmt. a (1977) (permitting recovery of out-of-pocket losses caused by negligent misrepresentation).

<sup>165</sup> See *id.* at § 8 cmt. 8 (P.D. No. 1 2005).

<sup>166</sup> See Part III-A.

<sup>167</sup> See Part III-C

<sup>168</sup> See *Michigan Microtech, Inc. v. Federated Publications, Inc.*, 187 Mich. App. 178, 466 N.W.2d 717, 722 (Mich. App. 1991) (recognizing that losses of “economic or pecuniary value” are recoverable in a defamation action).

<sup>169</sup> See *Latino Food Marketers, LLC v. Ole Mexican Foods, Inc.*, 2004 WL 632869, \*17 (W.D. Wis. 2004) (stating that although the plaintiff made “a half-hearted attempt to argue that defendant’s defamation counterclaim should be barred by the economic loss doctrine,” it conceded that it had “found no authority directly supporting this point,” and noting that in “one case the Court of Appeals for the Seventh Circuit assumed that injuries caused by defamation are not included in the meaning of ‘economic loss’”). As Chief Judge Barbara B. Crabb explained:

discussed below, such as false-light invasion of privacy,<sup>170</sup> tortious interference,<sup>171</sup> and injurious falsehood,<sup>172</sup> are usually not based on negligence, and therefore are not affected by the economic-loss rule. Likewise, in fraud actions,<sup>173</sup> which are founded on intentional or reckless misrepresentation, economic losses are routinely recoverable in most states.<sup>174</sup>

### III. Tort Theories of Recovery

#### A. Negligence and Infliction of Emotional Distress

In many cases, it may be possible to prove that the mis-scoring of a standardized test was the result of negligence. For example, erroneous results for approximately 5,000 takers of the Scholastic Aptitude Test were said to have been caused by the fact that “some answer sheets had swelled because of moisture.”<sup>175</sup> If the exposure to moisture was the result of a potential defendant’s carelessly allowing answer sheets to be exposed to rain<sup>176</sup> or spilled drinks, or stored in a damp basement or a leaky trailer, there would be evidence of negligence sufficient to take the case to a jury.

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[T]here is little danger of eroding the distinction between tort and contract law by allowing a party in a commercial relationship to maintain a cause of action for defamation. Damages caused by defamatory remarks are not the sort of loss that parties to a contract contemplate when they sit down at the bargaining table . . . . Because defamation is almost always extrinsic to a contract, it is unlikely that permitting a defamation claim will allow parties to do an “end run around contract law,” . . . or obtain double recovery for the same injury.

*Id.* at \*17. *See also* *Facchina v. Mutual Benefits Corp.*, 735 So.2d 499, 503 (Fla. Dist. Ct. App. 1999) (finding that an action for defamation, which “protects economic interests as well as [against] humiliation and embarrassment,” was not barred by the economic-loss rule).

<sup>170</sup> *See* Part III-C.

<sup>171</sup> *See* Part III-D.

<sup>172</sup> *See* Part III-E.

<sup>173</sup> *See* Part III-B-1.

<sup>174</sup> *See* ROBERT L. DUNN, *RECOVERY OF DAMAGES FOR FRAUD* 20 (3d ed. 2003) (“[D]ozens of cases are decided every year awarding economic loss damages for fraud.”); *id.* at 24-26 (discussing cases finding the economic-loss rule inapplicable to misrepresentation claims);

<sup>175</sup> *See* *Arenson*, *supra* note 59.

<sup>176</sup> *See* *Arenson*, *Don’t Want to Know*, *supra* note 100 (stating that “the dampness may have come from heavy rains in the Northeast on the day of the test”).

The duty of reasonable care imposed by the law of negligence means that “an actor must employ cost-effective measures”<sup>177</sup> to prevent foreseeable harm. As Chief Judge Benjamin N. Cardozo famously said in a different context, “the risk reasonably to be perceived defines the duty to be obeyed.”<sup>178</sup> Standardized test scoring errors are foreseeable for many reasons, and therefore there may well be a duty to take precautions. As noted earlier,<sup>179</sup> many testing agencies have experienced scoring problems in the past. For example, when the College Board discovered that thousands of SAT tests had been mis-scored, a representative acknowledged that there had been “things like this before, but not of this magnitude.”<sup>180</sup> Indeed, during the prior six months, “there had been other scanning problems, including one with a separately administered chemistry test.”<sup>181</sup> In the PRAXIS teacher-test litigation,<sup>182</sup> which was subsequently settled, the plaintiffs alleged that the “ETS ha[d] publicly admitted that it . . . incorrectly scored short essay questions on at least nine Praxis test administrations.”<sup>183</sup>

A finding of negligence might be premised on facts showing that, in the light of the risks and the costs of precautions, a testing agency should have “acquire[d] better scanning software, increase[d] training for test center personnel and . . . [made] other improvements in its procedures.”<sup>184</sup> Equipment can be used “to screen out humidity-tainted answer sheets.”<sup>185</sup> Critics argue that standardized testing regimes are plagued by a combination of insufficient resources,

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<sup>177</sup> Johnson, *supra* note 93, at 339 & n.152 (discussing the Learned Hand balancing test).

<sup>178</sup> *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100 (1928).

<sup>179</sup> See note 82 and accompanying text.

<sup>180</sup> See Arenson, *supra* note 67.

<sup>181</sup> See *id.*

<sup>182</sup> See the text beginning at note 74.

<sup>183</sup> Praxis Complaint, *supra* note 39, at para. 19.

<sup>184</sup> See Arenson, *supra* note 59 (describing findings of a report commissioned by the College Board to recommend steps to prevent errors in scoring the SAT). Presumably, such a report could not be introduced into evidence under the subsequent-remedial-measures rule. See, e.g., FED. R. EVID. 407 (2006) (stating rule). However, similar testimony might be introduced by an expert witness on testing. See also Arenson & Henriques, *supra* note 22 (quoting the dean of admissions at the Massachusetts Institute of Technology as stating, with reference to mis-scoring of SAT exams, that “[t]he story here is not that they made a mistake in the scanning and scoring but that they seem to have no fail-safe to alert them directly and immediately of a mistake”).

<sup>185</sup> Silverstein, *supra* note 7.

tight deadlines, and “lack of meaningful oversight”<sup>186</sup>—which may be another way of saying that too few resources are being devoted to the prevention of foreseeable harm.

In some cases, a plaintiff may argue that a defendant is liable essentially on a negligent hiring<sup>187</sup> theory. Such contentions may resonate with merit if the scoring of standardized tests, as in the SAT case, is entrusted to an enterprise that is “no stranger to botching test scores.”<sup>188</sup> The same might also be true if, as has sometimes been the case, low-paid temporary workers are hired to grade the essay portion of a standardized exam.<sup>189</sup>

In some cases, aggrieved plaintiffs suing for negligence may seek to invoke a *res ipsa loquitur* analysis.<sup>190</sup> They might argue that erroneous scoring of standardized examinations is the type of harm that does not occur in the absence of negligence, and that the negligent conduct more likely than not was caused by the party that exercised physical control<sup>191</sup> over the test instruments.<sup>192</sup> This may be a good argument even if the evidence shows that the plaintiff

<sup>186</sup> Winerip, *supra* note 11 (discussing testing pursuant to the No Child Left Behind law).

<sup>187</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 19 Reporters’ Note (P.F.D. 2005) (citing cases on negligent hiring).

<sup>188</sup> See Arenson, *SAT Blunder*, *supra* note 69 (discussing reliance by the College Board on Pearson, a company which, in 2002, had paid a “multimillion-dollar settlement . . . for scoring errors in Minnesota that affected more than 8,000 students”).

<sup>189</sup> Cf. High Stakes, *supra* note 1 (stating that “after a newspaper disclosed . . . that Kelly Services was advertising for \$10-an-hour temporary workers to score the writing portion of . . . [a Florida standardized test], the agency insisted the workers had colleges degrees and half were teachers”).

<sup>190</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §17 (P.D.F. 2005) (stating that “[t]he factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member”).

<sup>191</sup> See JOHNSON & GUNN, *supra* note 84, at 348 (discussing the “key question” of control).

<sup>192</sup> This type of claim is distinguishable from some education-related decisions that have rejected *res ipsa loquitur* arguments. For example, in Campaign for Fiscal Equity, Inc. v. State, 744 N.Y.S.2d 130, 143 (App. Div. 2002), the court found that “[a]lthough plaintiffs would most likely disagree with the characterization, their position is essentially a form of *res ipsa loquitur*: the fact that 30% of City students drop out and an additional 10% obtain only a GED must mean that the City schools fail to offer the opportunity of a sound basic education, which is ultimately the State’s responsibility (pursuant to the Education Article), and therefore the State’s funding

contributed to mis-scoring in some way, such as by making pencil marks that were too light<sup>193</sup> or bad erasures. Under modern comparative principles, fault on the part of the plaintiff does not preclude reliance on *res ipsa loquitur*.<sup>194</sup>

However, even if negligence can be shown, it is unlikely that an aggrieved test-taker or any other plaintiff could succeed on a claim for negligent infliction of emotional distress based on standardized test mis-scoring. The law on negligent infliction is very unfriendly to plaintiffs. They are likely to succeed only where they suffer actual or threatened physical harm,<sup>195</sup> observe

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mechanism must be the cause of the problem.” Whether a student obtains a high school degree is a matter not within the exclusive control of the school, but depends upon other factors, including whether students attend classes and work hard.

<sup>193</sup> See Arenson & Henriques, *supra* note 22 (discussing errors in scoring the SAT where “scanners did not pick up some lightly marked answers”).

<sup>194</sup> See *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980) (holding that under comparative negligence a *res ipsa loquitur* plaintiff is required to show only that the “defendant’s inferred negligence was, more probably than not, a cause [not *the cause*] of the injury, . . . even though plaintiff’s negligent acts or omissions may also have contributed to the injury”); *Cyr v. Green Mountain Power Corp.*, 485 A.2d 1265, 1268 (Vt. 1984) (holding that “contributory negligence no longer bars recovery in a case brought under a *res ipsa loquitur* theory”). See also *Giles v. City of New Haven*, 636 A.2d 1335 (Conn. 1994) (holding that an elevator operator was not barred from invoking *res ipsa loquitur* by virtue of the fact that she had some control over elevator’s movement, and the doctrine could be applied even if operator’s negligence may also have contributed to her injury). See generally JOHNSON & GUNN, *supra* note 84, at 351-52 (discussing the relationship of *res ipsa loquitur* to the plaintiff’s conduct).

<sup>195</sup> See, e.g., *Jalowy v. Friendly Home, Inc.*, 818 A.2d 698, 710 (R.I. 2003) (stating that “[o]nly two classes of persons may bring claims for negligent infliction of emotional distress: those within the “zone-of-danger” who are physically endangered by the acts of a negligent defendant, and bystanders related to a victim whom they witness being injured”).

the death or grievous injury of a loved one,<sup>196</sup> or there are other similar dramatic facts.<sup>197</sup> Dissemination of incorrect test scores—sometimes to third parties, rather than to the test-taker—comes nowhere close to the usual threshold for recovery damages in an action for negligent infliction.

It is fair to say that “[n]o area of tort law is more unsettled than compensation for negligent infliction of emotional distress . . . [and] there are often substantial differences in the requirements, or in their interpretation, from one jurisdiction to the next.”<sup>198</sup> Yet, in virtually all states, it is exceedingly difficult for a plaintiff to prevail. In some states, the tort of negligent-infliction is very narrowly defined.<sup>199</sup> However, even where that is not true, a negligent-infliction plaintiff must establish *severe* emotional distress.<sup>200</sup> In many states, in cases involving *intentional*<sup>201</sup> rather than *negligent* infliction of emotional distress, it is agreed that the recovery is

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<sup>196</sup> See, e.g., *Robinson v. May Dept. Stores Co.*, 246 F. Supp. 2d 440, 444 (E. D. Pa. 2003) (stating that “[t]o establish a claim of negligent infliction of emotional distress under Pennsylvania law, a plaintiff must prove that: (1) he or she was near the scene of an accident or negligent act; (2) shock or distress resulted from a direct emotional impact caused by the sensory or contemporaneous observance of the accident, as opposed to learning of the accident from others after its occurrence; and (3) he or she is closely related to the injured victim”); *Cox Texas Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 723 (Tex. App.—Austin 2001) (recognizing an exception to a general rule of non-recovery for negligent infliction of emotional distress that “is allowed for a bystander who witnesses a serious or fatal accident”).

<sup>197</sup> See, e.g., *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975) (allowing recovery based on negligently erroneous death message and shipment of body).

<sup>198</sup> JOHNSON & GUNN, *supra* note 84, at 577.

<sup>199</sup> See, e.g., *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993) (stating that “there is no general duty in Texas not to negligently inflict emotional distress. A claimant may recover mental anguish damages only in connection with defendant’s breach of some other legal duty”). *But see* Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist*, 33 ST. MARY’S L.J. 455, 465 (2002) (discussing the Texas Supreme Court’s construction of the tort).

<sup>200</sup> See, e.g., *Basnight v. Diamond Developers, Inc.*, 146 F. Supp. 2d 754 (M.D. N.C. 2001) (stating that “[a]lthough an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence”).

<sup>201</sup> See RESTATEMENT (SECOND) OF TORTS §46 (1965) (stating elements of intentional infliction of emotional distress).

available only for intolerably severe distress<sup>202</sup>—distress so great that it is “debilitating”<sup>203</sup> and “a reasonable person, normally constituted, would be unable to cope.”<sup>204</sup> Thus, courts have written that:

Liability for intentional infliction of emotional distress requires conduct that is so extreme and outrageous that it goes beyond all possible bounds of decency, is regarded as atrocious, is utterly intolerable in a civilized society, and is of a nature that is especially calculated to cause, and does cause, mental distress *of a very serious kind*.<sup>205</sup>

Many intentional-infliction claims founder because of the inability of the facts to meet this exceedingly demanding damages threshold. For example, one recent case determined that the children of parents who were wrongly incarcerated failed to state a claim for intentional infliction of emotional distress because the “children’s drop in grades and attitude problems . . . [were] not evidence of the type of severe distress, unendurable by a reasonable person,” that the tort requires.<sup>206</sup> It goes without saying that if severe damage is required in cases of *intentionally*

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<sup>202</sup> See *Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130, 146 (D. D.C. 2005) (holding that the failure of an airline passenger to corroborate, through medical bills or other sources, claims that he suffered severe emotional distress as result of being arrested precluded a claim for intentionally inflicted emotional distress under Virginia law); *Harris v. Jones*, 380 A.2d 611 (Md. 1977) (holding that the “tort requires the plaintiff to show that he suffered a severely disabling emotional response to the defendant’s conduct”); *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991) (quoting comment j to section 46 of the Restatement (Second) of Torts, which provides that “liability arises only when the emotional distress is extreme, and *only where the distress is so severe that no reasonable person could be expected to endure it*” and applying that standard to the facts of the case); *Williams v. First Tenn. Nat. Corp.*, 97 S.W.3d 798 (Tex. App.—Dallas 2003) (holding a former employee, who “was emotionally reeling” at the time he was fired, “lost his appetite,” and became “cranky,” failed to prove that he suffered unendurable distress, because “within a few weeks, he was able to ‘bounce back’”); *Villasenor v. Villasenor*, 911 S.W.2d 411 (Tex. App.—San Antonio 1995) (finding that a former husband, who alleged that he was the victim of his former wife’s manipulation of their children, did not prove unendurable distress).

<sup>203</sup> *Cochran v. City of Norton*, 2001 WL 866276, \*6 (Ohio Ct. App. 2001), *citing* *Cherney v. Amherst*, 584 N.E.2d 84, 86 (Ohio Ct. App. 1991).

<sup>204</sup> *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983).

<sup>205</sup> *Myslow v. New Milford School Dist.*, 2006 WL 473735, \*16 (D. Conn. 2006) (quoting *Miner v. Town of Cheshire*, 126 F. Supp. 2d 184, 194 (D. Conn. 2000)) (emphasis added).

<sup>206</sup> *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006) (Ripple, J.).

tortious conduct—which some courts say must be so extreme and outrageous as to “strike to the very core of one’s being, threatening to shatter the frame upon which one’s emotional fabric is hung”<sup>207</sup>—at least the same showing of severe damage should be necessary in cases of mere negligence.

In addition, “most courts hold that negligent harm to property, by itself, is an insufficient predicate for an award of mental-distress damages, at least if the harm occurs outside of the plaintiff’s presence.”<sup>208</sup> The latter rule might cover cases where answer sheets are lost<sup>209</sup> or destroyed, and logically might be extended to cases where the defendants negligently interfere with plaintiffs’ intellectual, rather than physical, property interests (if any)<sup>210</sup> in test results, such as the scores reported based on an exam. In cases involving the intentional tort of conversion, there is a tendency for courts to treat intellectual and physical property similarly.<sup>211</sup> If that same judicial approach carries over to negligence actions, it is likely that neither negligent interference with physical property, nor negligent interference with intellectual property, will support an action for negligent causation of emotional distress. There is certainly no historical reason to hold that emotional distress based on negligent interference with intellectual property is more readily actionable than negligent interference with physical property. The law on compensation for emotional distress has long been concerned with the genuineness of claims,<sup>212</sup> and it has often seized upon some shred of physical impact or physical consequences as a basis for allowing

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<sup>207</sup> *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1064 (Md. Ct. Spec. App. 1986). *See also McKenzie v. Comcast Cable Communications, Inc.*, 393 F. Supp. 2d 362, 379 (D. Md. 2005) (finding that the plaintiff had failed to satisfy the “shatter-the-frame” standard).

<sup>208</sup> *See JOHNSON & GUNN, supra* note 84, at 583 (citing cases).

<sup>209</sup> *Cf. Kubistal v. Hirsch*, 1999 WL 90625, \*7 (N.D. Ill. 1999) (dismissing, in a suit based in part on lost standardized test results, pendent state claims for negligent supervision and intentional infliction of emotional distress, because federal claims were barred by failure to exhaust administrative remedies).

<sup>210</sup> A discussion of the scope of intellectual property rights in test results is beyond the scope of this article. Merely because the information relates to a person does not mean that the person has a legally protected interest in that information. *Cf. Dwyer v. American Express Co.*, 652 N.E.2d 1351 (Ill. Ct. App. 1995) (rejecting a privacy claim relating to the defendants’ practice of renting information regarding cardholder spending habits).

<sup>211</sup> *Cf. Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (holding that an Internet domain name was a form of intangible property which could serve as the basis for a conversion claim).

<sup>212</sup> *See JOHNSON & GUNN, supra* note 84, at 581-2 (discussing how genuineness is established in negligent infliction cases).

recovery that would have been refused absent such physical corroboration.<sup>213</sup>

There may be other obstacles to recovering for negligently caused psychic suffering in particular situations. For example, if a negligence claim based on erroneous standardized test scoring is brought against a public entity, the defendant may be immune from suit under the discretionary-function doctrine.<sup>214</sup>

For all of these reasons, there is little reason to think that erroneous scoring of standardized tests will generate meritorious suits for negligent infliction of emotional distress, no matter how real that distress may be.<sup>215</sup> However, the same type of damages may be available under some other legal theory. For example, emotional distress damages are frequently available in actions for defamation<sup>216</sup> and can occasionally be recovered in a suit for fraud.<sup>217</sup> If those

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<sup>213</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 361-64 (5th ed. 1984) (discussing the reluctance of court to allow recovery for negligently inflicted mental disturbance alone and their greater willingness to permit damages in cases of physical injury or impact). See also *Robinson v. May Dept. Stores Co.*, 246 F. Supp. 2d 440, 445 (E.D. Pa. 2003) (stating that “[m]anifestation of physical injury is necessary to sustain a claim for negligent infliction of emotional distress”).

<sup>214</sup> See *Myslow v. New Milford Sch. Dist.*, 2006 WL 473735, \*17 (D. Conn. 2006) (finding that a claim of negligent infliction of emotional distress against school defendants, relating to accommodation of a student with learning disabilities, was precluded by common law and statutory immunity for discretionary governmental acts).

<sup>215</sup> To be sure, the processing of test results can cause emotional distress. A few years ago, I gave final grades to about 85 first-semester Torts students based in part on an objective-question examination that had been scored by the university test center. At the beginning of the second semester, a student came into my office to review her exam. As we inspected the printout of scores from the test center, I spotted a problem and immediately suspected that the test results were wrong. I excused myself, and raced to the test center. After a frantic hour, I determined that all of the test scores were correct, but that only the printout was erroneous—having substituted for the answer key the answers of a student who had failed to fill-in his or her secret exam number. I was relieved and the students were not harmed, but there was plenty of emotional distress in the interim.

<sup>216</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (recognizing that among the forms of harm inflicted by defamatory falsehood that are routinely recoverable are “personal humiliation” and “mental anguish and suffering”).

<sup>217</sup> See, e.g., *Kilduff v. Adams, Inc.*, 219 Conn. 314, 593 A.2d 478, 484 (Conn.1991) (joining “jurisdictions that allow the recovery of emotional damages that are the natural and proximate result of intentional misrepresentation); *Osbourne v. Capital City Mortg. Corp.* 667 A.2d 1321, 1328 (D.C.1995) (similar). *But see Zeigler v. Fisher-Price, Inc.*, 261 F. Supp. 2d

theories apply, the unavailability of the same damages based on a negligent-infliction claim may to some extent be irrelevant. Of course, the theory of liability may affect such matters as whether the losses are covered by insurance, which in many cases is a pivotal consideration. Many insurance policies exclude coverage for harm caused by intentional<sup>218</sup> or fraudulent conduct,<sup>219</sup> but cover harm caused by negligence, including negligently inflicted emotional distress.<sup>220</sup>

## B. Misrepresentation

In a limited range of cases, erroneous standardized test results might support claims for misrepresentation. In thinking about this subject, it is useful to differentiate two distinct misrepresentation theories (fraud<sup>221</sup> and negligent misrepresentation<sup>222</sup>) and two potential groups of plaintiffs (test-takers and other test-score recipients).

### 1. Fraud

The chief obstacle to a fraud claim will be proving *scienter*.<sup>223</sup> Presumably, it will be

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1047, 1052 (N.D. Iowa 2003) (determining that Iowa will not allow emotional distress damages in a fraud action).

<sup>218</sup> See 7A JOHN A. APPLEMAN ET AL., INSURANCE LAW AND PRACTICE § 4501.09, at 267 (Supp. 2003) (stating that “[i]ntentional injuries, generally, are not covered”). Cf. Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 923 (2004) (noting that “insurance companies seeking to avoid coverage have raised transferred-intent arguments” to avoid having accidental harm characterized as negligence).

<sup>219</sup> See 11 LEE R. RUSS, COUCH ON INSURANCE § 161.19 (3d ed. 2004) (discussing exclusion of coverage for fraud); *id.* at § 131:21 (stating that “[a]ttorney’s professional liability insurance policies frequently exclude from coverage any dishonest, fraudulent, criminal or malicious act or omission”).

<sup>220</sup> Cf. *Boyles v. Kerr*, 855 S.W.2d 593, 604 (Tex.1993) (Gonzalez, J., concurring) (explaining how a plaintiff tried to frame a case involving intentional videotaping of sexual conduct as one for negligent infliction of emotion distress in order to reach insurance coverage).

<sup>221</sup> See RESTATEMENT (SECOND) OF TORTS §§ 525-551(1977) (discussing liability for fraudulent misrepresentation).

<sup>222</sup> See *id.* at § 552 (discussing negligent misrepresentation, which provides a remedy for physical harm or economic losses resulting from carelessly false or misleading statements).

<sup>223</sup> See RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.10, at 826 (5th ed. 2000) (indicating that *scienter* is established by evidence showing that the defendant acted with knowledge of falsity or reckless disregard for the truth).

nearly impossible for a plaintiff to prove that a testing agency knowingly distributed erroneous results. However, establishing *scienter* based on recklessness will be easier, and sometimes possible. When the maker of a statement knowingly lacks confidence in the truth that a statement implies, the statement, if false, is fraudulently made.<sup>224</sup> Thus, if a testing agency has doubts about the correctness of test results but nevertheless distributes those results without disclosing its concerns, the agency acts with *scienter* and could be sued for fraud, if the test results are erroneous and cause harm by inducing reliance.

There is a well-recognized tort duty to correct false statements which, although believed to have been true when made, are later discovered to be false.<sup>225</sup> The duty to correct continues until the recipient of the information is no longer able to protect his or her own interests by avoiding reliance upon the utterance that the defendant speaker has discovered to be erroneous.<sup>226</sup> This theory of liability would be applicable to cases where a testing agency discovers errors in previously distributed test results, but neglects to disclose those errors in timely fashion.

Suppose, for example, that test results distributed in November are discovered in December to contain errors, but the problem is not disclosed to test-takers or other score recipients until March. Is the nondisclosure of the errors between December and March the basis for a lawsuit? Presumably, a testing agency would have a conditional privilege to delay

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<sup>224</sup> See RESTATEMENT (SECOND) OF TORTS § 526 (1977) (providing that a misrepresentation is “fraudulent” if the speaker “(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies”).

<sup>225</sup> See *id.* at § 551 cmt. h (stating that “[o]ne who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made”); Johnson, *supra* note 92, at 291 n.242 (collecting citations). A similar ethical obligation is imposed on attorneys with respect to statements to courts. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (1983) (stating that a “lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to a tribunal by the lawyer”).

<sup>226</sup> See Johnson, *supra* note 92, at 291-92 (indicating that “purpose of the rule is to avoid deception that causes harm”). See also *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 468 (7th Cir. 1981) (finding, in a corporate context, that “[t]he making of the original statements [that the plaintiff would be named president], the discovery of their falsehood, and the failure to correct them before plaintiff relied on them were ‘elements in a continuing course of conduct’ capable of establishing fraud”).

revelation of the suspected errors long enough to conduct an investigation of the facts.<sup>227</sup> The investigation might take weeks or months. When the College Board was alerted to possible problems with the October 2005 SAT, it launched an investigation of not merely the October test, but the subsequent exams in November, December, and January, total of 1.5 million exams in all.<sup>228</sup> A privilege to delay revelation of information about possible scoring errors long enough to investigate the facts would help prevent the type of harm that could be caused by erroneous reports about suspect results, and would also be consistent with the testing agency's own legitimate interest in taking reasonable steps to protect its reputation.<sup>229</sup> However, once the error has been or should have been verified, it is incumbent on the testing agency to promptly disclose the information<sup>230</sup>—provided that the reliance on the erroneous information could still be avoided.

On the posited facts concerning failure to correct, is there anything a test-taker or other score recipient could do to prevent erroneous test results from causing harm? In many cases, the

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<sup>227</sup> Cf. RESTATEMENT (SECOND) OF TORTS §§ 594-96 (1977) (discussing conditional privilege in defamation law). Similarly principles have been applied in other areas of the law. *See id.* at § 652G (applying conditional privileges from defamation law to a false-light invasion of privacy action). *See also* Arenson, *Tests Escaped Check*, *supra* note 126 (quoting a College Board official as stating that the “board had worked as fast as it could, including on nights and weekends, to assess and correct the errors” in scoring the SAT).

<sup>228</sup> *See Additional Detail*, *supra* note 65 (detailing scope of investigation).

<sup>229</sup> Cf. *Scott v. Educational Testing Service*, 252 N.J. Super. 610, 600 A.2d 500, 504 (N.J. Sup. Ct. App. Div.1991) (stating that a testing agency “has an interest in assuring the accuracy of the test results it reports and the predictions it thereby makes”); *K. D. v. Educational Testing Service*, 87 Misc.2d 657, 386 N.Y.S.2d 747, 752 (N.Y. Sup. Ct. 1976.)752 (“[T]he accuracy of its predictions is defendant’s sole stock in trade. The less accurate as a forecaster its tests are, the less value they have to the ... schools. Thus, if defendant reasonably believed that the tests scores ... did not accurately reflect [the plaintiff’s] aptitude ..., it acted within its right to protect its own image ... in canceling plaintiff’s scores and requiring him to take a retest.”).

<sup>230</sup> Similar privileges to delay notification for purposes of investigation are recognized throughout the law. For example, a statutory duty to notify data subjects that the security of their personal information has been breached may be suspended pending investigation. *See, e.g.*, GA. CODE ANN. § 10-1-912(a) (Westlaw 2006) (providing that “notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement . . . or with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system”); Il. Comp. Stat. Ann. Art. 530/10 (Westlaw 2006), 815 ILCS 530/10 (similar). *See also* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 70 Fed. Reg. 15,736, 15,732 (Mar. 29, 2005) (discussing what constitutes prompt notification).

answer will be “yes.” A test-taker who has applied for admission to a college or university could advise that institution of the unreliability of the results. A student who eschewed application to another educational program because the erroneous results appeared uncompetitive might still apply for admission there. And a student might forebear incurring the costs of preparing for and retaking the standardized test until correct results are available. In addition, an educational institution informed of documented or potential errors might be able to delay admissions decisions or scholarship offers, or might re-consider the files of students who were previously rejected. It seems possible that in some cases liability might be imposed under the duty-to-correct theory. This is particularly true if there is evidence, not merely of non-disclosure of the errors, but that the testing agency hid that information or unreasonably hoped that the problem would not be discovered.<sup>231</sup>

## 2. Negligent Misrepresentation

Actions for negligent misrepresentation (as opposed to fraud) would likely follow a similar analysis in cases against commercial providers of testing services, since liability for negligent misrepresentation extends to persons who fail to exercise care in statements made in the course of business operations.<sup>232</sup> The scope of liability for negligent misrepresentation is often more tightly limited than for deceit.<sup>233</sup> However, those limitations would probably not affect aggrieved test-takers and many other score-recipients. Cases that limit the scope of negligent-misrepresentation liability more strictly than by a rule of foreseeable reliance generally do either of two things. The cases either follow the *Restatement* approach or they impose a

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<sup>231</sup> Cf. Karen W. Arenson, *SAT Problems Even Larger Than Expected*, N.Y. TIMES, Mar. 23, 2006 (quoting a college vice president as stating, with respect to revelations of SAT scoring errors, that “[e]verybody appears to be telling half-truths”).

<sup>232</sup> See RESTATEMENT (SECOND) OF TORTS § 552 (1977) (stating that the rule on negligent misrepresentation applies to “[o]ne who, *in the course of his business, profession or employment*, or in any other transaction in which he has a pecuniary interest, supplies false information”) (emphasis added). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS § 10 (P.D. No. 1 2005) (stating that “[a]n actor who in a business undertaking negligently supplies false information to guide another in a business transaction is subject to liability for pecuniary harm resulting from the other’s justifiable reliance upon the information if the actor supplies the information in an advisory capacity or other circumstances justify imposing a duty of care upon the actor”).

<sup>233</sup> See Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 565-66 & n.172 (2004) (citing RESTATEMENT OF TORTS § 552 cmt. a and discussing competing views on the scope of liability for negligent misrepresentation).

requirement of privity or “near-privity.”<sup>234</sup> Under the *Restatement (Second) of Torts*, liability extends only to a “person or . . . [a member] of a limited group of persons for whose benefit and guidance . . . [the defendant] intends to supply the information or knows that the recipient intends to supply it,”<sup>235</sup> and only with respect to “reliance . . . in a transaction that . . . [the defendant] intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.”<sup>236</sup>

Educational institutions that receive test results would seem to readily qualify as plaintiffs under the *Restatement* test, since in such cases it would be clear both that they might rely and what type of reliance might occur.<sup>237</sup> In addition, such direct recipients of erroneous test-scores

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<sup>234</sup> See, e.g., *Hedges v. Durrance*, 834 A.2d 1, 5 (Vt. 2003) (stating that “in order to sustain a cause of action against an attorney for negligent misrepresentation, a third party must demonstrate a relationship so close as to approach that of privity”). See also BERNARD S. MEYER ET AL., *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1932-2003*, p. 475-77 (2006) (discussing the “amorphous” nature of privity, and the importance, under New York law, of conduct linking the defendant to the plaintiff in negligent misrepresentation cases).

<sup>235</sup> RESTATEMENT (SECOND) OF TORTS § 552(2)(a) (1977).

<sup>236</sup> *Id.* at § 552(2)(b) (1977). See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC LOSS § 10 (P.D. No. 1 2005) (discussing liability for negligent misstatement).

<sup>237</sup> Cf. N.Y EDUC. L. § 344 (Westlaw 2006) (providing that the “score of any test subject shall not be released or disclosed by the test agency to any person, organization, corporation, association, college, university, or governmental agency or subdivision unless specifically authorized by the test subject”).

The precise details of the reliance need not be foreseen, so long as the defendant had reason to foresee the general nature and magnitude of reliance. Thus, it would presumably make no difference whether the reliance by an educational institution that received the erroneous score resulted in the awarding or denial of a full scholarship versus a partial scholarship. As the Restatement explains:

There may be many minor differences that do not affect the essential character of the transaction. The question may be one of the extent of the departure that the maker of the representation understands is to be expected. If he is told that the information that he supplies is to be used in applying to a particular bank for a loan of \$10,000, the fact that the loan is made by that bank for \$15,000 will not necessarily mean that the transaction is a different one. But if the loan is for \$500,000, the very difference in amount would lead the ordinary borrower or lender to regard it as a different kind of transaction.

RESTATEMENT (SECOND) OF TORTS § 552 cmt. j (1977). However, it is easy to posit a case of reliance that might be beyond the scope of the Restatement rule. Suppose, for example, that an aunt promises to give her nephew a condominium where he can live while pursuing his legal

would probably also satisfy a privity/near-privity test. In that type of case involving the direct transmission of an erroneous document, there is the kind of one-to-one dealing that substitutes for privity.<sup>238</sup>

A test-taker who pays a fee to take an exam would also have no trouble satisfying a scope-of-liability requirement. The payment would place the test-taker in privity with the testing agency and would thus satisfy any type of standing requirement for negligent misrepresentation—foreseeability of reliance, intended reliance under the *Restatement* rule by a member of a limited group in a known or similar transaction, or privity/near-privity.

### 3. Duty to Non-Paying Test-takers

A different analysis would be required in cases of non-paying test-takers, such as elementary students who take state-required standardized examinations. First, those test-takers might only be able to establish foreseeable reliance, not intended reliance (under the *Restatement* rule) or privity/near privity. Second, there would also be an important issue relating to duty. Some cases—such as suits dealing with drug testing and other medical examinations—have held that the party administering the test owes no duty of care to the test subject, but only to the party paying for the test.<sup>239</sup> Without a duty to exercise care on the part of the defendant, a plaintiff

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studies, if he scores more than 160 on the LSAT. Upon receiving his erroneous test results overstating his performance, he shows a copy to his aunt, who in reliance thereon transfers title to the condominium to her nephew. It might well be argued that it would be unfair to hold the negligent testing agency liable for the loss incurred by the aunt in reliance on the erroneous score. The agency neither knew that the aunt would rely on the report, nor could have foreseen the nature of the transaction in which that reliance might occur. Without such information, the agency had no reason to know how much to spend on precautions to avoid mis-scoring.

<sup>238</sup> See *Credit Alliance Corp. v. Arthur Andersen & Co.*, 493 N.Y.S.2d 435, 445 (N.Y. 1985) (holding that direct communications between a borrower's accountant and a lender sufficiently approached privity to allow an action for negligent misrepresentation). Cf. *LaSalle Nat. Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 729 N.Y.S.2d 671, 675 (2001) (finding no linkage that would support a claim for negligent misrepresentation where it was not alleged that an accounting firm ever acknowledged a letter or otherwise acted to confirm the letter's receipt).

<sup>239</sup> See, e.g., *Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039, 1043 (N.D. Ohio 1998) (finding that a doctor and laboratory which analyzed random drug test results did not have a duty to employee that would support a negligence claim). See also *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 715 (Tex. 2003) (holding that employers who conduct in-house urine specimen collection under the Department of Transportation regulations for random drug-testing of employees owe no duty of care to employees to conduct the drug test with reasonable care); *Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347 (Tex. 1995) (holding, in a case where a prospective employee sued a laboratory that was under contract with the prospective

would be unable to sue for negligent misrepresentation, since duty is an essential element of any negligence-based claim.

However, a number of cases are to the contrary and hold a testing agency, even if employed by a third-party, owes a duty of care to the test-taker.<sup>240</sup> One lawsuit with apparent relevance to tort liability for erroneous scoring of standardized tests is *Merrick v. Thomas*.<sup>241</sup> There, the Supreme Court of Nebraska held that a merit commission owed a duty to a job applicant to score a test accurately. The plaintiff, after receiving an offer of employment from the sheriff's department, resigned her full-time job at her former place of employment. However, she was subsequently terminated by the sheriff's department following discovery that her hiring was the result of incorrect test score. The court wrote:

The merit commission could foresee that Merrick, by the act of applying, desired the job and would rely on the results of a prerequisite test for that job. It is reasonably foreseeable that an inaccurate passing score could result in Merrick's name being given to the sheriff as a qualified applicant and that, approximately 6 months after taking the test, Merrick would be offered a job that she was not qualified for. Last, it is reasonably foreseeable that acceptance of the offer would, with a high degree of certainty, cause injury when officials discovered the true test score. The defendants argue that the only duty owed is to the sheriff who receives the test score . . . [However, the] duty owed Merrick is rooted in common law.<sup>242</sup>

Of course, even if a duty of reasonable care is owed to a test-taker, there is another

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employer to perform a drug test, that the laboratory owed no duty to warn either the employee or the employer of possible causes of positive results other than using drugs).

<sup>240</sup> *See, e.g.*, *Webb v. T.D.*, D.C., 951 P.2d 1008 (Mont. 1997) (finding that a physician who performed an independent examination of a worker at the request of her employer's workers' compensation carrier owed a duty to the worker to exercise ordinary care to discover conditions posing imminent danger to worker's physical or mental well-being and to take reasonable steps to communicate such conditions to the worker); *Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215 (Pa. 2003) (holding that a hospital which contracted with an employer to perform drug testing owed an employee a duty of reasonable care with regard to collection and handling of her urine specimen); *Duncan v. Afton, Inc.*, 991 P.2d 739 (Wyo. 1999) (similar). *See generally* Amy Newman and Jay M. Feinman, *Liability of a Laboratory for Negligent Employment or Pre-employment Drug Testing*, 30 RUTGERS L.J. 473, 488 (1999) (recognizing a split of authority and arguing that a "laboratory has a duty to inform the employer of the relevant considerations surrounding drug testing and . . . to act reasonably during the course of performing the test").

<sup>241</sup> 522 N.W.2d 402 (Neb. 1994).

<sup>242</sup> 552 N.W.2d at 406-07.

obstacle to recovery. If the claim is framed as negligent misrepresentation, it is essential to prove the plaintiff relied upon the negligently false statement.<sup>243</sup> Sometimes that will be difficult or impossible to establish.

### C. Defamation and False-Light Invasion of Privacy

A statement is not defamatory<sup>244</sup> unless it carries with it the sting of disgrace.<sup>245</sup> To be actionable as libel or slander, an utterance must adversely reflect on the personal character of the plaintiff,<sup>246</sup> such as by subjecting the plaintiff to “hatred, ridicule or contempt.”<sup>247</sup> A defamatory

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<sup>243</sup> See *Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039, 1043 (N.D. Ohio 1998) (finding, in an action based on incorrect drug-test results, that the plaintiff had not pled sufficient facts to establish reliance on the representation).

<sup>244</sup> See RESTATEMENT (SECOND) OF TORTS § 559 (1977) (stating that “[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him”).

<sup>245</sup> See *McCulley v. Home Indem. Co.*, 1987 WL 19727 (Del. Super. 1987) (stating that “the element of disgrace is key to a determination of libel” and noting that “traffic offenses . . . may not give rise to . . . social disgrace”); *Shallenberger v. Scoggins-Tomlinson, Inc.*, 439 N.E.2d 699, 705 (Ind. App.1982) (holding that a statement regarding a practice of the real estate industry could not be reasonably interpreted as disgracing a realtor, and thus was not defamatory); *Chastain v. Kansas City Star*, 50 S.W.3d 286, 289 (Mo. App. 2001) (stating that defamatory words “must be of such a nature that the court can presume, as a matter of law, that they will tend to disgrace and degrade the person . . . [and] to expose him to public hatred, contempt or disgrace”); *McConkey v. Flathead Electric Co-op.*, 330 Mont. 48, 125 P.3d 1121, 1130 n.2 (Mont. 2005) (finding that the plaintiff failed to prove defamation where he neglected to show how a statement “would tend to degrade or disgrace him”); *Vitteck v. Washington Broadcasting Co., Inc.*, 256 Pa. Super. 427, 389 A.2d 1197, 1200 (1978) (citing Prosser for the proposition that defamation “necessarily . . . involves the idea of disgrace”); *McCann v. Shell Oil Co.*, 551 A.2d 696, 697 (R.I. 1988) (stating that to be actionable a statement must be “defamatory . . . in the sense that the material imputes disgrace”); *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 277 N.W. 177, 180 (1938), *criticized on other grounds*, *Martin v. Outboard Marine Corp.*, 15 Wis.2d at 460-61, 113 N.W.2d 135 (1962) (finding that it was not libelous to call someone an “arrested case of tuberculosis” because while “[i]t may be unfortunate, . . . it is no disgrace to be tubercular. Contracting the disease is not due, as in some cases of disease, to any immorality”).

<sup>246</sup> Cf. *Fitzgerald v. Tucker*, 737 So.2d 706, 715 (La. 1999) (stating that “[d]efamation involves the invasion of a person’s interest in his or her reputation and good name”).

<sup>247</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. b (1977).

statement must so tend<sup>248</sup> to “harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>249</sup> Communications falling short of this standard will not support a libel or slander claim.<sup>250</sup>

Many standardized test score errors are of a minor magnitude. A report understating a test-taker’s performance by twenty-five, or perhaps even fifty, points on the 2400 point SAT, probably is so unlikely to subject the test-taker to the opprobrium of the community that a court should not entertain a resulting defamation claim. *De minimis non curat lex.*<sup>251</sup> Defamation actions seeking to redress a minor scoring error may be dismissed under the substantial-truth rule, which bars recovery based on statements which, through literally false, are substantially correct.<sup>252</sup>

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<sup>248</sup> “[I]t is not necessary that the communication actually cause harm to another’s reputation or deter third persons from associating or dealing with him. Its [defamatory] character depends upon its general tendency to have such an effect.” RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977).

<sup>249</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>250</sup> *See Agnant v. Shakur*, 30 F. Supp. 2d 420, 424 (S.D.N.Y. 1998) (holding that an allegedly false accusation that plaintiff had worked as federal undercover informant was not defamatory).

<sup>251</sup> “The law does not concern itself with trifles.” BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>252</sup> *See, e.g., Swindall v. Cox Enterprises, Inc.*, 558 S.E.2d 788 (Ga. Ct. App. 2002) (finding that statements that a former Congressman had “lied about drug-money laundering” were substantially true, even though the former Congressman had not been charged with any substantive offenses, because he had been convicted of perjury for giving false testimony to a grand jury to conceal his involvement in discussions about money laundering); *Steele v. Spokesman-Review*, 61 P.3d 606 (Idaho 2002) (finding that an article’s statement that an attorney had relocated from California to Idaho at about the same time as members of a white supremacist group was substantially true even though two years separated their moves); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609 (Tex. App. 2002) (finding that a statement that an inspector had found roaches at a daycare center was not actionable because it was no more damaging than a more accurate statement that the inspector had noted allegations by staff members about roaches); *Provencio v. Paradigm Media, Inc.*, 44 S.W.3d 677 (Tex. App. 2001) (holding that a postcard identifying the plaintiff as a registered sex offender was substantially true, even though the card bore a misleading return address that implied that it had been sent by the government rather than by a news organization). *See also* JOHNSON & GUNN, *supra* note 84, at 971 (stating that a “trivial inaccuracy in a largely correct account will not give rise to liability . . . ‘Jones murdered his wife at 9:15 last night’ is not actionable if in fact Jones murdered his wife at 9:30, or even last week”).

A scoring error of greater magnitude will warrant more extensive judicial consideration, such as test results on the 2400-point SAT that are understated by, say, 200, 300, or 400 points. At some juncture, the magnitude of the error will be so great as to disgrace the test-taker and cause others to think less of him or her. Statements that impute incompetence in business, trade, or profession are readily actionable as libel and slander.<sup>253</sup> It is reasonable to assume that mis-scoring plaintiffs may be able to invoke successfully this type of precedent to mount defamation claims in cases involving sizeable scoring errors. That line of argument will be particularly appealing where an erroneous score precipitates clear harm, such as by causing a student to be denied a diploma, degree, or essential professional credential.<sup>254</sup> In such cases, a defendant testing agency publishes to those to whom it disseminates test scores false facts purporting to show that the test-taker is not “competent.”

The “publication” requirement for libel and slander is satisfied by intentional or negligent communication of the false statement to a third person who understands the defamatory utterance.<sup>255</sup> This standard will easily be satisfied where a testing agency provides test results directly to a person other than the test-taker. It is possible that a testing agency may be held liable for republication of an erroneous score by the test-taker. While the originator of a defamatory statement is generally not responsible for its re-publication by the subject of the false and defamatory statement, that is because the subject is normally aware of the defamatory content, and has a duty to avoid or mitigate damages.<sup>256</sup> However, re-transmission by the plaintiff of a known falsehood should be distinguished from cases of unwittingly transmission of a defamatory message whose falsehood is unknown. “If the defamed person’s transmission of the communication to the third person was made . . . without an awareness of the [false and] defamatory nature of the matter and if the circumstances indicated that communication to a third

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<sup>253</sup> See RESTATEMENT (SECOND) OF TORTS § 573 (1977) (discussing slanderous allegations of incompetence in business, trade, or profession). See also *Costello v. Hardy*, 864 So.2d 129, 141 (La. 2004) (holding that allegations calling into question an attorney’s skill were defamatory).

<sup>254</sup> See *id.* at § 573 illus. 4 (indicating there may be liability for defamation where “A, says to B that C, a lawyer, is ignorant and unqualified to practice law”).

<sup>255</sup> See *Economopoulos v. A. G. Pollard Co.*, 105 N.E. 896, 896 (Mass. 1914) (holding that no cause of action was stated due to lack of publication where one clerk accused the plaintiff in English of stealing a handkerchief, and no one was present, and a second clerk made a similar accusation in Greek, but the persons present (other than the plaintiff) did not understand the language). See also RESTATEMENT (SECOND) OF TORTS § 577(1) (1977) (recognizing liability for intentional and negligent publication).

<sup>256</sup> See RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977); see also note 262, *infra* and accompanying text (discussing compelled self-publication).

party would be likely, a publication may properly be held to have occurred.”<sup>257</sup>

Unlike defamation, an action for false-light invasion of privacy may be based on a statement that is highly offensive, but not so bad as to be disgraceful.<sup>258</sup> In that regard, it may be easier for a small scoring error to be actionable as false light rather than as libel or slander. However, falsity-light suits based on standardized test mis-scoring are likely to fail for two reasons. The first concerns the degree to which the statement is disseminated, and second relates to culpability.

While defamation is actionable if a false statement is communicated to just one person,<sup>259</sup> false light requires “publicity,”<sup>260</sup> meaning that the utterance must be so widely disbursed that it is substantially certain to become a matter of community knowledge.<sup>261</sup> In many cases, standardized test results are communicated only to a small group of recipients. Courts have generally rejected the theory of compelled self-publication in defamation law,<sup>262</sup> and it is likely

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<sup>257</sup> RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977).

<sup>258</sup> *Cf. id.* at § 652E illus. 3 (1977) (offering this example: “A is a renowned poet. B publishes in his magazine a spurious inferior poem, signed with A’s name. Regardless of whether the poem is so bad as to subject B to liability for libel, B is subject to liability to A for invasion of privacy”).

<sup>259</sup> *See id.* at § 577(1) (discussing “[p]ublication of defamatory matter . . . to one other than the person defamed”).

<sup>260</sup> *See id.* at § 652E (requiring “publicity”); *id.* § 652E cmt. a (erroneously cross-referencing comment a of § 652C, rather than § 652D). *See also* *Andrews v. Stallings*, 892 P.2d 611, 626 (N.M. Ct. App. 1995) (holding that a report to the IRS did not qualify as publicity).

<sup>261</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977) (discussing publicity given to private life). The Restatement explains:

“Publicity,” . . . [in privacy actions], differs from “publication,” . . . [in] defamation. “Publication,” . . . is a word of art, which includes any communication by the defendant to a third person. “Publicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

*Id.* at cmt. a.

<sup>262</sup> *See* COLO. REV. STAT. ANN., §13-25-125.5 (Westlaw 2006) (providing that “[s]elf-publication . . . shall not give rise to a claim for libel or slander against the person who originally communicated the defamatory statement”); *Gonsalves v. Nissan Motor Corp.*, 58 P.3d

that they will follow the same path in false-light cases, which require a wider degree of dissemination.<sup>263</sup> Thus, the plaintiff's own knowing repetition of the falsity cannot serve as the predicate for establishing the wide-spread awareness of the falsity within the community that is at the heart of the false-light "publicity" requirement.<sup>264</sup>

In addition, false-light invasion of privacy normally<sup>265</sup> requires proof of "actual malice,"<sup>266</sup> meaning that the defendant must have acted with a high degree of awareness of the probable falsity of statement.<sup>267</sup> This kind of proof will not commonly be available in erroneous

1196 (Haw. 2002) (rejecting self-publication); *White v. Blue Cross and Blue Shield of Massachusetts, Inc.* 809 N.E.2d 1034, 1037 (Mass. 2004) (same). *But see* *Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 219-20 (Minn. App. 2002) (holding that where the defendant had reported the plaintiff's alleged misconduct to the Nurse's Board, the plaintiff had no reasonable means to avoid self-publishing the statement to a new employer).

<sup>263</sup> *Cf.* *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997) (referring to the "largely discredited doctrine of 'compelled republication' or (more vividly) 'self-defamation,' which . . . [m]ost states . . . reject . . . as a basis for a tort claim," and refusing to extend the principle into federal constitutional law).

<sup>264</sup> A few cases have substantially departed from the "publicity" requirement in the parallel privacy action for disclosure of private fact (rather than false light). The case hold that "[w]hen a special relationship exists, the public can include one person or small groups such as fellow employees, club members, church members, family or neighbors." *See* *Pachowitz v. Le Doux*, 666 N.W.2d 88, 96 & n. 9 (Wis. Ct. App. 2003) (citing cases and affirming in part a judgment based on disclosure to one person whom the defendant knew had "loose lips"). *But see* *Swinton Creek Nursery v. Edisto Farm Cr.*, 514 S.E.2d 126 (S.C. 1999) (rejecting the argument that if information eventually became public, a party who disclosed the information to only one person could be held liable for "sparking the flame").

<sup>265</sup> *But see* *American Nat. Gen. Ins. Co. v. L.T. Jackson*, 203 F. Supp.2d 674, 685 (S.D. Miss. 2001) (recognizing false light invasion of privacy under negligence theory); *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 647-48 (Tenn. 2001) (holding that in a false-light action asserted by a private plaintiff regarding a matter of private concern, the plaintiff need only prove that the defendant publisher was negligent).

<sup>266</sup> RESTATEMENT (SECOND) OF TORTS § 652E(b) (1977) (stating that, for liability to be imposed, the plaintiff must prove that the "actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the . . . [plaintiff] would be placed"). *See also* *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250-51 (1974) (finding no occasion to re-examine the actual malice requirement in false-light cases).

<sup>267</sup> *Cf.* *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (discussing the "actual malice" requirement in defamation and concluding that there must be "sufficient evidence to permit the

scoring cases, but may be adduced in suits where the facts also establish *scienter* for a misrepresentation claim.<sup>268</sup>

The actual-malice culpability requirement in false-light cases is likely to be more demanding than the corresponding fault requirement in defamation actions. At one time, strict liability was imposed for defamatory false statements.<sup>269</sup> Today, however, proof that the defendant was at fault with respect to the falsity of a defamatory utterance is required in a wide range of cases. Public officials and public figures, suing with respect to their conduct, fitness, or role in their public capacity, must prove actual malice.<sup>270</sup> Of course, it is unlikely that this rule will apply to many standardized testing errors since the persons who take such tests are typically neither public officials nor public figures who have achieved notoriety in the community.<sup>271</sup> More probably, the mis-scoring plaintiff will be a “private person” suing with respect to a matter of public concern (e.g., a student taking a test required by state law), or a person suing with respect to a matter of private concern (e.g., perhaps a student taking a standardized test for which the results will be reported only to a small number of private colleges or universities). In the former case (private person/matter of public concern—for which the standards are set by *Gertz v. Robert Welch, Inc.*<sup>272</sup>), Supreme Court precedent mandates that States not permit recovery of damages unless there is evidence that the defendant was at least negligent as to the falsity of the

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conclusion that the defendant in fact entertained serious doubts as to the truth of his publication”).

<sup>268</sup> See Part III-B-1.

<sup>269</sup> See RESTATEMENT (SECOND) OF TORTS §§ 623A cmt. d (1977) (acknowledging that “strict liability as to the issue of falsity [was] imposed by the common law of defamation”). For example, in *Cassidy v. Daily Mirror Newspapers, Ltd.*, 2 K.B. 331 (1929), a newspaper article said that Mr. Cassidy was engaged to a woman, which is what both Cassidy and the woman told the newspaper. In fact, unknown to the newspaper, Cassidy was already married. The court held the newspaper liable to Cassidy’s wife for defamation because her acquaintances believed, as a result of the article, that she was living with a man (Cassidy) to whom she was not married.

<sup>270</sup> See *id.* at § 580A (stating that “[o]ne who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters”).

<sup>271</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (explaining that “[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures”).

<sup>272</sup> 418 U.S. 323 (1974).

defamatory statement.<sup>273</sup> As to cases in the latter group (a person suing with respect to a matter of private concern—where *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>274</sup> is a key precedent), the Supreme Court has not definitively ruled on whether strict liability is permissible or negligence must be shown.<sup>275</sup> Many states now require negligence.<sup>276</sup> Negligence as to falsity is considerably easier to prove than actual malice.<sup>277</sup>

Whether a defamation suit by a test-taker whose score is seriously understated is treated as involving a private person suing with respect to a matter of public concern (a *Gertz*<sup>278</sup> case), or simply a person suing with respect to a matter of private concern (a *Dun & Bradstreet*<sup>279</sup> case), has important implications not only with respect to culpability, but whether damages must be

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<sup>273</sup> 418 U.S. at 347 (stating that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”). *But see* *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 452 (Ind.1999) (holding that even private persons suing with respect to matters of public or general concern must prove actual malice).

<sup>274</sup> 472 U.S. 749 (1985).

<sup>275</sup> *Compare* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 774 (1985) (White, J. concurring) (arguing that “it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is . . . inapplicable in cases such as this); *with id.*, 472 U.S. at 781 (Brennan, J. dissenting) (stating that “the parties [do not] question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages.”). *See also* *Andersen v. Diorio*, 349 F.3d 8, 17 n.4 (1st Cir. 2003) (indicating that whether a negligence requirement applies to “statements against non-public figures in matters of private concern is still formally unsettled”).

<sup>276</sup> *See, e.g.*, *Costello v. Hardy*, 864 So.2d 129, 143 (La. 2004) (requiring “lack of reasonable belief in the truth of the statement giving rise to the defamation,” which is “akin to negligence”). *See also* *Zaidi v. United Bank Ltd.*, 747 N.Y.S.2d 268, 273 (Sup. Ct. 2002) (stating that the “New York Court of Appeals has yet to establish what degree of fault, if any, plaintiff is required to prove in cases involving a purely private plaintiff and speech implicating purely private concerns,” but that the Appellate Division has required negligence).

<sup>277</sup> *Cf.* *JOHNSON & GUNN*, *supra* note 84, at 991-92 (discussing the great difficulty of proving actual malice in reporting).

<sup>278</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>279</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

proved. At common law, all libel (generally written defamation<sup>280</sup>) was actionable *per se*,<sup>281</sup> as were four categories of slander<sup>282</sup> (generally oral defamation<sup>283</sup>), including statements imputing incompetence in business, trade, or profession.<sup>284</sup> This meant that a jury could award “presumed damages,” without proof of actual losses.<sup>285</sup> Under the rule of presumed damages—which was a great departure from the usual standards of tort liability—the jury could look to the nastiness of the statement and the degree of its dissemination and presume an amount of damages that would fairly compensate the plaintiff. Thus, many sizeable awards were made without any precise proof of what losses actually occurred.<sup>286</sup> During the process of reconciling the ancient law of libel and slander<sup>287</sup> with the demands of the First Amendment,<sup>288</sup> which began with *New York*

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<sup>280</sup> See RESTATEMENT (SECOND) OF TORTS § 568(1) (1977) (stating that “[l]ibel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words”).

<sup>281</sup> See *id.* at § 568(2) (providing that “[o]ne who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication”).

<sup>282</sup> See *id.* at § 570 (providing that “[o]ne who publishes matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other (a) a criminal offense, . . . or (b) a loathsome disease, . . . or (c) matter incompatible with his business, trade, profession, or office, . . . or (d) serious sexual misconduct”).

<sup>283</sup> See *id.* at § 569 (stating that “[s]lander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than [libel]”).

<sup>284</sup> See *id.* at § 573 (indicating that “[o]ne who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm”).

<sup>285</sup> See, e.g., *Schlegel v. Ottumwa Courier*, a Div. of Lee Enterprises, Inc., 585 N.W.2d 217, 222 (Iowa 1998) (stating that “[w]hen statements are libelous *per se*, they are actionable in and of themselves without proof of malice, falsity, or damage”).

<sup>286</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (discussing the traditional rules pertaining to libel).

<sup>287</sup> See Kay L. Reamey, Note, *Torts—Defamation—Private Figure Plaintiff Must Show Not Only Fault as to Falsity but Also Falsity Itself to Recover Damages for Defamatory Statements Made by Media Defendant on Matters of Public Concern*, 18 ST. MARY’S L.J. 581, 584 (1986)

*Times v. Sullivan*,<sup>289</sup> the Supreme Court “roughly bisected the sphere of social commentary between matters of public concern, which are those that can be ‘fairly considered as relating to any matter of political, social, or other concern to the community,’ and matters of private concern, which are those that address ‘matters of only personal interest.’”<sup>290</sup> The Supreme Court held that a *Gertz*-type plaintiff<sup>291</sup> (a private person suing with regard to a matter of public concern) could not recover presumed damages without proof of actual malice.<sup>292</sup> In contrast, a *Dun & Bradstreet*-type plaintiff<sup>293</sup> (a person suing with respect to a matter of purely private concern) was still allowed to recover presumed damages under the traditional rules, even in the absence of actual malice.<sup>294</sup> Consequently, damages issues relating to a defamation claim in standardized test mis-scoring cases may be greatly affected depending upon whether the false statement is viewed as a matter of purely private concern, rather than a matter of public concern. In that situation, proof of actual losses will not be not required.

What qualifies as a matter of private concern is often unclear,<sup>295</sup> and many persons doubt

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(indicating that “[i]n response to the violence that accompanied the transition from a feudal order to a capitalist nation-state during the sixteenth century, the law of the Court of Star Chamber proscribed both seditious and nonpolitical libel. . . . During this time, common law tribunals obtained jurisdiction of civil actions for slanderous attacks on reputation and awarded money damages for secular losses”).

<sup>288</sup> See U.S. CONST. amend. I (stating that “Congress shall make no law . . . abridging the freedom of speech, or of the press”).

<sup>289</sup> 376 U.S. 254 (1964).

<sup>290</sup> *Veilleux v. National Broadcasting Co., Inc.*, 8 F. Supp. 2d 23, 34 (D. Me. 1998), quoting *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 131 (1st Cir. 1997).

<sup>291</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>292</sup> See *id.* at 349 (stating rule).

<sup>293</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>294</sup> See *id.* at 761 (finding that “[i]n light of the reduced constitutional value of speech involving no matters of public concern, . . . the state interest [in compensating defamatory harm] adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice’”).

<sup>295</sup> See *Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 471 (Ind. 1999) (Boehm, J., concurring) (recognizing that “drawing a line between matters of public and private concern may prove to be problematic,” but opining that “[o]ver time . . . guidelines will emerge”); *Duracraft Corp. v. Holmes Products Corp.*, 691 N.E.2d 935, 941 n.14 (Mass. 1998)

whether courts can or should attempt to define what matters are legitimately of concern to the public.<sup>296</sup> In *Dun & Bradstreet*,<sup>297</sup> the Supreme Court re-embraced the public concern/private concern dichotomy that it had rejected just a few years earlier,<sup>298</sup> and somewhat surprisingly<sup>299</sup> held that an erroneous statement about whether a major employer in the community was going bankrupt was a matter of private concern because the statement was contained in a credit report that was distributed to a very limited number of subscribers.<sup>300</sup> In light of that ruling, standardized test results reported confidentially to a small number of private schools—in contrast to standardized testing results in the public education, which are often publicly available—might

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(observing that “distinguishing matters of public from matters of private concern is not always clear-cut”).

<sup>296</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) (opining that if “courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject,” even though courts “are not anointed with any extraordinary prescience”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (stating “[w]e doubt the wisdom of committing this task [of differentiating public concern from private concern] to the conscience of judges”).

<sup>297</sup> 472 U.S. 749 (1985).

<sup>298</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (finding that “[t]he ‘public or general interest’ test for determining the applicability of the *New York Times* [actual malice] standard to private defamation actions inadequately serves both of the competing values at stake”).

<sup>299</sup> See JOHNSON & GUNN, *supra* note 84, at 1006. The text states:

*Dun & Bradstreet* provides little guidance for distinguishing matters of private concern from matters of public concern. Indeed, the Court’s application of the law to the facts before it seems somewhat counter-intuitive. The credit report had erroneously said that the plaintiff had declared voluntary bankruptcy. Isn’t it a matter of public concern whether a business which employs numerous workers and pays taxes is failing? The Court appeared to place weight on the fact that the erroneous credit report was given limited dissemination and that the five subscribers who received the report were contractually precluded from further disseminating its contents. The Court also suggested that the reporting of “objectively verifiable information” deserved less constitutional protection than other kinds of speech, and that market forces gave credit-reporting agencies an incentive to be accurate, “since false credit reporting is of no use to creditors.”

<sup>300</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (noting that “[w]hether ... speech addresses a matter of public concern must be determined by [the expression’s] content, form, and context ... as revealed by the whole record”).

fall within that “private concern” category.<sup>301</sup> In defamation cases generally, courts are far more likely to label a statement as a “matter of public concern” or a “matter of private concern,” than to explain their reasoning behind that conclusion or identify relevant variables.<sup>302</sup>

As yet, there is no guidance from courts directly addressing defamation or false-light claims based on standardized test scoring errors. One of the unresolved question is whether a claim for libel or slander against a testing agency can be defeated by a qualified privilege.<sup>303</sup> Regardless of the attacks on standardized testing,<sup>304</sup> many would argue that such evaluative instruments serve a useful purpose, and therefore good faith communication of test scores—even if erroneous—should be qualifiedly privileged. A qualified privilege is lost when the privilege is abused.<sup>305</sup> One form of abuse is dissemination of a statement with knowledge of its falsity or with reckless disregard for its truth.<sup>306</sup> This means that qualified privileges will play no role in cases alleging defamation or false light against testing agencies, if the plaintiff must prove actual malice. That is, proof of the plaintiff’s *prima facie* case would by necessity destroy a qualified privilege. However, as explained above, it is likely that in many libel or slander mis-scoring suits the plaintiff will qualify as a “private” person, and will therefore only need to prove that the defendant testing agency acted with negligence as to the falsity of the report. In such cases, it

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<sup>301</sup> Some types of evaluations, or at least the protests related thereto, qualify as matters of private concern. *See Alaniz v. City of Sullivan City, Tex.*, 2005 WL 1651021,\*7 n.3 (S.D. Tex. 2005) (stating that “public employees raise matters of public concern if they criticize the special attention paid by the police to a wealthy neighborhood, or the implementation of a federally funded reading program. . . . [T]he quality of nursing care given to a group of people, including inmates, is a matter of public concern, as is the adequacy of a fire department’s level of manpower. However, public employees raise matters of “private concern” if they criticize the morale problems or transfer policies of the district attorney’s office; or criticize the performance of co-employees and supervisors; or protest an employer’s *unfavorable job evaluation*”) (emphasis added).

<sup>302</sup> *But see Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 999 F. Supp. 137, 140-43 (D. Me.1998) (extensively analyzing why a retail store manger’s statement to the author of a magazine article about a competitor was a matter of public concern).

<sup>303</sup> *See note 227, supra.*

<sup>304</sup> *See Part I-B.*

<sup>305</sup> *See* RESTATEMENT (SECOND) OF TORTS §§ 599-605A (1977) (discussing abuse of privilege).

<sup>306</sup> *See id.* at § 600 (stating rule). *See also Taranto v. North Slope Borough*, 992 P.2d 1111, 1114 (Alaska 1999) (stating rule).

may be possible for a qualified privilege to defeat the plaintiff's proof of a *prima facie* case.<sup>307</sup>

#### D. Tortious Interference with Prospective Advantage

The twin torts of interference with contract<sup>308</sup> and interference with prospective advantage<sup>309</sup> safeguard contractual and other valuable expectations “and thereby . . . nurture, if not ensure, the stability and predictability that are necessary . . . [for] commercial life” and personal achievement.<sup>310</sup> It is reasonable to ask whether standardized test scoring errors are actionable under either of these theories of liability.

An erroneous standardized test score will seldom disrupt an existing contractual relationship.<sup>311</sup> People typically do not administer tests to determine whether to maintain the

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<sup>307</sup> Cf. *Rogozinski v. Airstream by Angell*, 377 A.2d 807, 820 (N.J. Super. Ct. 1977) (holding that a report to the Unemployment Compensation Commission concerning the plaintiffs' discharge, though false and defamatory, was qualifiedly privileged because, although the defendant may have been negligent as to the falsity of the statements, the statements were not made with knowledge of their inaccuracy or reckless indifference as to whether they were correct).

<sup>308</sup> Interference with contract has two branches, complete disruption of the plaintiff's or a third person's performance and burdening the plaintiff's performance. See RESTATEMENT (SECOND) OF TORTS § 766 (1979) (providing that “[o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract”); *id.* at § 766A (indicating that “[o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him”).

<sup>309</sup> See RESTATEMENT (SECOND) OF TORTS § 766B (1979) (stating that “[o]ne who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation”).

<sup>310</sup> Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 75 (1988) (extensively discussing tortious interference with law firm client relationships).

<sup>311</sup> *But see Merrick v. Thomas*, 522 N.W.2d 402 (Neb. 1994), discussed *supra* in the text at note 241.

*status quo*. Rather, tests are more commonly used to determine whether a person will cross a threshold leading to a new status or arrangement. Thus, mis-scoring most often will interfere by causing the loss of future advantages, such as admission to a school, receipt of a scholarship, or attainment of a degree or license. Obviously, understated test scores can cause damage because when scores are too low, benefits are often not conferred. In the types of educational and professional evaluations where standardized test scores play a role, the offer of a valuable opportunity, such as admission or employment, many times goes to the more highly scoring competitor.

The first obstacle for a mis-scoring plaintiff is that the interference actions are exclusively intentional torts.<sup>312</sup> Merely negligent interference is not actionable,<sup>313</sup> except in the rarest of cases.<sup>314</sup> To recover for interference, the plaintiff must prove that the defendant intended to disrupt an existing or future relationship between the plaintiff and a third party. Intent encompasses purpose and knowledge.<sup>315</sup> It is exceedingly unlikely that a test-taker or other aggrieved party will be able to show that an erroneous standardized test score was disseminated with the purpose—the goal, objective, or desired consequence—of interfering with an existing or prospective relation between the plaintiff and some third person. Thus, a critical question will often be whether the other variety of intent—knowledge—is applicable. Did the defendant know with substantial certainty that its conduct would induce or otherwise cause disruption?

If a testing agency provides a very low test score directly to a college or university where a test-taker seeks admission, it may be possible for a court to find that the testing agency knew with substantial certainty that the student would not be admitted. The same is true where the testing agency is aware that a particular score is too low for a student to pass a government-mandated examination, such as those administered pursuant to the federal No Child Left Behind

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<sup>312</sup> See generally RESTATEMENT (SECOND) OF TORTS § 766 cmt. j, § 766A cmt. e, and § 767 cmt. d (1979) (discussing intent and purpose).

<sup>313</sup> See *id.* at § 766C (indicating that “[o]ne is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor’s negligently (a) causing a third person not to perform a contract with the other, or (b) interfering with the other’s performance of his contract or making the performance more expensive or burdensome, or (c) interfering with the other’s acquiring a contractual relation with a third person”).

<sup>314</sup> See, e.g., *J’Aire Corp. v. Gregory*, 157 Cal. Rptr. 407 (Cal. 1979) (allowing an action against a contractor who failed to complete a structural renovation in a timely fashion).

<sup>315</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 1 (P.F.D. No. 1, 2005) (stating that “[a] person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result”).

Act.<sup>316</sup> (In such cases, if the testing agency is to be saved from liability, it will be on some ground other than lack of intent—perhaps lack of a legally protectable interest on the part of the plaintiff, lack of impropriety,<sup>317</sup> or some kind of privilege (all of which are discussed below).)

Of course, an erroneous test score may not be so bad that the test agency “knows” what will happen when the score is received. For example, it may be wholly unclear whether an applicant for admission to the bar will be admitted in a particular jurisdiction when an erroneous Multistate Bar Examination score is disseminated. That score may have to be combined with an unknown score on an essay graded by law examiners to arrive at a scaled total score which then determines whether the aspirant will be allowed to practice law. By mis-scoring the MBE, the testing agency may have created an unreasonable risk that the bar applicant will not be admitted, but there is an important difference in this area of the law between unreasonableness (negligence or recklessness) and intent.<sup>318</sup> Anything less than intent as to the result that the law forbids—that is, intent as to resulting interference with a contract or prospective advantage—will not do.

According to the *Restatement*, there is liability both for disrupting an existing contract, and for *burdening* the performance of the contract, such as by making fulfilment of contractual obligations more difficult or expensive.<sup>319</sup> Some courts have endorsed the “burdening rationale,” but others have not.<sup>320</sup> Importantly, some courts have extended the burdening theory of liability

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<sup>316</sup> 20 U.S.C.S. § 6301 (2004).

<sup>317</sup> *Cf.* RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979) (indicating that “[t]he fact that . . . interference with the other’s contract was not desired and was purely incidental in character is . . . a factor to be considered in determining whether the interference is improper”). *See also id.* at § 767 (discussing the many factors bearing upon impropriety).

<sup>318</sup> *See, e.g.,* *Anderson v. Regents of Univ. of Calif.*, 554 N.W.2d 509 (Wis. Ct. App. 1996) (finding that no viable claim was stated where a complaint alleged that a state university was directly responsible for placing tickets in hands of scalpers, but failed to charge that the state university took those actions for the purpose of interfering with contracts between tourists and tour operators”). *See also* Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 521 (1998) (opining that “[t]he law of tortious interference safeguards interests in a relationship from unprivileged purposeful or knowing disruption by a person outside the relationship”).

<sup>319</sup> *See* note 308, *supra*.

<sup>320</sup> *See Price v. Sorrell*, 784 P.2d 614, 615 (Wyo. 1989) (refusing to adopt Restatement (Second) of Torts § 766A). In *Price*, a debtor’s attorney allegedly interfered with the contractual relationship between the creditor (a hospital) and its attorney (Price) by sending a letter to the hospital questioning its wisdom in hiring Price. The hospital did not discharge Price, but Price alleged that he was forced to incur expenses to restore good relations with the hospital. The court wrote:

to cases involving interference with prospective advantage.<sup>321</sup> Thus, even though the Restatement does not recognize liability for burdening absent an existing contract,<sup>322</sup> that theory might be argued in a mis-scoring case. An aggrieved test-taker might contend that even if a testing agency did not know that admission to a grade level or an educational program, or conferral of a scholarship, degree, or license, would be denied, it did know that the score would burden the performance or acquisition of that advantageous relation. Testing agencies should expect to encounter this type of argument.

It might be possible to ask again, as with fraud,<sup>323</sup> whether the conduct that forms the basis for the allegedly tortious interference could be viewed not as the initial dissemination of erroneous results, but the failure to correct those misstatements once their falsity is known. In tort law, acts and omission are sometimes,<sup>324</sup> but not always,<sup>325</sup> equivalent, so it not absurd to ask whether failure to retract an erroneous score could be a form of interference. Indeed, in defamation law, failure to remove defamatory postings by another is sometimes treated as being

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§ 766A requires . . . not a breach or non-performance, but only that performance became more expensive and burdensome. . . . [S]uch an element of proof is too speculative and subject to abuse to provide a meaningful basis for a cause of action. The breach or non-performance of a contract, or the loss of a prospective contractual relation, is a reasonably bright line that reduces the potential for abuse of the causes of action defined by §§ 766 and 766B.

*Id.* at 616. *See also* Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 659-63 (3d Cir. 1993) (declining to decide whether Pennsylvania would recognize tortious interference based on “burdening” or “hinderance,” but containing and extensive discussion casting doubt on that theory of liability).

<sup>321</sup> *See, e.g.*, LaRouche v. National Broadcasting Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986) (holding the defendant liable for expenses entailed by unsuccessful interference with an television interview, which ultimately took place).

<sup>322</sup> *See* note 309, *supra*.

<sup>323</sup> *See* Part III-B-1.

<sup>324</sup> *See, e.g.*, UNIF. COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 127 (1996) (defining “fault” as “acts or omissions that are in any measure negligent or reckless”).

<sup>325</sup> *See* JOHNSON & GUNN, *supra* note 84, at 443-469 (explaining that with respect to intervening causes, acts are more likely than omissions to break the chain of proximate causation); Johnson, *supra* note 93, at 348 (asserting that “[t]he law continues to draw an important distinction between doing something badly (misfeasance) and not doing it at all (nonfeasance). The former often gives rise to liability because one who acts must act reasonably, but the latter may go unpunished on the ground that the defendant had no duty to act to protect the interests of the plaintiff”).

the same as affirmative publication of the damaging material.<sup>326</sup> At least a first blush, the failure-to-retract argument lacks appeal. Most interference cases involve some very active form of intervention,<sup>327</sup> such as changing contract bidding rules,<sup>328</sup> cancelling a score,<sup>329</sup> or extending an offer of employment.<sup>330</sup> The interference is an act which, in a real sense, intrudes and disrupts some existing or prospective relation. Passivity may be tortious on some other theory, but at least in the absence of a request to retract, it is dubious whether passive failure to correct should constitute “interference.”

A “prospective contractual relationship” is “something less than a right” but “more than hope.”<sup>331</sup> An action for tortious interference with prospective advantage will lie only if there is a reasonable probability that a benefit or opportunity would have been conferred but-for the interference.<sup>332</sup> It will be difficult to establish this level of certainty in many cases.<sup>333</sup> In one suit,

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<sup>326</sup> See RESTATEMENT (SECOND) OF TORTS § 577(2) (1977) (proving that “[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication”).

<sup>327</sup> Cf. Johnson, *supra* note 318, at 521 (opining that “[t]he law of tortious interference safeguards interests in a relationship from unprivileged purposeful or knowing disruption by a person outside the relationship”).

<sup>328</sup> See *Printing Mart-Morristown v. Sharp Electronics Corp.*, 563 A.2d 31, 40 (N.J. 1989) (finding that a claim was stated for tortious interference with prospective advantage).

<sup>329</sup> See *Johnson v. Educational Testing Service*, 754 F.2d 20, 26 (1st Cir.1985) (holding that a testing agency’s cancellation of a suspectedly fraudulent test score was justified and therefore not actionable as tortious interference).

<sup>330</sup> See *Lumley v. Gye*, 2 El. & Bl. 216 (1853) (involving an opera star who was induced to breach her exclusive-engagement contract).

<sup>331</sup> *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 471 (Pa. 1979).

<sup>332</sup> See *Printing Mart-Morristown v. Sharp Electronics Corp.*, 563 A.2d 31, 41 (N.J. 1989) (holding that there was a “reasonable probability” that, but for defendants’ conduct, the plaintiffs would have been awarded the printing component of a contract because they submitted lowest bid for the entire job, the lowest bid for the printing component, and had “enjoyed a nine-year working relationship” with the party in question). See also *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1392 (3d Cir. 1991) (explaining that a medical school applicant failed to demonstrate “reasonable probability” of acceptance).

<sup>333</sup> See, e.g., *Anderson v. Vanden Dorpel*, 667 N.E.2d 1296, 1299-1300 (Ill. 1996) (finding that the plaintiff’s allegation that she was the “leading candidate” for new job was

where the plaintiff sued for tortious interference with her application to medical schools, the court denied recovery because although the applicant “had a ‘satisfactory academic record and background,’ she had ‘not demonstrated more than a mere hope in securing a prospective relationship with a medical school.’”<sup>334</sup> “If it is a matter of speculation whether a relationship will come to fruition, there is no cause of action for tortious interference with prospective advantage.”<sup>335</sup>

Interference is not actionable unless it is improper. The general test for impropriety is essentially a “totality of the circumstances” inquiry which takes into account, among other things, “the nature of the actor’s conduct, . . . the actor’s motive, . . . the interests sought to be advanced by the actor, . . . the social interests in protecting the freedom of action of the actor . . . , and . . . the relations between the parties.”<sup>336</sup> “Fraudulent misrepresentations are . . . ordinarily a

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insufficient to support claim of intentional interference with prospective economic advantage); *Strickland v. University of Scranton*, 700 A.2d 979 (Pa. Super. Ct. 1997) (finding that the plaintiff had “not demonstrated a genuine issue of material fact on whether it was reasonably probable that his contract with the University would have been renewed in the absence” of alleged interference). *But see Tarleton State Univ. v. Rosiere*, 867 S.W.2d 948, 952 (Tex. App.–Eastland 1993) (holding that a professor showed a reasonable probability of entering into future business relationship with a state university to support his claim for tortious interference with future business relationships resulting from the denial of tenure).

<sup>334</sup> *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1392 (3d Cir. 1991). As the court explained:

[I]t was difficult to determine whether or not Nathanson would have been accepted by a medical school. In 1985, she applied to ten medical schools and was accepted only by . . . [one]. In 1986, she applied to six medical schools and was accepted only by Georgetown which had rejected her when she had applied there the year before. Based upon this history, it is too speculative to conclude that she would have been accepted by any medical school in 1987 or 1989. Admissions policies vary considerably from school-to-school and from year-to-year. Other information is simply not known.

*Id.* at 1392.

<sup>335</sup> *Johnson*, *supra* note 318, at 523 (arguing that “[c]ounsel for an uncertified class has no more than a hope that a relationship will be consummated with unnamed putative class members, for it is entirely speculative whether the court (after considering the requirements of numerosity, typicality, commonality, and representativeness) will certify the class and whether those putative members (after being apprised of the [class] action and available opportunities) will elect to opt out of the class,” and therefore the relation would not be protected by the law of tortious interference).

<sup>336</sup> RESTATEMENT (SECOND) OF TORTS § 767 (1979).

wrongful means of interference and make an interference improper.”<sup>337</sup> However, the same may not be true of negligent misrepresentation, and there may be serious doubts as to whether dissemination of negligently false standardized test results will qualify as improper. In addition, the privileges that may defeat defamation and privacy actions also apply to interference cases.<sup>338</sup>

### **E. Injurious Falsehood**

Injurious falsehood, sometimes called “disparagement,” is a theory of tort liability that is neither much discussed nor well understood, despite its having been part of American law for so long that its principles were embodied in both the first and second Restatements of Torts<sup>339</sup> and continue to be applied by courts today.<sup>340</sup> More familiar to American lawyers than the overarching theory of injurious falsehood are its two principal subcategories, “trade libel” and “slander of title,” which are similar in many respects to defamation. An action for trade libel provides relief for pecuniary harm caused by false statements about the “quality of” the plaintiff’s “land, chattels or intangible things.”<sup>341</sup> Slander of title, in contrast, offers a remedy for disparaging statements about plaintiff’s “property rights” in the same array of interests—land, chattels, and intangible things.<sup>342</sup>

It is not necessary to force the facts of a case involving erroneous standardized test scores into the theories of relief offered by trade libel or slander of title, for the law of injurious

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<sup>337</sup> *Id.* at § 767 cmt. c.

<sup>338</sup> “Tortious employee conduct which is otherwise actionable may be privileged on public policy grounds if the conduct is in furtherance of some interest of societal importance.” *Wolf v. F & M Banks*, 534 N.W.2d 877, 885-86 (Wis. Ct. App. 1995) (relying on the common-interest conditional privilege to dispose of a tortious interference claim).

<sup>339</sup> *See* RESTATEMENT (SECOND) OF TORTS §§ 623A -652 (1977) (discussing liability for injurious falsehood, including slander of title and trade libel); RESTATEMENT OF TORTS §§ 624-652 (1937) (discussing liability for disparagement, including slander of title and trade libel).

<sup>340</sup> *See, e.g.,* *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362, 378 (D. N.J. 2004) (finding there was a question of fact as to whether statements posted on the Internet by a disgruntled customer constituted trade libel); *Wharton v. Tri-State Drilling & Boring*, 824 A.2d 531, 537 (Vt. 2003) (finding that landowners established slander of title where a company falsely and maliciously published a mechanics’ lien regarding the title to their home).

<sup>341</sup> RESTATEMENT (SECOND) OF TORTS § 626 (1977).

<sup>342</sup> *Id.* at § 624 (1977).

falsehood is broader.<sup>343</sup> According to the second Restatement,

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.<sup>344</sup>

Undoubtedly, the dissemination of an erroneous standardized test score is a false statement that may be harmful to the pecuniary interests of the test-taker. In addition, a testing agency “should recognize” that an erroneous test-score report is likely to cause just that type of harm. The only difficulty with suing on the theory of injurious falsehood would seem to be the final requirement concerning culpability, which imposes an obstacle equivalent<sup>345</sup> to *scienter* in fraud<sup>346</sup> and actual malice in defamation<sup>347</sup> and false-light invasion of privacy<sup>348</sup>—namely, knowledge of the statement’s falsity or reckless disregard for the truth. It seems likely that only the rare scoring-error case will offer this type of evidence. If such proof is available, does an action for injurious falsehood offer any advantage over suing for fraud or defamation? Perhaps.

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<sup>343</sup> RESTATEMENT (SECOND) OF TORTS § 623A cmt. a (1977) (stating that while the theory of injurious falsehood is “applied chiefly in cases of the disparagement of property in land, chattels or intangible things or of their quality . . . [i]t is equally applicable to other publications of false statements that do harm to interests of another having pecuniary value”). One of the illustrations offered by the Restatement involves the reporting of test results, albeit in a medical context:

A, a physician employed by B Company, examines C, a workman employed by the Company after an accident. Knowing that his statement is false, A reports to B Company that C is not seriously injured, as a result of which C is compelled to bring suit to recover his workmen’s compensation and suffers pecuniary loss through the expenses of suit. A is subject to liability to C.

Id. at § 623A illus. 5.

<sup>344</sup> RESTATEMENT (SECOND) OF TORTS § 623A (1977).

<sup>345</sup> See RESTATEMENT (SECOND) OF TORTS § 623A cmt. d (1977) (indicating the equivalence of *scienter*, actual malice, and the culpability requirement in injurious falsehood).

<sup>346</sup> See note 222 and the accompanying text.

<sup>347</sup> See note 269 and the accompanying text.

<sup>348</sup> See note 266 and the accompanying text.

Unlike fraud, injurious falsehood imposes no requirements of intending to induce or actually causing reliance by the plaintiff. All that needs to be proved is that the false statement in fact caused harm as a result of actions by a third party.<sup>349</sup> This simplifies the litigation process and increases the likelihood of recovery by removing one more issue from consideration by the judge and jury.

It is less clear that injurious falsehood is more favorable to test score plaintiffs than defamation.<sup>350</sup> Many of the same privileges that apply to libel and slander apply to injurious falsehood.<sup>351</sup> The chief advantage of suing for injurious falsehood would seem to be the elimination of the issue of whether the mis-scoring was of such magnitude as to disgrace the plaintiff.<sup>352</sup> This may be useful to some plaintiffs. A student performing at the top range of test results (e.g., one who earned 2200 on the SAT, but was erroneously reported to have achieved only 2100) might have difficulty arguing that the error in imputed incompetence to the student or otherwise subjected the student to the type of ridicule and humiliation that is defamatory. Yet on the same facts it might be possible to produce evidence showing that the understated result caused pecuniary harm, for example, by dropping the plaintiff into a less-generous scholarship category.

However, the biggest difference between injurious falsehood and defamation is the culpability requirement, and in that regard a defamation claim may have a decided advantage. As noted above,<sup>353</sup> most test-takers will be treated as private persons who are not required to prove actual malice, but only negligence, in a suit for libel and slander. Moreover, emotional distress damages are available for libel or slander,<sup>354</sup> but not for injurious falsehood, where compensatory

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<sup>349</sup> See RESTATEMENT (SECOND) OF TORTS §§ 623A cmt. b (1977) (stating that “it is not necessary that his statement be published for the purpose of influencing the conduct of some third person or with knowledge that it is certain or substantially certain to do so. The publisher must, however, know enough of the circumstances so that he should as a reasonable man recognize the likelihood that some third person will act in reliance upon his statement, or that it will otherwise cause harm to the pecuniary interests of the other because of the reliance”).

<sup>350</sup> See generally *id.* at § 623A cmt. g (discussing the relationship of injurious falsehood to defamation).

<sup>351</sup> See generally *id.* at § 646A (1977) (indication which rule on conditional privileges to publish defamation are applicable to injurious falsehood).

<sup>352</sup> See note 244 and accompanying text.

<sup>353</sup> See note 271 and accompanying text.

<sup>354</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that recovery for “actual injury is not limited to out-of-pocket loss . . . [and includes] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering”).

damages have “consistently been limited to harm to interests of the plaintiff having pecuniary value, and to proved pecuniary loss.”<sup>355</sup>

False-light invasion of privacy and injurious falsehood would seem to be roughly comparable theories. In each the plaintiff would face the great hurdle of proving actual malice or the equivalent, and in neither would it be necessary to prove the erroneous statement was disgraceful. Essentially the same privileges that apply to false-light invasion of privacy apply to injurious falsehood.

#### **IV Guarding, But Not Closing, the Courthouse Doors**

Courts have recognized that there are a number of competing interests at stake when the validity of standardized test scores are at issue. Thus, one court, in the context of a teacher certification test, wrote:

[The test-taker] has a legitimate interest in assuring that she is not stripped of a valid test score. . . . [The testing agency] has an interest in assuring the accuracy of the test results it reports and the predictions it thereby makes. The other test-takers are entitled to assurance that no examinee enjoys an unfair advantage in scoring. The school officials to whom test results are certified need to be assured that all reported test results are reliable. Finally, the public at large has an interest in assuring that all persons certified as teachers have in fact fulfilled the requirements of that certification.<sup>356</sup>

Tort law offers an appropriate vehicle for balancing these types of competing interests. Some theories of tort liability, supported by the right facts, will have merit, and other claims will not. It is important for courts to carefully consider cases seeking compensation for the harm that results from mis-scoring errors. If liability is too readily imposed, important institutions and the services they provide may be harmed or driven out of existence. If liability is not imposed in appropriate cases, blameworthy conduct may go unchecked and the victims of mis-scoring may have no recourse. Tort law can provide valuable incentives for the exercise of care in standardized test scoring, while at the same time rejecting claims that are without merit or would impose undue burdens on testing agencies. As always, the courthouse doors should be guarded against frivolous claims, but they should not be peremptorily closed to the victims of harm caused by erroneous scoring of standardized tests.

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<sup>355</sup> RESTATEMENT (SECOND) OF TORTS §§ 623A cmt. f (1977).

<sup>356</sup> *Scott v. Educational Testing Service*, 252 N.J. Super. 610, 600 A.2d 500, 504 (N.J. Sup. Ct. App. Div.1991).