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## Standardized Testing and Race: A Reply to Professor Subotnik

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Harvey Gilmore\*

### I. INTRODUCTION

Professor Dan Subotnik and I have been friends for nearly a dozen years, and I welcome the opportunity to respond to his recent piece on testing and race discrimination.<sup>1</sup> I had the pleasure of taking Professor Subotnik's class in Estate and Gift Taxation when I was a student in the L.L.M. program at Touro Law School in the spring semester of 2003. I earned a B+, which was the second highest grade in the class, according to the law school's official grade distribution chart.

I am an African-American male, and as such, I am happy to discuss whether testing is automatically racially biased. My own academic experience puts me squarely in the middle of this debate because I have seen academic life from both ends of the spectrum. On the one hand, I received a passing score on the entrance exam to one of the three elite high schools in New York City (Brooklyn Tech), only to end up a miserable dropout four years later. I dropped out because I was demoralized by the experience, and I decided that I needed to make a clean break from high school and start over. By the time I took the Scholastic Aptitude Test (SAT), I was not thinking about applying to college, and thus did not care about my test score. My score on the SAT was a joke (suffice to say, I did

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<sup>1</sup> See generally Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS L. REV. 332 (2013).

not crack 900). Later in life, when I applied to graduate school and law school, my Graduate Management Admission Test (GMAT) and Law School Admission Test (LSAT) scores, respectively, did not land me in the upper stratosphere, either. On the other hand, I have earned a Master's Degree, a Juris Doctor Degree, and a Master of Law Degree.

In response to concerns and doubts raised about the SAT,<sup>2</sup> some colleges in recent years have made their admission process “test optional.” Under this model, admissions personnel look at the overall person, instead of just a number on a so-called assessment test.<sup>3</sup>

I applaud this approach precisely because it gives people a chance to prove themselves both academically and professionally. For me, a track record of a person's actual performance is a much better indicator of

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<sup>2</sup> See, e.g., Steve Gretz, *New SAT: Fairer, More Predictive & Less Coachable? We Doubt It*, BRAINSTORM TUTORING & ARTS, available at <http://www.stormthetest.com/new-sat-fairer-more-predictive-less-coachable-we-doubt-it/> (last visited Sept. 7, 2014) (“The SAT is not a good predictor of college success—and that’s good for students. Yes, you read that right. The test’s current predictive power is so poor that more and more american [sic] colleges and universities (over 25% of 4-year institutions, according to FairTest.org) are simply not requiring it, and many of those who do require submission of SAT or ACT are opting to see it as a factor that can only help students’ chances for admission.”).

<sup>3</sup> See, e.g., Eric Hoover, *DePaul Becomes Biggest University to go “Test Optional,”* THE CHRONICLE OF HIGHER EDUC. (Feb. 17, 2011), <http://chronicle.com/article/DePaul-U-Will-Make-SAT-and/126396/http://chronicle.com/article/DePaul-U-Will-Make-SAT-and/126396/> (““Admissions officers have often said that you can’t measure heart,” said Jon Boeckenstedt, Associate Vice President for enrollment management. ‘This, in some sense, is an attempt to measure that heart’”); Michael A. Wilner, *Getting In Without the SAT*, N.Y. TIMES (Mar. 1, 2013), <http://thechoice.blogs.nytimes.com/2013/03/01/getting-in-without-the-sat/http://thechoice.blogs.nytimes.com/2013/03/01/getting-in-without-the-sat/> (“We’re interested in your work, but we’re not playing the game that says these tests are some indication of I.Q.”); Laura Bruno, *More Universities Are Going SAT Optional*, U.S.A. TODAY (Apr. 4, 2006 9:47 PM), [http://usatoday30.usatoday.com/news/education/2006-04-04-standardized-tests\\_x.htm](http://usatoday30.usatoday.com/news/education/2006-04-04-standardized-tests_x.htm) (““Whether they get 1300 or 1250 doesn’t really tell you anything about them as a person or a student,” says Ken Himmelman, Bennington Dean of Admissions. All the attention to numbers ‘becomes so crazy it’s almost a distraction’”).

academic and professional success than a person's performance on a one-time test such as the SAT.

In this piece, I will explore issues regarding the historical and cultural biases of the SAT and the LSAT. I will also look at some law school exam questions and give my opinions as to their objectivity. Finally, I will look at the discrimination issue in standardized testing as it relates to hiring decisions, as well as some of my own academic and professional experiences.

Professor Subotnik asks a very interesting question about testing in his article: "Where does the attack on testing of learning and knowledge come from?"<sup>4</sup> I do not agree with his assessment that there is a generalized attack on testing, *per se*. Students take exams all the time, whether it is in taxation, calculus, philosophy, or English. I agree that taking subject matter exams is necessary to determine how well one has learned the topic over the course of the academic semester. I also believe, along with other critics that Professor Subotnik takes issue with, that standardized testing can be exclusionary and discriminatory, as I will further discuss.

Although we are friends, Professor Subotnik and I part company on the issue of testing objectivity. The first part of my answer to his question about where attacks on testing come from is that there has always been a bit of a backlash against high-achieving students, sometimes referred to derisively as "brainiacs."<sup>5</sup> In the case of minority students especially, whenever they

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<sup>4</sup> Subotnik, *supra* note 1, at 353.

<sup>5</sup> See, e.g., Walter Williams, *Why Urban Problems Persist*, 66 S. CAL. L. REV. 1665, 1670 (1993) ("Perhaps the most pernicious quality of today's debate on the problems of black people is the relentless focus on social pathology to the near total exclusion, and sometimes denial, of their many successes. Sometimes black high school students who excel in their studies are criticized by their peers for being 'brainiacs' or 'acting white'"); See also Gerald Frug, *City Services*, 73 N.Y.U. L. REV. 23, 66 (1998) ("Academic tracking is one of the ways Americans first learn that a heterogeneous group should be divided into categories and that these categories should then be separated into different spaces—not just spaces for whites and blacks but for smart and dumb, college bound and

defy the odds and become academically successful, they get grief for it.<sup>6</sup> Researchers Signithia Fordham and Jonathan Ogbu conducted a well-known study on this issue,<sup>7</sup> They discovered the following:

An example is Fordham and Ogbu's study in the early 1980s of black high school students in Washington, D.C. They found among a significant number of the students a clash between their peer culture and educational achievement, fearing that academic achievement would risk their being called a 'brainiac' or worse 'white.'<sup>8</sup>

In my own middle school days, several adversarial classmates called me a "brainiac" because I was a good student too. Go figure.

The next part of my answer to Professor Subotnik's concern about the attack on testing goes deeper than mere jealousy between classmates. As we will see in this essay, the supposedly neutral SAT and LSAT have their origins rooted in creating and perpetuating racial exclusion and imbalance.<sup>9</sup>

I do not claim to be an expert in this area, but I believe that certain exams and questions can be racially and culturally exclusionary. There are situations where tests like the SAT can be racially and culturally biased, and other situations, like actual law school exams, where testing is completely objective, irrespective of the test taker's background, as I will show below.

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vocationally tracked, cool and nerd, blacks who identify with black culture and brainiacs who 'act white'").

<sup>6</sup> ROBERT CHARLES SMITH, RACISM IN THE POST-CIVIL RIGHTS ERA: 'NOW YOU SEE IT, NOW YOU DON'T' 95 (1995).

<sup>7</sup> Signithia Fordham & Jonathan Ogbu, *Black Student's School Success: Coping with the "Burden of Acting White"*, 18(3) THE URBAN REVIEW 176, 176-206 (1986).

<sup>8</sup> SMITH, *supra* note 6, at 95.

<sup>9</sup> 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, 609 (2001) ("Even today, the tests are white-normed; they impose burdens on those with no prior knowledge of law or recurring test situations. Fifty percent of law students have at least one lawyer parent; the others have to pick up legal knowledge reflected in the LSAT as best they can").

## II. PROFESSOR SUBOTNIK'S ARGUMENTS AND MY DISAGREEMENTS

Below are several arguments Professor Subotnik advances in his defense of standardized testing. I have summarized his position on each of his arguments and then explain why I disagree on each of his points.

### *A. The LSAT is the Best Predictor of Student Success*

Simply stated, Professor Subotnik argues that the LSAT is still the best predictor of law school grades.<sup>10</sup> The problem with Professor Subotnik's very blind faith in the accuracy of the LSAT is that I can personally disprove the accuracy of LSAT predictions by my own performance throughout law school. I proved my own LSAT score wrong by doing well in law school, scoring some B's, a few C's, and a smattering of A's. I do not say this out of some inflated sense of self-righteousness; these are just facts.

If the LSAT was such a great predictor of law school success, then I should have been exposed as an unqualified fraud that was overmatched in law school. That never happened as I did well enough to graduate with a respectable record. I am certainly proud of what I have achieved, and do not have to defend my admission or my graduation. I have no doubt that other people have done well in law school despite having a low LSAT score.

### *B. Underachieving Students Should Just Study Harder*

Professor Subotnik argues that simply studying harder will yield better test results. In his discussion of the Supreme Court case of *Ricci v. DeStefano* (in which the Supreme Court held that there was not strong enough evidence of disparate impact to warrant invalidating the results of a municipal firefighter exam when none of the department's black firefighters earned high enough scores on the exam to be promoted),<sup>11</sup> he asked the

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<sup>10</sup> Subotnik, *supra* note 1, at 387, 400.

<sup>11</sup> *Ricci v. DeStefano*, 557 U.S. 557 (2009).

following question: “Whose civil rights case is stronger when plaintiffs did nothing wrong, the minority firefighters could have studied harder, and New Haven invalidated its own test *post hoc*?”<sup>12</sup> In suggesting that the minority firefighters merely study harder, I believe that he takes an unnecessary cheap shot at the minority firefighters in the case who wanted the test results of a firefighter’s examination invalidated.<sup>13</sup> I take offense to his highly insulting statement.

His statement automatically assumes that the minority firefighters in the *Ricci* case did not study as hard as the higher-scoring plaintiffs. Interestingly, Professor Subotnik does not give a conclusive definition of what “study harder” truly means, at least as he sees it. He also does not give any proof as to how he knew the minority firefighters did not study as hard as the plaintiffs. I have no way of knowing how hard any of the parties in *Ricci* studied, and I do not think that Professor Subotnik knows that fact either. Frankly, his commentary about the minority firefighters is no different than the *Ricci* plaintiffs claiming with no proof that they scored higher because they studied harder.<sup>14</sup>

After Professor Subotnik clearly insults the minority firefighters by

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<sup>12</sup> Subotnik, *supra* note 1, at 401.

<sup>13</sup> See *Ricci*, 557 U.S. at 562. See also, Subotnik, *supra* note 1, at 348–49. (“African Americans made up thirty percent of firefighters in New Haven and nine percent of those ranked captain and above. Fourteen black firefighters took the exams for promotion, but so many other firefighters scored higher that none of the African Americans were eligible for promotion to either a lieutenant or captain position. After much discussion about the Title VII implications, the New Haven Civil Service Board refused to validate the exam and no one was promoted. In an effort to force New Haven to honor the test results, some white and Hispanic firefighters sued the City to force it to accept those results. The federal district court held for New Haven and the Second Circuit affirmed and then denied a rehearing in a one paragraph 7-6 *per curiam* decision. On appeal, in a 5 to 4 decision written by Justice Kennedy that has been criticized by a number of academics, the Court, as previously suggested, held that Title VII required that plaintiffs be promoted.”)

<sup>14</sup> See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151 (2006) (“the higher-scoring firefighters simply studied harder”), *rev’d and remanded*, 557 U.S. 593 (2009).

insisting that they merely study harder,<sup>15</sup> he goes on to mention that our country can only survive as a single society.<sup>16</sup> That is a rather interesting commentary when one considers that the US Constitution originally considered black slaves to be three-fifths of a person,<sup>17</sup> along with the US Supreme Court decision of *Plessey v. Ferguson*,<sup>18</sup> which confirmed the proposition of “Separate but Equal.”<sup>19</sup> I seriously doubt that anyone could convincingly say that America was a single, homogeneous society in those days.

In spite of that horrendously negative history, I think Professor Subotnik and I would agree that race relations have come a long way in this country since the days of slavery. However, the fact that we are still dealing with racial tensions in 2014 suggests to me that America is not yet one society, and will not be one society so long as the oppression of and disparate outcomes for racial minorities are ignored. In asserting that the United States will only succeed as a united society, Professor Subotnik seems to ignore the reality that the United States is still deeply divided along racial lines and, in doing so, fails to acknowledge the systemic oppression of racial minorities that prevent the United States from achieving a state of unity. Although this is a discussion of the racial impact of standardized testing, one need only look at the recent fatalities involving law

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<sup>15</sup> Subotnik, *supra* note 1, at 401.

<sup>16</sup> *Id.*

<sup>17</sup> U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV.

<sup>18</sup> *Plessey v. Ferguson*, 163 U.S. 537 (1896).

<sup>19</sup> *Id.* at 550–51 (“Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.”).



enforcement in Ferguson, Missouri,<sup>20</sup> and Staten Island, New York,<sup>21</sup> as further examples of the continuing racial divide.

*C. Any Criticism of the LSAT Is Bad*

Professor Subotnik almost summarily rejects any critic who has anything bad to say about the LSAT.<sup>22</sup> He neatly summarizes the criticism of standardized testing as follows: “In sum, by testing in an Anglocentric, static, ahistorical manner, white males perpetuate their hegemony both in school and in the workplace.”<sup>23</sup>

In one example he takes a shot at Professor Paula Lustbader.<sup>24</sup> Professor Lustbader is the Director of the Academic Resource Center (ARC) at the Seattle University School of Law.<sup>25</sup> ARC is a program that helps students succeed in law school despite a low LSAT score.<sup>26</sup> In her article describing ARC, Professor Lustbader argues that underrepresented students 1) should have access to a legal education,<sup>27</sup> 2) can make positive contributions to the

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<sup>20</sup> See Editorial Board, *Justice in St. Louis County*, N.Y. TIMES (Sep. 6, 2014) [http://www.nytimes.com/2014/09/07/opinion/sunday/inquiry-into-ferguson-mo-police-practices-is-just-a-start.html?\\_r=0](http://www.nytimes.com/2014/09/07/opinion/sunday/inquiry-into-ferguson-mo-police-practices-is-just-a-start.html?_r=0).

<sup>21</sup> See Natasha Lennard, *After Eric Garner’s Death, Cops Still Won’t Do the Right Thing*, VICE NEWS (Jul. 23, 2104) <https://news.vice.com/article/after-eric-garners-death-cops-still-wont-do-the-right-thing>.

<sup>22</sup> Subotnik, *supra* note 1, at 379-385.

<sup>23</sup> *Id.* at 343.

<sup>24</sup> *Id.* at 384-85.

<sup>25</sup> See generally Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 Cap. U. L. Rev. 71 (2012).

<sup>26</sup> *Id.* at 91. (“The Seattle University Academic Resource Center (ARC) alumni’s success also demonstrates that UGPA and LSAT scores do not correlate with success in practice. ARC alumni make a difference and thrive professionally.”)

<sup>27</sup> *Id.* at 146. (“Law schools can ensure inclusive, fair, and just admission without compromising their integrity. They can adopt admission policies that increase enrollment of the underrepresented without compromising their rankings, that satisfy the ABA accreditation standards, and that conform to the current legal climate.”)

law school community,<sup>28</sup> and 3) have found their passion and niche as practitioners.<sup>29</sup>

Professor Lustbader also cites many examples of former ARC students who have gone on to professional success. Among them are those who served as federal and state attorneys general, corporate counsel, and educators, among many others.<sup>30</sup>

Still, Professor Subotnik spends nearly two pages dismissing Professor Lustbader's arguments<sup>31</sup> and finally characterizes her argument as a self-actualized failure: "Seeming to understand her [own] unpersuasiveness, especially given today's harsh market realities, Lustbader moves away from cold statistics. Instead, she touts (cherry picks?) the personal stories of minority students who became attorneys, love their work, are good at it, and make a respectable living."<sup>32</sup> Professor Subotnik's commentary here is also insulting because he seems to assume that Professor Lustbader's examples of student successes are merely lucky exceptions and not legitimate proof that these students can be successful. On a personal note, I certainly do not apologize for my own success in law school or for enjoying my own academic career thereafter.

It is precisely stories like these that tend to prove that students, irrespective of race, can succeed in law school. Incidentally, Professor

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<sup>28</sup> *Id.* at 146. ("Consider these ARC alumni and the contributions they made as discussed earlier in this article. Over half of these ARC alumni were denied admission into any other law school. Without the ARC program, these individuals would not be lawyers. Without such access, the law school and the profession would not have benefitted from their many contributions. Can law schools and the profession really afford not to have these lawyers in the community?")

<sup>29</sup> *Id.* at 147. ("There are no words to explain how great it feels when you witness a victim of domestic violence turn the corner from 'victim' to 'survivor.'") ("My client walked up to me after a hearing and said, 'Thank you for giving me my child.' I know I made a direct difference in that child's life.")

<sup>30</sup> *Id.* at 91, 92.

<sup>31</sup> Subotnik, *supra* note 1, at 384–85.

<sup>32</sup> *Id.* at 385.

Subotnik makes a statement right after his attack on Professor Lustbader that, I believe, sabotages his attack and renders it rather specious. Below is his admission:

There is no greater satisfaction for a law professor, I readily admit, than to see students enter law school with few traditional credentials and with strong doubts as to their own abilities, and then exit after achieving their dream and perhaps routing the competition.<sup>33</sup>

Thus, Professor Subotnik himself acknowledges that students whose backgrounds and test scores do not predict success in his view may still be very successful in law school.

Professor Subotnik also attacks the Society of American Law Teachers (SALT), which has also expressed concern about the fairness of the LSAT.<sup>34</sup> In a nutshell, SALT alleges the LSAT only predicts 25 percent of first year law school grades,<sup>35</sup> and that minority students score lower on the LSAT due to the fact that minorities have been subjected to a “hostile learning environment.”<sup>36</sup> Here, Professor Subotnik uses what he calls a “full-throated response”<sup>37</sup> to respond to SALT’s criticism, in which he simply ridicules SALT’s criticisms, and at the same time blames minority students for, as he sees it, “not learning enough” to do well on the LSAT.<sup>38</sup>

He argues:

But SALT’s “hostile learning environment” claim also needs a more full-throated response. The charge is scandalous and destructive and, lacking evidentiary support, seems designed only to take minority students off the hook for not learning enough. SALT should either mind its language or produce evidence.<sup>39</sup>

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<sup>33</sup> *Id.* at n.269.

<sup>34</sup> *Id.* at 379–80.

<sup>35</sup> *Id.* at 379.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 380.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

Frankly, Professor Subotnik's response here is just as ridiculous and insensitive as his previous commentary about the minority firefighters in *Ricci* not studying harder. Just as I argued above that neither Professor Subotnik nor I know how diligently any of the *Ricci* firefighters prepared for their certification exam, Professor Subotnik presents no personal knowledge of nor research regarding how hard minority students, myself included, prepared for the LSAT. His statement here is made all the more asinine by his previous acknowledgment that the LSAT itself was based on maintaining racial purity.<sup>40</sup>

To be fair to Professor Subotnik, I will give him the benefit of the doubt—he might have made his statements about minority firefighters and minority LSAT takers out of some sense of misguided tough love. However, in taking this position, he has to understand that there are those who might take his statement as outright antipathy. A less positive reading of his statement says, in effect, that minority students do not study hard enough, that they do not do well enough on the LSAT, and that it is their fault—shame on them! If he really believes that is true, I have to wonder if he feels that I did not study hard enough in his class because I received only the second-highest grade in his class.

### III. WHAT IS THIS THING CALLED THE LSAT?

The LSAT, allegedly, is a predictor of how well one will ultimately do in law school.<sup>41</sup> The Law School Admissions Council (LSAC) describes the test as follows:

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<sup>40</sup> *Id.* at 365–66. (“After the American Bar Association, a then whites-only fraternity, had unwittingly admitted three black lawyers, the ABA asked its membership to vote on possible expulsion, emphasizing to the membership the importance of ‘keeping pure the Anglo-Saxon race.’ There is no denying that the LSAT, developed in 1947, can be traced to these themes.”).

<sup>41</sup> Lisa C. Anthony, Susan P. Dalessandro, Lynda M. Reese, *Predictive Validity of the LSAT: A National Summary of the 2011 and 2012 LSAT Correlation Studies*, LAW

The Law School Admission Test (LSAT) is a half-day, standardized test administered four times each year at designated testing centers throughout the world. The test is an integral part of the law school admission process in the United States, Canada, and a growing number of other countries. It provides a standard measure of acquired reading and verbal reasoning skills that law schools can use as one of several factors in assessing applicants.<sup>42</sup>

However, as explained below, I question whether the LSAT actually functions as a *standard* test of relevant abilities and whether it should actually be a central part of law school admissions.

#### A. *The LSAT Testing Areas*

The LSAC defines the exam's mission as testing a person's cognitive and analytical abilities necessary for success in law school.<sup>43</sup> The three areas the LSAT tests are reading comprehension/literacy, analytical reasoning, and logic.<sup>44</sup>

**Reading Comprehension Questions**—These questions measure the ability to read, with understanding and insight, examples of lengthy and complex materials similar to those commonly encountered in law school.<sup>45</sup>

**Analytical Reasoning Questions**—These questions measure the ability to understand a structure of relationships and to draw logical conclusions about that structure.<sup>46</sup>

**Logical Reasoning Questions**—These questions assess the ability to analyze, critically evaluate, and complete arguments as they occur in ordinary language.<sup>47</sup>

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SCHOOL ADMIN. COUNCIL (LSAC) (October 2013), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-13-03.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-13-03.pdf).

<sup>42</sup> LAW SCHOOL ADMIN. COUNCIL (LSAC), <http://www.lsac.org/jd/lsat/about-the-lsat/> (last visited Jun. 27, 2014).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

*B. The LSAT and Me*

In February 1994, when I was 29 years young, I took the LSAT. I scored 142. The LSAT scores range from a low of 120 to a high of 180.<sup>48</sup> A score of at least 151 is generally accepted to be a good enough score to get one accepted into law school.<sup>49</sup> In my case, my score would be considered below average, as it was well below the 50th percentile.<sup>50</sup> In addition, my score fit in with the statistics that show that African-American applicants score lower on the LSAT than their Caucasian counterparts.<sup>51</sup> Thus, if I were to believe the statistics, I should have done much worse in law school than many of my mostly white classmates. In spite of my score, two law schools, one in California and one in Massachusetts, accepted me as a new student. I went to law school in Massachusetts and graduated with a B average, which ranked me in the top third of my class. This raises an interesting question: Was I a bum who got lucky, or is standardized testing like the LSAT not all it's cracked up to be? At the risk of sounding immodest, I am certainly *not* a bum who got lucky. (I do not mean to suggest that anyone who got a low test score is a bum. I am deliberately applying the word “bum” only to me.) First, I worked quite hard to get

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<sup>47</sup> *Id.*

<sup>48</sup> LAW SCHOOL ADMIN. COUNCIL (LSAC), <http://www.lsac.org/jd/lsat/your-score> (last visited June 27, 2014).

<sup>49</sup> Blueprint Test Preparation, *What's a Good LSAT Score?*, ABOVE THE LAW (July 18, 2012), <http://abovethelaw.com/career-files/whats-a-good-lsat-score/>.

<sup>50</sup> *See, e.g.*, ALPHAScore ONLINE LSAT PREPARATION, <http://www.alphascore.com/resources/lsat-score-conversion/#chart> (last visited Sept. 6, 2014).

<sup>51</sup> *See, e.g.*, Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 259–60 (2011) (“For example, the average LSAT score for African Americans who took the test during the 2007–2008 academic year was 142.2, 146.3 for Hispanics, 148 for Mexican Americans, 148.1 for Native Americans, 152 for Asian Americans, and 152.6 for Caucasians”); *see also*, Artika Tyner, *Robust Exchange of Ideas and the Presence of the African American Voice in the Law School Environment: A Review of Literature*, 5 MODERN AM. 37, 39 (2009) (“The average LSAT scores for African-Americans are 143–144, while the national average is 150”).

where I am today. Second, as we will see, standardized testing is definitely *not* what it is made out to be.

#### IV. STANDARDIZED TESTING: THE HISTORICAL AND RACIST LIE OF MERITOCRACY

Standardized testing began as both a weeding out process and a mechanism designed to confirm that people who were white and European were naturally smarter than everyone else.<sup>52</sup> Consequently, anyone who was not a northern European white person just did not make the cut.<sup>53</sup> “Early testers were racists and eugenicists; merit for them was what white Europeans did and thought.”<sup>54</sup>

One of the earliest proponents of standardized testing as a means of intellectual purity was Carl Campbell Brigham, creator of the SAT, who was stalwart in his opinion of the intellectual pecking order, and wrote a book in which he stated his theory about people of color’s place in the intellectual landscape.<sup>55</sup> Brigham’s thesis, that white races were superior in intelligence to people of color, was based on previous psychological examinations conducted by the United States Army.<sup>56</sup> Brigham’s manuscript also shows that he was certainly no fan of black people: “[W]e have the most sinister development in this history of the continent, the importation of the negro.”<sup>57</sup> Consequently, Brigham’s thesis stated in no

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<sup>52</sup> Delgado, *supra* note 9, at 595 (“Standardized testing originated early in the twentieth century as a way to demonstrate the intellectual superiority of northern European whites”).

<sup>53</sup> *Id.* at 595–96 (“Associating intelligence with moral qualities and character, some test boosters assigned high marks to fellow citizens of Nordic stock and low intelligence and moral turpitude to Slavs, Mediterraneans, and, of course, blacks”).

<sup>54</sup> *Id.* at 609.

<sup>55</sup> CARL BRIGHAM, A STUDY OF AMERICAN INTELLIGENCE xxi, 188–90 (Princeton University Press, 1923).

<sup>56</sup> *Id.* at xx.

<sup>57</sup> *Id.* at xxi.

uncertain terms that he believed that blacks were at the low end of the intellectual food chain.<sup>58</sup>

If an individual with a view<sup>59</sup> like Brigham's actually created the SAT, a de-facto college entrance exam that high schools use to this very day, then one has to at least question the structural fairness of a test that is supposed to be objective. As one public school principal and law student argued, "American college officials are aware of this precept of inferiority or should be; yet these officials consciously require a racially biased assessment test as a condition for college admission."<sup>60</sup> Legal scholar and theorist Stanley Fish further criticizes the history of the SAT:

Nevertheless, in 1925, Brigham became a director of testing for the College Board, and developed the SAT. So here is the great SAT test, devised by a racist in order to confirm racist assumptions, measuring not native ability, but cultural advantage, an uncertain indicator of performance, an indicator of very little except what money and social privilege can buy.<sup>61</sup>

Cultural and racial biases aside, a standardized test really cannot be a meritocracy if the only standard is a mere test score. Each of us is a product of our own experiences, good or bad, and our experiences are what we make of them. We take those experiences, mindsets, and coping mechanisms with us anytime we take a test. On a standardized test though, unfortunately, things like life experience, passion, desire, and perseverance are not taken into consideration. Thus, if an admissions committee is only

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<sup>58</sup> *Id.* at 190 ("Our results showing the marked intellectual inferiority of the negro are corroborated by practically all of the investigators who have used psychological tests on white and negro groups").

<sup>59</sup> *Id.* at 193 ("The intellectual superiority of our Nordic group over the Alpine, Mediterranean, and negro group has been demonstrated.")

<sup>60</sup> Kendra Johnson, *Racially Biased SAT I/ACT Blocks College Access: Is it Constitutional for College Officials to Condition Admissions on a Racially Biased Assessment?*, 33 U. BALT. L.F. 2, 10 (2003).

<sup>61</sup> Stanley Fish, *Reverse Racism, or How the Pot Got to Call the Kettle Black*, THE ATLANTIC (Nov. 1, 1993), [http://www.theatlantic.com/magazine/archive/1993/11/reverse-racism-or-how-the-pot-got-to-call-the-kettle-black/304638/?single\\_page=true](http://www.theatlantic.com/magazine/archive/1993/11/reverse-racism-or-how-the-pot-got-to-call-the-kettle-black/304638/?single_page=true).



looking at the applicant's test score, and little else, that applicant may well be wrongly denied an opportunity to attend that institution.

#### V. THE FRAUD THAT IS THE SAT

The SAT is an exam that high school students take that supposedly predicts their ability to succeed in college.<sup>62</sup> According to the SAT College Board website:

The SAT and SAT Subject Tests are [a suite of tools] designed to assess your academic readiness for college. These exams provide a path to opportunities, financial support, and scholarships, in a way that's fair to all students. The SAT and SAT Subject Tests keep pace with what colleges are looking for today, measuring the skills required for success in the 21st century.<sup>63</sup>

The SAT College Board website also sings the praises of taking the SAT:

#### **It tests what you already know<sup>64</sup>**

The SAT tests the reading, writing and math skills that you learn in school and that are critical for success in college and beyond.

It gives both you and colleges a sense of how you'll be able to apply the thinking, writing, and study skills required for college course work.

#### **It's fair to everyone<sup>65</sup>**

The questions are rigorously researched and tested to make sure students from all backgrounds have an equal chance to do well.

The test is straightforward. There are no tricks designed to trip you up. Students who do well in the classroom are often the same ones who will do well on the SAT.

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<sup>62</sup> *SAT: About the Tests*, THE COLLEGE BOARD, <http://sat.collegeboard.org/about-tests#> (last visited Jun. 27, 2014).

<sup>63</sup> *Id.*

<sup>64</sup> *SAT: Why Take the SAT*, THE COLLEGE BOARD, <http://sat.collegeboard.org/about-tests/sat/why-take-the-test> (last visited Aug. 18, 2014).

<sup>65</sup> *Id.*

**It's more than just a test<sup>66</sup>**

The SAT also provides the opportunity for you to connect to scholarship opportunities, place out of certain college courses, and learn more about your academic strengths.

**It helps you select the right fit for college<sup>67</sup>**

SAT scores are among the factors considered in college admission. Many schools' websites share the range of SAT scores reported by their admitted students. You can also find this information in College Search. This valuable information allows you to research which colleges might be the best fit for you.

This is really a nice commercial for the SAT, and it might even be true in theory. However, there is one major problem that sticks out like a sore thumb: this is a test that is not fair for all students.<sup>68</sup>

With standardized tests, and the SAT in particular, the painful fact remains that all testing roads still lead to race and class.<sup>69</sup>

Test scores are highly correlated with economic status. In the old days, elite schools achieved status by admitting students with the best family backgrounds, which of course included the right race, ethnicity, and religion.<sup>70</sup>

*A. The Economic Bias of the SAT*

When it comes to answering some of these SAT questions, it is fair to ask whether two students in the testing room, with completely different racial and socioeconomic backgrounds, will come up with the same right answers.

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See generally Delgado, *supra* note 9.

<sup>69</sup> *Id.* at 601.

<sup>70</sup> See *id.* at 601; see also Eugene E. Garcia, *Where's the Merit in the S.A.T.?*, N.Y. TIMES, Dec. 26, 1997, at A39, available at <http://msuweb.montclair.edu/~furr/garciasats.html> (reviewing racial disparities in SAT scores in his response to critics of his recommendation to reduce the influence of the SAT in University of California admissions).

The answer is obviously no when we accept the research demonstrating disparate outcomes and acknowledge the fact that the SAT was designed for the progression of white students to the detriment of black students and other students of color.<sup>71</sup> One major factor is the fact that while SAT prep courses are available, not every family can afford them.<sup>72</sup> As Professor Richard Delgado, one of the leading critics of standardized testing, explains, “[a] further reason why SAT scores and family wealth may be correlated is that crash/prep courses, some of which cost \$1200 or more, are said to boost one’s score by 150 points or more on the SAT and a comparable amount on the LSAT.”<sup>73</sup>

If the economic playing field is divided between the haves and the have-nots, I believe that it is much more likely that a kid who lives in the affluent Mill Basin section of Brooklyn would take an SAT prep course. Conversely, I am not sure that a kid who lives in the economically depressed Brownsville section of Brooklyn has the same means or opportunity to take an SAT prep course.<sup>74</sup> It is not hard to do the math here.<sup>75</sup>

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<sup>71</sup> See generally Delgado, *supra* note 9; Fish, *supra* note 61.

<sup>72</sup> Delgado, *supra* note 9, at 602–03.

<sup>73</sup> *Id.* at 602.

<sup>74</sup> See Todd Balf, *The Story Behind the SAT Overhaul*, N.Y. TIMES (March 6, 2014) [http://www.nytimes.com/2014/03/09/magazine/the-story-behind-the-sat-overhaul.html?\\_r=0](http://www.nytimes.com/2014/03/09/magazine/the-story-behind-the-sat-overhaul.html?_r=0) (“An even more serious charge leveled at the test was that it put students whose families had money at a distinct advantage, because their parents could afford expensive test-prep classes and tutors”).

<sup>75</sup> Delgado, *supra* note 9, at 602–03 (“Because our society has the highest level of childhood poverty in the western world, with over forty percent of black and Latino kids growing up poor it is easy to guess who gets to take Kaplan courses and attend elite prep schools that emphasize college attendance”); Claudia Buchmann, *SAT Test Prep Tools Give Advantage to Students From Wealthier Families*, THE OHIO STATE UNIVERSITY, (Aug. 7, 2006) <http://researchnews.osu.edu/archive/satprep.htm>.

*B. A Few Sample SAT Questions*

The following sample questions come directly from the Official SAT Practice Test for the 2013-2014 academic year.<sup>76</sup> In my opinion, not only are these questions skewed toward excluding minority students from higher education, I am also hard-pressed to see how the majority of these questions are even relevant to everyday life. There are those who would argue that we learn many things in school that we never use in real life. My response is that learning things that I would never use otherwise is just a waste of time. For example, sitting in trigonometry, physics, history and literature classes was just utterly pointless for me. Admittedly these subjects may be useful to a student interested in pursuing a career in any of these fields, I had little to no passion for such careers or opportunities, so was not able to engage with the material in the same way other students who liked those subjects would have.

The following are sample verbal questions:

- 8.** Favoring economy of expression in writing, the professor urged students toward a \_\_\_\_\_ rather than an \_\_\_\_\_ prose style.
- (A) spare . . . ornate
  - (B) terse . . . opinionated
  - (C) personal . . . academic
  - (D) baroque . . . embellished
  - (E) repetitive . . . intricate<sup>77</sup>

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<sup>76</sup> OFFICIAL SAT PRACTICE TEST 2013–14, *available at* [https://satonlinecourse.collegeboard.org/SR/digital\\_assets/assessment/pdf/F4D31AB0-66B4-CE32-00F7-F5405701F413-F.pdf](https://satonlinecourse.collegeboard.org/SR/digital_assets/assessment/pdf/F4D31AB0-66B4-CE32-00F7-F5405701F413-F.pdf).

<sup>77</sup> *Id.* at 15.

3. Since other seabirds customarily nest in colonies on ocean cliffs and islands, the marbled murrelet's \_\_\_\_\_ nesting in forests many miles from the sea must be considered \_\_\_\_\_.
- (A) ambivalence about . . . hypothetical
  - (B) indifference to . . . bold
  - (C) insistence upon . . . evident
  - (D) aversion to . . . dangerous
  - (E) predilection for . . . atypical<sup>78</sup>

Unfortunately, minority students would not do well on questions like these for two very important reasons. First, minority students in poorer neighborhoods do not have the same cultural exposure as many white students where they could expand their vocabulary to include the words in these questions.<sup>79</sup> “African-American leaders contended that the SAT verbal exam is culturally biased against the poor because the questions relate more to upper middle-class white life.”<sup>80</sup> Second, minority students in poorer neighborhoods also suffer from being enrolled in inferior schools. This too results in minority students falling further behind because they do not have the resources that white students have access to.<sup>81</sup> This is an unfortunate fact of life because “lower-class African-American students do not receive the same quality of education as middle-class Caucasian students, and are therefore unable to be as successful on such tests as those with a higher quality of primary education.”<sup>82</sup>

When students are preparing for the verbal part of the SAT, a quick and dirty suggestion might be for them to go the Google website and look up the

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<sup>78</sup> *Id.* at 37.

<sup>79</sup> *See, e.g.,* Douglas Bryant, *A Level Playing Field? The NCAA's Freshman Eligibility Standards Violate Title VI, But the Problems Can Be Solved*, 32 TEX. TECH L. REV. 305, 310 (2001).

<sup>80</sup> *Id.* at 310.

<sup>81</sup> *See, e.g.,* Laura Pentimone, *The National Collegiate Athletic Association's Quest to Educate the Student-Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y. L. SCH. J. HUM. RTS. 471, 474 (1998).

<sup>82</sup> *Id.* at 473–74.

meanings of the words. That is easier said than done when one considers the possibility that minority students and their parents may not have a computer at home.<sup>83</sup> I am sure that in a few dire cases, some minority families may not be able to purchase a dictionary, let alone a computer. So, if a minority student cannot afford a prep course, private tutoring, or a computer, then his or her options are severely limited.<sup>84</sup>

### C. *The Cultural Bias of the SAT*

Whatever the reason—whether it is race, economics, or even life experience—all SAT takers are not created equal,<sup>85</sup> and the SAT questions seemingly go out of their way to perpetuate that inequality.<sup>86</sup> “Many test questions presuppose knowledge that is only common in middle or upper class white communities.”<sup>87</sup> Once again, if there is a state-sanctioned examination that is based, at least in part, on the racial and socioeconomic experiences of some to the exclusion of others,<sup>88</sup> do we really have to ask if such a test is one hundred percent neutral? The answer is an obvious no. I believe that the argument that the SAT is eminently fair and race neutral is either extremely naïve at best, or completely disingenuous, at worst.

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<sup>83</sup> See, e.g., Gerry Smith, *Without Internet, Urban Poor Fear Being Left Behind in Digital Age*, HUFFINGTON POST (March 1, 2012), [http://www.huffingtonpost.com/2012/03/01/internet-access-digital-age\\_n\\_1285423.html](http://www.huffingtonpost.com/2012/03/01/internet-access-digital-age_n_1285423.html).

<sup>84</sup> See *id.*

<sup>85</sup> See , Delgado, *supra* note 9, at 603 (“SAT and LSAT scores freeze the advantages one enjoys while living under one's parents' roof, or shortly thereafter, and the disadvantages that poor people and minorities suffer by reason of under-funded schools and lack of college prep courses. In legislating its way out of the worst depression this country has suffered, the government invested in whiteness through the Social Security Act, which excluded blacks from many of its provisions; the Wagner Act of 1935, which approved collective bargaining for all-white unions; and racially coded mortgage programs. These legislative acts allowed whites to earn more money and buy houses in better neighborhoods. Standardized testing, which came along shortly thereafter, consolidated those advantages.”).

<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at 605.

<sup>88</sup> See *id.*

If my frame of academic reference is, for example, knowing how many World Series championships the New York Yankees have won (27),<sup>89</sup> and another student knows that Jack Nicklaus has won the most major tournament championships (the US Open, the British Open, the Masters, and the PGA Championship) in golf (18),<sup>90</sup> it appears that the SAT deems golf questions worthy to be tested but not baseball questions. As Professor Delgado explains, “[o]ne study of the SAT found items requiring knowledge of golf, tennis, pirouettes, property taxes, minuets, kettle drums, tympani, polo, and horseback riding, items that are scarcely common in minority communities.”<sup>91</sup> I think it rather unlikely that a poor minority student from the Washington Heights section of upper Manhattan danced a pirouette, played tympani in an orchestra, or rode a horse prior to taking the SAT. Asking a student from that socioeconomic background to answer questions regarding those topics and then potentially base his or her academic and professional future on his or her ability to answer those kinds of questions is beyond unfair. Again, the logical progression is this: 1) a student in that position would not have the life experience necessary to answer that question; 2) if he or she gets enough of those questions wrong, it will adversely affect his or her test score; and 3) his or her test score would probably result in rejection of his or her college application. This shows that the SAT’s proclamation that it “tests what you already know”<sup>92</sup> is a flagrant misrepresentation; the SAT tests primarily what middle- and upper-class white students already know, not what all students already know.

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<sup>89</sup> *New York Yankees Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/NYY/> (last visited Sep. 6, 2014).

<sup>90</sup> See, e.g., *Jack Nicklaus: 18 Major Championships*, GOLF DIGEST, <http://www.golfdigest.com/golf-tours-news/players/2010-06/photos-jack-nicklaus-18-majors#slide=1> (last visited Sep. 6, 2014).

<sup>91</sup> Delgado, *supra* note 9, at 605.

<sup>92</sup> *SAT: Why Take the SAT*, THE COLLEGE BOARD, <http://sat.collegeboard.org/about-tests/sat/why-take-the-test> (last visited Aug. 18, 2014).

If that is not bad enough, what happens if a question shows up on the SAT that is actually favorable to a minority or economically disadvantaged test taker? When this has happened in the past, the SAT administrators have left those specific questions ungraded or eliminated them from future tests.<sup>93</sup> This again raises questions about the idea that standardized testing in general, and the SAT in particular, is really race neutral.<sup>94</sup> As explained in a piece by Dr. Ibram X. Kendi, the SAT administrators have thrown out questions in which black students performed better than white students.<sup>95</sup> It appears to me that minority students cannot really close the gap on the SAT if the SAT administrators throw out questions that relate to their experience and culture.<sup>96</sup> As Dr. Kendi argues, “the eliminating of the Black questions, the retaining of White questions is the heartbeat of racism in the SAT.”<sup>97</sup>

In addition to Dr. Kendi’s commentary, Dr. Roy Freedle, formerly of the Education Testing Service (ETS) (the organization that administers the SAT), gives a similar commentary regarding the SAT. He mentions that the

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<sup>93</sup> Ibram X. Kendi, *New Mind-Boggling Evidence Proves SAT Bias*, DIVERSE ISSUES IN HIGHER EDUCATION, <http://diverseeducation.com/article/49830/>; Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST OPTIONAL COLLEGE ADMISSIONS 104–17 (Joseph A. Soares, ed. 2012) (explaining how SAT administrators select new test questions to produce the same spread of scores as existing questions create, so select questions that continue to favor higher-income white males).

<sup>94</sup> See Kendi, *supra* note 93 (“So, if high-scoring test-takers—who are more likely to be White (and male, and wealthy)—tend to answer the question correctly in pretesting, it’s a worthy SAT question; if not, it’s thrown out”).

<sup>95</sup> See *id.* (Referring to the research conducted by Mr. Rosner, see *supra* note 93, Dr. Kendi explains, “[h]e found what he calls ‘Black questions,’ in which more Blacks than Whites answered correctly in the pre-testing phase. ‘But it appears that none ever make it onto a scored section of the SAT’”).

<sup>96</sup> See *id.*

<sup>97</sup> *Id.*



people who devise the SAT prefer to use questions that favor white students over black students.<sup>98</sup>

[W]hen a new test form is constructed by selecting items from a large number of potential test items, test assemblers routinely select *only* items that favor Whites over African-Americans. This is done even though one can find in the batch of potential items many examples wherein the African-Americans outperform the White students.<sup>99</sup>

If administrators continue to select questions that create the same demographic score distribution as the previously existing questions created, the SAT will continue to favor middle- and upper-class white males. Let us assume, for example, that an SAT question asks about baseball statistics and the question happens to be about Ty Cobb, a Baseball Hall-of-Fame player and a virulent racist in his lifetime.<sup>100</sup> As per the above commentaries of Dr. Kendi and Dr. Freedle, a black student might be compelled to answer that question precisely because it is on the test already. I would doubt that same student would have the same opportunity to answer a similar question about Jackie Robinson, a Baseball Hall-of-Fame player who broke the color line in 1947 with the Brooklyn Dodgers.<sup>101</sup> Very likely, a higher percentage of

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<sup>98</sup> Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 193 (2006).

<sup>99</sup> *Id.*, citing Jay Rosner, *On White Preferences*, NATION, Apr. 14, 2003, at 24, 24, also available at <http://www.jayrosner.com/publication-onwhitepreferences.html> (last visited Aug. 31, 2014).

<sup>100</sup> *Top 10 Tarnished Baseball Reputations*, REAL CLEAR SPORTS (May 17, 2013), [http://www.realclearsports.com/lists/top\\_10\\_tarnished\\_baseball\\_reputations/ty\\_cobb\\_tarnished.html?state=stop](http://www.realclearsports.com/lists/top_10_tarnished_baseball_reputations/ty_cobb_tarnished.html?state=stop) (“Cobb was also openly racist, once having stabbed a black night watchman, who intervened after Cobb had slapped a black elevator operator for ‘being uppity’”); see also Bill Pennington, *Hall of Fame Has Always Made Room for Infamy*, N.Y. TIMES (Jan. 8, 2013), [http://www.nytimes.com/2013/01/09/sports/baseball/baseball-hall-of-fame-has-always-made-room-for-infamy.html?\\_r=2&](http://www.nytimes.com/2013/01/09/sports/baseball/baseball-hall-of-fame-has-always-made-room-for-infamy.html?_r=2&) (“Known as the Georgia Peach, he was often painted a racist and had numerous documented altercations with African-Americans off the field, including one that led to a charge of attempted murder”).

<sup>101</sup> *Jackie Robinson Biography*, Biography.com, <http://www.biography.com/people/>

black students would be familiar with Jackie Robinson than with Ty Cobb so their scores on a new test question about Jackie Robinson would likely exceed their scores on a preexisting question about Ty Cobb.

In the book *SAT Wars*, Jay Rosner, Executive Director of the Princeton Review Foundation and noted testing expert, gives an example of such a question being eliminated from the SAT:<sup>102</sup>

The actor's bearing on stage seemed \_\_\_\_\_; her movements were natural and her technique \_\_\_\_\_.<sup>103</sup>

- a) unremitting...blase
- b) fluid...tentative
- c) unstudied...uncontrived
- d) eclectic...uniform
- e) grandiose...controlled

The correct answer is C.<sup>104</sup>

Interestingly, Rosner identifies this question as a "black question", meaning that 8 percent more black respondents than whites answered this question correctly.<sup>105</sup> Yet, this question never made it onto a scored section of the SAT.<sup>106</sup> Once again, there are test questions where black students actually outperform white students, but these questions are absent from the SAT.<sup>107</sup>

Therefore, taking the assertions of Mr. Rosner, Dr. Freedle, and Dr. Kendi at face value, a similar question about Jackie Robinson's

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jackie-robinson-9460813 (last visited Sept. 6, 2014).

<sup>102</sup> Rosner, *supra* note 93, at 113.

<sup>103</sup> *Id.* at 114.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ("So, Black questions do exist, but it appears none ever make it onto a scored section of the SAT. Black students may encounter black questions, but only on an unscored section of the SAT.").

accomplishments would probably never see the light of day on the SAT.<sup>108</sup> This sleight of hand confirms the reality that the SAT is anything but race neutral if it continues to systematically eliminate questions that seemingly favor minority test takers.<sup>109</sup>

Finally, it appears that the ETS in recent years has made very little information available. As Rosner noted: “ETS should be required to make item data available to anyone who requests it, at fees that were applicable at the time (\$500 per test) when the data was last available to the public (up until about 2002).”<sup>110</sup> Consequently, there is very little information available that would confirm whether in recent years this practice is still in force. Rosner also observed: “The publicly available data on rejected SAT questions are limited to partial data on about a dozen questions given by ETS to a few reporters, so no study of rejected questions is possible.”<sup>111</sup>

In my view, the dearth of recent information along with ETS’s seeming reluctance to provide additional information can lead one to question, even in 2014, whether their exam questions are in fact race neutral.

#### *D. The LSAT’s Equally Sorry History*

Unfortunately, the LSAT has an exclusionary history resembling that of the SAT.<sup>112</sup> Similar to the creation and rationale of the SAT, the LSAT was a mechanism not only used to prove the intellectual superiority of white

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<sup>108</sup> See, Kendi, *supra* note 93; see also, Freedle, *supra* note 98, at 193 (“This is done even though one can find in the batch of potential items many examples wherein the African-Americans outperform the White students.”).

<sup>109</sup> See Kendi, *supra* note 93; Freedle, *supra* note 98.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 101 (2006).

Europeans, but also used to keep lower-status individuals (namely, blacks) out of higher education, including law school.<sup>113</sup>

Since the LSAT's foundation was based on racial superiority, it is at least arguable that the individuals who write LSAT questions write them from their own cultural perspective.<sup>114</sup> Professor Delgado argues, "[t]est makers do not write test questions as culturally and socioeconomically stripped, neutral beings."<sup>115</sup> Therefore, the LSAT seems to continue the original sin of racially biased testing.<sup>116</sup> Professor Phoebe A. Haddon and Professor Deborah W. Post, who have both held leadership positions on national law school admissions and education committees, additionally explain, "the original LSAT had historical roots in efforts to substantiate racial inequality and nativism."<sup>117</sup>

#### *E. The Inconsistency of the LSAT*

One of the testing areas of the LSAT is logical reasoning. A multiple-choice logical reasoning question on the LSAT would look something like this:

Fred is tall, dark, and handsome, but not smart.  
 People who are tall and handsome are popular.  
 Popular people either have money or are smart.  
 Joan would like to meet anyone with money.

If the statements above are true, which of the following statements must also be true?

- I. Fred is popular.
- II. Fred has money.
- III. Fred is someone Joan would like to meet.

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<sup>113</sup> *See id.*

<sup>114</sup> Delgado, *supra* note 9, at 605–06.

<sup>115</sup> *Id.* at 605.

<sup>116</sup> Haddon & Post, *supra* note 112, at 101.

<sup>117</sup> *Id.*

- (A) I only
- (B) II only
- (C) III only
- (D) I and II only
- (E) I, II, and III<sup>118</sup>

Frankly, I do not know what answering a question like this has to do with one's success in law school; perhaps I never will. As someone who has earned two law degrees, I am not sure, even now, that I could do anything respectable on that part of the LSAT if I took it again. I say this neither as a badge of honor nor as one of shame; it is merely a statement of fact.

I never encountered this type of question on any exam I took in law school, whether it was in Contracts, Income Tax, Negotiable Instruments, or Trusts and Estates, and doing logic games did not serve me at all when I was calculating the marital deduction<sup>119</sup> on Professor Subotnik's Estate Tax exam. Even after completing law school, I do not see the benefit of the logic games section of the LSAT. I do not see any benefit because I do not know that one answers this type of LSAT question the same way one answers a law school exam question. Again, Professor Delgado offers an explanation:

Tests like the LSAT and the SAT do measure something, but what they measure may not be particularly important. How many real writers[—]not to mention lawyers[—]use obscure words or farfetched analogies?

Thinking styles vary from person to person. You and I, when faced with the same problem, may take radically different routes to get to the right answer. Or, we may come up with two answers that are slightly different but each arguably correct. Standardized tests punish takers who deviate from the path the designer has in mind. This enforced orthodoxy is independent of particular items and

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<sup>118</sup> Leslie G. Espinoza, *The LSAT: Narrative and Bias*, 1 AM. U. J. GENDER & L. 121, 121 (1993).

<sup>119</sup> Bequests, etc., to Surviving Spouse, 26 U.S.C. § 2056 (2012).

terms that disadvantage minorities and the working class, such as regattas and tuxedos.<sup>120</sup>

In my experience as an accountant, my clients seeking help with a tax audit cared about my ability to decipher and analyze the Internal Revenue Code, not about my ability to answer LSAT logic questions. I argue that the LSAT is not the greatest predictor of overall success in law school, and I also do not believe that the LSAT can wholly predict how one will do in certain courses, or in certain legal specializations. In the first year of law school, students normally take Contracts, Torts, and Property. Frankly, I just cannot see how my LSAT score can conclusively predict how well I will do in these courses.

### 1. Law School Exam Questions

Below are two exam questions that I found in the University of Maryland Law School exam archive.<sup>121</sup> The first one is from an Estate and Gift Taxation exam,<sup>122</sup> and the second one is from a Trusts and Estates exam.<sup>123</sup> These questions, I believe, would be similar to what Professor Subotnik might have asked on his own exams, knowing that he teaches the same courses.<sup>124</sup>

Why does § 2035(a) sweep back into the decedent's estate only those transfers within three years of death which otherwise would have resulted in property being included in the decedent's estate

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<sup>120</sup> Delgado, *supra* note 9, at 598–99 (internal citations omitted).

<sup>121</sup> UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, <http://www.law.umaryland.edu/marshall/services/exams/> (last visited Jun. 29, 2014).

<sup>122</sup> Prof. Shale D. Stiller, *Estate & Taxation*, UNIVERSITY OF MARYLAND SCHOOL OF LAW, <http://www.law.umaryland.edu/marshall/services/exams/PDFS/Stiller-EstateGiftTax-Fall2009.pdf> (last visited Sept. 7, 2014).

<sup>123</sup> Prof. Sandra Gohn, *Estates & Trust*, UNIVERSITY OF MARYLAND SCHOOL OF LAW, <http://www.law.umaryland.edu/marshall/services/exams/PDFS/Gohn-Aneckstein-ET1.pdf> (last visited Sept. 7, 2014).

<sup>124</sup> Dan Subotnik, *Professor of Law*, TOURO LAW, <http://www.tourolaw.edu/AboutTouroLaw/bio.aspx?id=38> (last visited Jun. 29, 2014).

under §§ 2036–2038 and § 2042? Why does § 2035 not reach transfers within three years of death that avoid estate tax under other sections that we have studied, such as the general inclusionary rule of § 2033, and powers of appointment under § 2041?

*Question One: Suggested Time: 1 Hour*

T's will provides:

I direct my just debts to be paid.

I give my automobile (a 1991 Honda Civic) to my daughter.

I give the contents of my house to my son.

I give \$25,000 to my grandchildren.

I give \$1,000,000 to my trustee, to invest it and pay the income for the maximum period permitted by the Rule Against Perpetuities to my descendants who (a) have never been pregnant as teenagers and (b) have never taken illegal drugs.

I give my horse trophies won by my horse 'Gallopin' Gal' when ridden by her jockey Bill Smith to Bill Smith and Gallopin' Gal.

I give \$2,000,000 to my trustee, to pay half the income to my neediest relatives and the balance of the income to my church, until the death of the last survivor of my relatives living at my death, and then to pay the principal to my then living descendants.

Signed on December 8, 2000.

\_\_\_\_\_ (SEAL)"

Discuss in detail the mistakes you see in this will, and the problems you would anticipate in its administration. You should assume that the will has been validly executed and attested, and there are no issues as to T's testamentary capacity.

The above sample questions are typical one-hour essay questions in which a law student has to spot the relevant issues. As Professor Subotnik can attest, a professor expects the student to analyze the facts by correctly applying the specific legal rule to the facts to come to a final conclusion.

This was certainly my experience in law school. Of course, not everyone has a legal background when taking the LSAT. The LSAT does not seem to reflect the type of analysis and skill required to do well in law school, so is not the best predictor of one's success in law school. I remain convinced that an overreliance on an LSAT, which does not clearly relate to success in law school, would wrongly deny applicants who otherwise had the ability to do well once in law school. Rather than denying applicants the opportunity to even try to study law based on their responses to LSAT questions, students' performance on actual law school exams should determine whether they can actually do the job and graduate. If they are not otherwise up to the challenge, they can at least say they gave it their best shots and it just was not meant to be.

Further when a professor writes an exam, he or she bases the questions on the material covered during the semester. Rest assured, professors (at least the ones I know) never write an exam based on who is in the class. Also, in law school, exams are graded anonymously. This means that when students take an exam in law school they identify themselves only by number, instead of putting their names on their test booklet. Anonymous grading guarantees that the professor will assess the student's work product only, free of any personal or other extraneous biases that could impact the professor's grading.<sup>125</sup>

## **2. The LSAT Is *Not* Foolproof**

I have no doubt that my own success in law school was not an isolated incident. Because of this, I am firm in my conviction that the LSAT is not an accurate predictor of a person's success in law school or after graduation as its dominance in the admissions process otherwise suggests. My LSAT

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<sup>125</sup> Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171, 173 (1998).



score never predicted that I would transition from being a burned-out accountant to a successful law student to a college professor.

The fact that I was accepted into not one, but two, law schools for a juris doctor degree showed that both admissions committees thought I had the ability to do well, and that they saw that I also had a strong enough track record (academically and professionally) to overcome a “bad” LSAT score. Law Professor Angela Onwuachi-Willig and her student Amber Fricke explain,

[a] difference in average LSAT scores between black and white students does not delegitimize the presence of the group with lower scores, harm the student, or serve as an accurate indicator of longtime future success.<sup>126</sup>

Once I got into law school, I knew I belonged, and I never had to apologize for being there. Besides, I was having too much fun in law school to be self-conscious about my LSAT score.<sup>127</sup>

I showed that I was up to the challenge of law school once I got in. All I needed was a chance to prove myself.<sup>128</sup> If I had been defined solely by my LSAT score, regardless of my life experience, I probably would not have been admitted anywhere, which means that I would not have written the sports column for the student newspaper, I would not have become the Student Bar Association treasurer, and I would not have graduated with the wherewithal to write this article.

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<sup>126</sup> Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807, 829–30 (2011).

<sup>127</sup> See generally, Harvey Gilmore, *Misadventures of a Law School Misfit*, 51 DUQ. L. REV. 191 (2013).

<sup>128</sup> Steven B. Duke, *Afterword: Humble Genesis*, 50 ARIZ. L. REV. 1227, 1228 (2008) (“I asked Dean John D. Lyons why the law school was not more selective in its admissions process, so as to reduce the number of failures. He replied that it was a matter of fairness; rather than use college grades and LSAT scores to exclude aspiring lawyers from the only law school in the state, he and the faculty preferred to give them a chance to prove their jurisprudential mettle by passing law school examinations.”).

As discussed above, the Seattle University School of Law's long-running ARC program helps students with lower LSAT scores reach academic success.<sup>129</sup> In giving students with lower scores the opportunity to prove themselves as more than a test score, Seattle University also discovered that such students contributed positively to the law school. Several of these students served as presidents of the Student Bar Association, were editors of the school's law reviews, and participated in Moot Court competitions.<sup>130</sup> The law school also discovered that many of these students did very well after graduation. Several of these alumni serve as judges, prosecutors, and as members of state bar committees.<sup>131</sup> I believe that stories like these show that successful law students and alumni are much more than a subpar LSAT score. ARC Co-Founder Professor Lustbader explains, "[t]he LSAT does not provide an accurate picture of such applicants' strengths and potential to contribute to the educational environment."<sup>132</sup>

The above success stories, including my own, show conclusively that the LSAT is by no means a wholly accurate predictor of student success.<sup>133</sup> In my humble opinion, the fact that people, myself included, have done well in law school and beyond, despite a subpar LSAT score, is no fluke.

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<sup>129</sup> Lustbader, *supra* note 25, at 71, n.107.

<sup>130</sup> *Id.* at 92.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 101.

<sup>133</sup> *See* Delgado, *supra* note 9, at 599–600 (“Even aside from conceptual incoherence, or perhaps because of it, the LSAT and other standardized tests simply are not very good at doing what they profess to do, namely predict first year grades. The LSAT, for example, correlates with first year grades with a coefficient of about .4, meaning that it predicts only about sixteen percent of the variation in those grades”).

## VI. THE AMERICAN BAR ASSOCIATION: GATEKEEPER OR CO-CONSPIRATOR?

The American Bar Association (ABA), on its website,<sup>134</sup> expresses its commitment to diversity in the legal profession. The website goes on to discuss much of what it does to help ensure that membership in the legal profession is both race and gender inclusive.<sup>135</sup> Logically, if the ABA is committed to diversity in the legal profession, it should be equally committed to diversity in law school, ensuring that all qualified applicants, irrespective of race and gender, have access to a legal education. But is it?

In recent years, the ABA has denied accreditation to law schools that have admitted students with LSAT scores below 143, and it has never accredited a school that has admitted any student with an LSAT score below 140.<sup>136</sup> Even if the ABA's rationale is to save some overmatched students from potential failure,<sup>137</sup> I do not see the fairness of instituting a *de facto* floor, especially when that floor practically eliminates any other factor that would make a student ultimately successful.

When we consider that the testing deck has historically been stacked against minority students, requiring a certain minimum LSAT score now guarantees that otherwise qualified minority students will automatically be denied admission due to a bad score.<sup>138</sup> Regardless of what a minimum

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<sup>134</sup> *Diversity—Diversity & Inclusion*, AMERICAN BAR ASSOCIATION, <http://www.americanbar.org/portals/diversity.html> (last visited Jun. 29, 2014).

<sup>135</sup> *See id.*

<sup>136</sup> Lustbader, *supra* note 25, at 123.

<sup>137</sup> AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION & ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015 31, Standard 501(b) (2014), *available at* [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf).

<sup>138</sup> *See* Lustbader, *supra* note 25, at 123 (“According to the most recent data published by LSAC, the average LSAT score for African-Americans in the 2008-2009 year was 142.25. This means that the ABA de-facto standard automatically disqualifies half of the African-Americans who take the LSAT”).

LSAT score might be, I think it would be grossly unfair for a law school to automatically deny admission to a student who might have had a 3.5 grade point average in both college and graduate school, but perhaps scored 135 on the LSAT. Again, if I were to apply to law school in 2014 with the same credentials that I had in 1994: a corporate accountant with a bachelor's and a master's degree, I do not know that I would have been admitted to any law school with my 142 score. Many other people who did well in law school and after graduation, might not have received that same opportunity today because of this policy.<sup>139</sup> This tells me that the ABA is not as interested in a student's overall package nearly as much as the LSAT score. This has to be the case if the ABA has already denied accreditation to schools that accepted applicants with LSAT scores below 140.<sup>140</sup>

*A. Doesn't Doing the Job Right Count for Anything?*

Ironically, the ABA's denial of accreditation to law schools that offer admission to applicants with lower test scores may be in violation of federal law.<sup>141</sup> The US Supreme Court, in *Griggs v. Duke Power Company*, invalidated a company's requirement that employees have both a high school diploma and pass an aptitude exam to qualify for higher paying positions.<sup>142</sup> The court invalidated the diploma requirement because it found that employees who were not high school graduates were competently performing their jobs.<sup>143</sup> The Court reasoned, "[t]he evidence, however, shows that employees who have not completed high school or taken the

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<sup>139</sup> See generally Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107 (2006) (discussing the admissions policy at the University of Dayton where any applicant with an LSAT score below 145 is automatically denied admission to the law school).

<sup>140</sup> *Id.* at 114; Lustbader, *supra* note 25, at 123.

<sup>141</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>142</sup> See *id.* at 427.

<sup>143</sup> See *id.* at 431–32.

[aptitude] tests have continued to perform satisfactorily, and make progress in departments for which the high school and test criteria are now used.”<sup>144</sup>

Using the Court’s analysis, it should logically follow that if a student is performing satisfactorily in law school, then his or her performance should be proof positive that he or she can finish the job and ultimately graduate. As law schools have a grading system in place,<sup>145</sup> they can easily determine which students are performing up to standards and which are not. Once a student has been accepted into law school, the burden is then on him or her to prove to the faculty and administration that he or she can meet the academic requirements necessary for graduation. For example, my LSAT score never predicted that I would score my first ever A in law school, which was in Contracts my first semester. Thus, the LSAT, presumptive cutoffs notwithstanding,<sup>146</sup> should not function as the be-all and end-all for predicting student success either during law school or after graduation. I have been with my current employer for 16 years as of writing this article, and my employer has never asked me what my LSAT score was. Whether it is in the classroom or in professional life after graduation, actual performance still counts!

Along those lines, here are two questions that I recently gave my students on their Federal Income Tax I exam (based on the 2013 calendar year):

- 1) Roger and Carol Hayes, ages 47 & 48 respectively, filed a joint return this year. They provided all of the support for their 19-year-

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<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 270 n.13 (1992) (“At most institutions, the minimum GPA necessary for retention or graduation is 2.00 on a four point scale, where A is four points; B, three points; C, two points; D, one point; and F, zero points. Failing to maintain a 2.00 average usually means being automatically placed on academic probation if not outright dismissal.”) (citing *Susan M. v. New York Law School*, 556 N.E.2d 1104, 1105 (1990) (outlining disciplinary procedures at New York Law School)).

<sup>146</sup> Randall, *supra* note 139, at 134–35.

old daughter, Robin, who is unemployed, stuck-up, and had no gross income. Their 10-year-old son, George, was a full-time student who has \$2,456 of income from his part-time job. Their 14-year-old son, Roger, Jr., is also a full-time student who had \$3,826 of income from his part-time job. None of the children are self-supporting. Robin, George, and Roger, Jr., lived with their parents all year. They also provided support to Roger's childhood friend, Aloysius, who lives in a nearby nursing home. How many exemptions can the Hayes properly claim on their return?

- a: 6
- b: 5
- c: 4
- d: 3

[The correct answer is b.]

2) Assume now that Roger and Carol had combined gross income of \$156,830, their deductions for adjusted gross income amounted to \$49,001, and their total itemized deductions amounted to \$12,658. Calculate the Hayes' taxable income.

- a: \$75,671
- b: \$76,129
- c: \$71,771
- d: some other amount (your answer: \_\_\_\_\_)

[The correct answer is a.]

In order for my students to answer the questions correctly, I expect them to know the concepts of gross income,<sup>147</sup> adjusted gross income,<sup>148</sup> and exemptions<sup>149</sup> to properly calculate the clients' taxable income.<sup>150</sup> For me,

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<sup>147</sup> See 26 U.S.C. § 61 (1954).

<sup>148</sup> See 26 U.S.C. § 62.

<sup>149</sup> See 26 U.S.C. §§ 151, 152.

<sup>150</sup> See 26 U.S.C. § 63.

their high school SAT score is wholly irrelevant. When my students become actual accountants and are doing tax returns for paying clients, I guarantee that the SAT will never come up during a tax audit.

Even Professor Subotnik, *albeit inadvertently*, helps make my case that testing should only be based on competence and knowledge of the subject matter: “After all, if learning and knowledge is to be prized in some particular endeavor, does it not have to be effectively demonstrated?”<sup>151</sup> I agree with him that in-class exam grades are a good and necessary predictor of overall success in higher education. Professor Subotnik mentions that grades show a person’s ambition and attention to detail.<sup>152</sup> As I mentioned earlier, I strongly believe that an overall track record of semester grades gives a better indication of a student’s competence. That said, I do acknowledge that subject matter exams are not the same as general college entrance exams, as I will discuss shortly.

I also agree with Professor Subotnik in this sense: The CPA (Certified Public Accountant) exam tests accounting knowledge and the bar exam tests legal knowledge necessary to become certified members of both professions. He mentions that there is no groundswell for eliminating the CPA exam.<sup>153</sup> No kidding! There is no such groundswell! Why is that? The CPA exam is entirely different from the SAT for this very important reason: The CPA exam requires, as the condition precedent, that applicants have a bachelor’s degree in accounting and have earned a minimum of 150 college credits.<sup>154</sup> As Professor Subotnik, himself a CPA,<sup>155</sup> can also attest, CPA

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<sup>151</sup> Subotnik, *supra* note 1, at 353.

<sup>152</sup> *Id.* at 388.

<sup>153</sup> *Id.* at 398 (“No movement seems afoot, however small, to change the CPA exam or loosen the passing standards, much less to abolish the exam”).

<sup>154</sup> See, e.g., *Initial License*, N.Y. DEPT. OF EDUC., <http://www.op.nysed.gov/prof/cpa/cpalic.htm> (last visited Jun. 29, 2014).

<sup>155</sup> See *Dan Subotnik*, TOURO LAW, <https://www.tourolaw.edu/AboutTouroLaw/bio.aspx?id=38#.VDSyePldWiE> (last visited Oct. 6, 2014).

exam candidates have to know about things like debits and credits,<sup>156</sup> taxable income and deductions, the time value of money,<sup>157</sup> statements of retained earnings,<sup>158</sup> cash flow,<sup>159</sup> Generally Accepted Accounting Principles,<sup>160</sup> and Generally Accepted Auditing Standards,<sup>161</sup> to name a few. None of these topics are race sensitive like tympani and polo topics are for the SAT. A CPA exam candidate who had taken a required class in Cost Accounting either knows how to prepare a statement of Cost of Goods Sold<sup>162</sup> or he or she does not; there is no middle ground. The knowledge of those subjects does *not* depend on the test taker's racial or socioeconomic background. Once in college, a person can voluntarily major in accounting, philosophy, engineering, or geology, among many other disciplines, based on his or her personal interests. Unlike the SAT, a CPA exam candidate, black or white, is a college graduate already. Thus, regardless of the CPA exam candidate's race, his or her SAT test score, high or low, is in the past.

Admittedly, the CPA exam and the SAT are completely different in that they test in different areas. The CPA exam tests on the following topics: auditing and attestation, financial accounting and reporting, regulation, and business environment and concepts.<sup>163</sup> The CPA exam, as mentioned above, is taken by individuals who are already college graduates with accounting degrees. While it is true that everyone cannot afford to go to a school like

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<sup>156</sup> FRED PHILLIPS, ROBERT LIBBY, & PATRICIA LIBBY, *FUNDAMENTALS OF FINANCIAL ACCOUNTING* 56 (4th ed., 2013).

<sup>157</sup> DONALD KIESO, JERRY WEYGANDT, & TERRY WARFIELD, *INTERMEDIATE ACCOUNTING* 308–40 (14th ed., 2012).

<sup>158</sup> *Id.* at 117–18.

<sup>159</sup> *Id.* at 227–35.

<sup>160</sup> *Id.* at 7.

<sup>161</sup> ALVIN ARENS, RANDAL ELDER, & MARK BEASLEY, *AUDITING AND ASSURANCE SERVICES: AN INTEGRATED APPROACH* 34 (14th ed., 2012).

<sup>162</sup> WILLIAM LANEN, SHANNON ANDERSON, & MICHAEL MAHER, *FUNDAMENTALS OF COST ACCOUNTING* 50 (4th ed., 2011).

<sup>163</sup> *Initial License*, *supra* note 154.



Long Island University (LIU),<sup>164</sup> for example, some people can at least afford to go to a good, and less expensive, state school, like Hunter College.<sup>165</sup> And, the course descriptions for an accounting degree at LIU<sup>166</sup> and at Hunter<sup>167</sup> are remarkably similar.

Finally, the CPA exam does not penalize non-accountants who do not have the necessary background for the exam precisely because it tests specific accounting knowledge.<sup>168</sup> The exam has set requirements for those individuals who want to take the exam.<sup>169</sup> Thus, a philosophy major would be precluded from taking the exam precisely because he or she does not have the academic credentials to qualify for the exam. Different academic majors have different requirements for entering into a profession, and people who choose their majors will eventually find this out. I, as an accounting graduate, would have absolutely no credibility if I tried to take the New York State medical licensing exams if I had never taken a medical course, let alone graduated from medical school.

Unlike the CPA exam, the SAT and the LSAT test for general knowledge. Again, these exams supposedly predict who will do well in college and law school, respectively. If we accept the proposition that the SAT and LSAT test general knowledge, we would also have to presume that the test takers would have access to the same information.

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<sup>164</sup> *Tuition and Fees*, LONG ISLAND UNIVERSITY, <http://www.liu.edu/CWPost/Admissions/NTSP/Summer/Tuition-Fees> (last visited Jun. 29, 2014).

<sup>165</sup> *Hunter College Tuition and Fee Charge Table*, HUNTER COLLEGE, <http://www.hunter.cuny.edu/onestop/repository/files/finances/Tuition-Fee-Charge-Table-Sp-2014.pdf> (last visited Jun. 29, 2014).

<sup>166</sup> *College of Management—Course Descriptions*, LONG ISLAND UNIVERSITY, <http://www.liu.edu/CWPost/Academics/Schools/COM/Dept/SPA/Undergraduate-Programs/BS-Acc/Courses> (last visited Jun. 29, 2014).

<sup>167</sup> *Economics and Hunter College—Courses*, Hunter College, <http://econ.hunter.cuny.edu/accounting-program/b-s-in-accounting/accounting-undergrad-courses/> (last visited Sept. 7, 2014).

<sup>168</sup> *150 hour Education Requirement*, NYSED.GOV, <http://www.op.nysed.gov/prof/cpa/cpa150hour.htm> (last visited Jul. 10, 2014).

<sup>169</sup> *See id.*

Unfortunately, as we have already seen, this is not the case.<sup>170</sup> Not knowing what a regatta<sup>171</sup> is can potentially have a negative effect on a high school student's future thanks to the SAT. Similarly, the LSAT's focus on only one skill set can unfairly preclude an otherwise worthy candidate's admission into law school and eventually the legal profession.<sup>172</sup>

#### VII. IS OCCUPATIONAL TESTING BIASED? NOT ACCORDING TO *RICCI V. DESTEFANO*

In *Ricci v. DeStefano*, the United States Supreme Court took up the issue of standardized testing for professional promotions.<sup>173</sup> Several firefighters in the City of New Haven took a high-stakes examination to receive an eventual promotion to the rank of lieutenant or captain.<sup>174</sup> The Court summarized the factual background of the case:

Promotion examinations in New Haven (or City) were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost.<sup>175</sup>

The test results showed that the white firefighters outperformed the minority firefighters on the exam.<sup>176</sup> In response to the test results, New Haven Mayor John DeStefano convened a series of public hearings on

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<sup>170</sup> Delgado, *supra* note 9, at 595.

<sup>171</sup> *Id.* at 599.

<sup>172</sup> *Id.* at 598 (“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”).

<sup>173</sup> See *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>174</sup> See *id.* at 561.

<sup>175</sup> *Id.*

<sup>176</sup> See *id.*

whether the City should certify the test results.<sup>177</sup> This in turn put the City in the center of a dilemma in which some firefighters argued that the test was discriminatory, due to the racial disparity in test scores.<sup>178</sup> This group threatened to sue the City if it certified the test results.<sup>179</sup> Another group of firefighters argued that the test was indeed fair, and threatened to sue the City if it disregarded the test results and denied promotions to those applicants who performed well on the test.<sup>180</sup> Unfortunately, the City found itself in the middle of a “damned if you do, damned if you don’t” scenario because no matter how the city decided the issue with the test results, the City was going to be the defendant in an eventual lawsuit.<sup>181</sup> Ultimately, the City decided not to certify the test results.<sup>182</sup> Frank Ricci and several other firefighters who scored well on the exam brought suit against the City to compel the City to certify the test results.<sup>183</sup> The plaintiffs were 17 white firefighters and one Hispanic firefighter who received passing scores on the exam; they claimed that they lost their opportunity for a promotion when the City refused to certify the test results.<sup>184</sup>

In a 5-4 decision, the US Supreme Court overturned the Court of Appeals’ decision granting a summary judgment favoring the City.<sup>185</sup> First,

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<sup>177</sup> *See id.*

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See id.* at 562 (“Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well”).

<sup>182</sup> *See id.* (“In the end the City took the side of those who protested the test results. It threw out the examinations”).

<sup>183</sup> *See id.*

<sup>184</sup> *See id.* at 575.

<sup>185</sup> *See id.* at 560 (Justice Kennedy, delivered the opinion of the Court, joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justice Scalia filed a concurring opinion. Justice Alito also filed a concurring opinion, joined by Justices Scalia and

Justice Anthony Kennedy's opinion noted the racial makeup of the individuals who sat for the lieutenants and captains exams:

Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.<sup>186</sup>

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.<sup>187</sup>

As mentioned above, the white firefighters significantly outperformed the black firefighters on the exam.<sup>188</sup> The majority noted the statistical disparity as follows:

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a *prima facie* case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent.<sup>189</sup>

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Thomas. Justice Ginsburg filed a dissenting opinion, joined by Justices Stevens, Souter, and Breyer).

<sup>186</sup> *Id.* at 566.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 586.

If the disparities in passage rates by race were that wide, it would seem to suggest that something was terribly wrong with the test. Consequently, the City of New Haven was under pressure to come up with an equitable solution to the problem.<sup>190</sup> The City at least tried to do something by refusing to certify the test scores, and the majority opinion even recognized the City was really in a bad spot. The Court summarized this conundrum: “Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry.”<sup>191</sup>

The Court held that the City’s refusal to certify the test results was based solely on race, in violation of Title VII of the Civil Rights Act of 1991.<sup>192</sup> The 1991 version of the Act contained a key provision for determining whether an employer could face disparate impact liability:

Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses ‘a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.’ An employer may defend against liability by demonstrating that the practice is ‘job related for the position in question and consistent with business necessity.’ Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer’s legitimate needs.<sup>193</sup>

The Court held that the City decided to throw out the test results solely because too few minority candidates performed well enough on the exams

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<sup>190</sup> *Id.* at 561.

<sup>191</sup> *Id.* at 593.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 578 (internal citations omitted).

to be considered for promotion.<sup>194</sup> The Court reasoned, “As the District Court put it, the City rejected the test results because ‘too many whites and not enough minorities would be promoted were the lists to be certified.’”<sup>195</sup> The court was also quite unimpressed that the City’s refusal to certify the test scores came from a genuine desire to give more minority candidates opportunity for promotions.<sup>196</sup> The Court explained, “[w]hatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.”<sup>197</sup> Along those lines, the Court also noted that the disparate treatment provision in the statute did not make any exceptions for making race-based decisions in good faith.<sup>198</sup>

Justice Ruth Bader Ginsburg’s dissent starts by noting that New Haven residents, the majority of whom are black and Hispanic, continue to be served by a still predominately white fire department.<sup>199</sup> She also mentions that the City’s refusal to certify the test results did not lead to a quota system where a specified number of positions were deliberately set aside for minority applicants.<sup>200</sup> Additionally, Justice Ginsburg argues that no one was harmed by the City’s decision not to certify the test.<sup>201</sup> No one received

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<sup>194</sup> *See id.* at 593 (“The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City’s refusal to certify the results”).

<sup>195</sup> *Id.* at 579.

<sup>196</sup> *See id.* at 579–80.

<sup>197</sup> *Id.* at 579, 580.

<sup>198</sup> *See id.* at 581 (“And when Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k)”).

<sup>199</sup> *See id.* at 608 (“By order of this Court, New Haven, a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions”).

<sup>200</sup> *See id.* at 620.

<sup>201</sup> *See id.*

a promotion, and everyone has to go back to square one and start the process again.<sup>202</sup>

#### A. *An Interesting Irony*

Admittedly, and perhaps even unashamedly, I agree with Justice Ginsburg's dissent. We must never forget that this country was built in part on a foundation of racial injustice, a stain that is indelible to this very day.<sup>203</sup> As we have already seen, the idea of racial segregation was also the basis of standardized testing.<sup>204</sup> Thus, if the SAT and the LSAT were built on that foundation, it is not a far leap to suggest that municipal exams were also designed with the purpose of keeping minority applicants from doing well enough to secure a good civil service job.<sup>205</sup>

The irony I see in *Ricci* is this: we have 17 white firefighters who are crying racial discrimination. Just to play devil's advocate here, let us consider this argument: Ricci and his fellow plaintiffs claimed unfair treatment and wanted to certify an exam result for which the municipal

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<sup>202</sup> See *id.*

<sup>203</sup> See, e.g., John D'Adamo, *The Continuing Struggle of Racial Injustice In America*, LIFE EXAMINATIONS (Jan. 19, 2011), <http://lifeexaminations.wordpress.com/2011/01/19/the-continuing-struggle-of-racial-injustice-in-america/>; *Is Racial Inequality Still a Problem in the U.S.?*, SOCIOLOGY.COM (Jan. 2013), <http://www.sociology.com/2013/01/racial-inequality-problem-u-s/>.

<sup>204</sup> Haddon & Post, *supra* note 112, at 101 ("Thus, the original LSAT had historical roots in efforts to substantiate racial inequality and nativism"); Subotnik, *supra* note 1, at 365–66.

<sup>205</sup> See, e.g., *Simpson v. New York State Department of Civil Service*, 166 Fed. Appx. 499 (2006); Ben Fractenberg, *City Agrees to Pay \$98M to Settle FDNY Bias Lawsuit*, DNAINFO NEW YORK (March 18, 2014), <http://www.dnainfo.com/new-york/20140318/civic-center/city-agrees-pay-98m-settle-fdny-bias-lawsuit>; Jill Colvin, *Judge Approves New FDNY Test, Hiring to Begin "Immediately"*, DNAINFO NEW YORK (September 28, 2012), <http://www.dnainfo.com/new-york/20120928/new-york-city/judge-approves-new-fdny-test-hiring-begin-immediately>; Maria Cramer & John R. Ellement, *Minority Officers Win Round In Legal Battle Over Promotion Exams*, BOSTON.COM (November 9, 2012), <http://www.boston.com/metrodesk/2012/11/09/sjc/kvAG3oW8rBa2aH5dcbeJzH/story.html>.

employer had tangible data that proved the test disproportionately favored white test takers. Such a claim appears to be a request for the municipal employer to use a racially discriminatory tool for promotion decisions.

I find it rather ironic that when the City tried to effectuate a race-neutral remedy where no one was harmed, the white test takers just could not abide by it so they sued to certify the test scores. If the plaintiffs had been black, and they sued to have those same test results thrown out, I doubt that Justice Kennedy and the conservative majority would have given the same reading to the disparate treatment codification of the 1991 Civil Rights Act. I say this because I do not believe that this group is terribly sympathetic to the concerns of minority litigants. As Professor Mark S. Brodin explained,

[f]our of the five justices joining the prevailing opinion are white males, and the fifth is an African American who has become the foremost opponent of any remedial race-conscious efforts at equality, which he views as the legal and moral equivalent of the most egregious forms of discrimination from our past.<sup>206</sup>

I also have doubts about the conservative majority in light of their recent decisions in practically gutting the federal Civil Rights Law<sup>207</sup> and chipping away at affirmative action.<sup>208</sup>

#### B. A “Win” for the Ricci “Good Guys”

In his article, Professor Subotnik mentions that many of New Haven’s white residents celebrated the victory of the *Ricci* plaintiffs: “It was an amazing experience. They [i.e., the white firefighters] were greeted like

<sup>206</sup> Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL REV. L. & SOC. JUSTICE, 161, 164 (2011).

<sup>207</sup> See John Blake, *Has the Roberts Court Placed Landmark 1964 Civil Rights Law on a Hit List?*, CNN.COM (April 10, 2014, 11:25 AM), <http://www.cnn.com/2014/04/10/us/roberts-court-civil-rights-law/>.

<sup>208</sup> See Eugene Robinson, *The Court Stacks the Deck Against Minorities*, THE WASHINGTON POST (Apr. 24, 2014), [http://www.washingtonpost.com/opinions/eugene-robinson-the-court-stacks-the-deck-against-minorities/2014/04/24/7d2fe2f2-cbe0-11e3-93eb-6c0037dde2ad\\_story.html](http://www.washingtonpost.com/opinions/eugene-robinson-the-court-stacks-the-deck-against-minorities/2014/04/24/7d2fe2f2-cbe0-11e3-93eb-6c0037dde2ad_story.html).



heroes on the streets, in the hotels, in the restaurants. Everywhere we went, people reached out to them to shake their hands and thank them for what they did.”<sup>209</sup>

Professor Subotnik mentions this celebration in the context of recent political polls that show the racial divide that people feel about affirmative action.<sup>210</sup> In a nutshell, most whites praised the *Ricci* verdict.<sup>211</sup> Although he does not explicitly state the reactions of New Haven minorities, I would presume that few minorities celebrated the verdict.

I guess that the celebration that Professor Subotnik speaks of here would be a normal reaction for those people who felt that the plaintiffs were in fact unfairly treated when the City refused to certify their test results. I argue here that being able to do the job (irrespective of test scores) must still count for something. Therefore, I would ask the celebrants, as well as Professor Subotnik, this question: If the *Ricci* verdict had gone the other way, and any of their homes or businesses were subsequently on fire, would they have welcomed the other firefighters’ help or would they have refused, possibly risking death, merely because they believed the other firefighters were just not good enough to save them? I ask this question because, irrespective of the reason people celebrated the *Ricci* verdict, I certainly would hope that none of these people would refuse any firefighter’s help, regardless of the person’s ethnicity.

### *C. A Potential Remedy after Ricci*

If standardized testing is to be a true competition, perhaps employers could take a cue from professional sports. For example, in professional football, division champions get an automatic bye through wild card

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<sup>209</sup> Subotnik, *supra* note 1, at 390.

<sup>210</sup> *See id.* at 390–91.

<sup>211</sup> *See id.*

weekend and the lower seeds have to play their way into the next round.<sup>212</sup> While the lower seeds—known as “wild cards”—did not have the best regular season records, their records are still good enough for them to qualify for the postseason tournament.<sup>213</sup> Once in a while, a “lesser” team at least has an opportunity to go far into the postseason, or even to run the table. Think back to the wild card New York Giants coming out of nowhere to knock off the undefeated, dynastic New England Patriots in the Super Bowl following the 2007 season.<sup>214</sup>

Employers can take a similar approach. Where testing is mandatory, let the highest test scorers get the automatic bids for a certain number of the jobs, and then the next level of scorers can perhaps “play their way in” by performing into the remaining job openings on a probationary basis. I am saying this with the hope that municipal employers like the City of New Haven can come up with truly race-neutral test questions that better assess the test taker’s overall ability.

Some people can do a job by employing reading comprehension and being able to memorize.<sup>215</sup> Other people can do the same job by being able to think quickly on their feet in the heat of battle.<sup>216</sup> I do not see how inherently fair it is to give a test favoring one type of skill to the exclusion

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<sup>212</sup> See, e.g., *2013 NFL Playoff Picture*, CBSSPORTS.COM, <http://www.cbssports.com/nfl/standings/playoffrace> (last visited Jun. 29, 2014); *NFL Tiebreaking Procedures*, NFL.COM, <http://www.nfl.com/standings/tiebreakingprocedures> (last visited Jun. 29, 2014).

<sup>213</sup> See *id.*

<sup>214</sup> *Super Bowl XLII*, PRO-FOOTBALL-REFERENCE.COM (Feb. 3, 2008), <http://www.pro-football-reference.com/boxscores/200802030nwe.htm>.

<sup>215</sup> See *What Skills Are Employers Looking For?*, AARP FOUNDATION, <http://www.aarpworksearch.org/Inside/Pages/HowEmployableAmI.aspx> (last visited Jun. 29, 2014).

<sup>216</sup> See, e.g., Travis Bradberry, *How Successful People Stay Calm*, FORBES.COM (February 6, 2014), <http://www.forbes.com/sites/travisbradberry/2014/02/06/how-successful-people-stay-calm/>; Aston Wackym, *Performance Under Pressure*, YALE DAILY NEWS (January 23, 2014), <http://yaledailynews.com/blog/2014/01/23/performance-under-pressure/>.

of the other.<sup>217</sup> One never knows what one can do on the job without getting a fair shot. I think if the City of New Haven had taken this approach to give the next tier of scorers a probationary opportunity while still certifying the test scores for the *Ricci* plaintiffs, this would have been a much more equitable result for all concerned. In other words, if a promotion opportunity presented itself, and the only eligible parties came from the second tier of scorers on the firefighter's exam, I think that giving a lower test scorer a chance to do the job would be equitable. Furthermore, if one performs on a satisfactory level, I believe that he or she will ultimately move from probationary to permanent status, precisely because he or she has proven that he or she can do the job.

#### VIII. THE PROFESSIONAL FACTS OF LIFE: RACE AND OCCUPATIONAL COMPETENCE

What's in a name? It depends on who wants the job and who is doing the interviewing.<sup>218</sup> People of color have it hard enough to overcome lower test scores and to prove themselves professionally. They also have to deal with employers who might hold their ethnic-sounding names against them as well. To compensate for the potential hiring bias, some people of color have even changed their names ahead of time to make them sound more like common white names.<sup>219</sup> “These job applicants might include a Latino

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<sup>217</sup> See, e.g., Richard Delgado, *Standardized Testing as Discrimination: A Reply to Dan Subotnik*, 9 U. MASS L. REV. 98, 103 (2014) (“The First Concern – Standardized Testing Rewards Only One Kind of Intelligence”).

<sup>218</sup> See Eve Tahmincioglu, *Like It Or Not, Name Can Impact Your Career*, NBCNEWS.COM (Nov. 23, 2009), <http://www.nbcnews.com/id/34063244/ns/business-careers/t/it-or-not-name-can-impact-your-career/>.

<sup>219</sup> See, e.g., Michael Luo, *'Whitening' the Resume*, N.Y. TIMES (Dec. 5, 2009), [http://www.nytimes.com/2009/12/06/weekinreview/06Luo.html?\\_r=0](http://www.nytimes.com/2009/12/06/weekinreview/06Luo.html?_r=0); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating 'National Origin' Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 837–38 (1994) (discussing how people like Martin Sheen, Danny Thomas, Kirk Douglas, Rodney Dangerfield and Woody Allen changed their original names so they could advance in show business).

Guillermo who becomes William or a black Tyree who simply becomes Ty.”<sup>220</sup> As further explained in a hypothetical by Professor Catherine Smith:

Mary, a white woman who is a partner at a law firm is reviewing law students’ resumes for summer employment. She has narrowed her selection to two similar resumes. The name at the top of one of the resumes is Sarah Fisher. Mary assumes that Sarah is white. The name at the top of the other resume is Tanya Washington. Tanya’s resume indicates that she is a member of the Black Law Students Association. Mary assumes that Tanya is black. Although Tanya has a higher G.P.A. than Sarah, Mary grants Sarah a job interview because she believes that Sarah will be a ‘better fit’ in the firm culture.<sup>221</sup>

This dynamic has resulted in a number of incidences where people of color may have missed out on job opportunities.<sup>222</sup> Researchers Marianne Bertrand and Sendhil Mullainathan conducted a study in which they sent fictitious resumes to various employers in response to various classified help wanted ads.<sup>223</sup> This is what they found: “To manipulate perceived race, resumes are randomly assigned African-American- or White-sounding names. White names receive 50 percent more callbacks for interviews.”<sup>224</sup> This suggests to me that an interviewer may possibly see a black-sounding name as an automatic disqualification from an interview.

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<sup>220</sup> Angela Onwuachi-Willig, Mario L. Barnes, *By Any Other Name? On Being ‘Regarded as’ Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1300 (2005).

<sup>221</sup> Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 80 (2006).

<sup>222</sup> Yolanda Spivey, *Unemployed Black Woman Pretends to be White. Job Offers Suddenly Skyrocket*, TECHYVILLE (Nov. 15, 2012), <http://www.techyville.com/2012/11/news/unemployed-black-woman-pretends-to-be-white-job-offers-suddenly-skyrocket/>.

<sup>223</sup> See generally Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

<sup>224</sup> *Id.* at 991.

I also experienced this during my days as a struggling young accountant. Indeed, if my name were “Hakeem Gibbs” instead of “Harvey Gilmore,” I would have had a much harder time forging a career than I already had. I recall one incident where a headhunter called me at my home to discuss other opportunities in the accounting profession. She called on a Sunday night, and then called my office the very next day to confirm our meeting later that afternoon. It was obvious to me that she liked my resume and what I brought to the table. At that time, I had been an accountant for about nine years and already had both a bachelor’s degree in accounting and a master’s degree in tax. When I met her face-to-face, I saw immediately that she was incredulous that a black man came with a good-looking, polished resume and professional background. Needless to say, I never heard from her again. I think she would be even more stunned if she were to discover where I am in my professional life today.

#### IX. CONCLUSION

I have attempted to show in this piece how standardized testing can be racially biased, along with a history of how testing was originally created with an exclusionary motive.<sup>225</sup> I have also argued that even without an exclusionary motive, standardized testing is not always solely or even consistently the best indicator of a person’s ability. There are many people, irrespective of race, who did not do the best on standardized exams, but actually blossomed in college, graduate school, law school, and beyond. A “test-optional” admissions process cannot be part of the attack on testing and knowledge that concerns Professor Subotnik because such a process takes a student’s entire body of work into account. This, I believe is more dispositive than just a test score. Again, once a student is admitted into college, graduate school, or law school, the burden is on the student to do

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<sup>225</sup> See generally Delgado, *supra* note 9; Haddon & Post, *supra* note 112.

the required assignments and pass all the exams with satisfactory grades. I remain firm in my conviction that standardized tests like the SAT and the LSAT can wrongfully exclude otherwise qualified applicants from higher learning. Can anyone assess how good a novel truly is by reading just one page? I think not. Similarly, I cannot understand how admissions officers, supposedly in good faith, can summarily disqualify a candidate with other admission-worthy credentials by placing undue, disproportionate weight on a test score. For the reasons discussed above, I believe that is grievously unfair.

Yet, Professor Subotnik makes this claim against those who do not trust the SAT: “It is hard to imagine that SAT critics would prefer that colleges go back to pre-SAT days when admissions procedures favored Andover and Phillips Academy graduates.”<sup>226</sup> I should hope not, considering that standardized testing was originally intended to exclude minorities.<sup>227</sup> That said, I still cannot see either the wisdom or efficacy of holding on to standardized testing, based on its continuing exclusionary methodologies.

I do not know that the days of Andover and Phillips Academy that Professor Subotnik mentions here are really that far removed from the days of segregationist governors who personally attempted to block the first African Americans from attending previously segregated institutions. For example, segregationist Mississippi Governor Ross Barnett personally confronted James Meredith in an attempt to stop him from being the first black man to register at the University of Mississippi.<sup>228</sup> Similarly, Arkansas Governor Orval Faubus tried to keep the “Little Rock Nine” from integrating Central High School until President Dwight Eisenhower sent federal troops to Central High School and made sure the nine students

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<sup>226</sup> Subotnik, *supra* note 1, at 353.

<sup>227</sup> Delgado, *supra* note 9, at 595–96

<sup>228</sup> *Ross Barnett, Segregationist, Dies; Governor of Mississippi in 1960's*, N.Y. TIMES (Nov. 7, 1987), <http://www.nytimes.com/1987/11/07/obituaries/ross-barnett-segregationist-dies-governor-of-mississippi-in-1960-s.html>.

attended classes.<sup>229</sup> Finally, Alabama Governor George Wallace<sup>230</sup> vowed in his first inauguration speech: “segregation now, segregation tomorrow, segregation forever.”<sup>231</sup>

Being that this discussion is about the racial stratification of standardized testing, I think this history of segregation and exclusion of people of color from educational institutions indicates that “colorblind,” in pre-testing days, meant a society with no blacks, no Hispanics, no Asians, and no women in important positions.

Professor Subotnik’s reference to the good old days before the SAT was used in college admissions is thus a reference to the “good old days” of explicit and vehement exclusion of people of color from educational institutions. Thus, I will respond to Professor Subotnik’s comment to SAT critics, just as sardonically: no, we do not want to go back to those good old, mint-julep-drinking-on-the-plantation, “pure,” pre-SAT days. Again, the reasons are obvious. In fact, my own parents, who grew up in the segregated, pre-Civil Rights South, would not be so magnanimous as to turn the other cheek at Professor Subotnik’s comment regarding returning to the good old days of pre-SAT college admissions.

Finally, on a personal note, although we strongly disagree in certain areas in this discourse, I truly love Dan Subotnik and I am certainly proud to call him my friend. I will always value and appreciate his friendship along with the sagacious academic and professional advice he has given me through the years. And, knowing me as well as he does, I believe he would tell

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<sup>229</sup> See, e.g., *Civil Rights: The Little Rock School Integration Crisis*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBRARY, MUSEUM, AND BOYHOOD HOME, [http://www.eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_little\\_rock.html](http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html) (last visited Jun. 29, 2014).

<sup>230</sup> *Radio Diaries*, ‘Segregation Forever’: A Firey Pledge Forgiven, But Not Forgotten, NPR (Jan. 10, 2013), <http://www.npr.org/2013/01/14/169080969/segregation-forever-a-fiery-pledge-forgiven-but-not-forgotten>.

<sup>231</sup> *Id.*

anyone who asks that I am not a bum who got lucky, and I, like many others, delivered the goods, uneven standardized testing be damned.