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#### Recommended Citation

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**EDWARD L. BARRETT, JR. LECTURE  
ON CONSTITUTIONAL LAW**

**Official Elitism or Institutional Self  
Interest? 10 Reasons Why UC-Davis  
Should Abandon the LSAT (and Why  
Other Good Law Schools Should  
Follow Suit)**

*Richard Delgado\**

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\* Jean Lindsley Professor of Law, University of Colorado-Boulder. J.D., U.C. Berkeley (Boalt Hall), 1974.

## INTRODUCTION

A few hours ago, as I was enjoying my morning constitutional, I was struck once again at what a beautiful campus this is. The sun was filtering through the trees, wisps of fog were clinging to the shores of the pond, the geese were out. Five days ago, back home in Colorado, I had run through freezing rain and 28 degree temperatures. It was probably good for my character, but the contrast did prompt me to ask myself what possessed me to leave this magical place twelve years ago? They say that intelligence is multiple. Maybe I am suffering from a low Living Situation Aptitude Test score — LSAT. When you consider that I left here for a fine law school in Madison, Wisconsin, a few miles from the North Pole, my own self-suspicion deepens.

At any rate, thank you to Rex Perschbacher and the Edward Barrett Committee for the invitation to speak. I am very pleased to be back, and especially to follow in the footsteps of my friend and colleague, Derrick Bell, who spoke here one year ago.

The subject of my talk is the billion dollar a year testing industry and especially the Law School Admissions Test (LSAT) — the real one. That little beauty, familiar to most of you from a terror-filled Saturday in October, is one of a family of tests that include the SAT, which hundreds of thousands of high school students take every year, the Graduate Record Exam (GRE), which you take to get into graduate school, and many others. Every year 143 million Americans take standardized tests for education alone, another 50 to 200 million for business and industry, and several million more for the military.<sup>1</sup> The number of standardized tests taken is on the order of 600 million annually,<sup>2</sup> with total costs running in the billions of dollars, more when you add in prep courses.<sup>3</sup>

As you might imagine, the College Board (Board) and Educational Testing Service (ETS), which lie at the center of the testing movement, are comfortably wealthy organizations. Despite its nonprofit status, the Board paid its president \$350,000 and its nine vice presidents more than \$100,000 in a recent year.<sup>4</sup> Even those pay scales are not particularly surprising when you consider that the Board earned more than

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<sup>1</sup> PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 221 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Ben Gose, *Historic Shift at the College Board as the SAT Faces Fresh Opposition*, *CHRON. HIGHER EDUC.*, Dec. 17, 1999, at A51.

\$250,000,000 that year, passing nearly two thirds of it on to ETS.<sup>5</sup> All three tests, the SAT, GRE, and LSAT, share a similar history and lineage, but the LSAT is comparatively unstudied because it is taken by a much smaller number of applicants than the SAT or GRE.<sup>6</sup> For that reason, I will sometimes draw on studies of these other two tests as well.

Standardized testing originated early in the twentieth century as a way to demonstrate the intellectual superiority of northern European whites.<sup>7</sup> Its originators subscribed to eugenic theories that considered nonwhites and southern European immigrants sources of contamination to the precious human gene pool.<sup>8</sup> Obsessed with mental deficiency, researchers such as Binet, Terman, Spearman, and Brigham pioneered the earliest mass tests,<sup>9</sup> including one for the United States Army during World War I to exclude the unfit and to assign soldiers to jobs based on ability.<sup>10</sup> 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,

<sup>5</sup> *Id.*

<sup>6</sup> See *The Law School Admission Council: A Hundred-Million Dollar Investment Fund that Does Law School Testing on the Side*, J. BLACKS IN HIGHER EDUC., Spring, 2000, at 95 [hereinafter *Testing on the Side*] (reporting that 70,000 students took LSAT in 1997); *Frontline: Secrets of the S.A.T.* (PBS television broadcast, Oct. 4, 1999) (transcript available at <http://www.pbs.org/wghb/pages/frontline/shows/sats/test/facts.html>) [hereinafter *Frontline*] (stating that two million students take SAT annually).

<sup>7</sup> SACKS, *supra* note 1, at 17-34; Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 758-60 (2000).

<sup>8</sup> See CARL C. BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* 197 (1923) (warning that immigrants and minorities swamped America with inferior genes); JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 35 (1996) (noting that Carl Campbell Brigham, designer of SAT, declared that "Nordic white intelligence in the United States was being diluted because of the introduction of inferior Negro stock."); Richard Delgado, *Ten Arguments Against Affirmative Action - How Valid?*, 50 ALA. L. REV. 135, 143-44 (1998) (tracing Carl Campbell Brigham's writings); Roithmayr, *supra* note 7, at 759; Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, and the NCAA*, 8 STAN. L. & POL'Y REV. 141, 146 (1997) (noting Carl Campbell Brigham's beliefs that minorities were less intelligent than Nordic whites); Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993, at 135 (finding that SAT founder was "an out-and-out racist" and SAT was to "confirm racist assumptions").

<sup>9</sup> See SACKS, *supra* note 1, at 19-21; Nicholas Lemann, *Behind the SAT*, NEWSWEEK, Sept. 6, 1999, at 53 (stating that Binet was French psychologist who devised first human intelligence test in 1905 and Americans Terman and Spearman advocated use of Binet's tests in America). See generally 5 ENCYCLOPEDIA OF EDUCATION 130-31 (1968) (providing biographies of Binet and Terman).

<sup>10</sup> SACKS, *supra* note 1, at 29-32; Shropshire, *supra* note 8, at 146; Fish, *supra* note 8, at 135.

of course, blacks.<sup>11</sup> Among those who obsessed about these matters was Carl Campbell Brigham, an early president of the College Board and an unapologetic race-purifier for whom Catholics, Jews, and east Europeans represented a defective strain of humanity.<sup>12</sup>

Threatened with underemployment after World War I ended, the testing industry transferred its attentions to the university and college market. The College Board had begun in 1900 with 35 colleges using its early examinations.<sup>13</sup> The Board expanded rapidly by tapping post-World War I enthusiasm for testing and the American penchant for organizational planning, later Cold War fervor, and, a little later, remarkably, the civil rights movement.<sup>14</sup>

A few years after Brigham's reign, in 1947, the Board created the Educational Testing Service (ETS) to supervise the construction and administration of the SAT.<sup>15</sup> Its early promoters, including James Conant, former president of Harvard, saw the test as an attractive alternative to admissions based on family connections. They also saw it as a means of organizing society efficiently along Platonic lines with every citizen assigned a place according to ability and aptitude.<sup>16</sup>

By 1948, thousands of ex-GIs were applying to law schools.<sup>17</sup> ETS responded by creating the Law School Admissions Test Council (now LSAC), which soon incorporated and chose its parent, ETS, as the agency to operate its testing program.<sup>18</sup> From the beginning, ETS worked diligently to enhance its progeny's image: scheduling conferences at fine resorts, assigning staff to produce reports on LSAC letterhead, and creating titles, committees, and consultant positions for law professors to forestall the possibility that the Association of American Law Schools might develop its own competing test.<sup>19</sup>

<sup>11</sup> JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 19 (1988); STEFANCIC & DELGADO, *supra* note 8, at 34-40; *see* Fish, *supra* note 8, at 135 (stating that SAT was developed by Carl Brigham to confirm racist assumptions). Brigham classified American society into distinct groups, with Nordic people at the top and African Americans at the bottom. Fish, *supra* note 8, at 135.

<sup>12</sup> CROUSE & TRUSHEIM, *supra* note 11, at 22-25; *see* SACKS, *supra* note 1, at 29-32; Fish, *supra* note 8, at 135; *see also* STEFANCIC & DELGADO, *supra* note 8, at 35-36.

<sup>13</sup> CROUSE & TRUSHEIM, *supra* note 11, at 17-18.

<sup>14</sup> *Id.* at 19-25, 35-36; DAVID OWEN, *NONE OF THE ABOVE* 6 (1995).

<sup>15</sup> CROUSE & TRUSHEIM, *supra* note 11, at 27; OWEN, *supra* note 14, at 6.

<sup>16</sup> CROUSE & TRUSHEIM, *supra* note 11, at 28-33.

<sup>17</sup> Paul D. Carrington, *Tocqueville's Aristocracy in Minnesota*, 26 WM. MITCHELL L. REV. 485, 515.

<sup>18</sup> ALLAN NAIRN, *THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS* 220, 242-43 (1980).

<sup>19</sup> *Id.* at 243.

ETS later developed programs, including the Law School Data Assembly Service (LSDAS), which provided law school admissions offices with class rankings, profiles, formulas, index numbers, and predicted first year averages, all designed to make law school admissions simple and pseudo-scientific.<sup>20</sup> Despite LSDAS' formidable ability to crank out numbers, the organization concealed the race gap in LSAT scores until comparatively recently.<sup>21</sup> And, when troublesome information does come to light, the testing industry tends to respond by stepping up publicity.<sup>22</sup> For example, when the U.S. Justice Department found no significant relationship between National Teacher Examination scores and teaching effectiveness, ETS responded not by rethinking its test, but by increasing promotion and newspaper ads.<sup>23</sup>

Because of conservative challenges to affirmative action, standardized testing today is emerging as the chief barrier to the educational ambitions of minorities and the poor.<sup>24</sup> The same conservatives who have been attacking affirmative action strenuously support standardized testing, equating test scores with the objective merit that affirmative action is said to ignore.<sup>25</sup> A host of critics take issue with that equation.<sup>26</sup>

The body of my talk outlines the case against standardized testing. But before I begin, I would like to note that many of us are deeply invested in test scores, having done well on standardized tests and seen them open doors for us as we have gone through life. Yet, I would like to give you some reasons to start thinking about those scores in a different light. And, toward the end of my talk, I will address the reaction that many listeners have on hearing talks like this, that is: what is the use, things will never change. I provide a series of alternatives to the LSAT and ways to assure that these alternatives receive attention.<sup>27</sup>

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<sup>20</sup> *Id.* at 244-45.

<sup>21</sup> *Testing on the Side*, *supra* note 6, at 95.

<sup>22</sup> *See, e.g.*, NAIRN, *supra* note 18, at 320-24 (describing how ETS responded to criticism over National Teacher Examination).

<sup>23</sup> *Id.* at 319-20.

<sup>24</sup> *See* William Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 193-97 (2000).

<sup>25</sup> Peter Sacks, *Standardized Testing: Meritocracy's Crooked Yardstick*, CHANGE, Mar.-Apr. 1997, at 29.

<sup>26</sup> *Id.* at 25-26.

<sup>27</sup> *See infra* Part II.

## I. ARGUMENTS AGAINST STANDARDIZED TESTING

The first argument against standardized testing is that despite its origins in intelligence testing and white supremacy, the tests are surprisingly poorly written. Keen eyes are constantly finding mistakes in them. For example, on one multi-state bar examination, administered by ETS, thirty to forty answers were found to be wrong.<sup>28</sup> On the Test of English as a Foreign Language, ETS had to re-grade an entire nationwide sample when it discovered it was using the wrong answers.<sup>29</sup> And, on one administration of the SAT, four out of forty five verbal test answers turned out to be wrong, and many other wrong answers were as plausibly correct as the ones ETS keyed correct.<sup>30</sup>

Particular test items aside, many ETS tests do not test all relevant skills. The LSAT, for example, only requires verbal and reasoning fluency, not the ability to command probability, scientific reasoning, humanistic thought, historical thought, or knowledge of human motivation and psychology – all skills important for lawyers.<sup>31</sup> Multiple choice test taking under severe time constraints, as one critic put it, "is a specialized kind of game which rewards certain kinds of people and penalizes others for reasons apart from their ability to handle words [concepts] and numbers."<sup>32</sup> Many reputable psychologists today recognize that intelligences are multiple and that complex intellectual tasks, such as lawyering, require a wide range of abilities. These abilities include empathy, communication skills, common sense, reasoning by analogy, synthetic reasoning, and the ability to make order out of situations that are ambiguous, complex, and uncertain.<sup>33</sup> Using a two hour paper and pencil test of word comprehension and logical games to judge fitness for law school is like picking basketball players based on a trial of foul shots.<sup>34</sup> Tests like the LSAT and the SAT do measure something, but what they measure may not be particularly important.

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<sup>28</sup> NAIRN, *supra* note 18, at 139-40.

<sup>29</sup> Leo Reisberg, *1,000 Students Hit by Grading Error on TOEFL*, CHRON. OF HIGHER EDUC., Apr. 30, 1999, at A45. See generally CROUSE & TRUSHEIM, *supra* note 11, at 11-14 (noting errors on ETS tests); OWEN, *supra* note 14, at 33-55 (providing examples of error prone questions).

<sup>30</sup> CROUSE & TRUSHEIM, *supra* note 11, at 11-12; OWEN, *supra* note 14, at 35-55.

<sup>31</sup> Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 976 (1996). See generally CROUSE & TRUSHEIM, *supra* note 11, at 155-67.

<sup>32</sup> NAIRN, *supra* note 18, at 83-84.

<sup>33</sup> SACKS, *supra* note 1, at 208-10; Sturm & Guinier, *supra* note 31, at 976.

<sup>34</sup> Douglas Lederman, *Persistent Racial Gap in SAT Scores Fuels Affirmative-Action Debate*, CHRON. OF HIGHER EDUC., Oct. 30, 1998, at A36

How many real writers – not to mention lawyers — use obscure words or farfetched analogies?<sup>35</sup>

Thinking styles vary from person to person.<sup>36</sup> 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.<sup>37</sup> Standardized tests punish takers who deviate from the path the designer has in mind. This enforced orthodoxy is independent of particular items and terms that disadvantage minorities and the working class, such as regattas and tuxedos.<sup>38</sup> It also punishes those who think outside the box. This punishment becomes particularly troublesome considering that standardized tests came into wide use in the 1950s and 1960s, when the civil rights era was just starting, and froze standards as they stood at a time when many minorities could not possibly meet them because of segregated schools and widespread poverty.<sup>39</sup>

Recall that the testing industry shifts its promotional material with the times.<sup>40</sup> The testing industry has not, however, demonstrated this same flexibility with the contents of its tests, which have remained remarkably the same for decades. This is true even though what society needs today is vastly different from what it needed fifty years ago, and even though today's 180 ABA accredited law schools differ greatly in their missions and characters.<sup>41</sup> The earliest versions of the LSAT were a hodge podge of questions from other occupational tests, not specific to law.<sup>42</sup> Yet, they predicted law school performance just as well, or badly, as today's versions do.

Even aside from conceptual incoherence, or perhaps because of it, the LSAT and other standardized tests simply are not very good at doing

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<sup>35</sup> John K. Wilson, *How the Left Can Win Arguments and Influence People: A Tactical Manual for Progressives* (forthcoming 2001) (on file with author).

<sup>36</sup> SACKS, *supra* note 1, at 208-10; Sturm & Guinier, *supra* note 31, at 976. See generally HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE: A READER* (1993); DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1995).

<sup>37</sup> See *supra* note 36.

<sup>38</sup> See *infra* notes 88, 90 and accompanying text.

<sup>39</sup> See Sturm & Guinier, *supra* note 31, at 987-92.

<sup>40</sup> See *supra* notes 13-14 and accompanying text.

<sup>41</sup> See generally Note, *The Relationship between Equality and Access in Law School Admissions*, 113 HARV. L. REV. 1449, 1458-62 (2000). For example, law practice today is much more cooperative than it was in the past, emphasizing a team approach, use of paralegals, and negotiation. The LSAT has done nothing to incorporate this dimension.

<sup>42</sup> NAIRN, *supra* note 18, at 233-34, 40.



what they profess to do, namely predict first year grades.<sup>43</sup> 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.<sup>44</sup> Other factors, which we *could* focus on but do not because the test is so simple and convenient, account for the other eighty-four percent. And, a study of minority law students showed a sharp drop off in correlation after the first year — .27 for the second year and .17, barely positive, for the third.<sup>45</sup> That is another way of saying that by year three, test scores were predicting less than three percent of the variation in performance.

The LSAT is not the only ETS test that does not predict what it professes. As mentioned earlier, the Justice Department found no significant relationship between National Teacher Exam scores and teacher effectiveness.<sup>46</sup> In another study, high scorers on the GRE took longer to graduate than modest scorers.<sup>47</sup> At Yale, the correlation between GRE scores and academic success was negative for female graduate psychology students.<sup>48</sup> On the SAT, men score forty-five points higher than women, who nevertheless earn higher college grades.<sup>49</sup> And, in the range of test scores in which admissions officers function, the SAT increases schools' ability to predict graduation only one tenth of one percent over class rank alone, while greatly reducing minorities' chances of admission.<sup>50</sup> At the University of California, for example, the number of Latinos would double if the system dropped the test.<sup>51</sup>

<sup>43</sup> Kristan S. Mayer, *Flagging Nonstandard Test Scores in Admissions to Institutions of Higher Education*, 50 STAN. L. REV. 469, 480 (1998) (proving that LSAT does not predict student success); see Bill Brighof, *Asking Too Much of School Tests*, ST. LOUIS POST-DISPATCH, July 1, 1999, at B7 (stating that LSAT results only indicate possible college success).

<sup>44</sup> Kidder, *supra* note 24, at 187; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1264 n.39 (1995) (stating that correlation between LSAT and first year grades is about 0.35, according to UCLA); Sturm & Guinier, *supra* note 31, at 971; Abiel Wong, "Boalt-ing" Opportunity?: *Deconstructing Elite Norms in Law School Admission*, 6 GEO. J. ON POVERTY L. & POL'Y 199, 227 (1999).

<sup>45</sup> CECILIA V. ESTOLANO, *NEW DIRECTIONS IN DIVERSITY: CHARTING LAW SCHOOLS ADMISSION POLICY IN A POST-AFFIRMATIVE ACTION ERA* 32-33 (1997).

<sup>46</sup> NAIRN, *supra* note 18, at 320.

<sup>47</sup> SACKS, *supra* note 1, at 278 (describing study evaluating GRE score and time until graduation in geology master's degree program); Sacks, *supra* note 25, at 26.

<sup>48</sup> SACKS, *supra* note 1, at 278.

<sup>49</sup> Eugene E. Garcia, *Where's the Merit in the S.A.T.?*, N.Y. TIMES, Dec. 26, 1997, at A39.

<sup>50</sup> See also Alan Jenkins, *Leveling the Playing Field: An Opportunity Agenda*, THE NATIONAL, Mar. 6, 2000, at 16 (reporting on 1994 study revealing that GPA and LSAT formula scores did not predict success of African American students). See generally CROUSE & TRUSHEIM, *supra* note 11, at 5-8, 89-145.

<sup>51</sup> Garcia, *supra* note 49. See generally *Testing on the Side*, *supra* note 6, at 46-48 (stating

Many students with low scores perform well after graduation. Studies of large-scale mistakes in test scoring show that low scorers do as well as those admitted without the mistake.<sup>52</sup> Additionally, studies of Ivy League legacies show that sons and daughters of alumni admitted with test scores far lower than those of their classmates go on to do just as well.<sup>53</sup> (This is not an argument for legacy admits, however.) And, recent large-scale studies of minority graduates by Bowen and Bok<sup>54</sup> and by four professors at the University of Michigan law school<sup>55</sup> show that minorities admitted under affirmative action, with SAT scores in many cases considerably lower than those of their classmates, nevertheless perform superbly after graduation, publishing books, winning prizes, and earning Ph.Ds at rates exceeding even those of their high testing peers.

Test scores are, however, highly correlated with economic status.<sup>56</sup> 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>57</sup> Current rankings of institutions, generated primarily by test scores, are exactly the same as the pre-existing hierarchy that turned on social status.<sup>58</sup> A SAT taker can expect an extra thirty points for every ten thousand dollars of parental income;<sup>59</sup> a graph of test scores by family income is a straight line rising steeply. Test scores correlate with family income even more highly than they do with

that admissions system relying on LSAT resegregates blacks into lower ranked schools).

<sup>52</sup> See Kidder, *supra* note 24, at 206; Sturm & Guinier, *supra* note 31, at 974.

<sup>53</sup> See *Prime Numbers*, CHRON. OF HIGHER EDUC., Sept. 15, 2000, at A12. See generally William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29 (forthcoming 2000); Sturm & Guinier, *supra* note 31, at 995 (stating that legacies constitute 12 to 25 percent of student body at some elite colleges). Ninety-six percent of these legacies are white. Sturm & Guinier, *supra* note 31, at 995.

<sup>54</sup> WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

<sup>55</sup> Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395, 398-400 (2000) (discussing how admissions index that combines LSAT scores and undergraduate grade-point average does not necessarily predict income, self-satisfaction and success of minorities).

<sup>56</sup> See NAIRN, *supra* note 18, at 197-219; SACKS, *supra* note 1, at 8; Sturm & Guinier, *supra* note 31, at 957; Wong, *supra* note 44, at 231-34.

<sup>57</sup> See Roithmayr, *supra* note 7, at 761-62.

<sup>58</sup> *Id.* at 765; Wong, *supra* note 44, at 237-45 (pointing out that elite lawyers intentionally support LSAT precisely because it discriminates on basis of wealth); see NAIRN, *supra* note 18, at 198-99.

<sup>59</sup> SACKS, *supra* note 1, at 8; Sacks, *supra* note 25, at 27.

first year grades.<sup>60</sup> Social class also correlates with scores, so that the children of a professional making \$70,000 a year do better on the average than those of a blue collar family earning the very same income.<sup>61</sup> Even zip codes predict ETS test scores with startling accuracy.<sup>62</sup>

Why such a strong correlation? Lani Guinier reports an informal study in which Jesse Jackson went to Glenbrook South, a suburban high school outside of Chicago that spends \$11,000 per year per pupil, has twenty-four hour service from janitors earning \$45,000 a year, carpets on the floor, a ninety-eight percent graduation rate, and assumes every student is able to learn.<sup>63</sup> If any student has trouble, the school simply assigns him or her a tutor and computer, if necessary.<sup>64</sup> Jackson then went to the Cook County jail, where he interviewed the predominantly black and Hispanic population of inmates. Instead of a ninety-eight percent graduation rate, he found a ninety percent rate of high school dropouts, on whom Cook County was spending \$22,000 a year to keep behind bars.<sup>65</sup> Ninety-nine percent of the inmates were functionally illiterate.<sup>66</sup>

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>67</sup> Because our society has the highest level of childhood poverty in the western world, with over forty percent of black

<sup>60</sup> Sturm & Guinier, *supra* note 31, at 957; see Sacks, *supra* note 25, at 27 (noting that parental education also accounts for fifty percent of variation in SAT scores).

<sup>61</sup> NAIRN, *supra* note 18, at 203. See generally Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in THE BLACK-WHITE TEST SCORE GAP 1, 20-25 (1998) (discussing numerous factors that result in gap between black and white students' test scores).

<sup>62</sup> Jon T. Casteen III, *Commentary*, VIRGINIAN-PILOT, Oct. 10, 1999, at J1.

<sup>63</sup> Lani Guinier et al., Conference, *Rethinking Equality in the Global Society*, 75 WASH. U. L.Q. 1561, 1650 (1997).

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

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

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

<sup>67</sup> See Wong, *supra* note 44, at 236-37 (citing increase after coaching of 7.5 points on current scale); see also *Sex and Race Differences on Standardized Tests: Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 299 (1987) [hereinafter *Subcommittee*]; Sturm & Guinier, *supra* note 31, at 991 n.164 (citing study with 110 point gain); *Testing on the Side*, *supra* note 6, at 96 (stating that LSAT prep companies claim that coaching yields gains of 10 percent or more). But see Carolyn Mooney, *Test Preparation Courses Have a Negligible Effect on Scores, Study Concludes*, CHRON. OF HIGHER EDUC., Mar. 26, 2001, <http://chronicle.com/daily/2001/03/2001032601.n.htm>.

and Latino kids growing up poor,<sup>68</sup> it is easy to guess who gets to take Kaplan courses and attend elite prep schools that emphasize college attendance.

A culture of test saviness compounds these inequities. A recent study gave undergraduates one hundred reading comprehension questions taken from actual SATs.<sup>69</sup> In some cases, the researchers provided the reading passages, the questions, and the five possible answers; in others, only the questions and answers.<sup>70</sup> One group of sixty-one honors students, who were given only the questions and answers, but not the reading passages, scored 52.8; a second group of non-honors students, who also only received the questions and answers, scored 37.6.<sup>71</sup> Because choosing answers at random would lead to scores of about twenty, and both groups scored much higher, performance on reading comprehension tests may measure overall cleverness as much as developed ability.<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup> 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.

Test scores may be highly positively correlated with income and social class, but they are even more so negatively correlated with race.<sup>75</sup> Except

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<sup>68</sup> Colloquy, *Affirmative Action and Standardized Testing*, 4 TEX. HISP. J. L. & POL'Y. 85, 95 (1998).

<sup>69</sup> Chris Raymond, *Research Notes: Study Questions Validity of Reading-Comprehension in SAT*, CHRON. OF HIGHER EDUC., Apr. 25, 1990, at A5.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at A5, A7.

<sup>73</sup> See generally CROUSE & TRUSHEIM, *supra* note 11, at 122-32; Roithmayr, *supra* note 7, at 762-63 (discussing standardized tests as de facto exclusion of people of color).

<sup>74</sup> See generally JUAN F. PEREA, RICHARD DELGADO, ANGELA HARRIS, AND STEPHANIE WILDMAN, RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 648-50 (2000) (discussing race and property values); Roithmayr, *supra* note 7, at 786-88 (stating that American segregation era has caused persistent discrimination).

<sup>75</sup> See Subcommittee, *supra* note 67, at 297 (noting racial minorities do not perform as well as whites at same economic level on standardized tests); SACKS, *supra* note 1, at 7-8;

for minorities, most admissions decisions do not change with the addition of test scores.<sup>76</sup> Conversely, when graduate and professional school admissions officers ignore standardized test scores, they admit a much higher proportion of minority applicants.<sup>77</sup> At every grade point average, minority applicants to law schools are admitted in lower proportions than whites.<sup>78</sup> For example, whites with 3.50 to 3.74 GPAs were admitted to law schools eighty-five percent of the time, compared to seventy-six percent of African Americans and eighty percent of Hispanics with the same GPAs.<sup>79</sup> As GPA decreased, disparities increased. Whites with 2.25 to 2.49 GPAs were admitted nearly half the time, whereas blacks only one quarter.<sup>80</sup> Minorities make up slightly more than ten percent of the U.S. lawyer population, lagging behind accountants<sup>81</sup> and only slightly ahead of physicians, college professors,<sup>82</sup> dentists, and natural scientists.<sup>83</sup> The LSAT today is a principal reason for that disparity.

Consider the group of mainly poor and African American students at Northampton East High School in rural North Carolina who, building on their physics and chemistry lessons, constructed an electric car that won a national competition that included many of the country's elite high schools.<sup>84</sup> Although Northampton students made the best car, they might easily have been aced out of Harvard, Stanford, or the University of California by their competitors who scored 1500 or 1600 on their SATs and who society deems more meritorious by conventional criteria. ETS blandly insists that before standardized testing, elitism reigned and

Lederman, *supra* note 34, at A36.

<sup>76</sup> See William Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. (forthcoming 2001) (stating that LSAT creates gap between black and white students that is considerably larger than gap found in first year grades of black and white law students); Kidder, *supra* note 24, at 180-82, 196, 207-09; William Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J. L. & FEMINISM 1, 10 (2000) (hereinafter *Portia Denied*).

<sup>77</sup> See generally CROUSE & TRUSHEIM, *supra* note 11, at 122-32; Roithmayr, *supra* note 7, at 762-63.

<sup>78</sup> Kidder, *Portia Denied*, *supra* note 76, at 14.

<sup>79</sup> *Id.*

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

<sup>81</sup> James Podgers, *Progress Hits a Wall: Minority Law Enrollment Stalls, Prompting Calls for New Diversity Efforts*, A.B.A. J., Sept. 2000, at 94 (noting that 14.3 percent of accountants are minorities).

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

<sup>83</sup> *Id.*

<sup>84</sup> See SACKS, *supra* note 1, at 14; Sacks, *supra* note 25, at 31.

colleges admitted few blue collar students and minorities, whose numbers went up after their tests came into wide use.<sup>85</sup> This proposition has not been proven and, in any event, today things are plainly working in the opposite direction.<sup>86</sup>

Why do many minorities score poorly on these tests? As mentioned earlier, inferior schools, poverty, and lack of access to test prep courses are part of the reason.<sup>87</sup> But the tests themselves share part of the blame as well. Many test questions presuppose knowledge that is only common in middle or upper class white communities.<sup>88</sup> The Multi-State Bar Exam (MBE) and LSAT questions emphasize business and property concepts, not civil rights, minority history, or literature.<sup>89</sup> One study of the SAT found items requiring knowledge of golf, tennis, pirouettes, property taxes, minuets, kettle drums, tympani, polo, and horseback riding,<sup>90</sup> items that are scarcely common in minority communities. A study of the LSAT showed reading passages disparaging W.E.B. Du Bois, Cesar Chavez, and Harriet Tubman.<sup>91</sup> Other LSAT questions presupposed legal knowledge.<sup>92</sup> And, although the industry assumes that conditions are the same for all, admissions officers have no way of knowing which applicants have taken a prep course, or whose scores reflect what Steele and Aronson call stereotype threat.<sup>93</sup>

Testing requires communication, which in turn requires understanding of language and situations. Test makers do not write test questions as culturally and socio-economically stripped, neutral beings. Rather, test writers, like all humans, reflect the culture and surroundings in which they were raised. The situations and circumstances they incorporate into test questions, and, more importantly, the meanings and thought patterns they deem "right" will inevitably favor test takers who

<sup>85</sup> CROUSE & TRUSHEIM, *supra* note 11, at 122.

<sup>86</sup> *Id.* at 122-32.

<sup>87</sup> Clarence Page, *Schools Must Give All Students Chance to Succeed*, CINCINNATI POST, Aug. 6, 1999, at 21A.

<sup>88</sup> See, e.g., Kidder, *supra* note 24, at 38 app; see also *infra* notes 88-90 and accompanying text.

<sup>89</sup> NAIRN, *supra* note 18, at 230.

<sup>90</sup> *Subcommittee*, *supra* note 67, at 298. See also Kidder, *supra* note 24, at 38-42 app.

<sup>91</sup> *Subcommittee*, *supra* note 67, at 298.

<sup>92</sup> See Colloquy, *supra* note 68, at 89-90.

<sup>93</sup> Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 799-801 (1995); see also Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29, 30-31 (1999) (explaining that stereotype threat occurs when stereotype jeopardizes performance motives).

share those meanings and thought patterns.

Bias can enter in one final way, namely, in how we interpret and ascribe meaning to test scores. Blacks, for example, today have entrance test scores that compare with those of whites admitted to college in 1951, when admission was much less competitive than it is today.<sup>94</sup> That generation of students did not do so badly, and were, in fact, running the world until quite recently. Why do we imagine that today's minority students will do any worse? Imagine that someone designs a test of cultural competence that contains items on preference for types of music, willingness to wait in line, and attitudes toward credit. Suppose scores on this test were used to predict crime and who is likely to be arrested, expelled from school, and fired from work. Further suppose that the correlation between test scores and one of these other events turns out to be .41, with minorities earning most of the low scores. Does that mean that the test is valid? Of course not — arrest and school discipline rates are in many cases themselves a function of social prejudice, profiling, and other forms of structural bias against people of color. The test would serve, in effect, as a proxy for racism by measuring little of importance about blacks and other minorities, but much about our social attitudes toward them.

Reliance on standardized test scores may even be illegal.<sup>95</sup> If the LSAT, for example, discriminates against certain groups, is not job related, and predicts scarcely better than chance, then its use in law school admissions may contravene federal guidelines.<sup>96</sup> The United States Department of Education has released a series of drafts of a guidebook for the use of standardized tests in admissions decisions.<sup>97</sup> Among other things, it warns that because the tests have disparate impacts on minorities, over-reliance on them could trigger legal problems.<sup>98</sup> The

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<sup>94</sup> BOWEN & BOK, *supra* note 54, at 30.

<sup>95</sup> See Patrick Healy, *Civil Rights Groups Work to Line Up Support for Draft Guidelines on Standardized Tests*, CHRON. OF HIGHER EDUC., June 18, 1999, at A28; U.S. Dept. of Education, Office of Civil Rights, *Nondiscrimination in High-Stakes Testing: An overview* (republishing draft guidelines), CHRON. OF HIGHER EDUC., May 17, 1999, <http://chronicle.com/weekly/documents/v45/i38/4538nondiscrimination.htm> [hereinafter *Nondiscrimination*].

<sup>96</sup> See *Nondiscrimination*, *supra* note 95. See generally *Ass'n of Mex.-Am. Educ. v. Cal.*, 231 F.3d 572, 581 (9th Cir. 2000) (permitting Title VII suit against California for using standardized test for teacher certification); Sara Hebel, *Little is Changed in Latest Draft on Education Department Guidelines on Standardized Tests*, CHRON. OF HIGHER EDUC., July 14, 2000, at A31 (describing Department of Education guidelines that discuss potential legal problems associated with utilizing standardized test for admissions purposes).

<sup>97</sup> See *Nondiscrimination*, *supra* note 95.

<sup>98</sup> See *id.*

Department expects institutions to re-evaluate all tests and criteria on which certain racial or ethnic groups perform better or worse than others to make sure that they are educationally necessary and that no other device would impose less of a disparate impact.<sup>99</sup> Alternatively, in California, the LSAT may constitute a racial preference for whites in violation of Proposition 209.<sup>100</sup>

Over-reliance on standardized tests is not only bad for institutions, it is bad for society at large. The tests reward rote performance, guessing, gamesmanship, and the ability to sort artificial alternatives quickly under timed conditions.<sup>101</sup> Not surprisingly, standardized test scores do not predict creativity, artistic achievement, or other forms of accomplishment later in life.<sup>102</sup> In fact, one may speculate that our society's obsession with test scores is responsible, in part, for the marked decline in achievement in the arts, humanities, science, politics, and law visible in the last half century.<sup>103</sup> It discourages teachers from teaching real material; instead they teach to the tests.<sup>104</sup> Recall how early test boosters, like James Conant, were bureaucrats and Cold War Warriors who were uninterested in promoting creative or divergent thinking.<sup>105</sup> Tests penalize dreamers, young people who live in a world of ideas or imagination. A recent analysis found that the SAT can cause problems for students who are unusually clever or creative.<sup>106</sup> As a thought experiment, try to imagine anyone whom the United States has

<sup>99</sup> See *id.*

<sup>100</sup> ESTOLANO, *supra* note 45, at 76-77; Guinier, *supra* note 63, at 1637.

<sup>101</sup> Sturm & Guinier, *supra* note 31, at 977; see, e.g., *National Academy of Sciences' President Attacks 'Boring' Tests*, CHRON. OF HIGHER EDUC., May 8, 1998, at A34 (describing international and science-achievement tests as "excruciatingly boring").

<sup>102</sup> Guinier, *supra* note 63, at 1645-46; Kidder, *supra* note 24, at 198-202; Sacks, *supra* note 25, at 27-28; Sturm and Guinier, *supra* note 31, at 977; John Cloud, *Should SATs Matter?*, TIME, Mar. 12, 2001, at 61-70 (listing well known figures with less-than-stellar SAT scores). European nations that test for college or university admission do not use multiple choice tests, but written essays. SACKS, *supra* note 1, at 14; Sacks, *supra* note 25, at 30-31.

<sup>103</sup> See generally JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE: 1500 TO THE PRESENT ix, xvi-xvii, 773-801 (2000) (stating that 20th century is only notable for fast food, TV, advertising, political slogans, sex, pornography, simplified curricula, child-raising by day-care centers, poor taste, and lack of great thinkers, writers, journalists, or artists – a few shrewd individuals but little more — and drawing parallel to Middle Ages).

<sup>104</sup> See Edward Cohn, *Selling Higher Test Scores*, AM. PROSPECT, Oct. 23, 2000, at 29; *infra* note 131 and accompanying text.

<sup>105</sup> See *supra* notes 8-12 and accompanying text.

<sup>106</sup> NAIRN, *supra* note 18, at 77; SACKS, *supra* note 1, at 218-20; Sacks, *supra* note 25, at 27-28; Sturm & Guinier, *supra* note 31, at 977; see Susan Dodge, *Backers of Standardized-Test Reforms Publish Guide for Students*, CHRON. OF HIGHER EDUC., Sept. 20, 1989 at A37.



produced in the last fifty years, the era of mass testing, who is as good a scientist as Einstein or Salk, a politician like Woodrow Wilson or John F. Kennedy, an artist like Frank Lloyd Wright, or a musical composer the equal of Aaron Copland or Igor Stravinsky. If, like me, you have trouble with that exercise you have no less an authority than Jacques Barzun, who wrote an entire book on the subject, on your side.<sup>107</sup> Recent research shows that groups perform best when they are diverse, not uniform, and the same is likely to be true for society at large.<sup>108</sup> Finally, standardized tests may limit opportunities for future leaders. Perhaps the greatest American civil rights figure of our time, Martin Luther King, Jr., a man whose name adorns this building, could not get into graduate school because he flunked the GRE, enrolling instead in a theological school.<sup>109</sup> The rest was history. Even a study of 1,300 millionaires found "no correlation between [earlier] SAT scores, grade point averages, and [later] economic achievement."<sup>110</sup>

Our obsession with testing may even be responsible for the decline in public esteem for the legal profession.<sup>111</sup> Like many similar tests, the LSAT correlates negatively with community activism, social empathy, a desire to help others in trouble, and wanting to make a contribution to knowledge.<sup>112</sup> When the public complains that lawyers seem callous, uninterested in justice, have poor communication skills, and do not return phone calls, might it be that we are screening for exactly that sort of person? Most senior partners, judges, and law professors entered law school at a time when the LSAT was not required, or when scores were much lower than they are today.<sup>113</sup> Many could not get into the schools from which they graduated if they were applying today. As a further thought experiment, cast your mind back over the last fifty years and try

<sup>107</sup> BARZUN, *supra* note 103.

<sup>108</sup> Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity From Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479-90 (1999); Sturm & Guinier, *supra* note 31, at 1024-25.

<sup>109</sup> Kidder, *supra* note 24, at 192 n.116; *see also* Roithmayr, *supra* note 7, at 757 (stating that University of Maryland Law School denied entry to Thurgood Marshall).

<sup>110</sup> Chad Roedmeir, *Average Millionaires Made Average Grades, Author Says*, DENVER POST, Feb. 7, 2000, at 11A. A Harvard study showed success in life correlated with *low* SAT and blue-collar background. Guinier, *supra* note 63, at 1561; Sturm & Guinier, *supra* note 31, at 976.

<sup>111</sup> *See* JoAnne Epps, *LSATs Provide a Narrow Gate into Legal Profession*, NAT. L. J., Aug. 28, 2000, at C3 (arguing that society needs lawyers with skills not measured by LSAT).

<sup>112</sup> NAIRN, *supra* note 18, at 228; Kidder, *supra* note 24, at 201-04; Kidder, *supra* note 53, at 39-40.

<sup>113</sup> That is to say they entered law practice in the 1950s and 1960s, before the tests were in wide use. *See supra* notes 16-18 and accompanying text.

to think of legal scholars the equal of Prosser, Fuller, Corbin, Llewellyn, or Jerome Frank; judges to match Felix Frankfurter, Louis Brandeis, or Oliver Wendell Holmes. Could our obsession with tests have something to do with that scarcity?

Test scores can easily infiltrate our thinking so as virtually to constitute what we deem merit. Early testers were racists and eugenicists; merit for them was what white Europeans did and thought.<sup>114</sup> Even today, the tests are white-normed,<sup>115</sup> they impose burdens on those with no prior knowledge of law or recurring test situations.<sup>116</sup> 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.<sup>117</sup>

ETS could easily adjust its tests to produce a more equitable distribution of scores across race and class lines, but it seems unlikely to do so without external pressure.<sup>118</sup> Until recently, men earned more National Merit Scholarship Awards than women.<sup>119</sup> In 1999, the Board, embarrassed by this, made minor changes in the Preliminary SAT (PSAT), including adding a multiple choice writing section, that equalized scores for men and women.<sup>120</sup> In law, for example, a certain type of personality scores high on the LSAT, gets into law school, then into teaching, and, finally, on the admissions committees where, unsurprisingly, they look for persons like themselves (except thirty years younger).<sup>121</sup> Law professors who set out to teach in a different way find themselves reinforced negatively by students, a critical mass of whom is quick, glib, and expects the professor to cater to that form of discourse.<sup>122</sup>

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<sup>114</sup> See *supra* notes 7-12 and accompanying text.

<sup>115</sup> See Jodi S. Cohen, *Testimony Claims Testing Bias: Executive for Test Firm Says Questions Favor Wealthy White Males*, DETROIT DAILY NEWS, Jan. 25, 2001, available at <http://www.detnews.com>.

<sup>116</sup> See Roithmayr, *supra* note 7, at 739-40, 782-84 (explaining how standardized tests discriminate against minorities in terms of culture). Even when minorities do well on standardized tests, their success can spark suspicion. Consider the case of East Los Angeles high school teacher Jaime Escalante, whose Latino students scored high on the A.P. calculus test and were immediately challenged by ETS and required to undergo a retest. Jay Mathews, *Dedicated Calif. Teacher Turns Students into Calculus Whizzes*, WASH. POST, Dec. 12, 1982, at A6.

<sup>117</sup> Roithmayr, *supra* note 7, at 784-85.

<sup>118</sup> See *supra* notes 22-23 and accompanying text.

<sup>119</sup> Kidder, *supra* note 24, at 31.

<sup>120</sup> *Id.*

<sup>121</sup> Roithmayr, *supra* note 7, at 784-85.

<sup>122</sup> See generally MICHAEL LEVIN, *THE SOCRATIC METHOD* (1987) (describing dynamics of this method of instruction).

Professional norms push in the same direction. Law schools publish their average LSAT scores.<sup>123</sup> If they are high, the alumni smile and reach for their checkbooks.<sup>124</sup> Corporate recruiters take notice and add the school to their road show.<sup>125</sup>

A final reason to get rid of the LSAT and its sister tests is that the standardized testing industry really deserves it. If their tests were to fall into total disuse, in my opinion, it could not happen to a nicer bunch of people. Now under scrutiny, the testing industry has responded by hype and self-promotion, rather than self-examination or meeting their critics half way.<sup>126</sup> ETS has long appointed professors and university administrators to committees, commissions, and consultantships and invited them to lavish retreats and conferences.<sup>127</sup> Realizing that it is now under attack by many in the minority community, it has hastily increased representation of blacks and Latinos on committees and working groups.<sup>128</sup> It takes out full page ads and hires minority front men to advocate the "responsible use" of their tests.<sup>129</sup> It knows that prep courses improve scores, but continues to deny it.<sup>130</sup> ETS winks at teachers who teach to K-12 competency tests<sup>131</sup> and suburban students who gain an unfair advantage by submitting doctors' certificates that they need more time.<sup>132</sup>

<sup>123</sup> Roithmayr, *supra* note 7, at 777.

<sup>124</sup> *Id.* at 765.

<sup>125</sup> *Id.* at 767.

<sup>126</sup> See *supra* notes 22-23 and *infra* notes 127-29.

<sup>127</sup> See generally CROUSE & TRUSHEIM, *supra* note 11, at 28.

<sup>128</sup> See, e.g., LAW SCHOOL ADMISSION COUNCIL, NEW MODELS TO ASSURE DIVERSITY, FAIRNESS, AND APPROPRIATE TEST USE IN LAW SCHOOL ADMISSIONS (2000) (listing five minority professor co-authors).

<sup>129</sup> See *supra* note 24 and accompanying text; Cari Hammerstrom, *Admission Council Announces \$10 Million Plan to Find LSAT Alternatives*, UNIVERSITY WIRE TODAY, Feb. 13, 2001 (LSAC urges law schools to use test judiciously).

<sup>130</sup> See *Testing On the Side*, *supra* note 6, at 95-97.

<sup>131</sup> See SACKS, *supra* note 1, at 124-25 (noting that standardized testing leads teachers to teach to those tests); *Teachers, Principals the Culprits in Recent Cheating Scandals*, DENVER POST, June 8, 2000, at 12A.

<sup>132</sup> *SAT Accommodations Soar for Wealthy, White Males*, EDUC. DAILY, Jan. 18, 2000, at 4; Kenneth R. Weiss, *New Test-Taking Skill: Working the System*, L.A. TIMES, Jan. 9, 2000, at A1, A20-A21.

Mental testing is an effective means of social control.<sup>133</sup> Breaking ETS' monopoly will require real effort. Employer A won't hire the first black applicant with a lower test score out of concern for what others in the same industry will think, and the same is true for schools. Even though the black or Latina may be the best worker, employer A may find it rational to hire the second best worker who is socially constructed as "the best" in the eyes of employers B and C.<sup>134</sup>

## II. A ROADMAP FOR ABOLITIONISTS

What might we do to reduce reliance on standardized tests such as the SAT and LSAT? If a school believes that a standardized test "amounts to the academic lynching of children of color,"<sup>135</sup> it could insist that testing agencies provide it with scores adjusted for race or economic background; adding points when students "beat their demographic odds."<sup>136</sup> Better yet, it could insist on test scores that are fair across the board.

Better still, as one university president has proposed, schools could abolish the use of the test entirely<sup>137</sup> or make it optional, as over 280 colleges and universities have done with the SAT, including a few elite ones like Bowdoin, Bates, Dennison, and Mt. Holyoke.<sup>138</sup> A number of

<sup>133</sup> RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (forthcoming 2001); Sacks, *supra* note 25, at 31 (quoting former College Board president and ETS trustee asserting that society always will need means "to help...young people know...where they stand in the universe of their peers in terms of intellectual aptitudes and readiness for continued learning.").

<sup>134</sup> Roithmayr, *supra* note 7, at 767-68; Wong, *supra* note 44, at 204.

<sup>135</sup> Abigail Thernstrom, *Shooting the Messenger: Why Suppressing Educational Tests Will Not Help Black and Hispanic Americans*, *TIMES LITERARY SUPPLEMENT*, June 9, 2000, at 8 (quoting Peter Sacks).

<sup>136</sup> See, e.g., Clifford Adelman, *Why Can't We Stop Talking About the SAT?* *CHRON. OF HIGHER EDUC.*, Nov. 5, 1999 at B4; Nathan Glazer & Abigail Thernstrom, *The End of Meritocracy: Should the SAT Account for Race?*, *THE NEW REPUBLIC*, Sept. 27, 1999, at 26-29.

<sup>137</sup> See, e.g., Jeffrey Selingo, *Task Force Suggests that U. of California Drop SAT as Admissions Requirement*, *CHRON. OF HIGHER EDUC.*, Oct. 13, 1997, at A37 (noting panel recommendation to discontinue use of SAT requirement); *In California, the SATs Face a New Test*, *NEWSWEEK*, Feb. 26, 2001, at 56 (reporting that University of California is considering dropping SAT requirement); Diana Jean Schemo, *Head of U. of California Seeks to End SAT Use in Admissions*, *N.Y. TIMES*, Feb. 17, 2001, at A1. *But see* Jeffrey Selingo & Jeffrey Brainard, *Call to Eliminate SAT Requirement May Reshape Debate on Affirmative Action: U. of California Proposal Is Likely to Reverberate Nationwide*, *CHRON. OF HIGHER EDUC.*, Mar. 2, 2001, at A21 (proposal sparking wide-reaching discussions); Jacques Steinberg, *Most Colleges Are Expected to Continue to Use the SAT*, *N.Y. TIMES*, Feb. 24, 2001, at A6 (reporting that most higher education institutions are adopting wait-and-see approach).

<sup>138</sup> SACKS, *supra* note 1, 259-60, 307-12; *see also* Sacks, *supra* note 25, at 28-29 (revealing

these schools report that the size and quality of their applicant pool went up in the wake of the change.<sup>139</sup> In several high school districts today top students are boycotting graduation tests, believing them unfair to the less able.<sup>140</sup> Pressures of this sort could hasten reform.

Law schools could give applicants the option to determine how much weight is afforded LSAT scores. One law school changed its admissions form to allow applicants to check one of two boxes.<sup>141</sup> If they checked one box, the school would give their LSAT score the usual weight.<sup>142</sup> If they checked the other, it would give their LSAT scores less weight and other factors, such as community service, overcoming adversity, recommendation letters, and unusual life experiences, more.<sup>143</sup> They now have forty percent minority enrollment and have not lost the near-elite status they enjoyed before the change.<sup>144</sup>

A reputable organization such as the Association of American Law Schools (AALS) or Society of American Law Teachers (SALT) could sponsor its own culture free test. Current accreditation requirements only oblige law schools to include some written test in the admission process.<sup>145</sup> Since past "accomplishments are the best predictor of future accomplishments,"<sup>146</sup> schools might give that factor decisive weight.

that Harvard Divinity School's master's program and Harvard Business School have abandoned their usual admissions tests).

<sup>139</sup> SACKS, *supra* note 1, at 306-12.

<sup>140</sup> Peter Schrag, "High Stakes are for Tomatoes;" *Backlash Against Educational Standards and Testing*, ATLANTIC MONTHLY, Aug. 1, 2000, at 19; Nancy Trejos, *Some Students Sitting Out the MSPAPs*, WASH. POST, May 7, 2000, at C1; Joel Turner, *Students Rally Against SOL Tests: Del. Richard Cranwell Says He'd Vote to Repeal Them*, ROANOKE TIMES & WORLD NEWS, May 6, 2000, at B4; see Henry Gottlieb, *How to Save Affirmative Action: "Life Experience" Track Allows Rutgers to skirt Hopwood by Selecting Minorities Not Because They're Minorities*, N.J. L.J., June 12, 2000, at 12; Janice S. Robinson, *Unlocking the Doors to Legal Education: Rutgers-Newark Law School's Minority Student Program*, N. J. LAWYER, at 16-20 (on file with author); The State University of New Jersey, Rutgers School of Law-Newark, 2001 Application; see also Percy Ednalino, *Teacher Won't Administer CSAP Tests*, DENVER POST, Jan. 27, 2000, at A1 (discussing teacher who refuses to administer standardized test).

<sup>141</sup> Interview with Stuart L. Deutsch, Dean, Rutgers-Newark Law School (May, 1999) [hereinafter Deutsch Interview].

<sup>142</sup> Deutsch Interview, *supra* note 141; Gottlieb, *supra* note 140, at 12; Robinson, *supra* note 140.

<sup>143</sup> Deutsch Interview, *supra* note 141; Gottlieb, *supra* note 140, at 12; Robinson, *supra* note 140.

<sup>144</sup> Deutsch Interview, *supra* note 141.

<sup>145</sup> NAIRN, *supra* note 18, at 221; Katherine S. Mangan, *U. of Michigan Tries a New Yardstick for Sizing Up MBA Students*, CHRON. OF HIGHER EDUC., May 25, 2000, available at <http://chronicle.com/daily/2000/05/2000052506n.htm>.

<sup>146</sup> NAIRN, *supra* note 18, at 77; see SACKS, *supra* note 1, at 271 (noting that high school grades are better predictor of college grades than SAT).

Law schools might do something similar. For example, the University of California, Davis could work with Sacramento State University and local community colleges to offer guaranteed admission to law school for students who perform at a high level in their undergraduate curriculum.<sup>147</sup>

We might interview applicants or create a character index composed of traits we consider indicative of a good lawyer.<sup>148</sup> Cornell's Department of Human Development created a targeted test which gave applicants particular assignments such as "critique this article."<sup>149</sup>

Law schools could open up their second year ranks to transfers from lesser institutions, thereby rewarding demonstrated merit. They could give the LSAT five or ten percent weight instead of the current thirty to fifty percent. They could offer summer try-out programs for borderline candidates, guaranteeing admission in the fall to those who performed well.

Law schools could agree not to report their test scores to U.S. News & World Report, as forty-four colleges and universities have done with the SAT.<sup>150</sup>

We could make allowances, not only for underprivilege and surmounting adversity, but also for *privilege* so that applicants who come from wealthy families and have had many opportunities to excel but produced only mediocre credentials, say a GPA of 3.1 and a SAT of 1200, would have their scores reduced.<sup>151</sup>

Corporate America loves affirmative action even though conservative think tanks do not.<sup>152</sup> Once it is gone, business will find it more difficult

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<sup>147</sup> See, e.g., Ben Gose, *Some Colleges Assure Undergraduates' Medical-School Admission: But Critics Say the Institutions, Not Students, Are the Real Beneficiaries of the Strategy*, CHRON. OF HIGHER EDUC., June 27, 1997, at A41-42; Robin Wilson, *A Community College Propels Graduates to Top Universities*, CHRON. OF HIGHER EDUC., Sept. 9, 1992, at A33-34 (outlining honors program at Rockland Community College for presumptive admittance at prestigious undergraduate institutions).

<sup>148</sup> See, e.g., John L. Pulley, *A \$1-Billion Experiment Seeks a New Way to Identify Talented Minority Students: Gates Grant Program Disregards Grades and Scores in Favor of Criteria Critics Deride as 'Mushy'*, CHRON. OF HIGHER EDUC., June 23, 2000, at A41 (describing minority scholarship program that focuses on community service, demonstrable leadership skills, ability to cope with racism, and other intangible factors).

<sup>149</sup> Wendy M. Williams, *Reliance on Test Scores Is a Conspiracy of Lethargy*, CHRON. OF HIGHER EDUC., OCT. 10, 1997, at A60.

<sup>150</sup> Robin Wilson, *44 Colleges Plan to Stop Reporting Average Scores of Students on Standardized Admissions Tests*, CHRON. OF HIGHER EDUC., Oct. 4, 1989, at A37.

<sup>151</sup> Delgado, *supra* note 8, at 152-54.

<sup>152</sup> Peter Schmidt, *General Motors Files Court Brief Defending Affirmative Action at U. Michigan*, CHRON. OF HIGHER EDUC., July 19, 2000, available at <http://chronicle.com/daily/2000/07/2000071901n.htm> [hereinafter *Defending*]; Peter Schmidt, *How*

than ever to recruit workers of color, particularly if standardized testing continues unchallenged.<sup>153</sup> Activists at law schools could seek guarantees of large contributions from local corporations to their schools on condition that those schools abolish the LSAT and other standardized tests.

Activists at the University of California, Davis could communicate with the Martin Luther King Foundation and inform them of how a law school that bears his martyred name is employing a version of the very test that kept him out of graduate school to screen out minorities of color.<sup>154</sup> It could ask them to request that the school discontinue using his name and image until it changes its admission procedures.

Small but elite law schools, like Yale, could simply expand; a much larger first year class could hold many more minorities, especially if the school were willing to broaden admission requirements at the same time. They could ask other law schools to sign a pledge de-emphasizing the LSAT. Student and faculty activists could point out that a more diverse student body would make the school more attractive to women and minority professors, easing its recruitment woes. I can assure you that well-regarded minority law professors would flock to the first school to take such a step. Finally, a school that is prepared to end the reign of tests will make admissions fairer for all students, including talented whites who do not test well or who simply prefer a more diverse, fairer atmosphere in which to learn the law.

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*Michigan Won Corporate Backing for Its Defense of Affirmative Action*, CHRON. OF HIGHER EDUC., Nov. 24, 2000, at A21 [hereinafter *Backing*].

<sup>153</sup> Schmidt, *Defending*, *supra* note 152; Schmidt, *Backing*, *supra* note 152, at A21.

<sup>154</sup> See *supra* 109 and accompanying text.