

Standardized Testing as Discrimination: A Reply to Dan Subotnik

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ABSTRACT

Richard Delgado replies to Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013).

AUTHOR NOTE

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I. INTRODUCTION

In *Does Testing=Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*,¹ Dan Subotnik defends the use of paper-and-pencil tests as a means of screening applicants to selective colleges, the practice of law, and high-paying blue-collar jobs such as firefighting. He is particularly concerned with answering the accusation that standardized tests are unfair to minorities, many of whom score lower than whites and end up excluded from valuable opportunities.²

Few minorities will welcome Professor Subotnik's defense, for it consists largely of insisting that they work harder.³ By buckling down, he says, minorities can dispel the suspicion that they are unable to perform at a high level⁴ and thus avoid the stigma of owing their jobs or places to the helping hand of affirmative action.⁵

I disagree⁶ and take this opportunity to point out other disadvantages that attend our obsession with standardized tests: they are unfair to whites and bad for society at large.⁷ Standardized tests

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

² *Id.* at 357 (noting the criticism of some that testing's "overall impact is a class-linked opportunity structure that credentializes a 'social oligarch'" (citing Susan Strum & Lani Guinier, *The Future of Affirmative Action; Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957 (1996))).

³ *See id.* at 398 ("There is no full equality for any group that is not educationally and economically competitive . . . I do not believe that minorities will ever have true respect for any reform that does not demand as much or more from them as from others" (quoting SHELBY STEELE, *A DREAM DEFERRED* 108, 113 (1998))); *id.* at 402 (urging blacks to buck up (citing STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE*, at xv, 44 (1995))).

⁴ *Id.* at 335–37 (recounting the achievements of Jesse Owen who proved his worth by out-competing his peers, including the fair-haired, Aryan Germans at the 1936 Olympic Games); *id.* at 402 (describing a need for blacks to work harder to beat whites at their own game).

⁵ *Id.* at 339 ("reinforcing classic . . . stereotypes that African Americans are just 'dumb' or 'lazy.'").

⁶ *See, e.g.*, Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 597 (2001) (arguing for the elimination of the LSAT because of its inherently biased results based on race).

⁷ *See infra* Part II.

damage mainstream social institutions in three ways. They encourage test-takers—that is to say, most people—to cultivate a narrow form of intelligence. They relegate many people whose intelligence is not narrow to low-level jobs. And they contribute to the slow decline of the societies that rely on testing to select undergraduates, lawyers, firefighters, and police. This decline has been especially perceptible in sectors such as education and law, where narrow intelligence is a serious handicap.⁸

This reply invites Professor Subotnik to apply his formidable skill to a new problem: If standardized testing is damaging the life chances of minorities—even if the setback is, as he believes, deserved—might it also be doing much the same for mainstream society? If so, the policy professions confront a problem that is broader than the ones Subotnik engages, namely civil rights and equality. Like pollution, global warming, and a sagging economy, this problem haunts American society across the board.

In Part II, I outline Subotnik’s defense of standardized testing against the charge that it is unfair to minorities. Then, in Part III, I explain my suggestion that our obsession with testing hinders the chances of society at large, including whites.

II. PROFESSOR SUBOTNIK’S DEFENSE OF STANDARDIZED TESTING AND HIS PRESCRIPTION FOR MINORITIES

Professor Subotnik’s thesis is easy to state. Standardized tests are useful to employers, educational institutions, and the public.⁹ They do not serve primarily as covers for perpetuating social power.¹⁰ They measure valuable traits like intelligence and aptitude.¹¹ Racial disparities in the test results are a real but insufficient reason to limit

⁸ See *infra* notes 29–37 and accompanying text.

⁹ Subotnik, *supra* note 1, at 334 (questioning whether standardized tests “measure something valuable”); *id.* at 393 (discussing the Programme for International Student Assessment finding of “a strong correlation across the globe between success on these tests and a country’s economic growth . . .”).

¹⁰ *Id.* at 334 (questioning whether tests serve the interests of “the powers that be”).

¹¹ *Id.* at 359 (“research in [industrial organization and psychology] has repeatedly documented that, despite their imperfections, tests and criteria . . . remain the best predictors of performance for jobs at all levels of complexity”).

the use of testing.¹² Minorities displeased with poor scores should study harder.¹³

Subotnik begins by reviewing recent decisions on job tests.¹⁴ His main focus is *Ricci v. DeStefano*, which upheld a standardized testing program for firefighter promotions in New Haven, Connecticut.¹⁵ He also discusses *Gulino v. Board of Education*, which considered teacher certification tests in New York City and came to the opposite conclusion.¹⁶

Next, Subotnik considers the cultural history of IQ and standardized testing, including their unsavory origins in eugenicist thought, together with current criticism of testing as “Anglocentric, static, [and] ahistorical.”¹⁷ Modern critics charge that testing is a means by which “white males perpetuate their hegemony both in school and in the workplace.”¹⁸ Subotnik rejects these arguments, on the grounds that they no longer apply.¹⁹ He extends his analysis to the bar exam and the LSAT, concluding that both pass muster for many of the same reasons that support standardized testing generally.²⁰

Subotnik then discusses how a heavy-handed correction of the imbalance resulting from standardized testing could create racial quotas, which, in turn, could generate ill will, resentment, and social

¹² *Id.* at 341–43 (noting the size of the gap).

¹³ *See id.* at 401 (“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?”).

¹⁴ *See id.* at 347–53.

¹⁵ *See* 557 U.S. 557, 585 (2009) (“If an employer cannot rescore a test based on the candidates’ race . . . then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates . . .”).

¹⁶ *See* 236 F. Supp. 2d 314, 341 (S.D.N.Y. 2002) (“In disparate impact cases . . . it is well-settled that plaintiffs do not need to show specific racial motivation on the part of the employer For that reason, there is no requirement that plaintiffs control for variables other than race and ethnicity in their statistical proof.”).

¹⁷ *See* Subotnik, *supra* note 1, at 343.

¹⁸ *Id.*

¹⁹ Prime among these reasons is that no better means are available for selecting the best candidate for a position or slot in a school program. *See id.* at 400 (“the LSAT is the best current predictor of law school grades.”).

²⁰ *Id.* at 369–78 (defending the bar exam); *id.* at 379–89 (defending standardized admissions tests).

division.²¹ Such a correction could also allow people to win jobs for which they are unqualified, resulting in economic stagnation.²²

Subotnik ends by reasserting that the attack on standardized testing is misguided and could harm minorities, the very group its architects seek to safeguard.²³ It could also harm society by fomenting class division and resentment, and by placing poorly trained people in positions for which they are ill prepared.²⁴

III. A NEW PROBLEM WITH STANDARDIZED TESTING: IT MAY HARM SOCIETY

As the reader may have guessed, I believe that it is standardized testing, not the attacks on it, that poses the greater danger to minorities. But my purpose here is to raise a quite different concern, namely that standardized testing is bad for whites and for society itself.

My concerns fall into three groups, each of which I will address briefly.²⁵

A. The First Concern—Standardized Testing Rewards Only One Kind of Intelligence.

Scientists know that intelligence includes more than the narrow range of abilities that paper-and-pencil tests measure.²⁶ Professor Subotnik acknowledges this, but insists that testing other traits, such as empathy and practical judgment, would be costly and difficult.²⁷ By testing for measurable skills, employers and admissions officers can at least be sure that a candidate possesses some of the desired skills. “If a job requires two skill sets [jumping and skipping],” he asks, “and if only jumping can be successfully tested, does equity really require that the measurable skill be left untested?”²⁸

²¹ See *id.* at 343.

²² *Id.* at 344–45.

²³ See *id.* at 366.

²⁴ *Id.*

²⁵ I.e., within the limits of a short reply article. I may expand my analysis into a full-length article in the future.

²⁶ See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 8 (1993) (“[T]here is persuasive evidence for the existence of several *relatively autonomous* human intellectual competencies . . .”).

²⁷ See generally Subotnik, *supra* note 1, at 389–94.

²⁸ See *id.* at 343.

But with complex tasks, the skills making up a good practitioner may not be so easily divided. They may not even be additive²⁹ but mutually dependent, requiring the right balance to operate at an optimum level. For example, a political leader with great intelligence but no moral sense might be dangerous.³⁰ A lawyer with highly developed analytical ability but little practical judgment might have a career marked by blunder after blunder.³¹ An inventor with a superb command of physics or chemistry but little head for marketability may generate one useless patent after another.³² And so on. Rewarding one skill exclusively may not be like having half a loaf of bread, better than none at all.

B. The Second Concern—What is Good For the Individual May Not be Good for Society at Large

Choosing an aspiring lawyer with a high LSAT score over one with a middling score may do no harm. But if we select all entering lawyers this way without making an effort to measure other, more intangible skills, we may end up with a much worse legal profession than what we would have created if we had discarded the paper-and-pencil test scores altogether and relied on “soft” measures, such as essays, grades, letters of recommendation, and personal interviews.

Excessive reliance on analytical ability may yield a profession that is contentious, petty, unhappy, and heartily disliked by the public at large.³³ The profession may lack creativity and the ability to generate

²⁹ Viz, like the scores on various events of the decathlon. *See, e.g.*, John Barrow, *Decathlon: The Art of Scoring Points*, UNIV. CAMBRIDGE: MATHS & SPORT, <http://sport.maths.org/content/decathlon-art-scoring-points-0> (last visited Dec. 2, 2013).

³⁰ *E.g.*, Subotnik, *supra* note 1, at 335–36 (discussing Hitler’s Germany).

³¹ I once asked a distinguished professor who teaches at a major English law school what he thought of his American students, whom he had taught recently during a year-long visit at a top U.S. law school. He replied that, compared to his British students, the Americans were “clever,” by which he meant good at manipulating words and doctrine. But they struck him as lacking in commitment to a philosophy of law and a deep sense of calling. Might the shallowness he noted be a product of the mode of their selections, namely by a high LSAT score and a pre-packaged application essay striking just the right notes?

³² *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2009 (2007) (“Nonpracticing entities file 30–40% of all patent suits in the computing and electronics industries . . .”).

³³ *See, e.g.*, JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 82–84 (2005) (hypothesizing

new legal ideas and theories, finding it easier and more lucrative to crank out predictable hundred-page briefs rehashing the familiar cases.³⁴

Has this, in fact, happened? I believe that a comparison between the quality of legal practice, especially legal innovation, in the decades before standardized testing came into vogue—the late 1960s³⁵—and the decades afterward will bear this out. I am thinking about the ferment that characterized the early sixties when public-interest lawyers developed theories such as warranty of habitability, unconscionability, contracts of adhesion, and the consumer class action.³⁶ Even earlier, one saw examples such as NAACP Legal Defense Fund's steady, highly intentional march toward *Brown v. Board of Education*.³⁷ Today's highly selected lawyers, with their over-the-top LSAT scores, have produced little that is comparable.³⁸

The same is true for society at large. The middle years of the twentieth century saw the arrival of the Beat generation of writers,³⁹

that lawyers are often unhappy in their profession because of formal training, which ignores significant and more emotionally satisfying philosophies such as critical theory and non-legal-literature); Richard Delgado, *Recent Writing on Law and Happiness*, 97 IOWA L. REV. 913, 914–15 (2012) (discussing recent trends in legal practice).

³⁴ See STEFANCIC & DELGADO, *supra* note 33, at 80.

³⁵ See JAMES A. JOHNSON ET AL., FOUNDATIONS OF AMERICAN EDUCATION 60 (16th ed. 2005). See also PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 33–34 (1999) (discussing some of the factors promoting standardized testing in the post-war American economy).

³⁶ See Richard Delgado & Jean Stefancic, *Can Lawyers Find Happiness?*, 58 SYR. L. REV. 241, 249 (2008).

³⁷ 347 U.S. 483, 495 (1954) (invalidating separate school assignments for black and white children). See also JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 107–115 (1994) (describing the NAACP Legal Defense Fund's preparation for the school segregation cases).

³⁸ The main legal innovations in the decades following the advent of the LSAT are easy to name: billable hours, very large law firms, outsourcing of legal work, a steep associate-to-partner pyramid, and legal specialization. New schools of legal thought, such as law and economics and critical race theory, have not yielded comparable breakthroughs, in my opinion.

³⁹ See John Clellon Holmes, *This is the Beat Generation*, N.Y. TIMES MAG., Nov. 16, 1952, at 10, available at <http://www.litkicks.com/Texts/ThisIsBeatGen.html>.

breakthroughs in physics including transistors⁴⁰ and space travel,⁴¹ and a generation of film-makers that pioneered new techniques and advanced the medium in quantum jumps.⁴²

Meanwhile, solutions to important social problems such as global warming, the depletion of fossil fuels, the development of green energy, and an all-electric car have eluded today's innovators. While I am not denying technological advances and social progress, the pace of economic and educational achievement has slowed in recent years.⁴³ Could the way we select who receives educational opportunities be responsible for some of this decline?

C. The Third Concern—Ego-Boosting and Complacency

Finally, I cannot help but wonder whether the race for university rankings⁴⁴ and invidious comparisons over test scores⁴⁵ subtly shift attention away from achievement and toward numerically measurable merit. In the 1940s and 1950s, Howard Law School was easily the most effective producer of legal talent in the United States, despite its

⁴⁰ See Wolfgang Saxon, *William B. Shockley, 79, Creator of the Transistor and Theory on Race*, N.Y. TIMES, Aug. 14, 1989, <http://www.nytimes.com/learning/general/onthisday/bday/0213.html> (discussing William Shockley and his invention of the transistor).

⁴¹ The Sputnik went into orbit in 1957. An American crew reached the moon in 1969. See generally Steve Garber, *Sputnik and the Dawn of the Space Age*, NASA.ORG. <http://history.nasa.gov/index.html> (last visited Dec. 3, 2013).

⁴² See, e.g., BLOW-UP (MGM 1966); BONNIE AND CLYDE (Warner Bros. 1969); FACES (Continental Distributing 1968).

⁴³ For example, computer technology brought about the Internet and a world that is connected electronically. Yet, these innovations merely built on the invention of the transistor, which took place in an earlier era. See *supra* note 40. Although they ushered in undeniable advances such as FaceBook, YouTube, and computerized legal research that made life easier and more convenient, they consist of linear refinements of an earlier discovery, amounting to a difference of degree, not of kind. See also Robert Gordon, *The Great Stagnation of American Education*, N.Y. TIMES OPINIONATOR, Sept 9, 2013, at 5, available at http://opinionator.blogs.nytimes.com/2013/09/07/the-great-stagnation-of-american-education/?_r=0 (discussing the rising costs but slowing returns on American education).

⁴⁴ See, e.g., Marian Wang, *Public Colleges' Quest for Revenue and Prestige Squeezes Needy Students*, CHRON. HIGHER ED., Sept. 11, 2013, available at <http://chronicle.com/article/Public-Colleges-Quest-for/14154/> (explaining how college rankings turn, to a considerable extent, on average SAT score).

⁴⁵ I.e., "I got a ___ on the LSAT. How did you do?"

small size and low budget.⁴⁶ Today, US News & World Report routinely places near the top of its ranking law schools that register few discernible accomplishments in a typical year other than graduating a senior class with high test scores.⁴⁷ And everyone knows the member of Mensa who cannot hold a job, spends his day playing computer games, and is going nowhere in life, intellectually or socially.⁴⁸

Some colleges and universities have de-emphasized standardized test scores, and it has not injured their intellectual standing or level of achievement—it may have even boosted them.⁴⁹ These schools report that their student bodies are more engaged than ever and the campus atmosphere more vibrant and diverse.⁵⁰

For all these reasons, we should hesitate to continue our current emphasis on test scores and conventionally defined, numbers-based merit. The ability to manipulate numbers and words very quickly and record answers on a test sheet or computer may have some connection to performing high-level collegiate or legal work. But it is by no means the only ability that we need to be on the lookout for. And if the ease of testing for these talents means that we stop looking for other, more important skills, we test at our peril.

⁴⁶ See, e.g., JUAN PEREA, ET AL., RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA 163–66 (2007).

⁴⁷ See Wang, *supra* note 47.

⁴⁸ See Jerald Grobman, *Underachievement in Exceptionally Gifted Adolescents and Young Adults: A Psychiatrist's View*, 17 J. SECONDARY GIFTED EDUC. 199, 205 (2006), <http://www.gifted.uconn.edu/sem/pdf/Grobman.pdf>.

⁴⁹ See Delgado, *supra* note 6, at 612 (noting that Rutgers-Newark Law School has not lost its “near” elite status since implementing these changes (citing Interview with Stuart L. Deutsch, Dean, Rutgers-Newark Law School (May, 1999))).

⁵⁰ See, e.g., *id.*