University of Massachusetts Law Review

Volume 9
Issue 2 *Trends and Issues in Veterans & the Law*

Article 2

January 2014

Race Indeed Above All: A Reply to Professors Andrea Curcio, Carol Chomsky, and Eileen Kaufman

Dan Subotnik

UMass Law Review

Race Indeed Above All: A Reply to Professors Andrea Curcio, Carol Chomsky, and Eileen Kaufman

Dan Subotnik

9 U. MASS. L. REV. 278

ABSTRACT

Dan Subotnik responds to Andrea Curcio, Carol Chomsky & Eileen Kaufman, *Testing, Diversity,* and *Merit: A Reply to Dan Subotnik and Others*, 9 U. Mass. L. Rev. 206 (2014).

AUTHOR

Dan Subotnik is Professor of Law at Touro College, Jacob D. Fuchsberg Law Center. He thanks Touro librarians Laura Ross, Stacy Posillico, and Isaac Samuels and his chief editor, Rose Rosengard Subotnik. He also thanks Professors Curcio, Chomsky, and Kaufman for engaging with him on this important issue.

I. INTRODUCTION

> *". . . law schools may have to redefine qualification and merit in ways that are less racially harmful."* [1]

In *Does Testing = Race Discrimination?:* Ricci*, the Bar Exam, the LSAT, and the Challenge to Learning*,[2] I charged a number of law academics with treating race as "the axis on which the world should turn."[3] I reached this conclusion through analysis of widespread criticism over the last twenty years directed against tests such as the bar exam and LSAT. Testing, critics have claimed, is not only an invalid predictor of performance; it also creates unacceptable racial disparities in crucial areas of social and economic life. Accordingly, they urge, testing systems must be subverted. The latest such sally, "Testing, Diversity, and Merit," is included in this volume—and is primarily directed at me.[4] Having carefully listened to my detractors, I proceed to affirm my original judgment.

The authors, Professors Andrea Curcio, Carol Chomsky, and Eileen Kaufman (CCK, if I may), categorically deny holding that "race comes first,"[5] or its twin, "diversity above all."[6] These prominent members of the Society of American Law Teachers (SALT) charge me in turn with perpetuating both "a false dichotomy between the twin goals of diversity and identifying qualified individuals,"[7] and a system where test scores correlate with family money and education.[8]

---

1 Kristen Holmquist, Marjorie Schultz, Shelden Zedeck & David Oppenheimer, *Measuring Merit: The Schultz-Zedeck Research on Law School Admissions,* 63 J. LEGAL EDUC. 565, 575 (2014). The sentence begins: "To maintain an equitable admissions system and to contribute to a racially diverse legal profession . . . ." *Id.*

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

3 *Id*. at 339.

4 Andrea Curcio, Carol Chomsky, and Eileen Kaufman, *Testing, Diversity, and Merit: A Response to Professor Subotnik (and others)*, 9 UMASS L. REV. 206 (2014).

5 *Id*. at 275; *see id.* at 208–09.

6 *Id*. at 213.

7 *Id.* at 209. The authors insist that they speak for themselves in their article, not for SALT. *Id*. at 206.

8 *Id*. at 210.

Insisting that they are not "anti-intellectual,"[9] CCK allow that universities and employers have the right to interrogate a student's and an employee's ability to succeed through tests: "Achieving fair and economically appropriate decision-making—*not* achieving racial balance—is the goal, but racial balance in outcomes is reason enough to explore the validity of the tests."[10] Citing Title VII, they go on to explain that educational and commercial institutions are duty-bound to ensure both that tests are valid, *i.e*. predictive, and that they do not produce "unintentional*"* and unnecessary disparities.[11]

In this reply, I argue that CCK are deluding themselves—that, their protests to the contrary, race for them is not secondary; it comes first. I further argue that testing measures some-to-much of what it is designed to measure, and that a modern technological society requires these measurements. Tests are fair in the sense that they are objective and are usually created by groups of highly trained people.[12] These groups of course have their own interests to protect, but the burden, I will argue, should be on those who would discredit test utility, a burden which, I hold, CCK have not met.

II. A RETURN TO RICCI

I begin with *Ricci v. DeStefano,* as do CCK.[13] In short, Ricci involved a test given for promotion in the New Haven Fire Department. No African American candidate emerged among the top ten scorers and thus, under prevailing rules, none was eligible for promotion. At this point, New Haven threw out the test. According to CCK, New Haven's motive for annulling test results was, as suggested, concern about validity—not to favor minority candidates.[14] This would seem to suggest that test validity and absence of group favoritism are distinct goals.

What is beyond dispute, however, is that New Haven would not have annulled the test if the results had been racially balanced. Indeed,

---

9 *Id*. at 221–22.

10 *Id.* at 211 (emphasis added). It is not clear what CCK mean by "economically appropriate."

11 *Id.* at 216.

12 *See, e.g.*, Stephen G. Sireci, *The Most Frequently Unasked Questions About Testing, in* DEFENDING STANDARDIZED TESTING 111, 111–12 (Richard P. Phelps ed. 2005).

13 Ricci v. DeStefano, 557 U.S. 557 (2009).

14 *See* Curcio, *supra* note 4, at 219.

in a five-to-four decision, the Supreme Court forced the City to promote the successful firefighters under Title VII on the grounds that the City had made its decision to annul the test "because of race."[15] In arguing that New Haven should start its assessment over because of attendant racial disparities in scores, are CCK holding race above all?

CCK say no, supporting the position of the Ricci minority.[16] For them a review of the test results was most likely *mandated* under Title VII by the resulting racial disparities; these results alerted New Haven that there might well be a problem with offending disparities.[17] Such a notion, however, hardly refutes the charge that for CCK race comes first. If statistical disparity based on race is suggestive of invalidity, and if, as previously suggested, New Haven would not have offered another test but for the disparity, then racial balance would seem highly probative of validity.

To this argument, CCK respond that invalidity can be established without reference to race. They argue, citing the *Ricci* dissent, that "command presence" is key for fire supervisors.[18] Other jurisdictions, CCK claim, accordingly gave lower weight to tests and higher value to job assessments featuring simulations of real job conditions. But here again race rears its head. For CCK, evidence that these assessment measures were no less valid lies largely in the fact that in such jurisdictions a greater number of racial minorities succeeded in their efforts at promotion.[19] Validity again means minority candidate success.

To show that they were not merely reproducing a tautology, *i.e.*, that they were not ignoring test validity in the normal sense of the word, CCK advert to the fact that the tests in these other jurisdictions had been vetted by testing professionals.[20] But this is hardly convincing. The test given by New Haven had also been approved by professional industrial organization experts. These folks, moreover, went out of their way to create a test that took into account "minority firefighter styles."[21]

---

15 *See Ricci*, 557 U.S. at 580.

16 *See* Curcio, *supra* note 4, at 215.

17 *See id.* at 215–16.

18 *Id*. at 218.

19 *Id.* at 219.

20 *Id.* at 219–20.

21 *See* Ricci v. DeStefano, 557 U.S. 557, 565 (2009).

This brings us to the practical consequences to municipalities if the law had required New Haven to repudiate the test. Using a simple cost-benefit analysis, municipalities would be obliged to scrutinize personnel tests to make sure that racial disparities did not lead to the attendant expense, embarrassment, and political cost of retesting. Since that is far from easy, reasonable prudence would further induce municipalities to develop tests and scoring systems in the first place that would assure minority success. In short, if CCK have their way, racial balance would be promoted at the expense of validity. Race above all?

Affirmative action supporters may well see nothing wrong with this. In one sense, they are right; what kind of person would fail to celebrate the closing of employment and other racial gaps? But, it will be recalled at this point, racial balance, or "diversity above all," is just what CCK repudiate as their goal.[22]

III. TESTING AND RACE

Ricci was of interest to me not because I thought one screening device was better or fairer than another, but because New Haven attempted to pull the rug out from under the white firefighters, who had no notice of the racial component in the test for promotion. I mostly used *Ricci*, as do CCK, as a lever to raise issues relating to more broad-based tests such as the bar examination, the LSAT, and testing in math and science. Before turning to these matters, a few general observations. First, I do not argue here that testing as we know it should be the touchstone for admissions and hiring. Tests will always exclude some who might well make the grade in school or on the job, often because they bring with them aspirations or traits that are not tested. On the other hand, for those working at non-menial jobs, job knowledge is essential. This being the case, high test scores can be valuable.

Understandably, those who do not succeed on tests will attempt to undermine them with all the tools at their disposal. Because tests can always be adjusted, disparities for the test disadvantaged will be avoidable. But the inevitable resistance to tests does not mean that they should be abandoned. We cannot do without them in contemporary life; indeed, we need to capture the hard-to-identify-and-evaluate-

---

22 *See supra* notes 5, 6, and accompanying text.

talents of our students.[23] For all talk to the contrary, however, these exist only in experimental states and have not been developed in the area of greatest concern to this paper: lawyering.

Second, as I have noted throughout my years in the legal academy, race is so central to the sense of self in America—race elicits so much insecurity and guilt—that loose talk pervades the legal discourse. As a result, more than the normal amount of scholarly skepticism is required in this area. Consider CCK's charge about the tie between test performance and family wealth and education.[24] Granting this unfortunate connection, as we must, should those without economic advantages not be asked to compete head-on with their more fortunate brethren? CCK never answer this question, much less consider the implications.

Consider also what is left unaddressed by CCK in the following passage about test results: "[Q]uestioning [disparities] is entirely appropriate, especially if it results in better tests as well as more diverse—and more fair—outcomes."[25] The passage raises obvious questions; Fair to whom? The public? Firefighters generally? Minority firefighters? Again, CCK do not say.

The point is, to put the matter candidly, that "more diverse" and "more fair" outcomes, in the results-oriented sense that CCK use the latter term, will often point in a different direction than "better tests." This is both because groups are not per se less diverse—*i.e.*, more identical—than are individuals and because testing cannot serve two masters equally. Diversity and excellence may not be mutually exclusive; but they are not synonymous either. CCK would have considerably strengthened their article if they had dealt explicitly with this inescapable and important matter.

A. The Bar Exam

Turning to the bar exam, CCK sound a message with a familiar ringtone: the famous gateway exam to the profession fails to "address whether there are viable, and better, ways to test for lawyering skills . . . without a disparate racial impact." [26] The bar exam is premised on the simple idea that not everyone can be lawyer; those

---

[23] *See* John D. Mayer, *We Need More Tests, Not Fewer*, N.Y. TIMES (March 11, 2014), at A21.

[24] *See supra* note 8, and accompanying text.

[25] *See* Curcio, *supra* note 4, at 211.

[26] *Id.* at 224. CCK cite a bar committee study which complained of serious racial disparities. *Id*. at 228.

would seek to represent others first need to show minimum competency to practice law on their own.[27] Only the most hardened public choice theorist, it would seem, believes otherwise.[28]

To support their challenge to the bar exam, CCK refer to series of studies by the New York bar beginning in 1992 to evaluate the bar exam for its validity and for the racial disparities it was producing. These efforts resulted in reports that complained variously of the exam's emphasis on "speededness," multiple choice questions, memorization, multiple test subjects, and the exam's correlative lack of concern with lawyerly skills.[29] I discuss each of these points separately. As a preliminary matter, suffice to say that the bar examiners have been at it a long time and get lots of help from the bar. They are also a diverse group, racially and otherwise.[30]

Regarding exam time-sensitivity, CCK charge me with suggesting, "without any empirical basis, that test taking speed is related to lawyer efficiency."[31] I do not know how to prove the point to CCK's satisfaction. I took the matter mostly as self-evident, since lawyers are asked to read fast and well on the job. It might be helpful to recall the old saw that a "lawyer's time and advice are his stock in trade."[32] The

---

27 *See, e.g.*, PENNSYLVANIA BOARD OF LAW EXAMINERS, http://www.pabarexam.org/ (last visited Sept. 6, 2014). The purpose of the bar exam is to ensure that exam takers have the "minimum competency necessary to become members of the bar." *Id.*

28 Public choice economics is premised on the idea that all too often government engages in conspiracies with vested interests to help the latter receive "rents," i.e., undeserved windfalls. *See generally* PATRICK A. MCNUTT, THE ECONOMICS OF PUBLIC CHOICE 223–27 (2nd ed. 1996).

29 *See* Curcio, *supra* note 4, at 230–40.

30 *See MBE FAQ*, NATIONAL CONFERENCE OF BAR EXAMINERS, http://www.ncbex.org/about-ncbe-exams/mbe/mbe-faq/ (last visited Apr. 28, 2014).

> The National Conference of Bar Examiners is committed to gender and ethnic diversity on all its drafting and policy committees. Each drafting committee is composed of members of both sexes, and members of ethnic minority groups participate in the preparation and review of items both at the drafting committee level and at the MBE policy committee level.

Id.

31 *See* Curcio, *supra* note 4, at 238.

32 Shapiro, THE YALE BOOK OF QUOTATIONS 466 (Yale University Press, 2006). This quote is apocryphally attributed to Abraham Lincoln. *See, e.g.*, George B. Shepard & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 149 n. 224.

lawyer's time must thus be used well, a matter that bar examiners surely understand. This is not to say that bar tests of "speededness" have it right. Experiments in this area might prove useful. On the other hand, estimates reported by CCK that an exam that doubled the allotted time would increase bar exam scores by thirty points[33] are not necessarily relevant, especially if such a change inspired related increases in scores of all bar takers. Competitiveness in efficiency would seem to be relevant to employers.

Multiple choice questions obviously cannot not be defended as representative of the work lawyers do. On the other hand, as CCK themselves point out, a report commissioned by the NY Court of Appeals and charged with considering race and gender performance concluded that the bar exam, with its multiple choice questions, did validly test generalized legal knowledge as it set out to do.[34] In doing so, it would seem to serve a valuable function. Perhaps more important, no evidence supports the conclusion that scores on multiple choice questions measurably differ from those on essay writing. Lawyers have to be able to write. Under these circumstances, a race-based objection to multiple choice questions cannot be sustained.

As for the "memorization" matter, the thought presumably is that in the computer age the law can always be looked up. But requiring immediate control of some subject matter, to know some things "cold," cannot be dismissed as excessive. To illustrate—and at the risk of sounding lame— contracts lawyers must incorporate the doctrine of consideration in their bones or they might not know what to look for in a contract formation matter. CCK might well characterize this not as memorization but only understanding. The label hardly matters. In my primary teaching domain, tax, one has to know what an expense is. A lawyer who has to look *that* up is useless.

The claim that lawyers do not need, and proceed to forget, material outside their area of specialization implies that the bar exam tests too many subjects. But if the exam focused on one or two subjects, on what basis would candidates be able to apply for jobs in different fields of law? Moreover, analytical skills and practical solutions learned in one specialized area are often transferrable to another. Legal problems do not come in topically discrete containers. Finally, it is hard to imagine that testing in one area would produce a distribution

---

33 *See* Curcio, *supra* note 4, at 238–39.

34 *See id.* at 227.

that was any different from the current one encompassing many areas. If CCK think otherwise, they should say so.

But there is something more fundamental here. Passing the bar proves that you can learn and digest a mass of information. It may well not matter whether that material is ever used, whether it sits on the back burner of the mind, or whether it is soon forgotten. Whether or not you have to know something to begin a practice, controlling a large swath of disparate material would seem to be essential to success in the practice of law as in any other profession.

I will address proposed alternatives to the bar exam below. For now, a return to a simple question: Do CCK really want a screening device for the bar? [35] Or is it again racial balance that they seek?

I commented in my earlier piece about the irony served up when academics in a "learned profession" bash tests of knowledge.[36] In a "knowledge economy" and an "information age," no less. But there is no paradox here for CCK. Academic knowledge is one thing; work knowledge another.

But here again, there is reason to doubt CCK's understanding of their own motives. Indeed, CCK readily acknowledge that African Americans do not do well on the bar, referring to a "quite large" racial gap in New York several years ago. Based on a passing score of 660 a few years back, the pass rate in New York for Caucasian/whites was 88% while for Black/African Americans it was 58%.[37]

It simply cannot be the construction of the bar exam that is at fault for failing to show what students can do. On all kinds of evaluations, starting in the earliest years of childhood and continuing through adulthood, CCK admit, African Americans lag behind their counterparts.[38] Gaps may be greatest of all in law schools.[39] CCK identify possible causes of these gaps, but they are no more able to evaluate them than to explain why bar exam tests do not measure knowledge necessary for lawyers.

One thing, however, is apparent. Lack of competitiveness is a tragedy in contemporary America. For all the research, for all the effort and money this country has invested, we have not learned how to properly educate our black youth. The point here is that it would be

---

35 *See id.* at 249.

36 Subotnik, *supra* note 2, at 395.

37 *See* Curcio, *supra* note 4, at 225 n. 84.

38 *Id*. at 271.

39 *Id.* at 263.

miraculous at this time if our black young people *as a group* were competitive on tests of knowledge that bar examiners would choose to give. This being the case, if they are to hold black and white students as equally prepared for law school, CCK must try to define bar exam validity in terms other than that of knowledge. Hence the opening epigraph.

Assisting in this effort is the attack on law school grades.[40] CCK must play down grades because they correlate with bar passage.[41] In this attack, CCK are least convincing. The evidence they present is essentially limited to a study of a large New York law firm that found that law school grades did not tie to success at the firm except for those at the very top of their classes.[42] But if, as is likely, the firm could restrict hires to those from the top of the class through high salaries, a *restriction of range* problem would render this study meaningless.

If grades are not important, what is? It is not just that tests of knowledge are invalid. It is that knowledge itself is overrated. Success at work is founded on "[C]reativity, the ability to work well in teams, listening skills, common sense, and good judgment."[43] CCK are undoubtedly right in the high value they attach to these factors and I will come back to this arguement. But if CCK really believed that grades do not matter, we could expect them to address the issue of grades on a broader scale. Concern about grades after all drives many students to distraction and requires administrators to provide costly mental health services.[44]

More important, If students are actually deficient in emotional and interpersonal competence, or if studying Title VII, antitrust, and privacy law provides an insufficient professional payoff for them, law schools should be hiring educational psychologists and expanding the curriculum. Warehouses full self-help books and DVDs could be mined to enhance student creativity and relationships with co-workers, superiors, subordinates, and especially clients.

---

40 *Id.* at 239.

41 *Id*.

42 *Id*.

43 *Id*. at 240.

44 We should all agree that law school would be sweeter and healthier if students were told explicitly that grades are just a vestige of a corrupt hierarchical system and that they should be taking take their nights off.

One should not suppose that training in these areas would be déclassé for even a top graduate school. The University of Chicago Graduate School of Business, for example, requires all students to take *Leadership Effectiveness and Development*, a course that highlights negotiation, team building, and giving feedback.[45]

Consistent with their stated goal of testing merit, CCK do not suggest that law graduates be automatically licensed to practice law, a state of affairs that exists in Wisconsin for those who do their legal study in the State and remain there to work.[46] They propose as alternatives to current bar exams a range of programs that test "MacCrate" skills rather than doctrine, pointing as a model to the Daniel Webster Scholars Honors Program at the University of New Hampshire School of Law.[47] Upon completion of one year at UNH, those accepted into the program move to special educational environments in which MacCrate skills are highlighted and students are monitored by faculty and members of the New Hampshire Board of Law Examiners. Upon successful completion of the program, students can be admitted into the New Hampshire bar without having to take the bar exam.

There is much to be said for teaching legal skills and then testing for them. How much, however, can such testing in these conditions accomplish? UNH Law School only accepts only one-third of its approximately seventy-five students per class into the program, and these students follow a prescribed curriculum and must maintain a B average to graduate.[48] Admittees, in other words, have either already shown or could be expected to develop the requisite knowledge; they would most likely pass the regular bar exam. Thus the Program would not satisfy CCK's objectives of producing lawyers who would otherwise be screened out. Beyond that problem, it is hard to see how

---

45 *See Leadership, Effectiveness, and Development (LEAD)*, THE UNIVERSITY OF CHICAGO BOOTH SCHOOL OF BUSINESS, http://www.chicagobooth.edu/programs/full-time/academics/lead (last visited Sept. 4, 2014). The University of Chicago Business School has entire concentrations of relevance to us here, e.g., marketing management, general management, and managerial and organizational behavior. *Id*.

46 *See* WIS. STAT. § 757.28 (2012).

47 *Id*. at 245–46.

48 Telephone Interview with Professor John B. Garvey, Director of the Daniel Webster Scholar Honor's Program, University of New Hampshire School of Law (Apr. 22, 2014).

this could play out in New York State when 15,000 candidates seek admission to the bar at the same time.

An alternative plan proposed by CCK would be to give students credit for public service or clinic experience, and there is something to be said for this as well.[49] But here too, in addition to the impossibility of objective measurement and all the issues of fairness that that would raise, there is the problem of candidate doctrinal knowledge. For reasons previously mentioned, that cannot simply be wished away.

B. The LSAT

Just as CCK deem legal knowledge as measured by bar exam scores largely irrelevant for assessing readiness for professional practice, so too do they hold cognitive testing on the LSAT to be irrelevant for measuring capacity to function as a lawyer. The LSAT, CCK admit, is useful in predicting first-year grades in doctrinal courses because it tests the same "narrow range of analytical skills using multiple choice and essay or short answer questions administered under time pressure."[50] But it fails to "fully predict academic performance"[51] and it does not test "practical judgment" and "communication,"[52] required for the job. Aggravating the problem with the LSAT is the malevolent influence of US News & World Report.[53]

Since a measure that can "fully predict" anything in our world would seem hard to come by, rejecting the LSAT on this basis makes little sense. Law schools can try to screen for students with "practical judgment," but how to find this elusive quality? As for communication skills, the LSAT already requires candidates to write a coherent and persuasive essay.[54]

This suggests that the real concern raised by the LSAT lies elsewhere. If measurement is important for educational institutions, if the LSAT is designed to help students avoid enormous expense and

---

49 *See* Curcio, *supra* note 4, at pp. 249–52.

50 *Id*. at 254.

51 *See id.* The test reportedly does not correlate with grades in legal research and writing.

52 *See id.* at 264.

53 *Id*. at 258–59.

54 The bar exam already requires an essay. *See, e.g.*, *Bar Admissions Basic Overview*, AMERICAN BAR ASSOCIATION, (last visited Sept. 9, 2014) http://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.html.

frustration when their chances of success are limited, it would seem that it is the racial disparities again that are at issue. The sad reality is that the mean African American LSAT score of 143 is ten points lower than the average white score, 153.[55]

That law schools overvalue the LSAT will find no support here. But in order to seriously limit use of that test, it would seem, critics must show one of two things: either that law school grades do not measure anything useful, or that there are good alternatives or supplements to the LSAT.

As for grades, we need more evidence from CCK than they provide. If first-year grades have no significance, one would expect that, as was discussed in relation to the bar exam, CCK would be urging law schools to move to pass-fail systems or perhaps to abolish final exams. That CCK do not go this far should lead readers to be skeptical. The other problem with CCK's critique is the absence of real alternatives to the LSAT. Without these, we cannot know what significance to give to racial disparities.[56]

To be sure, discussing aptitude testing, CCK tell us about efforts to measure the "multiple aspects of intelligence," citing the work among others of Robert Steinberg whose test reportedly has "twice the practical predictive power" of the SAT alone on scholastic performance.[57] But they do not tell us whether this test is appropriate for law schools.

CCK report more fully on the work of Marjorie Shultz and Sheldon Zedeck.[58] After years of research with scores of practitioners, these two researchers found 26 "effectiveness" factors[59] and developed tests for their measurement. The good news, CCK report, is that there are few racial subgroup differences. But CCK do not show us Shultz and Zedeck's tests, or samples thereof. CCK admit, moreover, that this work, along with Steinberg's, is "developing, not definitive."[60] Under

---

55 *See* Law School Admissions Council, LSAT Technical Report 12-03, at 19 (Oct. 2012).

56 *See* Curcio, *supra* note 4, at 260–62.

57 *See id* at 260.

58 *See* Marjore M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions,* 36 L. & SOC. INQUIRY 620 (2011).

59 *Id*. at 630.

60 *See* Curcio, *supra* note 4, at 262–63. Holmquist *et al*. suggest that, although requiring much more validation work, the test is available now. *See* Holmquist, Schultz, Zedeck & Oppenheimer, *supra* note 1, at 382.

the circumstances, it is hard to know what rational observers are supposed to do except to continue with the current system.

C. The Workplace

In the last section of their article, CCK extend their case against the bar exam to the workplace. This environment they argue requires employees to "recognize problems that are ill defined, require information-seeking, may have multiple acceptable solutions, may require information learned in everyday experience, and potentially require motivation and personal involvement, a different set of skills than those involved in solving academic problems."[61]

The implication is that learning in school is a dead end, *i.e.*, its utility ends at the threshold of the workplace. Easy to say; but is it so? My point: academic training makes it more likely, not less likely, that well-educated students will come up with "multiple acceptable solutions." Learning, moreover, requires motivation and curiosity about the world. To the extent that CCK distance the relationship between school and the job, they themselves are creating a false dichotomy.[62]

Work, for CCK, correlates not so much with cognitive skills but with "conscientiousness, extraversion, emotional stability, agree-ableness, and openness to experience."[63] These factors are important, to be sure. Doing well in school, however, evidences conscientiousness. A curriculum vitae will show personal involvement in the form of organizational leadership both in school and outside of it. It will also demonstrate a thirst for experience. But surely it cannot be assumed from the absence of good grades that students are doing something interesting and productive; students have to show it. Even where a student can show a successful internship at a not-for-profit during law school, CCK provide no help in assessing how that should play out in law firm hiring.

We come to what seems the most important ingredient for success at work for CCK—at least they tout it more highly than any other element, including knowledge: race itself, i.e., diversity. Hiring racial minorities, say CCK, will help companies serve an "increasingly diverse customer base."[64] Indeed, "[t]he market arguments in favor of

---

61 *See* Curcio, *supra* note 4, at 262–63.

62 *Id.*

63 *Id.* at 270–71.

64 *Id* at 268 (citing Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 424–27 (2008)).

diversity are compelling."[65] Diversity is perhaps most important in the legal profession and judiciary. A diverse workplace brings different "life experiences," "linguistic and cultural skills, knowledge of international markets," and it "strengthens the rule of law."[66] The trick is to liberate ourselves from the oppressive burden of tests so as to give appropriate effect to diversity. Whatever the diversity payoff to individual employers or to the larger society, we are back to the bottom-line question: race above all?

One matter remains. Admittedly, much of the previous discussion, on both sides, has been based on conjecture. Which kind of screening test is more valid for promotion in the fire department? Do lawyers with high LSAT and bar exam scores perform better than others? Could those who do not pass the bar exam perform sufficiently well. In sum, are tests just crapshoots?

While CCK provide no empirical evidence of the economic contribution of diversity, I did provide such evidence on the value of cognitive skills and knowledge that current tests measure. I cited a study by a major economic player in the world, the Organization of Economic Co-Operation and Development (OECD), of the results on science and math tests (PISA scores) administered to 15 year-olds in mostly developed countries around the world. American students emerged in the middle of the pack. Most important, researchers found that math and science scores, which were also tied to reading scores, correlated with GDP growth rates. The study ended up estimating that if the US had been at the top in test scores, the present value of the economic growth would be over $100 trillion.

CCK are not persuaded. Even if GDP and exam scores correlate with one another, they conclude, "it is hard to prove that higher cognitive skill levels *produce* higher GDP."[67] They cite a study showing that other factors such as trade policy and the number of R &

---

[65] *Id*. Do CCK really mean this? If market arguments for diversity are so compelling, why the need for affirmative action on the job? If the answer is racial discrimination, it would seem that the charge should be explicit. Since it is not and since minorities are under-represented in higher level positions, one might hypothesize, contrariwise, that for CCK it is *nondiscrimination laws* that stand in the way of minority hiring. For what it is worth, a University of California sociology professor thinks so. *See* JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 35–37 (2014).

[66] *See* Curcio, *supra* note 4, at 268 (quoting AMERICAN BAR ASSOCIATION, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS, REPORT AND RECOMMENDATIONS 9–10 (2010)).

[67] *Id.* at 268–69 (emphasis added).

D researchers are no less important to GDP growth. This is not the place for a full evaluation of the OECD study. Nor, perhaps, do we need one. CCK insist that they hold to the "highest educational standards"[68] but conclude that "it is a mistake to over-emphasize the value of standardized cognitive tests in considering how to improve GDP just as it is a mistake to look only at cognitive test results to determine who is likely to succeed in school and on the job."[69]

Is this CCK's real point? If I am right here, CCK are far more interested in racial balance than in anything else.

IV. CONCLUSION

It is hard to understand how, believing that tests predict so little, academics can be central players in a system where tests of knowledge play so large a part. I will not even attempt to do so. I will, however, try to answer questions more closely related to CCK's article: Why do McKinsey, Bain Capital and Goldman Sachs ask for SAT scores of job applicants?[70] How to understand the fierceness with which CCK deny both seeking racial balance and "undermining the case for the highest intellectual standards," on the one hand, while, on the other, suggesting that minority status is a key predictor of success in the marketplace.

Knowledge and learning ability count. Nowhere in their sixty-page article, however, do CCK say anything recognizing that, for historical, cultural, or discriminatory reasons, there are real differences in academic preparation among racial groups and that tests reflect these gaps. For CCK, preparation must be equal across racial lines *a priori*. That being the case, race can be used to determine academic and employment opportunity.

Like so many others, it would appear, CCK are so discomfited by racial gaps in testing that they will do anything to avoid recognizing their true significance. This must have a profound effect on contemporary discourse and understanding. Sweeping away these differences, takes eyes off the ball. Downplaying the importance of grades, as CCK do in their article, has the same effect. If tests proved to be valid, as CCK themselves admit, the solution for minorities

---

68 *Id*. at 269.

69 *Id*.

70 Shaila Dewan, *How Businesses Use Your SATs*, N.Y. Times (March 29, 2014), at SR4. Dewan reports that researchers are finding that other tests, such as Advanced Placement exams, are even better predictors that the SAT. *Id.*

might be "remedial work to improve performance on the test."[71] That is to say, it is the reputed invalidity of tests that allows CCK to ignore racial differences—and the needed educational effort.

Denying real racial differences has a negative effect on non-minorities as well. Because of its perceived false foundations, because of the unimaginability that CCK teach their children and students that test scores and grades are unimportant, a climate of general distrust of racial discourse is created. This undermines majority support for affirmative action and educational enrichment. If there are no real knowledge differences between blacks and whites, if they are indeed competitive with one another, wherein lie the disadvantages—as in "disadvantaged minorities"— that should be at the heart of affirmative action?

Getting minorities into the center of the educational mainstream is essential for our country. Holding that everything should turn on race subverts this purpose, again, by distracting our attention from what needs to be done; holding this position and denying it is worse. An open and honest discussion in which merit is not definitionally conflated with diversity—a discussion in which the need for legal services can be carefully weighed against loosening requirements for admission into the legal profession—is called for. Only by allowing comparison of the intellectual aspects of the law with those, say, of medicine, can we have a chance to figure out what lawyers can and should know. Only where we can accept that racial differences in test scores are danger signs, not presumptive civil rights violations, will we maximize our chance at progress and peace.[72]

---

[71] *Id*. at 58.

[72] Several hours before I turned this article in, I learned from Professor Lani Guinier at a Law and Society meeting that she has finished a new book, THE TYRANNY OF MERITOCRACY (forthcoming Jan. 2015). Readers interested in my piece will surely want to get her take.