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Contesting a Contestation of Testing: A Reply to Richard Delgado

Dan Subotnik

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ABSTRACT

Dan Subotnik responds to Richard Delgado, *Standardized Testing as Discrimination: A Reply to Dan Subotnik*, 9 U. Mass. L. Rev. 98 (2014).

AUTHOR

Dan Subotnik is a Professor of Law at Touro College, Jacob D. Fuchsberg Law Center. He thanks Richard Delgado for finding time, at short notice, to participate in this disputation. The author thanks Laura Johnson and Rose Rosengard Subotnik for their editorial help.

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I. INTRODUCTION

Professor Richard Delgado is not only a founder of the critical race theory school but he is also among the most prolific and frequently cited American legal scholars.¹ As a commentator myself of long standing on racial issues²—as well as an occasional interlocutor of Delgado’s³—I cannot responsibly avoid responding to his latest writing: “Standardized Testing as Discrimination: A Reply to Dan Subotnik.”⁴

Delgado’s piece, published in a prior issue of this journal, responds to an extensive article of mine defending tests for work and study such as the bar exam and the LSAT.⁵ I began my article supporting the U.S. Supreme Court’s decision in *Ricci v. DeStefano*.⁶ In *Ricci*, very briefly, the City of New Haven had administered a test for promotion in its fire department. Unhappy with the racial results—no African Americans made it to the top ten, the baseline for promotion under existing rules—the City threw out the test results, whereupon high scoring candidates sued the city under Title VII to overturn New Haven’s action. In a 5 to 4 decision, the Supreme Court upheld their claim.

I chastised the Court minority for placing “race above all.”⁷ Based on my experience on the playing fields of Central Park, New Haven’s action amounted to moving the finishing line. This tactic seems so

¹ Having reviewed over 1,000,000 articles in 2012, HeinOnline ranked Delgado’s scholarship eighth in number of citations. Miranda Rosati, *Most Cited Authors in HeinOnline —2012 Edition*, HEINONLINE (Oct. 10, 2012), <http://help.heinonline.org/2012/10/most-cited-authors-in-heinonline-2012-edition/>.

² See, e.g., DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005); see also TOURO LAW CENTER, <http://www.tourolaw.edu/AboutTouroLaw/bio.aspx?id=38> (last visited August 10, 2014) (listing my additional works on racial issues).

³ See, e.g., Dan Subotnik, *Are Law Schools Racist?: A “Talk” with Richard Delgado*, 43 U.S.F. L. REV. 227 (2008); Richard Delgado, *The Sincerest Form of Flattery*, 43 U.S.F. L. REV. 253 (2008); Dan Subotnik, *Are Law Schools Racist?—Part II* 43 U.S.F. L. REV. 761 (2009).

⁴ Richard Delgado, *Standardized Testing as Discrimination: A Reply to Dan Subotnik*, 9 U. MASS. L. REV. 98 (2013).

⁵ Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, The LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013).
⁶ 557 U.S. 557 (2009).

⁷ See Subotnik, *supra* note 5, at n.2.

completely un-American that it could not possibly have been anticipated with favor by Congress.

While Delgado does not explicitly disagree with me about *Ricci*, he comes down hard on testing generally. Testing keeps many people out of schools and jobs who might succeed if given a chance. For what it is worth, I am no testocrat; tests fail to measure important things. But Delgado goes too far in underestimating the need to measure knowledge, which tests can do, however imprecisely.

II. TESTING AND PREPARATION

My initial interest here is to respond to the charge that testing, a feature near the heart of contemporary social and economic life, constitutes “discrimination.” Tests, which are produced by professionals, are the only objective measures we have. Since they are embedded in American culture⁸ and since “discrimination” is a word not to be used lightly, good academic practice requires that a critique of tests itself be tested.

Citing Frank Ricci’s extensive preparation for the test, the Supreme Court majority remarked that the minority firefighters could have worked harder.⁹ This does not sound unreasonable. Delgado “disagree[s].”¹⁰

One might understand holding that working hard is only the start of a larger solution, one that perhaps includes providing free tutoring for job candidates. One might *even* understand an appeal to boycott tests altogether as a civil rights protest. But to “disagree” on the need for better test preparation? Since hard work and grit have long been acknowledged as keys to worldly success,¹¹ Delgado’s position sounds shocking.

For Delgado, the relevant problem in American society that needs attention is not failure to work at tests, but tests themselves.¹²

⁸ Like people in other countries, we take aptitude tests in grade school and the military, and we take achievement tests for medicine, certified public accounting, dentistry, actuarial science, engineering, locksmithing, and selling securities, real estate, and insurance.

⁹ See *Ricci*, 557 U.S. at 569–70.

¹⁰ See Delgado, *supra* note 4, at 100.

¹¹ The classic “Labor omnia vincit” (work conquers all), for example, derives from a Virgilian maxim and is Oklahoma’s State Motto. See OK. CONST. art. VI, § 35.

¹² See Delgado, *supra* note 4, at 103.

Accordingly, their significance must be minimized.¹³ Consider, however, the short-and-intermediate term costs: making it harder to get minorities into law school and the profession. Since Americans of good will know that we will be operating at our political, moral, and economic best in an environment where minorities are successfully represented in all areas of life—a desideratum that Delgado has given much of his life to achieving—when Delgado disagrees that minorities should be called upon to better prepare for tests, it would seem that for him preparing for tests and trying to abolish them are mutually exclusive.

Human beings, however, know how to deal with the cognitive dissonance brought on by having goals that conflict. We are often asked to do things to which we strongly object. Students pay college tuition even if they think that the higher education is a public good that should be free of cost. We pay for health care when we think it too should be free. So why, when the cost is so high, does Delgado ignore this talent for *contra-tasking*?

At this point we can only *speculate*. That should not, however, dishearten us; there may be much to be learned thereby about this issue and about racial discourse more generally.

Does Delgado believe that minorities are short on ability, which would suggest that studying for firefighter and other tests is hopeless? Such a conclusion seems inescapable given Delgado's recognition of the charge, which he cites and then fails to dispute, that minorities have in fact been uncompetitive on many standardized tests.¹⁴

Of course, Delgado does not speak plainly here. Nor, perhaps, should we expect him to. Going public with even a discussion of racial disability would undermine the chance that disadvantaged minorities could reach educational or occupational parity. It would be taken as an admission that minorities cannot compete in areas involving learning and might thereby excuse any admissions officer or employer who wanted to exclude them. Such a concession, particularly when accompanied by a repudiation of hard work, would also undermine calls for affirmative action. No future Barbara Grutter could graciously or otherwise accept being denied a seat in a law school in favor of

¹³ See *id*; see also, 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).

¹⁴ See Delgado, *supra* note 4, at 100.

someone who was not even making an effort to compete.¹⁵ Reticence on Delgado's part would serve a useful purpose here.

Why Delgado believes that minorities are untrainable for tests is also unclear. But he is a very smart guy who surely understands the interethnic problem he creates by bashing tests. Might I hypothesize further that this concern has led him to extend his critique of testing? It is not only minorities who suffer from testing, but all populations, and the country generally. What, specifically, is wrong with testing?

Testing as we know it, Delgado claims, measures only a "narrow" range of skills encompassed perhaps by what we might call "booksmartness." He cites famed Professor Howard Gardner's theory of multiple "intelligences" for the idea that testing in the form of IQ tests are from comprehensive measures of native ability.¹⁶ But the only intelligences on Gardner's list that are relevant to law practice are "verbal-linguistic," which testing is directed at, and interpersonal relations, about which more below.¹⁷

Not even the LSAC which administers and profits from the LSAT believes that that exam and by extension the bar exam are great indicators of lawyerly potential and capacity to practice law.¹⁸ That is why law schools rightly use college grades, letters of recommendations, essays, and personal interviews for admissions purposes, factors that Delgado explicitly endorses.

These factors are not, to be sure, weighed equally, but on what basis does Delgado think that they play out differently from the LSAT? Notwithstanding the lack of objectivity, moreover, if all factors are equally valid predictors of success, Delgado should at least begin the effort of proving it. Has he talked to admissions and development officers about how they evaluate and compare non-objective metrics? Why do law firms with the biggest clout keep

¹⁵ Barbara Grutter was the plaintiff who challenged the University of Michigan Law School's affirmative action policy in the landmark *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the policy.

¹⁶ See Delgado, *supra* note 4, at 103 (citing HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 8 (1993) (identifying musical-rhythmic, visual-spatial, "verbal-linguistic," logical-mathematical, bodily-kinesthetic, interpersonal, intrapersonal, and naturalistic intelligence).

¹⁷ See *infra* p. 304.

¹⁸ Regarding the ability to learn, my favorite story in my thirty years at Touro is that of a young woman whose LSAT score was rock bottom but who graduated second in her class and has had a fine career. The LSAC itself warns that the LSAT should not be the only measure of ability.

insisting on top grades? The fact that he is mum on these matters would seem to be telling.

III. TESTING AND SOCIETY

Testing, and measurement more generally, Delgado reports, do far more than exclude people who could perform well. They corrupt our thinking and our culture. In so riding tests, it would appear, Professor Delgado goes off the rails.

This is a strong statement. I need to explain. In my article I hypothesized a job requiring two skills, running and jumping, where only running was measurable. I asked whether good practice demanded that it not actually be measured because jumping was ignored. Delgado answers by warning that running and jumping “may not be additive.” That is to say, a job candidate who can run may not be better able to jump. Fair enough. He goes on, however, to suggest that the focus on running may cause harm to the employer by distracting it from the overall goal. The employer, thus, might be better off without tests for a needed attribute: “Rewarding one skill exclusively may not be like having half a loaf, better than none at all.”¹⁹ Anything is possible. But why assume employers are irrational?

Screening by testing in admissions, he says, leads our universities dangerously into producing political leaders who can lack moral restraints on their behavior. Relying “excessively” on standard admissions criteria has analogously yielded law students who become “petty, unhappy, and heartily disliked” professionals lacking in creativity.²⁰ Do readers see their lawyer friends this way?

In the 1960s, contrariwise, before mass testing, we got “warranty of habitability, unconscionability, contracts of adhesion,” and the like.²¹ Our jurisprudence, Delgado laments, has been stagnating since, and the same can be said for the arts and technology. The 1950s, says Delgado, gave us the Beats; nothing comparable can be found today. The 1950s also gave us the transistor. By contrast, Facebook and YouTube represent only incremental gains. Our fall from grace, Delgado concludes, is nicely captured by a near universal experience today: “everyone knows the member of Mensa who cannot hold a job,

¹⁹ See Delgado, *supra* note 4, at 104.

²⁰ *Id.*

²¹ *Id.* at 105.

spends his day playing computer games, and is going nowhere in life, intellectually or socially.”²²

Is Delgado’s grim diagnosis right? It is hard to imagine that there are more dysfunctional Mensa members today than in earlier periods, what with, on the one hand, the vast array of medication presently available and, on the other, the high prestige geeks enjoy today. One can more easily argue that the insistence on standards in the 1970s was not a step backwards, but rather a step forward to counteract the postmodernist “anything goes” culture of the 1960s.

Perhaps more to Delgado’s point is his underestimation of progress since then. The law since then has given us such gifts as sexual harassment protection, no-fault divorce, a right of election in one-third of a deceased spouse’s net estate, same sex marriage, and far more women and minorities in law schools as students and faculty; in technology, we have artificial intelligence and artificial limbs, Microsoft, Google, Cloud technology, Mars landings, voice transcription, smart phones, wind and solar farming, and now driverless cars; in culture, suffice to report the dazzling entertainment of such shows like *Madmen*, *the Good Wife*, *Breaking Bad*, *Downton Abbey*, and *the Wire* in order to refute the immortal characterization a half-century ago of television as a vast “wasteland.”²³ This suggests that, pace Delgado, the modern age, with all its testing, is effecting productive change faster than ever.

If schools and employers cannot find out anything about the intellectual abilities and achievements of applicants and job-seekers, one might add, they cannot decide who to admit and hire. An interview for everyone is too expensive. And who to interview when there may be 150 applicants for one slot?

This very problem has led a number of high-tech firms like McKinsey, Bain, and Goldman Sachs to ask for SAT scores of job candidates—in some cases years after school.²⁴ Some researchers believe that Advanced Placement exams are better indicators of

²² *Id.* at 107. I, for one, know of none.

²³ This is how the FCC chairman, Newton Minow, referred to the tube in 1961. Newton Minow, Chairman, Fed. Comm’n Comm’n, Address at the National Association of Broadcasters (May 9, 1961), *available at* <http://www.americanrhetoric.com/speeches/PDFFiles/Newton%20Minow%20-%20Television%20and%20the%20Public%20Interest.pdf>.

²⁴ See Shaila Dewan, *How Businesses Use Your SATs*, N.Y. TIMES, (March 29, 2014). A low score is likely to preclude an interview. *Id.*

success in school than the SAT.²⁵ If Delgado thinks he can do a better job of screening applicants for these companies and for universities generally, if he thinks that technical skills are less important in law firms, or that racism undergirds these policies, he needs to say so.

Can we survive economically without serious testing? I showed in my earlier piece that testing is done in virtually all industrial countries. More importantly, test scores strongly correlate with economic growth in virtually all industrial countries.²⁶ As for lawyers, no evidence suggests that the public is ready leave itself in the hands of public choice theorists and leave the bar door open to all.²⁷ There would appear to be a universal need to know who can do what in complex, modern economies, and testing satisfies that need. Are we ready to throw out the baby of economic strength with the bathwater of testing?

This brings us, finally, to interpersonal skills. For Delgado, it would seem, these skills can substitute for cognitive ability and knowledge. There is no denying the importance of emotional groundedness and intelligence to organizational success. Screening out harassers, malcontents, bullies, egomaniacs, corporate spies, resume fraudsters, non-bathers and the like is undoubtedly a main purpose of the job interview. But what are the implications of believing that personality is more important than intellectual preparation and knowledge in the ever-changing information age? If Delgado is right, then law schools should offer—indeed require—Dale Carnegie courses on emotional intelligence and leadership along with contracts and torts.

Perhaps it can all boil down to this: if we want to build a modern megabusiness, who would we want as our leaders, proud nerds like Bill Gates, Mark Zuckerberg, or Sergei Bryn, on the one hand, or Sandra Bullock's, "Ms. Congeniality,"²⁸ or Jimmy Fallon, on the other?

²⁵ *Id.*

²⁶ OECD, THE HIGH COST OF LOW EDUCATIONAL PERFORMANCE: THE LONG-RUN ECONOMIC IMPACT OF IMPROVING PISA OUTCOMES 14 (2010).

²⁷ The Public Choice school of economics holds that regulation of commerce is a conspiracy between the professions and elected officials to keep competition down and prices up. *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE, Spring 1971, at 10.

²⁸ *See* MISS CONGENIALITY (Warner Bros. 2000).