The Legal Fiction of Standardized Testing

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I. Pete

Pete told everyone that he had absolutely no concerns about the SAT.[1] He read through the test prep books his mom had ordered for him, but they couldn't compare to his best friend's at-home computer study software. He actually had fun answering questions and hearing the instant gratification of the digital beep accompanied by the arrogance-inducing blurb about how only 23 or 27 or 44 or 17 percent of last year's test-takers answered that

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1. Gerald Torres: There was a wonderful article in the New Yorker about a month ago called "The Examined Life." It was an article about Stanley Kaplan and his SAT and LSAT prep courses. In the middle of the article, the author discusses the University of Texas because kids admitted under the Ten Percent Plan [where all students who finish in the top ten percent of GPAs in their respective Texas high schools are automatically admitted to the University of Texas] are still required to take the SATs, it just doesn't count toward their admission. Researchers have discovered that students who would have been rejected if you'd used their GPA or SAT previously are exceeding expectations in college; and if you take minority students and white students at the same SAT level, the minority students are outperforming the white students. Additionally, those students who ordinarily wouldn't have been admitted have a higher persistence rate (persistence means whether the students come back for their second year). The group that has the highest persistence rate is African-American women. Many of the things that people thought you learned from standardized tests turn out not to be true.

Symposium Proceedings, *Building a Multiracial Social Justice Movement*, 27 N.Y.U. REV. L. & SOC. CHANGE 5, 23 (2001-02) (citing Malcolm Gladwell, *The Examined Life: What Stanley H. Kaplan Taught Us About the S.A.T.*, NEW YORKER, Dec. 17, 2001, at 86).

question correctly. He told his friends and family and (grade) rivals how ready he was for the test, but he could scarcely breathe even a moment after speaking the words. His whole life depended on the Saturday at Southfield High School. Everything. He was sure studies had been done comparing kids scoring in each percentile and the average income they would earn over their lifetimes.[2] Every percentage point counted could mean thousands of dollars a year in income, even millions spread out over a work life. He'd write off a successful career and happiness if he didn't get into an Ivy League college.

Pete added all the objective indicators for admission he could think of throughout his high school career. He played baseball, sang in the school choir, took calculus and German at Washtenaw Community College during the summer while staying with his sister in Ann Arbor, participated in school-sponsored trips to Barcelona and Paris, started a school-sponsored book club, served on the Student Council for all four years, and founded a rock band called TBFS. All that in addition to the three point nine five (thanks to stupid Mister Jantzen's B plus in English), plus the forty or so credits from A.P. classes and community college courses.

The only piece of the puzzle still missing for Pete was the 99th percentile on the admissions test.[3]

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2. 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. The number of standardized tests taken is on the order of 600 million annually, with total costs running in the billions of dollars, more when you add in prep courses.

   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. Even those pay scales are not particularly surprising when you consider that the Board earned more than $250,000,000 that year, passing nearly two thirds of it on to ETS.

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, 594-95 (2001).

3. "Anyway, ... I was ... twenty minutes late. So I ran into a bathroom, changed into my grass-dance outfit, then sat down with your little test, realizing belatedly that I was definitely the only Injun in the room, and aside from the black kid in the front row and the ambiguously ethnic chick in the back, I was the only so-called minority in the room, and that frightened me more than you will ever know.

   "But I crack open the test anyway, and launch into some three-dimensional calculus problem, which is written in French translated from the Latin translated from the Phoenician or some other God-awful language that only white people seem to find relevant or useful,

Pete's parents had never gone to college and only his mother had a high school diploma. Sometimes one of the older teachers from his high school would look at him funny, like they remembered him from somewhere, like they thought they knew him. Pete's father told him that he had taken classes from a Mister Greene and a Miz Bickens, both of whom thought Pete's father would turn out no good. There were two Mister Greenes and Pete avoided both of them, even though only the auto shop Mister Greene squinted at Pete when they would pass each other in the hallway on the way to the bathroom. And when Pete saw Missus Pelleston, the biology teacher who sometimes glared at Pete for no good reason, he walked passed her without saying hello. She walked with a limp and had a mole on her left cheek, exactly how his father described Miz Bickens. Needless to say, Pete skipped her biology class and went directly to chemistry.

Mister Jantzen, Pete's guidance counselor, often spoke to Pete in a kind manner normally reserved for seven-year-old children lost in the frozen foods department of the grocery market. He kindly told Pete that an Ivy League school would chew him up and spit him out and that maybe he should try community college first, just to get his feet wet, and then go from there. Baby steps, he said.[4]

Pete methodically and calmly studied his last unused test

> and I'm thinking, I am Crazy Horse, I am Geronimo, I am Sitting Bull, and I'm thinking the required number two-pencil is a bow and arrow, that every math question is Columbus, that every essay question is Custer, and I'm going to kill them dead.
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> "So, anyway, I'm sure I flunk the damn test, because I'm an Indian from the reservation, and I can't be that smart, right? I mean, I'm the first person in my family to ever graduate from high school, so who the hell do I think I am, trying to go to college, right? So, I take the test and I did kill it. I killed it, I killed it, I killed it."

SHERMAN ALEXIE, *Saint Junior*, *in* THE TOUGHEST INDIAN IN THE WORLD 150, 170-71 (2000).

4. But I will close by telling you that I am lucky to be where I am today. Really. What I have not yet told you was that there was this guidance counselor in my junior high school .... He told me that, despite my high grade point average, and the fact that I was one of only four students from my junior high school to be accepted into Stuyvesant High School that year, I should go instead to my local high school where, he assured me, I could distinguish myself as a "big fish in a little pond." I would probably not distinguish myself at Stuyvesant, he counseled. He did not give this advice to Ronald Wong, or Lauren Lee, or George Stephanopolous, the other students accepted into Stuyvesant – just to me. I didn't take the advice of the guidance counselor, and, like many of my insignificant or unhelpful or actively harmful teachers, I can't remember his name.

Marcella David, *Learning from the Past: Schoolroom Tales, Life Lessons*, 2 J. GENDER, RACE & JUST. 127, 135-36 (1998) (footnote omitted).

prep booklet (it seemed too easy) until seven p.m. the night before the test, ate a reasonable meal, spoke rationally with his parents for another hour, and retired for the evening. The next morning, Pete's father drove him the twelve miles to Southfield High, tirelessly repeating how proud he was of his only son, to Pete's generic annoyance.

At the school cafeteria while waiting for the test to begin, Pete recognized several of his friends and (grade) rivals, people that might compete with him for valedictorian.[5] He waved and strutted, smiling and laughing with everyone.

He approached his classmate Tommy Fina. "Pete, old man, you look tired," Tommy said, laughing.

Shirl Stanley, a girl he knew from quiz bowl, commented to him that he had red eyes. "You nervous, Pete?" she asked him.

Amy Angeles told him that his eyebrows were twitching. She said calmly, "I blame stress. You really got to look out for stress. Stress'll kill ya."

A (grade) rival from school named Art Holcombe noticed that Pete was clutching strange-looking pencils. "Hey, Pete," he said, "I don't think No. 2.5 pencils are comparable to No. 2 pencils. They're more likely to break and ... I think they might be illegal."[6]

Pete overheard other test takers joking that small schools couldn't compete with the relatively wealthy suburban or parochial schools in the Detroit area like Country Day and Brother Rice. Others mentioned that they were glad that they studied so much on their own.

"I bet you're the first Indian in your family to go to college, right, Pete?" Sami Tammaker asked. "Or should I say 'Native American?'" She held up two fingers on either side of her head and bent them as she said the last phrase.

Pete knew this was coming and kept his head up.

As Pete wandered around the high school, trying to relax while he waited for the testing agency to let them in the

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5. *See, e.g.*, Goodman v. Crew, 658 N.Y.S.2d 370, 370 (1997) (dismissing as moot a case regarding whether one student, rather than two, could be considered valedictorian of a high school, where graduation went forward with both students accorded the position of valedictorian).

6. The method of counting absentee ballots used in Volusia County for the 1996 election was called "Accu-Vote," which is an optical scan tabulating system. Five other Florida counties also used this type of optical scan system. In using this system, absentee voters were instructed to mark their ballots with number two pencils. The optical scanner rejected ballots which were marked with instruments other than number two pencils.

Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720, 722 n.5 (Fla. 1998).

gymnasium or auditorium where they would take the test, he saw a lot of kids acting strange. Not the teenager awkwardness he knew as well as any teenager, but behavior he normally associated with adults having a bad day – pacing, talking to no one, avoiding eye contact, tearing strips of white paper, rocking back and forth. He wondered what it was about the test that turned kids into neurotic grown-ups.

At last, they called them all in and assigned Pete to the auditorium. He sat down and closed his eyes. "Piece of cake," he whispered very quietly, so no one else would hear.

Outwardly confident, Pete nonetheless felt like he had swallowed flesh-eating bacteria.[7]

II. Zeke

Zeke couldn't afford to take the LSAT prep course but he bought as many books as the testing company offered and a few others dated 1997 and 1999 at the discount book warehouse on State Street across from the University of Michigan golf course. His summer front desk job at West Quad provided a few hours a day of paid studying, punctuated by sometimes rude interruptions and world-threatening laundry room-related crises. He knew he should choose C if there was any doubt, if he couldn't come up with a good answer. The test prep books prepared by the testing company included the toughest questions but provided the briefest and most frustrating answer explanations. The test prep books

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7. Increased reliance on standardized testing and high-stakes exams has further dehumanized the education system. Although states may claim they have a variety of educational goals, basing school promotion or high school graduation on a single examination sends a signal to students that education is not about personal development or learning, but merely about passing an exam. Teachers and principals are also stripped of their decision making power when students' fates are determined by a single test. In a survey that asked about statewide exams, "nearly seven in ten teachers said [that] instruction stresses state tests 'far' or 'somewhat' too much." This problem is compounded by the most common test structure, multiple-choice questions, which require little creative thinking. Students in such a system may be deprived of the ability to develop subject-area expertise and critical thinking skills, which require more than memorization and the successful completion of a single test.

Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 567 (2001) (quoting *Quality Counts 2001: A Better Balance*, EDUC. WK., Jan. 11, 2001, at 9, *available at* http://www.edweek.org/sreports/qc01 (last visited Sept. 16, 2002)) (footnotes omitted).

from the nineties delivered the easiest questions coupled with answer explanations almost comical in their expansive detail.

Zeke had taken his first practice test at a cubicle in the underground law library (after sneaking past the dozing undergraduate ID-checker) for inspiration, quiet, and solitude. He worried about the results of his first practice so he asked his coworker, already accepted into a Top 10 law school and beginning in the fall, to grade it for him. She did so almost gleefully and somberly reported back the score as not disastrous but probably not Top 10 or even First Tier law school potential.[8]

"I got 97th percentile on the LSAT," Zeke's coworker said, sincerely trying not to brag, but failing miserably. "I didn't really study that hard, though. I think I was just very lucky."

"You call that luck," Zeke said, incredulous. "Well, there's no such thing as luck."

Hearing exactly what she had wanted to hear, Zeke's coworker said, "Could be."

"I'm going to have to bear down if I want to do well."

"That's probably true, but if you get into a school with a not-so-great reputation, you might be able to get a better GPA, stand out a little. Poor me, I'll probably be at the bottom of the barrel at my school."

Zeke liked his coworker and decided that he would talk to her again some day, but not until he went through a very long cooling

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8. Following both the passage of SP-1 and Proposition 209, in the spring of 1996 the law school reexamined its admissions processes and made substantial revisions. The major change entailed eliminating the consideration of race or gender as a positive factor in making individual admissions decisions and shifting to consideration of a broad range of "diversity attributes" that included socioeconomic background and "significant hardships overcome." At [UCLA School of Law] the effect of the prohibition enacted by Proposition 209, combined with the continued heavy reliance on the LSAT as a crucial factor in making admissions decisions, resulted in the near disappearance of Black students and a severe initial decline in the numbers of Latina/o students. Compared to the averages between 1990-1996, the class of 2000 (admitted in 1997) represented a 73 percent decline in African American enrollment, a 27 percent decline in Latina/o enrollment, and an 80 percent decrease in American Indian enrollment. In 1998, eight Black students enrolled at UCLAW; in 1999, that number fell to two out of a class of three hundred and the number of Latina/o students dropped to seventeen from thirty-nine in the previous two years. Moreover, while the population of Asian Pacific Islander students overall has increased, the numbers of certain groups like Filipinos and Southeast Asians have declined or remained small.

Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1223-25 (2002) (footnotes omitted).

off period. "Okay," he said.

Zeke studied harder after the first practice but each taking of his practice tests resulted in scores lower than the original. He seemed to get worse and worse, the first score hanging in his head for the weeks leading up to the actual test as a beacon, a goal – maybe only a hopeless dream – worth reaching.

Zeke often studied late into the night at the law school's underground library, sometimes late enough to join the remaining law students in their game of running up the side of the angled concrete wall to see how far one could climb before sliding back down. One Latina law student told him about the African American professor who resigned because the law school didn't do enough to stop the person or persons leaving the racist notes on his door.[9] An Arab American law student told him about the time a couple of white male law students stopped him in the hallway to tell him that he was an Affirmative Action law student and they didn't think he was smart enough to study with them.[10] An Asian student told him about the journal the students of color wanted to start that the administration wouldn't want to fund because they did not believe critical race studies was a legitimate subject, that it was some politically-correct, amorphous, non-intellectual exercise

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9. The result is that legal educators only rarely refer to race. The uniformity of silence on race should alert us to its non-accidental nature. This silence can be understood within the norm of color blindness as saying that discussions of topics that allude to race are unnecessary because there are no relevant differences between African Americans and whites. Given the ideology of color blindness, the silence works to construct African American students as white. Legal educators, who are themselves predominantly white, teach the subjects that are important to them and to the predominantly white bar. In organizing their courses and their curricula around these subjects, legal educators implicitly make the claim that African American law students are, or ought to be, the same as white students, and that they are, or ought to be, animated by the same concerns that animate white students.

Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 74 (1994) (footnotes omitted).

10. There was a clear feeling among many of the students that they had to justify being in law school because they were taking the seat of a better qualified White applicant. A Latino had this experience at a social function at the law school: "One of the students jokingly, but in front of everyone, implied that I didn't really deserve to be in this law school and I was invited for affirmative action reasons." A Black male also commented on a student newspaper column: "He [another student] wrote something about affirmative action that made it sound like every single African American student here was wholly incompetent, and had no reason to be here."

Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equality and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237, 281-82 (2001).

in self-righteousness.

"This is what you get to look forward to," a Native American law student who worked part-time at a local deli told him. "Four, five, sometimes six-hour final exams.[11] All you can do is your best and see what happens."

A week before the test, Zeke called his brother, a lawyer working for a large law firm in San Francisco, to talk about testing strategies. He never would have thought to call his brother or anyone else to discuss testing strategies, but his brother had e-mailed him a few days earlier. "Let's talk testing strategies," his brother's e-mail stated.

Zeke's brother had done very well on the test when he had taken it several years earlier and offered Zeke advice on testing strategies that did not make any sense to anyone except possibly Zeke's brother. Zeke listened attentively and politely but felt worse for calling his brother. He simply did not get the advice and felt he would do poorly on the test because he didn't understand the concept of testing strategies.

"Well," Zeke's brother said in conclusion, "just don't screw it up."

"What do you mean?" Zeke asked. "If I blow it, I blow it. Who cares? I'll try again."

"Maybe." Zeke's brother breathed into the phone slowly. Swiftly and quietly, he added, "Your father would be crushed if you messed it up."

"What?"

"Nothing. Look, I gotta go. See ya."

"Thanks."

"Good luck."

Click.

Two days later, Zeke's coworker graded another test for him.

"Looks like you're gonna go to a directional school," she said

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11. There are three basic performance testing models in law school: (i) a student takes a 14-week course and has an examination at the end; (ii) a student takes a seminar, or some variant, and writes a paper that is graded; (iii) a student does a field placement or a clinical project and receives a performance evaluation, often in the form of "pass" or "fail." Of these, the first is by far the most common and the resulting pressure during exam periods twice a year is substantial. Taking a typical bluebook examination has virtually nothing to do with the reality of practicing law, and the methodology tends to splinter the subject of "law" into multiple sub-specialties which often seem unconnected to one another.

Howard O. Hunter, *Thoughts on Being a Dean*, 31 U. TOL. L. REV. 641, 644-45 (2000).

when she was done.

"What are you talking about?"

"You know. Something like Western Connecticut State or Southeastern Alaska or East Dakota or Upper Peninsula of Michigan Law."

"So what's wrong with those schools?"

"Nothing. It's just that no one's ever heard of them. Plus, they'll have bad basketball and football teams. Think of it this way. If the school has a good football or basketball team or both, they'll have a great law school, too. Why do you think those alumni reunions happen during a football Saturday here in Ann Arbor?"[12]

"They do?"

"Yeah. No one wants to give money to a law school when the football team goes 0-11."

Zeke pondered this for a moment.

"Just kidding. You'll do fine." Zeke's coworker patted him on the arm and walked away. As she walked away, she said, "Hey, don't worry about it. You'll get in because you're Indian."

Zeke wouldn't let that one go. "Listen, you. I'm sick of hearing about how people of color get into schools easier than white people because they're minorities. We do just as well professionally as you do so that makes us either overachievers or it makes you underachievers."

Zeke's coworker apologized.

The night before the test, Zeke's mom told him to take in a movie, get a decent meal, and hit the sack a little earlier than usual. He did as advised, but stayed awake all night thinking

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12. Homecoming is the weekend of October 24 when West Virginia plays the University of Miami. Our homecoming activities will kick off with the 20th anniversary of Law School Day on Friday, October 23. Please note that Law School Day is being moved to Friday evening preceding the football game. After consulting with the class agents, the Visiting Committee, the Law School Association, and others, we decided to try Law School Day on the Friday preceding the football game. The fact that the kick-off of the football games is often moved to accommodate television has complicated the planning of events following football games. While there are certain disadvantages in moving this event to the Friday preceding the homecoming game, the advantages seem to outweigh the disadvantages. The format for Law School Day is being revised to enhance the opportunity to visit with one's classmates, and to reminisce about the "good old days." More information concerning these activities will be forthcoming, but please mark your calendar for Friday, October 23 for this year's Law School Day.

John Fisher, *Fall Activities*, 11 W. VA. LAW. 8, 8 (1998).

about what law school he would attend, what the other students would be like, whom he would ask to write letters of recommendation for his applications to various law schools, whether or not his hand would cramp up at an inopportune moment, and whether the relaxing dinner he had at the Fleetwood diner would come back to haunt him in the morning.

The coworker dropped Zeke off at the test location, a neo-modern building where Michigan B-Schoolers took classes during the fall and winter. He still felt a little tired and had brought a few bananas to chew on while he waited to go into the chamber of horror. All of the other test-takers (there were far more than he imagined would be there beforehand and he recognized none of them) looked full of confidence, well-rested, properly fed, and well-versed by their expensive test prep teachers who had to score one hundred percent on last year's test to be hired. Some were on their cell phones, juggling coffee and pencils, talking about how they had gotten only two wrong on their last practice test.

Zeke kept to himself and tried to remember his older brother's advice, but couldn't. He thought about how his brother was the coolest guy before he graduated from law school. He was always having parties and introducing Zeke to cool people and he was always joking around. Since his brother graduated, he was always working and never told jokes to anyone anymore. He was too serious. He looked around at the fashionably dressed undergraduates trying to look like they were having a good time and this test wasn't a big deal and wondered how many of them would lose their sense of humor by the time they graduated from law school.

Zeke closed his eyes and remembered his childhood, how his gram would hold him on her lap and tell him stories about her father, Pete Pokagon, and how he used to tease Zeke's mother in his language, Potawatomi. Then, he worried that his dad would think ill of him if he didn't do so well. He thought those thoughts even though he knew them not to be true, but he couldn't help himself. He took a deep breath and tried to start over with thoughts about his gram, but then the proctors called him into the test-taking room.

In the room, Zeke sat down and inspected his pencils and looked around. The arrogance of the others he had noticed faded into an almost stunned silence as the moment of truth approached. The proctors started handing out test booklets. His brother had said the LSAT was a piece of cake, but he wasn't so sure.

Zeke felt like he had swallowed live worms.

III. Myriam

After a four-hour studying session with Leonard – the third in four days – Myriam threw down her pen and crib sheets in disgust. She was sick and tired of Contracts. She was sick and tired of Leonard. She was sick and tired of the New York State bar exam. She was sick and tired.

"Whoever thought up the concept of multiple choice should be imprisoned," Myriam said loudly, startling a few of the patrons in the café where she and Leonard, a cousin and recent law graduate, had quizzed each other that day on implied contracts, breach, remedies, and whether or not the bar exam instructor knew anything at all about contracts. The day before it was torts – defamation, assumption of risk, proximate cause, and the like. Before that it was criminal law – mens rea, the difference between burglary and larceny, self-defense.[13] "And whoever thought up the concept of common law needs to be shot, too."

"Quiet down," Leonard said harshly, also at the end of his wits but reacting with more violence, almost threatening to retaliate, to walk out, to punish. "We still have a week. You've got it easy. You already passed another bar in another state. You did this all before. Me? I have no idea what to expect."

"So what are you saying?"

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13. Criminal law and constitutional law are also not subjected to a comprehensive and systematic analysis of how they construct and sustain the imbalance in racial relations in this society. Criminal law is the law school subject in which race is dealt with most explicitly, largely because a disproportionate number of the defendants are men of color. More than in other subject areas, the insights from the perspective of a critique of White supremacy, such as the demonizing of juveniles of color through the over-policing of communities of color, the criminalization of childbearing for drug-addicted mothers, the use of racial profiling in policing, the wrongful association of drug usage with communities of color, or the lack of adequate legal representation (even in death penalty cases), have been integrated into the conventional discourse about crime in this society. Unfortunately, however, stereotypes about people of color as violent and predatory are reinforced in the law school curriculum by what is said as well as what is left unsaid. The relentless pressure to get through the conventional topics, especially since the multistate bar exam further structures what is to be taught and how students are to be socialized and professionalized with inattention to race, leaves little time to establish a sociolegal context that connects the criminal justice system to the de/formation of racial relations.

Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 896-97 (2000) (footnotes omitted), 33 U. MICH. J.L. REFORM 263, 312-13 (2000) (footnotes omitted).

Leonard would not stop berating his cousin. "Plus, you went to a good law school. You must have done pretty well on the LSAT to get in,[14] so you're already a master at high-pressure multiple-choice questions and testing situations. I went to a mediocre law school, a direct result of my LSAT score. Sometimes, I freak out while taking these tests. I read slower than you do. Each question, I feel like Sisyphus. Just as I think I get a question, I gotta read it all over again. I have to start over. I've seen you take these practice tests. You motor through everything. You might not get every answer right, but at least you finish all the questions."

Myriam nodded and sighed, deeply annoyed at her cousin, her study-partner, her support, her source of encouragement. She had done well enough on her LSAT and, before that, her SAT. Back in high school and college, she recalled being taunted by the smart kids at her school before the test for being unprepared or maybe too tired to score well enough. Then, she was ostensibly competing against every other test-taker, the percentile results more important than the overall score. This time, she found herself on the butt-end of reverse taunts from those with supposedly lesser qualifications.

"The way I see it," she said, chiding her cousin, "is that I only need to study enough to pass. A score more than one point over what I need to pass means that I spent too much time studying."[15]

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14. Statistical measures of the Law School's entering classes (median grade-point average and LSAT score by quartiles) can be found in the Official American Bar Association Guide to Approved Law Schools. While these measures hardly succeed in capturing the true quality of any entering class, they show a gradual upward trend over the past several years that is consistent with our personal impressions about the quality of the student body.

Mark C. Rahdert & Laura E. Little, *The Future of Temple Law Review: Stasis and Change*, 75 TEMP. L. REV. 13, 16 n.7 (2002).

15. The dissent quarters its argument as to why the law school's admissions policy is not narrowly tailored to achieve the compelling interest of diversity. Each of the four subparts bear arguments that are unfounded and inflammatory. For example, in first discussing what the dissent characterizes as the true magnitude of the law school's policy, the dissent focuses on LSAT and UGPA data. It then advances the outrageous contention that the law school's policy allows for a minority applicant to put forth less effort than the otherwise similarly situated white applicant, and that somehow the minority will therefore use his race to compensate for his lack of effort. There is nothing whatsoever in the record to support the allegation that the law school's admissions policy would be manipulated in this fashion by people of color or ethnicity.

Grutter v. Bollinger, 288 F.3d 732, 769 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (Dec. 2, 2002).

Leonard shook his head and disagreed vehemently, not realizing Myriam's humor. Apparently, it was too close to the test dates to make fun. "Well, okay." He stood to go, packing his book-bag. "See you later," he said. "Good luck, or whatever."

Myriam and Leonard would not study together again. Two days before the exam dates, she put down her books and rested her mind. She told herself that she had never failed in anything significant. She had done well enough in high school and on the SAT to get into a prestigious college. She had done well enough in the prestigious college and on the LSAT for acceptance into a top tier law school. And, she had done well enough in the top tier law school to land a decent, well-paying job in a large Midwestern city, contingent upon her passing that state's bar.[16] And she did that. She performed well enough in her practice in the Midwestern city to secure an excellent reputation and offers of partnership from her own firm and others. She had most recently accepted a partnership with another well-paying firm in Long Island nearer to her extended family and would need to pass the New York State bar to cement the deal.

After all, Myriam felt good about taking a second bar exam. The meritocracy had worked for her so far and she had every confidence she deserved her place, that she deserved her reputation, that she deserved her new partnership and the big money, the long vacations, and international standing.[17]

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16. Presumably, success in law school should have some predictive relationship to success in the legal profession. In stark contrast to the LSAT however, there is very little data supporting, or analyzing the presumed predictive relationship between law school exam performance and lawyering. The studies that have been done are at best equivocal, and some show no correlation between success in law school, as measured by grades and success in the profession. This is a very difficult issue to study. While successful law students often go on to be successful lawyers, law students with strong first year grades also have significantly better opportunities than their less successful peers. Their relative professional success may reflect those opportunities, as much, or more than, their particular merit relative to their law school classmates, all of whom met the same narrow and well-defined admissions criteria. The profession is also full of lawyers who enjoy professional success but did not excel in law school.

Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation By Simulation and Written Exam*, 8 CLINICAL L. REV. 247, 249-50 (2001) (footnotes omitted).

17. Nevertheless, its diversity committee, launched several years ago, now rarely meets. While the number of attorneys of color has gone up sharply, many have failed to thrive. In recent years, the firm has made few equity partners of color or women; the few senior attorneys are mostly laterals. Internally, opinion leaders doubt the value of more diversity programs. Associates of color and women continue to cite inequities within the firm, yet partners cannot accept it because they

The night before the bar exam, Myriam dreamed that she had overslept for the exam and showed up late, so late that she walked into the convention hall just as everyone was slipping out for lunch. She awoke after that dream at 3:17 a.m. and checked her alarm clock again. She had no trouble sleeping and drifted into a dream about showing up to work naked.

On the morning of the first day of the bar exam, standing outside the convention hall assigned to Myriam, she said out loud to no one in particular, "Piece of cake."

Yet Myriam felt like she had just swallowed a gallon of bleach.

IV. Wenona

Wenona's first federal court trial was in a week and her supervisor Wendy was very nervous. She hadn't wanted to go to trial – no one did in this matter, certainly not the client – but the plaintiffs refused to settle at agreeable terms.

Pre-trial briefs and proposed findings of fact were due at the end of the day. She had finished the rough draft of both a few days earlier and Wendy had marked them up with suggested changes. They had discussed the minute details of the findings of fact nearly all night with the client and finalized that document at four in the morning, only three hours earlier. Wenona had gone home while Wendy went over the brief for a final time. When she returned around ten a.m. after a relaxing and desperately needed nap, Wenona and Wendy argued over whether to include a section on a Rule 11 motion against opposing counsel. Wenona eventually decided against including the argument and signed her name to the brief at noon.

A courier ran off with the forty-page proposed findings of fact document and the twenty-five page pre-trial brief and Wenona again returned home to rest. She slept for twenty hours straight and woke only when a semi-irate Wendy called her to complain about opposing counsel's proposed findings of fact, arguing for another Rule 11 motion.[18]

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believe it is a true meritocracy.

Verná Myers, *On Diversity and Inclusion: What Stage is Your Firm In?*, 46 B. B.J. 16, 17 (2002) (footnotes omitted).

18. The practice of law is a competitive and stressful occupation involving constant challenges to one's competence and self-worth. Attorneys expose themselves to evaluation on a variety of levels; they

Over the next several days, Wendy, an experienced trial attorney, grilled Wenona with difficult questions and possible twists and turns she might have to deal with on her feet at the trial. Wendy had practiced for over twenty-five years and had been extraordinarily successful. She had lost only one trial – her first, way back in the day – and that experience made her very nervous for Wenona's first trial. Wenona had been an associate in their small boutique law firm for almost five years but Wendy had never asked her to litigate solo. Though the case was relatively minor in comparison to other cases, opposing counsel was putting little or no effort into his client's case, and Wenona was extremely composed, Wendy put her through a difficult and exhaustive boot camp for aspiring litigators.

Two days before the trial in Detroit, Wendy relented and told Wenona to relax until the Monday trial. Wendy explained that rest and minimal stress were the main keys to performing well at the trial. Wenona did as she was told and spent the two days gently and constantly reminding herself that she had trained virtually her whole life for this event.

The day before trial, Wenona called her estranged grandfather. Ostensibly, she called to ask for support and advice, her grandfather being an experienced and successful trial lawyer in another state, but actually, she called to tell him that she had made it and was finally in charge of her own trial.

"That's fabulous, child," Wenona's grandfather said. "Congratulations. I really need to go. I have my own trial in a few days and I need to study."

Wenona never understood why her grandfather always referred to trial prep as "studying" and she chuckled into the phone. "Good luck, Grampa."

On the morning of trial, Wenona woke early and took a short, five kilometer run. She ate granola and yogurt with a hearty serving of bananas for breakfast, skimming over the New York

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> daily contend with the negative public perception of attorneys, the fear of failure, the desire to please superiors, time pressures, meeting billable hour requirements, client demands and lack of honesty from clients. The attorney's challenged competence and self-worth leads to paranoid ideation, which is constantly validated by the fact that there are more attorneys than available jobs, attorneys are expected to work many hours with little concern for their own private lives and women, in particular, tend to lack a supportive social network outside of the office.

Julie E. Buchwald, *Confronting a Hazard: Do Eating Disorders Plague Women in the Legal Profession?*, 9 S. CAL. REV. L. & WOMEN'S STUD. 101, 121 (1999) (footnotes omitted).

Times. On the highway to the federal courthouse in Detroit, Wenona listened to the tape of a continuing legal training seminar called "Dealing With Hardball Litigators" for last-minute guidance.

Wenona met Wendy at the courthouse for pre-trial coffee. Looking at her boss's shivering, Wenona decided that Wendy had already consumed more than her share of caffeine. To the contrary, Wenona felt very relaxed.

Since Wendy had a hearing on a Rule 56 motion in another case across the hall, she could not attend the trial. Before they parted on Monday morning, she offered Wenona one last bit of advice: "Remember what got you here, from elementary school to high school to college to law school to getting this job. All those tests, all those lessons, everything you have done until now prepared you for this moment. You're the elite, the top of your class, and you'll simply murder opposing counsel."

The judge called the courtroom to order. It wasn't full but the other side had several people – clients, in-house counsel, well-wishers, and the like – sitting behind their own litigator, their warrior. Wenona approached the other litigator, a Mister Fletcher, and shook his hand.

"How are you, Miz Singel?" he said, smiling like he knew something she didn't.

"Very fine," she replied. She noticed the others on his side looking at her, sizing up their opposition. Nothing prepared me for this, she thought. An audience of hostile people, hoping and praying she would fail at her duty. She turned her back on them and attempted to concentrate on her argument.

The judge entered, gaveled the room to order, and asked for any final pre-trial motions. Wenona asked the judge to strike a line of questions she knew opposing counsel had proposed. The judge granted the motion over opposing counsel's objection and conferred briefly with her law clerk. The clerk scribbled something on a couple sheets of notepaper. Wenona breathed a discreet sigh of relief, glad that the issue had been removed from consideration so easily. Not even Wendy had very good answers or an adequate grasp of that issue and could not assist.

The judge did not hear any further motions. She motioned to her clerk and she rose, carrying two large booklets. The clerk approached counsel for both parties and handed each of them the booklets – both sealed – and a sheet covered in pink circles.

As Wenona began filling in her name and bar number on the answer sheet, opposing counsel rose.

"Objection, your Honor," he said. "Local rules state the essay portion of the trial should be given first, so as to shorten the time for decision."

The judge waved off the objection. "Sorry, Mr. Fletcher. Your adversary's thoughtful motion has temporarily thrown the essay portion in some disarray. We'll delay that portion until tomorrow."

"Then I move for a continuance."

"Denied." The judge looked annoyed. Wenona's heart raced a little faster. The time for trial approached.

A few moments later, the judge asked the litigators if they had filled out their answer sheets. Both attorneys nodded. The judge returned the nod and nodded to the law clerk. The clerk nodded back to the judge and stood. She read from a prepared statement.

"You have three hours to answer each of the 300 multiple-choice questions in the booklets before you. In accordance with the Federal Rules of Civil Procedure, specifically Rule 39, each of the multiple-choice questions relates to the legal and factual issues the parties have raised in the dispute. The judge selected each of the questions from proposed questions generated by each of the parties and created others *sua sponte*. Please fill in each circle completely, using only No. 2 pencils. Any other types of pencils, including No. 2.5 pencils, are not allowed. You may to use the bathroom once during the three-hour morning testing period. Anyone caught talking or cheating will be held in contempt of court, punishable by up to 365 days in jail and a $15,000 fine, as well as any concomitant discipline from the state bar. Another three-hour multiple-choice portion will be held after lunch. Do either of the attorneys have any questions? No? Then you may begin."

Mister Fletcher looked over at Wenona and smiled, still looking like he knew something she didn't. Wenona focused on her own booklet and recalled what Wendy had called the trial exam. "A piece of cake," she had said.

As Wenona tore open the sealed test booklet, she felt as though she had swallowed an overdose-level of Valium.

V. Epilogue – Johnny

Johnny woke up when his father dropped a dish on the kitchen floor. The sound jolted him out of a sound sleep and a nice dream about playing with his dog, Harrison.

"Big day, son?" Johnny's dad said to him when he stumbled into the kitchen looking for cereal. Johnny's mother was out of town on business.

Johnny shrugged. Seemed like any other day.

Johnny's dad, a lawyer, tore around the house getting ready for work, dropping things and slurping down coffee and toast. His parents amused him when they were late for appointments. On the way to school, Johnny's dad mentioned something about a trial that day in Grand Traverse Band Tribal Court and that he couldn't be late.

"One of these days, John," he said, "you'll be rushing your children around on your way to work."

Johnny couldn't imagine that ever happening.

Later that day, Johnny's teacher passed out an answer sheet covered in pink circles to all the kids in his fourth grade class. She read aloud the instructions on how to complete the form, adding personal information – name, date of birth, address, and so on – even though he knew already how to do it.

So this is what my parents warned me about, Johnny thought. Standardized testing. Piece of cake.[19]

Johnny felt like he had swallowed a basketball.

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19. Current lawmakers are moving toward making standardized tests the measure of success. Some school districts are testing children each year on such tests and making school decisions based on these results. This is ironic at a time where quality institutions of higher learning are moving away from standardized testing for admissions to colleges as they have been shown to be classist and have ethnic/racial biases (Bowen and Bok, 1998; Alfred, 1998). Other indicators which include a child's socio-emotional adjustment, the child's individual progress based on their initial skills, diversity issues, plus teacher, parent and child efficacy in their schools, have taken a back seat to standardized testing.

Grace Carroll, et al., *School Privatization: A Cure or a Curse?*, 45 HOW. L.J. 445, 450 (2002) (citing WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998)).