

Competency Testing: The Hidden Risk of School Reform

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why some people be mad at me sometimes

they ask me to remember
but they want me to remember
their memories
and i keep on remembering
mine.¹

Improvement of an education system, whether actual or imagined, interests and affects many. Schools shape and define the character of communities, states, and ultimately the nation. Parents desire a quality education for their children because good schools are seen by many as a way to a better life, a road leading away from poverty.² It is not surprising that parents are upset when they hear their children's schools called inferior. Angry parents pressure school boards and state legislatures to improve local conditions. Legislative response to parental concern has produced numerous reform programs. Competency tests are one type of such legislative reform. Competency tests traditionally have been used to identify schools in need of extra help.³ Some states have extended the use of competency tests beyond this by requiring students to achieve a predetermined test score in order to graduate from high school.⁴

At least thirteen states now require minimal competency as a

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1. Lucille Clifton, *Next: New Poems* 20 (1987).

2. See Novella Williams, *Community Concern About Testing: A Parent's Point of View*, in *Evaluation in the Inner City: Report of an Invitational Conference on Measurement in Education*, Philadelphia, 1969, at 23 (Thomas J. Fitzgibbon ed. 1970). Ms. Williams believes that every child deserves the chance to develop thinking ability, to read, to write, to function, and to produce in society. *Id.*

3. Merle Steven McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 *Fordham L. Rev.* 651, 655 (1979).

4. *Id.* at 656. For example, Florida has used the test for this purpose since the 1977 to 1978 school year, when it made a passing score a prerequisite to receiving a high school diploma. See *Debra P. v. Turlington*, 474 F. Supp. 244, 247-48 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

prerequisite to obtaining a high school diploma or grade-to-grade promotion.⁵ Minimal competency is determined by standardized competency tests.⁶ A few states also permit the denial of a diploma to a student who fails to pass a competency test, but leave the ultimate decision in the hands of local authorities.⁷ As a result, many states are basing important decisions, either exclusively or in part, upon the results of standardized tests. As pressure for school reform grows, more legislatures are likely to consider using competency tests to quell public criticism.⁸

Competency tests continue to gain popularity with legislatures because they increase public accountability of school systems.⁹ The evaluation involved appears logical, objective, and fair. If a student questions his or her grade, computer error can be readily discerned. Courts welcome the use of such tests because they seem readily adaptable "to the . . . tools of judicial . . . decisionmaking."¹⁰ If such tests are problem-free, a court only must

5. States using competency tests include: Arizona (1976), Oregon (1978), Florida (1979), North Carolina (1980), Utah (1980), Alabama (1981), California (1981), Delaware (1981), Vermont (1981), Virginia (1981), Maryland (1982), Nevada (1982), and Tennessee (1982). McClung, *supra* note 3, at 656. In addition, many cities, such as St. Paul, Minnesota (1988), have instituted such tests on their own. See *Students Must Master Competency Tests for Diploma*, St. Paul School District 625 News, Dec.-Jan. 1988, at 1 (on file with *Law & Inequality*).

6. McClung, *supra* note 3, at 656. "Standardized tests," as used in this article, are the descendants of IQ tests first used to keep immigrants out of the United States. A student is given a short question or problem situation, and then asked to choose the "correct" single answer from four or five answers. See Andrew J. Strenio, Jr., *The Testing Trap* 1-16 (1981). See also Roger Farr & Robert F. Carey, *Reading: What Can Be Measured?* 1-27 (1986). A norm or average score is established which subsequent students are evaluated against to arrive at a standardized score. See *Hobson v. Hansen*, 269 F. Supp. 401, 479 (D.D.C. 1967). For an example of the types of skills tested on Florida's competency test, see James W. Morrison, *Florida Literacy Test* (1978).

7. These states are Massachusetts, Connecticut, Rhode Island, and New Hampshire. McClung, *supra* note 3, at 657.

8. An estimated 80% of the states are using or are considering using successful scores on competency tests as a requirement for a high school diploma. *Id.* at 656 (citing Chall, *Minimum Competency Testing*, 22 Harv. Graduate Sch. Educ. Bull. 9, 10 (1978)).

9. See William Spady, *Competency Based Education: A Bandwagon in Search of a Definition*, 6 Educ. Researcher, Jan. 1977, at 9, 13. At least one state legislature chose competency testing partly because it was the least expensive option for educational reform. *Id.*

10. *Board of Curators v. Horowitz*, 435 U.S. 78, 90 (1978). The Court held that the administration and faculty of the University of Missouri medical school had the right to set its own criteria for graduation. *Id.* at 85-90. The Court characterized the process of grading medical school exams as "a continuing relationship between faculty and students." *Id.* at 90. The Court was hesitant to intervene in such an arrangement. *Id.* In contrast, standardized exams are given infrequently and do not engender ongoing personal relationships between teachers and students. Thus, courts should be more willing to intervene and evaluate their appropriateness.

decide procedural due process problems.

These tests do present problems, however, which must be resolved. Standardized tests are a remnant of an age when Blacks and other minorities were believed genetically inferior.¹¹ The use of national testing firms assures uniformity among all tests administered across the country.¹² Nevertheless, such competency tests fail to consider the disparity in quality and funding between the various schools in any one state. This disparity in funding disproportionately affects minority students because their test scores have been shown to be more dependent upon funding than white students' test scores.¹³ As Thurgood Marshall has noted,

[t]hat a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the State.¹⁴

Few students, given a choice, would select a school providing an inferior education. To penalize those who are forced to attend an inferior institution is to penalize the victims of an entire nation's incompetence.

I. An Educational System In Crisis?

Any student's ability to score well on a standardized exam is gauged largely by the quality of the education he or she receives. The stated mission of competency testing is to examine how effective that education has been. Unfortunately for students, the United States' school systems have failed to provide all students with an adequate education in recent years.¹⁵ The amounts spent on rural and urban schools is much less than spending in posh suburban districts.¹⁶ The vast majority of rural and urban students do

11. See Strenio, Jr., *supra* note 6, at 6-8.

12. See *id.* at 43-48.

13. See *id.* at 37-39. Further problems arise when exams, designed for use in analyzing a student's progress, are suddenly used to deny advancement or a diploma. Standardized exams are at best able to monitor deficiencies in a student's progress. The tests are unable to effectively evaluate the student's achievement, since most norm-referenced exams are merely aptitude tests. These tests are insensitive to learning gains, and therefore are not useful in evaluating achievement. See Farr & Carey, *supra* note 6, at 144-46.

14. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 84 (1973) (Marshall, J., dissenting).

15. See *American Education in the Twentieth Century* 197-203 (Marvin Lazer-son ed., 1987) [hereinafter *American Education*].

16. Cynthia Parsons, *Seeds: Some Good Ways to Improve Our Schools* 142 (1985). Programs designed to aid minority youth, such as Head Start, mandate addi-

not attend schools with libraries.¹⁷ At least one commentator believes that government-sponsored pre-school training concentrates its benefits on children from educationally-oriented homes; they qualify because they score higher on early admission criteria.¹⁸ As the student population of United States schools became increasingly non-white and of immigrant stock, the desire to enhance equity lessened.¹⁹ The move to standardized competency tests by many school districts ignores the reality of the United States' educational system.

Reports resulting from investigations of the education crisis have demanded quick change.²⁰ These studies, critical of the United States education system, have called for "[c]ontinued, rather than diminished federal, state, and local attention to the rights of the disadvantaged and those discriminated against because of race, language, sex, or handicapping condition."²¹ More democratic governance of school districts is seen as an urgent priority.²² Relatively simple changes, such as increased teacher input into the choice of text books is long overdue.²³ Perhaps the most important reform needed is the enactment of more equitable and adequate systems for financing schools.²⁴ This would make the quality of education available to a child less dependent upon where that child lives.²⁵ Concentrating science, art, music, and other facilities in the suburbs threatens to destroy the soul of the nation's education system.²⁶ All must realize that "excellence without equity is both impractical and incompatible with the goals of a demo-

tional resources for the disadvantaged. Failure to act now could leave millions of children "at risk" in society. See American Education, *supra* note 15, at 201-03.

17. Parsons, *supra* note 16, at 142.

18. See *id.* at 146-48. Parsons illustrates this concept with a narrative contrasting the family backgrounds of two pre-schoolers. *Id.*

19. American Education, *supra* note 15, at 46-47. Few like to discuss the possibility that much of the traditional United States emphasis on education has come from a desire of parents to educate their own children. The desire to educate the children of others has been less apparent. As inner city children's race becomes increasingly different than that of tax-payers in the suburbs, the chance that others are willing to pay for their education diminishes. See *id.*

20. See *id.* at 197-201. For example, the National Commission on Excellence in Education saw major problems with the amount of time United States children spend doing school work, the ineffective use of classroom time, and the low qualifications of teachers. *Id.*

21. *Id.* at 203.

22. *Id.*

23. *Id.* at 200-01. While the need for increased teacher salaries has long been maintained, the need for increased professional input is also important. This would include an individual teacher having a larger say in the books his or her class uses. See Parsons, *supra* note 16, at 142-46, 172.

24. See American Education, *supra* note 15, at 203.

25. *Id.*

26. See generally Parsons, *supra* note 16, at 12, 140-77.

cratic society.”²⁷

The lack of opportunity for those students trapped in an awful school system is often ignored. Recently, the Chicago Public School System was labeled the “worst in the nation” by the United States Secretary of Education.²⁸ One of the largest school districts in the nation, the \$1.9 billion Chicago system employs 42,000 workers and enrolls about 400,000 students.²⁹ Reality for students enrolled in Chicago schools is grim. One-third of the students are absent each day.³⁰ The high school dropout rate nears fifty percent.³¹ Two-thirds of the students read below grade level.³² These facts are appalling and illustrate the need for reform. But the injustice of ignoring the inadequate education these children receive while expecting them to compete with other students state-wide or nationally becomes apparent when one examines their standardized test scores. In national ACT³³ scores, one-half of Chicago’s high schools rank in the bottom one percent.³⁴

Children who find themselves in a horribly mismanaged or underfunded school district do not have the option of transferring to another system unless they move. In *San Antonio Independent School District v. Rodriguez*,³⁵ the Supreme Court held that so long as there is no absolute deprivation of a public education, state authorities are under no obligation to ensure that the quality of education in various local districts is of equal or even similar value.³⁶ Justice Stewart, in his concurrence in *Rodriguez*, described the United States system of funding public education as “chaotic and unjust.”³⁷ Nevertheless, the Court decided that a funding system resulting in grossly unequal expenditures could

27. American Education, *supra* note 15, at 202.

28. See Herbert J. Walberg, Michael J. Bakalis, Joseph L. Bast & Steven Baer, *We Can Rescue Our Children* 7 (1988).

29. Ben Joravsky, *The Chicago School Mess*, 14 Ill. Issues Apr. 1988, at 13.

30. The failure to ensure that children are in school is indicative of the lack of control teachers and school administrators enjoy. *Id.*

31. *Id.*

32. *Id.*

33. ACT is an acronym for the American College Test, a major college entrance exam.

34. Joravsky, *supra* note 29, at 13. Ironically, this horrible performance is the product of a system that spends \$4,000 per year per student, more than the state and national averages. This figure is *triple* the amount spent at Chicago’s Catholic schools. The Catholic schools, with an 80% minority population, have a 1% dropout rate and send 70% of their students to college or other higher education. See Walberg, Bakalis, Bast & Baer, *supra* note 28, at 1-3, 97-98.

35. 411 U.S. 1 (1973).

36. *Id.* at 18-19.

37. *Id.* at 59 (Stewart, J., concurring).

withstand the rational basis test of the equal protection clause.³⁸ The Court deferred to state legislatures largely because it was reluctant to become involved in matters concerning the propriety of taxation and expenditure.³⁹ Such intervention was viewed as an entrance into a never-ending quagmire, an area properly within the realm of legislative power.⁴⁰ Students are forced to accept the education offered by the public school nearest to their home. That this education is often inferior to the education offered other students makes no difference.

Even if a disadvantaged student finds him or herself within a school with decent facilities, the "advantage" is taken away by the invidious use of tracking. Tracking involves an attempt to discern a student's ability in order to direct him or her in a vocationally reasonable direction.⁴¹ The determination of which students are the brightest often is made by using non-diagnostic tests.⁴² Tracking ignores the reality that a "fast" student may not be a "good" student.⁴³ Many who learn slowly may be extremely bright and self-motivated.⁴⁴ Even if a desirable goal, this separation of students fails because the three or four ability groups used by most schools is too approximate a categorization.⁴⁵ Learning takes place on widely disparate levels.⁴⁶ Tracking simply divides a school's classes by race.⁴⁷

The racist results of tracking can be best illustrated by comparing the differences of lower track offerings designed for predominantly white schools with those in largely minority schools.⁴⁸ In predominately white schools, lower track classes, if vocational rather than college preparatory, focus on home economics or industrial arts courses which bear no special stigma.⁴⁹ Business courses are often available.⁵⁰ Elite courses covering topics

38. *Id.* at 18-21, 40-44.

39. *Id.* at 33, 40-44.

40. *Id.*

41. Barbara Benham Tye, *Multiple Realities* 298-99 (1985).

42. *Id.* at 305. Diagnostic tests would allow more careful evaluation of a student's weaknesses. Standardized non-diagnostic exams do not have enough sensitivity to assess particular weaknesses and aid each student. *See id.* at 299, 305.

43. *Id.* at 300.

44. *Id.*

45. *Id.*

46. *Id.* at 302.

47. *Id.* at 309-10.

48. In her book, *Multiple Realities*, Barbara Benham Tye compared the tracking programs of 13 different school districts. *See id.* at 27. The racial composition of individual schools varied from all-white to all-minority student bodies. Rural, suburban, and urban schools were studied. *See id.*

49. *Id.* at 310.

50. *Id.*

such as marine technology are sometimes offered.⁵¹ All of the classes are part of the regular school schedule, and are held on school grounds.⁵² The white students taking these classes feel an integral part of the overall school program.

In contrast, lower track programs at predominantly Black or other minority schools—or programs designed for minority students at integrated schools—tend to offer classes concentrating on training students for fairly low-level occupations,⁵³ such as building maintenance, sewing, cosmetology, television repair, and the like.⁵⁴ Such an emphasis on vocational skill is not new.⁵⁵ But when a standardized exam tests skills that have not been taught, the results can be disastrous for lower-tracked children.⁵⁶ The skills necessary to excel on such tests are most often learned by constant repetition and exposure to similar learning concepts.⁵⁷ Deprived of “[b]asic skills and basic feelings about participating in our democracy,”⁵⁸ students in lower tracks are deprived of the education society purports to give them.

Society’s interest in quality education mandates an effective method of analyzing schools and the pupils they serve. This article will first examine Florida’s experience with its competency test. Florida’s use of the test is typical, and the analysis here applies to any state using competency tests. Second, it will show that the analysis used to examine competency tests should be no different than that used for any other type of standardized exam. Third, various constitutional considerations involved in evaluating state sponsored tests, and past challenges which have been successful will be discussed. Finally, some recommendations will be proposed for improved competency testing.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* These classes, in contrast to the home economics or shop classes familiar to many, are vocational in focus. Often these courses take up over half of the school day, with students enrolled in them going to places of business for their “education.” Traditional home economics or shop classes, on the other hand, concentrate on what students may do in their spare time and take place on school grounds during regular class periods. *Id.*

55. Booker T. Washington thought schools for Blacks should focus on practical training. See American Education, *supra* note 15, at 4.

56. See Farr & Carey, *supra* note 6, at 64-72.

57. *Id.* at 69-72.

58. Parsons, *supra* note 16, at 137.

II. Florida's Test

A. *The SSAT II*

As in other states, Florida's public colleges and universities require a high school diploma for admittance.⁵⁹ Likewise, in the overwhelming majority of positions, a diploma is a prerequisite to employment by the state.⁶⁰ Yet the State of Florida, following a national trend, denies graduation to roughly twelve percent of each senior class.⁶¹ Diplomas are denied for failure to pass a "standardized" competency test.⁶²

The appropriateness of this action has been subject to legal criticism. In 1978, the first direct legal challenge to a state competency testing program was initiated. In *Debra P. v. Turlington*,⁶³ the Federal District Court of Florida examined Florida's testing policy, especially charges of the use of discriminatory standardized tests.⁶⁴ The court in *Turlington* considered whether Florida's competency test was discriminatory as administered.⁶⁵

Florida's competency test was an attempt at educational reform. In 1976, the Florida legislature attempted to resolve growing dissatisfaction with the state's educational system by passing the Educational Accountability Act of 1976.⁶⁶ Reforms were passed which increased the number of credits required for graduation.⁶⁷ Among the reforms introduced was one denying a diploma to students who failed to pass a uniform state-wide competency test.⁶⁸ The test covered math and verbal skills.⁶⁹ Rather than composing

59. *Debra P. v. Turlington*, 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

60. *Id.* Private employers also tend to see high school diplomas as a guarantee of fundamental skills needed on the job. See Strenio, Jr., *supra* note 6, at 116.

61. *Turlington*, 474 F. Supp. at 248-49.

62. *Id.*

63. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

64. *Id.* at 252-57.

65. *Id.* The district court originally held that the test was discriminatory against Black students. *Id.* at 269. On remand, however, the district court changed its earlier decision and held that the test was not discriminatory. See *Debra P. v. Turlington*, 564 F. Supp. 177, 188-89 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984). For a discussion of the district court's holdings and the subsequent history of this case, see *infra* note 81 and accompanying text.

66. *Id.* at 247-48 (citing Ch. 76-223, 1976 Fla. Laws 489-508). Florida made this move to improve the level of education in its schools only five years after the end of official segregation. This legislation grouped a minimum number of credits with the mastery of basic skills and "satisfactory performance in functional literacy as determined by the State Board of Education." Fla. Stat. § 232.245(3) (1977).

67. See *Turlington*, 474 F. Supp. at 247-48.

68. See *id.*

69. See *id.*

its own test, the State of Florida contracted with the Educational Testing Service (ETS) to provide standardized exams. Less than half a year after receiving this commission, ETS compiled a two-part exam known as the SSAT II.⁷⁰

ETS is the largest manufacturer of standardized tests in America.⁷¹ Among its offerings are the Scholastic Aptitude Test (SAT) exam, the Law School Admissions Test (LSAT), and the Multi State Bar Examination.⁷² Created over forty years ago by the College Board, ETS has a virtual monopoly in certain markets. ETS has been criticized in recent years, however, for devoting an increasing amount of money to executive salaries and public relations instead of research, and still maintaining its status as a non-profit organization.⁷³

Based on past experiences with competency exams, the Florida legislature anticipated that minority students would have more difficulty with the exam than white students.⁷⁴ Children from less affluent school districts have more difficulties with standardized tests than those from wealthier backgrounds.⁷⁵ Florida racially segregated its public schools until 1971, with minority children receiving a markedly inferior education.⁷⁶ Considering this, a high Black failure rate is hardly surprising. Yet the initial Black failure rate was great enough to shock even the most ardent supporters of the test.⁷⁷ While seventy-six percent of white students passed the SSAT II on their first try, only twenty-six percent of Black students did.⁷⁸ The Black students who failed had successfully com-

70. *Id.* at 257-60. Actually, the test existed in some form since 1972. See Morrison, *supra* note 6, at 11. In no way should literacy tests be seen as new, unbiased exams. IQ tests and Scholastic Aptitude Tests are seen as biased because they do not include enough minority children in the test "norm" used to determine the correct answers. Such tests imply a knowledge of certain aspects of white middle-class culture to which minority and disadvantaged children do not have access. Literacy tests have all of the problems inherent in other standardized exams. See generally Strenio, Jr., *supra* note 6.

71. *Id.* at 46.

72. See *id.* at 12-13, 46-50.

73. See *id.* at 49, 60.

74. *Id.* at 220. Past performance indicated that blacks would score significantly below whites; in reality, 20% of the black students failed to pass the test, compared to 1.3% of the white students. See *Debra P. v. Turlington*, 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981). There was more concern with "restoring dignity to a high school diploma" than with the effects on the children. Morrison, *supra* note 6, at 12.

75. See *supra* notes 13-25 and accompanying text.

76. A dual school system was operated from 1890 to 1967. These effects lingered officially until "ending" in 1971. See *Turlington*, 474 F. Supp. at 250.

77. See Strenio, Jr., *supra* note 6, at 220.

78. See *Turlington*, 474 F. Supp. at 248. See also Strenio, Jr., *supra* note 6, at 220.

pleted all of the course work required by their districts for a high school diploma. Because of their SSAT II failure, however, they were denied diplomas until they passed the exam.⁷⁹ These students and their parents, already the victims of inferior public schools, decided to challenge the SSAT II in court.⁸⁰ The district court in *Debra P. v. Turlington* ultimately held that Florida's competency test was not discriminatory as administered.⁸¹

The great importance placed on the Florida competency test requires that its fairness be unquestionable. The test now used, however, has received much criticism.⁸² Florida's legislature should discard the test since its stated goal of improving the education of all students is not met by its use. A more equitable test also might achieve the better educational environment Florida seeks. Since the test used by Florida is one in use across the United States,⁸³ this is an issue of national concern.

B. *The Test's Drawbacks*

Many school districts, employers, and colleges place too great an importance upon standardized test scores. For example Florida, like many other states,⁸⁴ denies a high school diploma to students who do not receive a passing score. ETS previously maintained that such tests should only be given limited weight.⁸⁵ Standard-

79. *Turlington*, 474 F. Supp. at 247-48. This was the first opportunity for children to receive test counseling. Morrison, *supra* note 6, at 11-12. Even if they failed one of the earlier three tests administered by Florida, the children were not held back. *Id.* Students who fail the test after three attempts are given a "certificate of attendance" showing completion of the required number of credits to graduate from high school, but are not issued diplomas. *Id.*

80. See generally *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

81. See *Debra P. v. Turlington* 564 F. Supp. 177, 188-89 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984). The district court originally had held that the test discriminated against Black students. See 474 F. Supp. at 269. That decision was partially affirmed by the United States Court of Appeals for the Fifth Circuit which held that if the test included subjects not taught to all students, it was discriminatory and remanded the case to the district court for a factual finding on that issue. See 644 F.2d at 406-08. On remand, the district court found that the test's material had been taught to the aggrieved students, which established that it was instructionally valid and not violative of Black students' due process or equal protection rights under the fourteenth amendment. See 564 F. Supp. at 188-89. The district court's opinion was affirmed by the United States Court of Appeals for the Eleventh Circuit. See 730 F.2d at 1415-17.

82. See Strenio, Jr., *supra* note 6, at 220-22. Educators and parents often are critical of standardized exams because they question their validity. See *supra* notes 15-58 and accompanying text.

83. See Morrison, *supra* note 6, at 12.

84. At least 13 states now require students to pass competency tests prior to receiving diplomas. See *supra* note 5.

85. The NAACP and other groups have been concerned about the use of SAT

ized test scores were supposed to be only one aspect of determining a student's academic progress. Other considerations, such as classroom performance and teacher evaluations were also to play an important role in assessing the student's progress. Courts have ruled that the placement of students in learning disability classes is too critical of a decision to be based solely upon test results.⁸⁶ By allowing state denial of diplomas based solely on test scores, however, the court in *Turlington* undermined the students' basic due process rights.⁸⁷ Not only is the test an unreliable judge of literacy skills, it discriminates against the less affluent students. Testing companies, such as ETS, are also less motivated to improve their tests, since the court's analysis focuses upon the right to test and the administration of the tests rather than content of the tests.

Standardized test scores are useful in certain circumstances such as spotting weaknesses in a student's performance. Florida tests each student four times during his or her academic career.⁸⁸ A span of up to three years can elapse between tests.⁸⁹ This is too long. If catching those students who fall behind is the legislature's true goal,⁹⁰ more frequent testing is necessary.⁹¹ Over a four year period, a student may fall hopelessly behind. Since his or her problems are not noted on a standardized test—the only test which now matters—he or she will not receive the remedial help needed.

and IQ tests on minority students. See Strenio, Jr., *supra* note 6, at 133. ETS always cautioned patience, emphasizing that such tests are only one assessment criteria used. *Id.* at 132-36. Now that ETS is peddling its exam as a mandatory exam of literacy, these warnings have mysteriously disappeared. See Morrison, *supra* note 6, at 11-12.

86. See *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

87. A student has a due process right to a competency exam that is a fair test of what is taught in the classroom, and the test's racially discriminatory impact must not be due to the present effects of past discrimination. See *Debra P. v. Turlington*, 730 F.2d 1405, 1407 (11th Cir. 1984).

88. The tests are administered to the third, fifth, eighth, and eleventh grade students: those who score low on any but the final exam are not held back. Morrison, *supra* note 6, at 11.

89. *Id.* Allowing children to fall hopelessly behind in their studies can deprive them of a fair opportunity to obtain an education. See *Hobson*, 269 F. Supp. at 474. In *Hobson*, the infrequent use of tests was ruled to discriminate against minority students where test results were of enormous influence. *Id.* at 474-76.

90. See Fla. Stat. § 229.55 (1989) ("The intent of the legislature is to . . . [p]rovide information to the public about the performance of the Florida system of public education in meeting established goals. . . .").

91. See David A. Goslin, *The Impact of Testing on Self-Image*, in *Evaluation in the Inner City: Report of an Invitational Conference on Measurement in Education*, Philadelphia, 1969, *supra* note 2, at 61. The goal must be to ensure that students are being tested on knowledge rather than "standardized test-taking skills." *Id.* at 61-63. The only effective way to do this is to bombard the students with standardized exams. *Id.*

If standardized tests are truly the answer to the nation's academic problems, they should be used on at least a bi-yearly schedule.⁹² Refusal to follow this schedule effectively hinders rather than aids students.⁹³ If administered every two years, the chance is greatly increased that competency tests will act as a constructive, rather than a destructive tool.⁹⁴ Monitoring student's progress is a legitimate goal of state governments. Once undertaken, however, the testing process must be conducted effectively so as not to unfairly discriminate against certain students.

Increased frequency of testing is also necessary to ensure that the tests examine knowledge of verbal and math skills rather than test-taking ability.⁹⁵ ETS admits that the more often one is exposed to a test, the higher the scores tend to be.⁹⁶ Rather than aid those who are least likely to be comfortable with the exams, however, ETS refuses to release its tests for public scrutiny or practice.⁹⁷ This denies students the chance to practice on their own, eliminating a method by which they may reduce their test anxiety or improve their test-taking skills or both. ETS's refusal to release its tests has a disparate impact on less affluent students because only more affluent students can afford to take test-preparation courses. In a school district which administers only four standardized tests between kindergarten and twelfth grade, those students who can afford costly test-preparation courses will have a clear advantage.⁹⁸ By not allowing equal access to an element (frequent testing) that greatly determines success on standardized tests, states and school districts violate the due process rights of poorer students. The student's rights are violated by testing them on materials not taught in the schools. Instead, the students are rewarded for learning what is taught in test-preparation classes. While no fundamental right to education exists, once a school district endeavors to provide an education for its students, all stu-

92. See *id.* at 54-61.

93. *Id.* Standardized tests cost school districts approximately only 40 cents per student to administer. Strenio, Jr., *supra* note 6, at 44. Faced with such a small cost, one has to infer that reluctance to provide more frequent testing stems from lack of interest in the end result.

94. See Goslin, *supra* note 91, at 61. The more frequently students take tests, the more comfortable they will become doing so. This makes the test a much stronger tool for evaluation. *Id.*

95. See *id.* at 61-62.

96. Strenio, Jr., *supra* note 6, at 36. Because of this, students retaking the SAT have their scores combined and are given only the average of the two scores as their score on the second test. *Id.* at 257-58.

97. See generally *id.* at 262-80.

98. *Id.* at 34-36. In investigating test preparation courses, the Federal Trade Commission has found that SAT scores can be improved by as many as 50 points. See *id.* These courses often cost \$200 or more. *Id.* at 270.

dents must have equal access to that education.⁹⁹ Otherwise, the entitlement to an education is meaningless.

Denial of a high school diploma is not the only way that standardized testing may harm students. Students who receive low scores on standardized tests can be traumatized in ways not always immediately perceivable. A good self-image is very important to a student's achievement level, especially if the student is from a minority or less affluent background.¹⁰⁰ Poor test scores may convince a student that he or she is stupid and unable to achieve in school.¹⁰¹ This discourages effort. Standardized tests allow little insight into whether a student gave a totally wrong answer, was partially wrong in his or her reasoning, or was merely nervous. In addition, standardized tests ignore children's cognitive analytical processes. The multiple-choice format allows no room for creativity, writing skills, or originality. These tests reward those who think and read quickly and give superficial answers.¹⁰² While this may meet the definition of a "literacy" test, one might hope that more is desired from graduates of high schools.¹⁰³ In fairness to all students, a better test of skills is needed.

Flaws in learning measurement seriously hinder children who are subjected to their inaccurate results.¹⁰⁴ One problem is that tests tend to measure those parts of "reading" that are easily quantified.¹⁰⁵ Research has shown that students who do well on reading comprehension tests are not likely to do well on phonics and vocabulary.¹⁰⁶ The question of determining what *should* be

99. Education plays such an important role in our society that to allow denial of a quality education on racial grounds is impermissible. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

100. See *Hobson v. Hansen*, 269 F. Supp. 401, 481-82 (D.D.C. 1967). Poor test scores can cause increased stress in the student. This often results in "test anxiety" which causes future scores to be lower as well. *Id.* A student faced with poor scores may rebel against a system he or she senses is weighted in another's favor. In the future this student may cease trying to improve or drop out of school. *Id.*

101. *Id.*

102. Strenio, Jr., *supra* note 6, at 77.

103. See *Farr & Carey*, *supra* note 6, at 96-107. The dramatic improvement in scores that coaching brings also indicates that competency tests fail as assessment tools. See *Hobson*, 269 F. Supp. at 481-82.

104. *Farr & Carey*, *supra* note 6, at 190-91.

105. *Id.* at 190-91.

106. This research consisted of a reading test divided into several subsets: phonics, vocabulary (word identification), and reading comprehension (multiple choice). The test was administered to 40,000 children. By analyzing the data, the researcher discovered that there was a significant *negative* correlation between a combination of the phonics and vocabulary subtests and the comprehension subtest. Those likely to do well on one subtest were likely to do poorly on the other. *Id.* at 191.

tested and what *can* be tested has been largely ignored.¹⁰⁷ If one imposing a competency test arbitrarily sets a cut-off point using average performance for the norm, half of the students taking the test would fail. They would not necessarily be incompetent, but they would be below the norm.¹⁰⁸ Teachers in a given school district thereafter will attempt to remedy these students' performance, attempting to improve performance on parts of tests on which a student may not require mastery. Norm-based education diverts attention away from the education a society needs to so-called statistical progress.

C. ETS

1. Lack of Relevancy

Florida's choice of ETS to compose its competency test is absurd. ETS is a commercial organization which has cornered the market in providing adolescent anxiety. Originally designed to show the mental inferiority of minority groups,¹⁰⁹ standardized tests soon expanded into the academic market, providing colleges with a method of rating a student's "aptitude."¹¹⁰ Students bear the costs of standardized exams, which makes the tests even more attractive to colleges.¹¹¹ School districts also used ETS exams to track children, especially minorities, into classes for the "slow."¹¹² For years these markets proved profitable to ETS. But by the mid 1970s, court challenges and citizen dissatisfaction had damaged standardized tests' reputations.¹¹³ IQ tests were forbidden from being used to channel minority children into classes for the re-

107. *Id.* at 187-90. Farr & Carey note that cut-offs on such tests often are set by using arbitrary and sometimes political criteria. *Id.*

108. This author does not mean to suggest that the norm is usually set at the half-way point, but only that the point at which it is set is purely arbitrary. *See id.* at 188.

109. IQ tests, the ancestor of today's "literacy tests," were originally used to show the "borderline feeble-minded[ness]" of "Spanish-Indian and Mexican families of the Southwest and also among negroes." Strenio, Jr., *supra* note 6, at 183 (quoting Lewis Terman, *The Measurement of Intelligence* 91 (1916)). The man who developed the SAT, Carl Brigham, believed that "Nordics are . . . rulers, organizers, and aristocrats. . . individualistic, self-reliant, and jealous of their personal freedom. . . as a result they are usually Protestant. . . [lacking] the unstable temperament and the lack of reasoning power so often found among the Irish." *Id.* at 6. Henry Goddard, founder of one of the earliest (and still popular) IQ tests "proved" that "83 per cent of the Jews, 80 per cent of the Hungarians, 79 per cent of the Italians, and 87 per cent of the Russians [coming into Ellis Island] were feeble-minded', that is, of subnormal intelligence." *Id.* at 7.

110. *See id.* at 130.

111. *Id.*

112. *See* *Hobson v. Hansen*, 269 F. Supp. 401, 457-58 (D.D.C. 1967).

113. *See, e.g., id.*

tarded.¹¹⁴ Many of the nation's best and most progressive colleges decided to stop using the SAT as a criterion for admission.¹¹⁵ ETS was reluctant to lose lucrative markets, but it also balked at re-writing its huge library of tests. ETS has resisted the expense of researching new tests; it spends twice as much yearly on public relations as on test composition.¹¹⁶ By repackaging its existing tests as "ability" rather than "aptitude" exams, ETS found new markets waiting in the 1970s and 1980s.¹¹⁷ Not surprisingly, this new "safe-guard" was embraced most readily by those not-so-enthusiastic proponents of integration: big business and southern school districts.¹¹⁸

When Florida's choice of literacy test was challenged, the state spent thousands of dollars on research in an effort to establish that its test was a fair examination of what its schools taught.¹¹⁹ When selecting the test's format, however, the state quickly chose ETS. ETS, once chosen, delivered its completed product in a matter of months.¹²⁰ The Florida statute authorizing the test expressly stated that it wished to ensure that students could "successfully apply basic skills to everyday life situations."¹²¹ ETS's definition of just which skills are necessary to everyday life is questionable. The use of white middle-class values in other standardized tests has made the tests discriminatory and their use unconstitutional under the due process and equal protection clauses

114. See, e.g., *Larry P. v. Riles*, 343 F. Supp. 1306, 1314-15 (N.D. Cal 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). When used as the sole criteria of intelligence, IQ tests were judged to discriminate against minority children. *Id.* at 1313-15.

115. See Edward B. Fiske, *Questioning an American Rite of Passage: How Valuable Is the S.A.T.?*, N.Y. Times, Jan. 18, 1989, at 21, col. 1. Some schools, such as the Massachusetts Institute of Technology (M.I.T.) automatically add points to the scores of some students in order to balance out the inequality. *Id.*

116. ETS only spends between 5-7% of test revenues on test development. Strenio, Jr., *supra* note 6, at 272.

117. *Id.* at 219-220. These categories are, of course, almost identical. See *id.* at 184. "Ability" tests concentrate on what has been learned, while "aptitude" tests determine what can be learned by examining what a student has learned thus far. *Id.*

118. See *id.* at 31-32, 220. Because they are employers covered by Title VII of the Civil Rights Act of 1964, however, big businesses already are prohibited from measuring skills unrelated to job requirements by using tests which have a disproportionate impact on racial minority groups. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

119. See *Debra P. v. Turlington*, 564 F. Supp. 177, 180 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984). IOX Assessment Associates, a private group, sent surveys to every teacher in Florida, and observers to every school district. *Id.* Compare this methodical search to the off-hand decision to have ETS compose a test. See *Debra P. v. Turlington*, 474 F. Supp. 244, 257-61 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

120. See *Turlington*, 474 F. Supp. at 257-61.

121. Fla. Stat. § 229.55 (1977).

of the fourteenth amendment.¹²² With respect to the SSAT II, the lack of time devoted to developing it, coupled with the scant amount of money spent by ETS on new research, strongly implies that the SSAT II was formed using ETS's library of tests.¹²³ As a result, ETS may have written the SSAT II placing value on the same white middle-class traits which previous courts have found discriminates against minority groups.¹²⁴

Minority group and other non-middle-class input is necessary in the formulation of tests in order to prevent their discriminatory effect on those groups.¹²⁵ The differences between minority values and experiences and those of the test-makers can be astounding.¹²⁶ For example, a recent study examined auto assembly-line workers whose average age was twenty.¹²⁷ The workers listed the following skills as necessary to their lives, both personal and as employees:

- 1) Spotting small mistakes 81.9%
- 2) Doing jobs that require coordination
of both hands and feet 78.4%
- 3) Reacting quickly when you see a
dangerous situation 74.7%
- 4) Remembering the names of people
you meet 55.4%
- 5) Using your fingers to work with small
things, like repairing a watch 54.2%
- 6) Using words to communicate
to others 48.1%

122. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

123. See *Turlington*, 474 F. Supp. at 257-61.

124. IQ tests have been found to be discriminatory against minority children. See *Hobson*, 269 F. Supp. at 485; *Riles*, 343 F. Supp. at 1314-15. Although those cases involved IQ tests, one leading commentator considers all standardized tests—IQ, SAT, competency, etc.—to be essentially the same thing. See Strenio, Jr., *supra* note 6, at 47-50. The discrimination inherent in one rears its head in another because all ETS tests are written by the same 67 people. *Id.*

125. Not just minority but all low-income children suffer from standardized tests. Scores on the SAT, for instance, correlate directly with income. See *id.* at 36-38. By allowing children from differing backgrounds into the test "norm" the chance of discrimination is reduced. Luis M. Laosa, *Nonbiased Assessment of Children's Abilities: Historical Antecedents and Current Issues*, in *Psychological and Educational Assessment of Minority Children 15-16* (Thomas Oakland ed. 1977).

126. For a discussion of the values and experiences of test-makers, see *infra* notes 153-74 and accompanying text.

127. See Frederic R. Wickert, *Self-Perceived Abilities and On the Job Performance of Culturally Disadvantaged Workers*, in *Mental Tests and Cultural Adaptation* 260 (1972). While this author does not suggest that these skills become the new criteria of standardized tests, the study tends to show that certain values are not being acknowledged in most tests.

- 7) Checking written material for mistakes 44.5%
- 8) Thinking through a difficult problem 38.0%
- 9) Reading a map 27.7%
- 10) Solving arithmetic problems quickly ..25.4%.^{128.}

Test-makers, by contrast, value the ability to make quick, superficial judgments. Little concern is shown for non-majority or lower income values. White middle-class values are given paramount importance.

To succeed in a white middle-class society one must exhibit a certain amount of conformity to standards. Schools must be judged, in part, by how well they accomplish the teaching of such standards. But as the above-quoted study shows, other groups' standards are important too, both to them and to anyone trying to determine achievement or ability.

2. Lack of Access

For standardized tests to improve, there must be an understanding of how they are written. ETS's test formulation policies and criteria must be examined. Critics of these have been made less effective by ETS's refusal to release copies of its exams for public inspection.¹²⁹ Ostensibly this has been done for cost considerations: ETS prefers to recycle its exams rather than spend money to prepare new ones.¹³⁰ ETS has been so protective of its exams that it has brought suit against individuals who have taken the test and later exposed what was on it.¹³¹ This tends to chill debate over the test's discriminatory make-up. Additional problems are exacerbated by ETS's refusal to release its exams for public inspection. These problems afflict minority and low-income children disproportionately relative to the rest of the population.¹³²

A bare refusal to release old tests creates a market for private test-preparation courses.¹³³ These courses, while expensive,

128. *Id.*

129. See Strenro, Jr., *supra* note 6, at 262-65.

130. *Id.* at 272-73. ETS spends very little on the formulation of its exams. When New York passed an open access test law, which allowed the public to inspect old exams, ETS predicted that the cost of tests would skyrocket. This has not been the case. *Id.*

131. *Id.* at 73.

132. See *id.* at 36-38.

133. See Gene I. Maeroff, *Pick One: SAT Coaching Is (Is Not) Fair to Students*, N.Y. Times, May 6, 1976, at E11. See also Strenio, Jr., *supra* note 6, at 32-36.

have been shown to increase test scores significantly.¹³⁴ Since test-preparation courses charge \$275¹³⁵ or more for their services, children from low-income backgrounds are unlikely to be able to afford them. This expense, coupled with ETS's refusal to release its tests, ensures that poorer children rarely see any form of the test. This tends to increase stress and fear of the test. As a consequence, a poor student's performance is greatly hindered.¹³⁶ Exposure to the tests and practice taking them, even if short of a preparation course, also tends to raise scores.¹³⁷ Proponents of standardized tests maintain that the tests are fair, that they help society become more of a meritocracy.¹³⁸ Yet what kind of a meritocracy rewards class and income? ETS's refusal to release its exams ensures that competency tests improperly reward just that and penalize disadvantaged students.

Its refusal to release old exams also protects ETS from criticism concerning test construction. Credit is given for the right choice—none is given for selecting one of the other three or four possible answers.¹³⁹ ETS's SAT focuses on verbal and math skills. By allegedly testing knowledge of fields of law, its Multi-State Bar Examination determines who shall become lawyers. Surprisingly, ETS's tests are not structured by linguists, mathematicians, or lawyers. Instead, the tests are developed by psychologists who are not aware of many of the subtle nuances of english, mathematics, or law.¹⁴⁰ Because of the inconsistent answers this may cause, ETS is hesitant to subject its tests to public scrutiny. On certain occasions, the public has had access to ETS exams. In 1972, for instance, a copy of ETS's Multi-State Bar Examination was released.¹⁴¹ This action was motivated by the complaints of disgruntled attorneys. Law professors examining the test maintained that over twenty-five percent of the questions gave credit for in-

134. See Gene I. Maeroff, *Coaching' Findings May Change S.A.T.*, N.Y. Times, June 5, 1979, at C5.

135. Maeroff, *supra* note 133, at E11.

136. See *Hobson v. Hansen*, 269 F. Supp. 401, 481-82 (D.D.C. 1967). Psychological research has shown that children who have done poorly on past exams tend to be very anxious on future tests. See *id.* This "test anxiety" can have a detrimental effect on their performance. *Id.*

137. Strenio, Jr., *supra* note 6, at 32-36.

138. *Id.* at 196.

139. See Rogers Elliott, *Litigating Intelligence* 115-22 (1987). In fact, standardized exams are scored by machine. *Id.*

140. See Strenio, Jr., *supra* note 6, at 170-78.

141. *Id.* at 174. Standardized tests no longer effect only school children. Doctors, lawyers, plumbers, and others now are subjected to their questionable results. *Id.* at 174-75.

correct answers.¹⁴² This aptly illustrates that the refusal of testing services to allow public access to its exams discriminates against those without funds to prepare adequately for the test. Those whose answers are most likely to conflict with the preparer's are the most slighted. Without funds for costly test preparation courses, poor students do not know the preparer's way of answering, which may not be the only right answer. If ETS wishes to reduce such suspicions, it can solve the problem by releasing more of its exams. This not only would allow poor students greater access to past exams for practicing, it would invite the public to scrutinize the tests for proper content.

ETS could adopt a compromise position by releasing only certain exams. By allowing some tests to remain away from the public eye, ETS could recycle exams and save costs. A broad sweep of releasing each year's exams might raise the costs of the tests. Since the tests so greatly affect children, any increase in cost should be borne by the public, either through paying for preparatory classes or paying for ETS to revise their exams yearly. A series of nearly identical competency tests often results in schools attempting to teach the skills the test requires: this comes at the cost of a comprehensive education.¹⁴³ If real educational reform is the goal, quality is more important than cost.

Many states have clauses in their constitutions guaranteeing a free education.¹⁴⁴ In some states, students have used these "free-school" clauses to challenge fees on school activities, academic

142. *Id.* Perhaps some of ETS's reluctance to release its exams stems from this incident. *Id.* at 174.

143. British studies have shown that when standardized tests of a "pass/fail" type are given, teachers often concentrate on students just below the "pass" line. See *Testing the Tests*, *The Economist*, Dec. 12-18, 1987, at 64-65. This hardly seems to be the type of education reformers have in mind when they institute such tests.

144. Kirk Ah Tye notes that the following state constitutions call for a public education that is "free" or "without charge": Ala. Const. art. XIV, § 256; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1 ¶ 1; Idaho Const. art. IX, § 1; Ill. Const. art. IX, § 1; Ind. S.D. Const. art. XI, § 1; Md. Const. art. VIII, § 1; Mich. Const. art. VIII, § 2; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1 (a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; N.J. Const. art. VIII, § 4 ¶ 2; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. X, § 2; Okla. Const. art. XIII, § 1; S.C. Const. art. XI, § 13; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Va. Const. art. VIII, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; and Wyo. Const. art. VII, § 1. Kirk Ah Tye, *School Fees in Public Education*, 19 *Clearinghouse Rev.* 2, 4 n.6 (1985). The following state constitutions are also noted for containing the word "common" with the word "school": Ariz. Const. art. XI, § 1; Iowa Const. art. IX, § 12; Ky. Const. § 183; Nev. Const. art. XI, § 3; and Wash. Const. art. IX, § 2. *Id.*

courses, and varsity sports.¹⁴⁵ In *Hartzell v. Connell*,¹⁴⁶ a Santa Barbara, California public school plan to charge students a mandatory \$25 fee was challenged.¹⁴⁷ Unless the fee was paid, students could not participate on any athletic teams, or in jazz and marching bands, or theatre and music groups.¹⁴⁸ Plaintiffs emphasized the strong nexus between the activities and the schools.¹⁴⁹ School funds were used to purchase equipment and uniforms, while school staff was used to moderate, advise, and clean up.¹⁵⁰ Observing that "it can no longer be denied that extra curricular activities constitute an integral component of public education," the California Supreme Court held that the fees violated the "free-school" clause of the California Constitution.¹⁵¹

Such free education clauses also may be useful to those challenging standardized tests. Although not a direct fee for education, the current standardized testing system, with its emphasis on expensive preparatory courses, amounts to an indirect fee on an integral component of public education. School districts purchase the exams, use class time and faculty to administer them, and allow an insufficient score to deny a diploma. Such tests, therefore, are integral to a public education. Just as important are classes that help students prepare for standardized tests. Any system denying an integral part of a public education to those who cannot pay violates the spirit and the letter of provisions promising a free education.¹⁵² Schools which give standardized exams but fail to provide test-preparation courses to all students do just that.

The value of standardized tests seems very minimal. Many, including this author, think their use should be abolished, or at least improved. But if such tests are used, fairness to all must be ensured. Both the past exams themselves and test-preparation courses must be made more accessible to all students. Once educators ensure that all students have the requisite skills to take a test, they can concentrate on examining the students' knowledge.

145. See, e.g., *Hartzell v. Connell*, 35 Cal. 3d 899, 679 P.2d 35, 201 Cal. Rptr. 601 (1984). See generally Tye, *supra* note 144.

146. 35 Cal. 3d 899, 679 P.2d 35, 201 Cal. Rptr. 601 (1984).

147. *Id.* at 901, 679 P.2d at 37-38, 201 Cal. Rptr. at 603.

148. *Id.* at 901, 679 P.2d at 40-43, 201 Cal. Rptr. at 603.

149. *Id.* at 903-05, 679 P.2d at 39-40, 201 Cal. Rptr. at 605-06.

150. *Id.* at 906, 679 P.2d at 41, 201 Cal. Rptr. at 607. Plaintiffs stressed that this showed the importance of the activities to school administrators in terms of image and spirit. *Id.* at 906, 679 P.2d at 41, 201 Cal. Rptr. at 607-08.

151. *Id.* at 908, 679 P.2d at 44, 201 Cal. Rptr. at 610.

152. See *id.*

III. Problems with Competency Tests

Past inquiries into the fairness of competency tests, as exemplified by the *Turlington* decision, have failed to deal with the inherent flaws of standardized exams. All standardized tests—whether IQ, achievement (competency), or aptitude (SAT, LSAT, etc.) tests—are essentially examinations of certain reading and verbal skills.¹⁵³ Yet there are far better ways of testing these skills. Alternatives include essay tests, oral examinations, and teacher/psychologist evaluation of incorrect answers.¹⁵⁴ All tests ultimately involve a subjective element.¹⁵⁵ In standardized tests, the subjective decision is made in formulating the examination and determining the “correct” answer. No attention is paid to the student’s thought process.¹⁵⁶ Careless guesses may receive points, yet reasoned (but “wrong”) answers do not.¹⁵⁷ This result must be changed. In addition, when the decision to choose a standardized test is made with full knowledge that minority students will fare less well because of the type of test administered, as was the case in Florida,¹⁵⁸ these exams should be ruled an unconstitutional violation of the students’ due process and equal protection rights.

Standardized exams in the United States reflect white middle-class values and meanings.¹⁵⁹ This is to be expected, since the

153. See *Hobson v. Hansen*, 269 F. Supp. 401, 477-79 (D.D.C. 1967). In *Hobson*, Judge Skelley Wright noted that aptitude tests used to assign children to various tracks are standardized primarily on white, middle-class children. *Id.* at 407. The results of these tests relegate Black and disadvantaged children to the lower tracks, from which the chance of escape is remote. *Id.*

154. See Strenio, Jr., *supra* note 6, at 291-95. See also Elliott, *supra* note 139, at 177-80. Educational programs’ chief interest must be educating children. While other methods of analysis might appear cheaper or more convenient, the ultimate form of testing chosen must be one which does not discriminate against the child. See *Hobson*, 269 F. Supp. at 485-91; *Larry P. v. Riles*, 343 F. Supp. 1306, 1310-13 (N.D. Cal. 1972), *aff’d*, 502 F.2d 963 (9th Cir. 1974).

155. In testing, there is necessarily a determination of what is the “correct” answer. In essay tests this comes in the grading. Standardized tests are objective in grading but subjective in formulation. Strenio, Jr., *supra* note 6, at 62-73.

156. *Id.* at 77-78.

157. *Id.* at 75.

158. See *Debra P. v. Turlington*, 474 F. Supp. 244, 248-249 (M.D. Fla. 1979), *aff’d in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

159. See *Hobson v. Hansen*, 269 F. Supp. 401, 481 (D.D.C. 1967). When questions ask about a specific object, for instance a symphony orchestra, they assume the student is familiar with it. Judge Skelley Wright explained the testimony of a defense witness:

a principal of a low-income Negro elementary school, [who] told of how most of the children had never been more than a few blocks from home; they had never been downtown, although some had been to a Sears department store; they did not know what an escalator was, had not seen a department-store Santa Claus, had not been to a zoo.

Id. Tests assume this knowledge and punish children for not having it. *Id.*

students comprising the test "norm" are white and middle class to an unrepresentative extent.¹⁶⁰ The typical white student also has far more exposure to the areas examined by standardized tests than does the average Black or other minority youth.¹⁶¹ Even ETS has studies establishing that student scores increase with frequent exposure to the exams.¹⁶² Courts and observers seem to overlook the fact that IQ tests (the predecessors of the Florida competency tests and the SAT) originally were designed to show the "border-line feeble-minded[ness]" of "Spanish-Indian and Mexican families and also among negroes."¹⁶³ As IQ and SAT tests continue to fall into disfavor, ETS and the other testing companies scramble for new markets for their repackaged tests.¹⁶⁴ The pittance spent developing the Florida test¹⁶⁵ refutes any claim that the test is new, original, or improved. Allowing students to be branded incompetent for their failure to perform well on such tests is not only an injustice, it ignores prior case law. Standardized tests have been held to be a highly suspicious means of testing knowledge or ability.¹⁶⁶

Standardized tests are ineffective as a sole means of evaluation because the one "correct answer" has been determined with little regard to cultural and regional differences among students taking the test. The vocabularies and experiences of children living in Iowa, San Francisco, and New York may be drastically different, even for children of similar socio-economic backgrounds.¹⁶⁷ Minority and economically deprived students find the burden of conforming to white and middle-class norms almost an impossible task.¹⁶⁸ For example, the WISC-R test, one of the nation's most widely used standardized intelligence exams, asks students to create a story by placing four pictures in what the authors consider to be the correct order.¹⁶⁹ The test's authors want the pictures or-

160. See McClung, *supra* note 3, at 694-98.

161. See Hobson, 269 F. Supp. at 480-81.

162. See Strenio, Jr., *supra* note 6, at 34-35.

163. *Id.* at 183 (quoting Lewis Terman, *The Measurement of Intelligence* 91 (1916)).

164. See generally *id.* at 26-32, 134. ETS has seen skyrocketing business in these new markets. Employers, graduate schools, even professions (from plumbers to lawyers) now use standardized ETS exams. *Id.* at 170-78.

165. ETS came back to the Florida Department of Education with its test only three months after receiving the objectives for its content. *Debra P. v. Turlington*, 474 F. Supp. 244, 257-58 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

166. See *Hobson v. Hansen*, 269 F. Supp. 401, 513-15 (D.D.C. 1967); *Larry P. v. Riles*, 343 F. Supp. 1306, 1314-15 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

167. Elliott, *supra* note 139, at 123.

168. See *id.* at 122.

169. *Id.*

ganized to show 1) a burglar in a mask approaching a window; 2) the burglar raising the window; 3) the burglar entering the room and placing goods in a bag; and 4) the burglar being apprehended by a police officer.¹⁷⁰ To the astonishment of the test's authors, minority children seldom placed the scene with the police officer last in the sequence.¹⁷¹ Instead, minority children tended to place it first.¹⁷² The police apprehend criminals in the middle-class world of the test's authors, but not in the world of many minority children.¹⁷³ Given their familiarity with gang crime and corrupt police officers looking the other way, ghetto children view the police as knowing observers of most crime.¹⁷⁴ By placing the police officer in their story first, minority children only are reflecting the world as they experience it. Standardized tests in this case only serve to demonstrate the vastly different backgrounds of disadvantaged children and test authors.

If competency tests or grades could evaluate a student's ability with complete accuracy, they would have a correlation coefficient of 1.00.¹⁷⁵ Grades, the best existing indicator for high school students, only have a correlation coefficient of .50 when predicting raw ability or future grade point average (GPA) in an academic setting.¹⁷⁶ In contrast, the correlation coefficient between standardized intelligence test scores and high school GPA has been calculated as .39 for white students and .24 for black students.¹⁷⁷ Standardized tests are seen as useful because they purportedly predict ability and achievement more accurately than grades. Since these tests are actually less accurate predictors of ability and achievement than grades alone, any use of them to deny a student a high school diploma must be prohibited.¹⁷⁸

In addition to their statistical inaccuracies, standardized tests

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 Harv. C.R.-C.L. L. Rev. 89, 100 n.40 (1979). A totally accurate test would have a correlation coefficient of 1.00. A correlation coefficient of 0 would indicate no relationship whatsoever between the test and the student's ability, and a correlation coefficient of -1.00 would indicate a perfect negative relationship in which the higher the test score, the lower the student's ability and vice versa. *Id.*

176. *Id.* at 100.

177. See Elliott, *supra* note 139, at 126. The correlation coefficients Elliott refers to were based on the WISC or WISC-R standardized intelligence test. *Id.*

178. Even the average correlation coefficients for the SAT with college grades were low: .42 on the SAT-verbal and .39 on the SAT-math. White, *supra* note 175, at 100 n.43.

have an alarming undercurrent of racism. The tests frequently keep otherwise bright and able minority students from receiving diplomas or entering the school of their choice.¹⁷⁹ Black college students, with SAT scores hundreds of points below their white colleagues, often fare as well in college or graduate school environments as white students.¹⁸⁰ Instead of considering an individual's ability to perform on a job or at school, standardized tests measure one's ability to master the test's nuances.¹⁸¹ For example, negative correlations have been reported between Medical College Admissions Test scores and clinical ratings or physician performance.¹⁸² Until test developers—who are usually white—are better able to evaluate minority students objectively, the results of such tests must be viewed with suspicion.¹⁸³

IV. Constitutional Considerations

A. A Student's Due Process Rights

In the context of competency testing, a student has two basic due process rights. The first is the right that the test be non-discriminatory.¹⁸⁴ Whether intentional or not, the tests cannot expect Black and other minority students to have knowledge of subjects to which they never have been exposed. To do so penalizes students for being Black and impoverished, not for being uneducated.¹⁸⁵ Where a test has a bias toward the answers of white middle-class society, it should not be used to deprive minority children of their educational opportunities.¹⁸⁶

179. *Id.* at 114-15.

180. *Id.* at 115.

181. Elizabeth M. Bagdon, *Teacher Competency Testing*, 28 Wash. U.J. Urb. & Contemp. L. 251, 257 (1985). Bagdon presents an excellent discussion of many of the problems encountered when using standardized exams for purposes they were not intended. Because of the many differences between the workplace and the classroom, this author has not dealt with teacher competency testing in this article. Many issues, however, such as the injustice of denying a good performer a job and recognition on the basis of a test score, are the same.

182. See White, *supra* note 175, at 107 n.74.

183. White teachers' views of Black children differ greatly from those of Black teachers. See Scott J. Davidson, Stuart W. Davidson & Judith Hall Howard, *The Riffing of Brown: De-Integrating Public School Faculties*, 17 Harv. C.R.-C.L. L. Rev. 443, 487 (1982). In one study, both Black and white teachers were asked to observe a group of Black students and describe them from a list of 36 adjectives. The Black teachers described the children as "happy," "energetic," and "fun-loving." The same children were characterized by white teachers as "talkative," "lazy," and "rebellious." *Id.*

184. *Hobson v. Hansen*, 269 F. Supp. 401, 482 (D.D.C. 1967).

185. As a result, minority children are penalized more for being disadvantaged than for not being intelligent. *Id.* at 481-83.

186. See *id.* See also *Larry P. v. Riles*, 343 F. Supp. 1306, 1311-12 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

The second due process right protecting students is the right that the tests be accurate indicators of ability. Tests that deny diplomas dramatically impact students. Education is considered vitally important in our society and is often symbolized to employers and universities by a diploma.¹⁸⁷ Since education is valued so highly, if a diploma is denied on the basis of a test, that test must be a valid assessment of a child's education.¹⁸⁸ It is imperative that the test fairly examines literacy skills and not test-taking ability.¹⁸⁹ States which use standardized tests might do so with good intentions, but this is not enough. If these tests are not accurate indicators of incompetency, their use is discriminatory, violating the children's constitutional rights to due process.¹⁹⁰

An important consideration in challenges to the propriety of state action is the burden of proof.¹⁹¹ Initially, the burden of proof is on the person challenging the legislation.¹⁹² The burden of proof shifts to the state upon the child's demonstration of two things.¹⁹³ First, the child must show that the test is fundamental to the assessment decision for which it is being used.¹⁹⁴ For example, a test that by itself tracks children into a program for the retarded is fundamental to that assessment decision.¹⁹⁵ A test that by itself denies a high school diploma is equally crucial to that assessment decision. Secondly, the child must show that when taking such a test, Blacks have a failure rate significantly disproportionate to their percentage of the population.¹⁹⁶ Where Blacks comprise two-thirds of those failing the test and are placed in classes for the retarded, but constitute only one-quarter of all students in the school district, such a disproportionate impact was held to exist.¹⁹⁷ Importantly, these figures are almost identical to those of Blacks in Florida who were denied diplomas.¹⁹⁸ Nevertheless, in *Turlington*, the district court on remand held that test

187. See *Debra P. v. Turlington*, 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

188. *Hobson*, 269 F. Supp. at 484-90.

189. *Id.*

190. See, e.g., *id.* at 485-91.

191. See *Larry P. v. Riles*, 343 F. Supp. 1306, 1311-12 (N.D. Cal. 1972)(citing *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967)), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

192. *Id.*

193. See *id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. See *id.*

198. See *Debra P. v. Turlington*, 564 F. Supp. 177, 186 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984). The district court in *Turlington* found that Blacks composed 57% of those students who had not passed the test, while they formed only 20% of the student population. See *id.*

makers must meet only "minimum standards of fairness."¹⁹⁹ Surprisingly, the district court did not follow precedent and left the burden of proof on the plaintiffs, despite their presentation of evidence showing the test's disproportionate impact on minority students.²⁰⁰ Once plaintiffs have established that a test has a disproportionate impact on minority students, a court must require the state to show that its test is not discriminatory. Students no longer should be expected to prove that the test is discriminatory.

The United States Supreme Court has established that children have no federal constitutional right to an education.²⁰¹ If local or state authorities choose to provide publicly funded education, however, all children have an equal right to such an education.²⁰² Once granted, the right to education is severely limited by discriminatory competency testing. The right to education and the consequential worth of that right is substantially diminished when a student is wrongfully deprived of his or her diploma. Competency tests designed in such a way that minority children are disproportionately affected violate minority children's due process rights.²⁰³ Whether the discrimination is intentional or unintentional is immaterial.²⁰⁴ Florida mandated a uniform test without requiring either a uniform curriculum or uniform amounts of funding among school districts. Children from poorer school districts are more likely not to be taught some of the subjects tested on the competency test.²⁰⁵ Consequently, children from school districts which spend the least on education and cover the least material most often fail minimum competency tests.²⁰⁶ Since these children are also members of racial minority groups, the state's action must pass a strict scrutiny test: the state must have a compelling interest and must have taken the only solution available to achieve its purported goal.²⁰⁷ Florida cannot pass this

199. *Id.* at 183.

200. *Id.* at 183-85.

201. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

202. *Id.*

203. *See Hobson v. Hansen*, 269 F. Supp. 401, 443 (D.D.C. 1967). If minority children are put into classes for the retarded, or denied a high school diploma solely on the basis of one test's results, that test must not discriminate. *Id.* at 473-75. When test makers do not consider the cultural disadvantages minority children live with, the test fails to be a valid assessment of the child's ability. *Id.* at 479-81. To have a child suffer from the results of a poorly formulated test would result in a violation of the child's due process rights. *Id.* at 443.

204. *See id.* at 513-14.

205. *Debra P. v. Turlington*, 474 F. Supp. 244, 255-61, 264-67 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

206. *Id.* at 264-67.

207. *See Larry P. v. Riles*, 343 F. Supp. 1306, 1311 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). Where a school places substantial weight on a standardized test,

test.

State plans to implement competency testing programs usually result from good intentions. The competency tests are usually only part of a larger program designed to improve student achievement. These programs, however, are not the most efficient or least discriminatory methods available. States can always choose to increase spending on education, to investigate why minority students do poorly in school, or to ask local authorities which students they feel need extra aid. Test scores are not the only available criterion for assessing a student.²⁰⁸ Class performance and the quality of a student's work are also important.²⁰⁹ The Florida legislature picked a test that they knew minority children would score lower on than white children.²¹⁰

Not only must the test be fair, but a chance for children to appeal the results of their test is also necessary. Some state programs have been judged adequate mainly because of such an appeal process.²¹¹ When no such appeal process exists, the state has a greater burden of proving that testing programs having a disproportionate impact on minority students are not discriminatory.²¹² The burden increases in the absence of an appeal process because such a review policy would support the state's claim that the student's welfare is its main concern.²¹³

B. Past Challenges

Students faced with discriminatory standardized competency tests can challenge them in court. Tests judging students by impermissible criteria can be struck down for violating the students' due process and equal protection rights.²¹⁴ Challengers must be

and where that test has a disproportionate impact on minority students, it must meet the strict scrutiny standard under the equal protection clause. *Id.* at 1309. This heightened standard reflects the strong judicial and constitutional policies against racial discrimination. *Id.* It also acknowledges the positive duty of states to avoid racial imbalances in its institutions. *Id.* at 1310. Failure of the test challenged in *Turlington* results in the denial of a diploma. This result is similar to *Riles* where failure of the challenged test caused the student to be placed in a learning disability class. See *id.* at 1310-12.

208. See *Hobson v. Hansen*, 269 F. Supp. 401, 488 (D.D.C. 1967).

209. *Id.*

210. *Debra P. v. Turlington*, 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981).

211. See, e.g., *Riles*, 343 F. Supp. at 1313-15. Review policies and follow-up procedures tend to show concern for the students' results. *Id.*

212. *Id.*

213. *Id.*

214. See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401, 481-83, 492-93 (D.D.C. 1967) (I.Q. tests used to route children into vocational tracking programs violated children's due process and equal protection rights); *Larry P. v. Riles*, 343 F. Supp. 1306,

careful to focus the court's inquiry upon the test and its ability to achieve the state's objectives. If a state deprives a student of his or her diploma on the basis of one test, that test must be a fair and effective evaluation.

In *Debra P. v. Turlington*,²¹⁵ the district court on remand failed in part because it chose to dwell more upon the state's right to test the child rather than the discriminatory impact of the test itself.²¹⁶ A state should not be allowed to deprive certain children of an education and then punish them for lack of competency. Few could fail to commend Florida for its efforts to upgrade its schools. Nevertheless, the standardized test instituted because of those efforts violates a student's due process rights in two ways. First, the test itself, as composed, discriminates against minority youths by forcing them to guess an answer chosen by white middle-class test formulators as the single correct answer.²¹⁷ Second, these competency tests, since they are uniformly administered, place undue burdens on students from poorer school districts.²¹⁸ A study conducted by the State of Florida revealed that even four years *after* the institution of the test, some of the skills it tested were not being taught in all school districts.²¹⁹ To test even some children on subjects they have not had access to is patently wrong. Furthermore, when the penalty for failing such a test is the denial of a diploma, the test must be set aside as unconstitutional.

Evidence of the discriminatory nature of a test may be shown

1311-14 (N.D. Cal. 1972) (standardized tests used to place children in special education courses violated children's equal protection rights), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

215. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. 1981). The *Turlington* case has a rather complicated subsequent history. In 1979, the United States District Court for the Middle District of Florida found the SSAT II discriminatory, against Black students and enjoined the use of the test as a diploma sanction. *See Id.* at 269. That decision was affirmed in part and vacated in part by the United States Court of Appeals for the Fifth Circuit and remanded to the district court for a determination of whether the aggrieved students had an opportunity to learn the material covered on the test. *See* 644 F.2d at 406-08. On remand, the district court found that the students had such an opportunity, and consequently held the test to be instructionally valid. *See* *Debra P. v. Turlington*, 564 F. Supp. 177, 183-86 (M.D. Fla. 1983). The district court's decision on remand was affirmed on appeal. *See* *Debra P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984).

216. *See* 564 F. Supp. at 183-85. The Eleventh Circuit agreed, believing that even if the Black failure rate was caused by the present effects of past intentional racial segregation, "the test will help remedy those effects." 730 F.2d at 1415.

217. In its original opinion, the district court in *Turlington* stated this as one of the reasons for enjoining the use of the test. *See* 474 F. Supp. at 264-67.

218. This was another reason the *Turlington* district court originally found the test invalid. *See id.*

219. *See* *Turlington*, 730 F.2d at 1408 (citing a study by IOX Assessment Associates, a private consulting firm).

in several ways. The simplest method is outlined in *Larry P. v. Riles*.²²⁰ *Riles* involved the use of IQ tests by the San Francisco School District to classify children as mentally retarded and as a basis for placing them in learning disability classes.²²¹ The district court in *Riles* found that slightly more than twenty-eight percent of all students in the school district were Black.²²² It further found that Blacks were disproportionately over-represented in classes for the mentally retarded.²²³ In fact, sixty-six percent of all students in classes for the mentally retarded were Black.²²⁴ This disparity alone was sufficient to establish that a racial imbalance existed in the composition of such classes.²²⁵ The school district placed students in learning disability classes solely on the basis of IQ test results.²²⁶ This process of class formulation resulted in the over-representation of Black students in classes for the retarded. Due to this inequitable result, the *Riles* court ruled that the tests were prima facie discriminatory and prohibited their continued use.²²⁷

Similarly, the tests used by Florida and other states should be removed from use as penultimate guides for important decisions. The results from such exams continue to show a far greater failure rate for Black students.²²⁸ Since the students are denied their diplomas on the basis of one test, the use of the test would be prohibited under the analysis used in *Riles*.²²⁹ With no safeguards such as evaluations by teachers, opportunities to explain answers, or credit for other skills, the SSAT II discriminates against Flor-

220. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

221. *Id.* at 1311.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* A school district's lack of regard for racial imbalance can also be gleaned from follow-up practices. The state of Massachusetts has an elaborate appeal system for children who disagree with their assessment as learning impaired. *See id.* at 1313-14. Since San Francisco did not have this protective mechanism, the chances that its test was discriminatory were increased. *Id.* Similarly, Florida's lack of a review policy strengthens charges of discrimination.

226. *Id.* at 1312-15.

227. *Id.* at 1313-15. The district court's decision in *Riles* was affirmed by the United States Court of Appeals for the Ninth Circuit. *See* 502 F.2d 963 (9th Cir. 1974). The Ninth Circuit held that the district court's finding that IQ tests could not be used as the sole means for placing students in classes for the educable mentally retarded was not clearly erroneous. *Id.* at 965.

228. *See Turlington*, 564 F. Supp. at 186. Although Black scores in Florida have improved somewhat, the Black failure rate is still very high. Blacks comprise 57% of the twelfth graders who have not passed the test, while they constitute only 20% of Florida's student population. *Id.*

229. *See Riles*, 343 F. Supp. at 1311-15. Discriminatory results must be prohibited even if undertaken with good intentions.

ida's minority school children in the same way the IQ tests hurt the students in *Riles*. A test which can alter a child's life so radically must be a fair evaluation of that child's ability.²³⁰ The right to attend regular²³¹ classes and the right to graduate after completing a school district's coursework are substantially equivalent. In both *Riles* and *Turlington*, students were deprived of these rights for failing to pass a standardized test.²³²

Freedom from racially discriminatory tests is a fundamental right.²³³ Such tests deny children equal access to education.²³⁴ Once a state or municipality endeavors to provide education, it cannot deny that education to children because of their race.²³⁵ Whether intentional or not, competency tests do just that. The Florida exam therefore should be analyzed using the strict scrutiny standard under the equal protection clause.²³⁶ In light of Florida's reprehensible past discriminatory acts—segregated schools until 1971—²³⁷ and the known weaknesses of standardized tests, the SSAT II should be eliminated.

Many of the standardized tests' problems arise because they are written by psychologists rather than linguists or mathemati-

230. See *id.*

231. "Regular" here refers to mainstream classes, as opposed to those expressly for children with learning disabilities. See *id.*

232. See *id.*; *Turlington*, 474 F. Supp. at 244

233. The right to education is such that tests designed to deny minorities fair access are prohibited. See *Hobson v. Hansen*, 269 F. Supp. 401, 405-07, 474 (D.D.C. 1967).

234. *Id.* at 443.

235. *Id.* at 513-14.

236. For a discussion of the strict scrutiny standard and the circumstances in which a standardized test must withstand such heightened inquiry, see *supra* note 207 and accompanying text.

In *Riles*, the court stated that the particular standardized test used in that case must be "rationally related to the purpose of segregating students according to their ability to learn." 343 F. Supp. at 1314. In support of this standard, however, the court cited *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hobson*, 269 F. Supp. at 513, two cases that used the strict scrutiny standard. See 343 F. Supp. at 1309-10. This cited authority, coupled with the *Riles* court's demand that the state carry the burden of proving that the test does not discriminate against Blacks as an identifiable group, shows that the standard used was actually strict scrutiny. See *id.*

In *Turlington*, on the other hand, the district court used a rational basis standard which concentrated the analysis on whether the test was instructionally valid. See 564 F. Supp. at 180. This standard is inappropriate since the test deprives students of the right to graduate, a result similar to the test in *Riles* which kept students out of mainstream classes. Using the strict scrutiny standard, the *Turlington* court would have been forced to consider alternative measures to reform Florida's schools. Alternative reform measures exist that likely have a less discriminatory impact on minority students. Thus, under the strict scrutiny standard, these less discriminatory alternatives probably would have invalidated the Florida competency test.

237. See *Turlington*, 474 F. Supp. at 253.

cians.²³⁸ Because the tests' authors do not know all of the etymological possibilities, they do not realize that they are composing the exams in confusing, or even erroneous, ways.²³⁹ The words in minority dialects often have different meanings than those of "standard United States English."²⁴⁰ In one study, white middle-class British children—obviously English speaking—were given certain United States standardized tests, and their scores deviated from the test "norm" in the same way as United States minority groups' scores.²⁴¹ The tests are thus only accurate when given to a very narrow group—those students who have mastered white middle-class United States English. With no chance to explain their answers, children are denied diplomas for giving correct, or at least defensible, responses. Not only is this unfair, it defeats the basic purpose of such testing: identifying incompetent students.²⁴²

Surprisingly little attention has been paid to the ramifications of Florida's decision to impose a state-wide mandatory competency test while leaving control over schools in local hands. The Supreme Court has ruled that children's rights are not violated when they are required to attend school districts which spend less per pupil than wealthier neighboring districts.²⁴³ The situation presented in *Debra P. v. Turlington* raises new problems.²⁴⁴ There, students attend schools with greatly disparate facilities.²⁴⁵

238. The original formulators of these exams were all psychologists. Even today, psychologists tend to dominate those companies which sell standardized tests. William A. Mehrens & Irvin J. Lehmann, *Standardized Tests in Education* 65-69, 132-36 (1969).

239. Because of this, standardized tests often become a game of choosing the answer the test-makers want, not necessarily the one the student believes is correct. Strenio, Jr., *supra* note 6, at 76-77.

240. *Id.*

241. The Missouri Children's Picture Series test was given to middle-class children from England, Belgium, and Holland. When scored, it was found that Black children from the United States differed in the same direction from the white United States norm group as did the Europeans—all of whom were proficient in English. Jerome D. Pauker, *A Culture-assimilation Measure and Its Relationship to Intellectual Performance*, in *Mental Tests and Cultural Adaptation* 254 (1972).

242. See Fla. Stat. § 232.245(3) (1989).

243. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973). The Court held that there is no fundamental right to equality in public school education. *Id.* at 29-39. The plaintiffs claimed that their equal protection rights were violated by disparate school spending. *Id.* at 50-51. The Court did indicate, however, that an absolute deprivation might be an impairment of a fundamental right. See *id.* at 56-59. In *Debra P. v. Turlington*, the students were absolutely deprived of their diplomas—a symbol of education to employers and universities. 474 F. Supp. at 249.

244. Students are being tested on their knowledge of certain material, but given unequal opportunity to learn it. While Florida now has more state-wide input into text book ordering and curriculum, local school boards still make decisions. See 474 F. Supp. at 264.

245. See *Turlington*, 730 F.2d at 1408. Even as recently as 1984, the United States

All students must take a uniform exam that tests them on material which they allegedly have learned. Florida's own studies, however, show that not all school districts cover all of the subjects on the exam.²⁴⁶ To deprive students of equal access to a good education while penalizing them for failure to learn is not an effective solution to educational problems. If students are judged on a single standard, all must have equal access to a quality education.

Florida has begun to move toward educational equality. School book orders are beginning to be placed on a state-wide basis.²⁴⁷ Florida also has taken some preliminary steps to establish a uniform curriculum in its many school districts.²⁴⁸ Black students no longer will be forced to learn with pathetically inadequate tools.²⁴⁹ These reforms are a good start. A comprehensive test of literacy skills should not be implemented until these and other reforms are completed. Otherwise, we will continue to punish the victims of an inferior education under the guise of helping them.

V. Possible Solutions

If a state or school district insists on using standardized tests, several steps could reduce the chances of discriminatory results. More frequent testing would ensure student familiarity with the test and improve testing skills.²⁵⁰ It would also prevent a student from falling even further behind. Florida exposes students to only four basic skills exams between kindergarten and the twelfth grade.²⁵¹ This is inadequate to familiarize the student with these kinds of exams and makes it difficult for schools to identify those students in need of extra help. Helping students to improve should be the goal of any educational reform plan.

Standardized tests would also be less offensive if each student who failed the exam was given a chance to consult with a psychologist or teacher to explain his or her answers. A competency test should examine an individual's comprehension of a question and

Court of Appeals for the Eleventh Circuit was shown evidence that some of the school districts, especially those with a high rate of student failure, do not teach all of the information on the exam. *See id.*

246. *See id.*

247. School book orders are approved by the state. None of the texts ordered, however, contain all of the material tested on the exam. *See Turlington*, 474 F. Supp. at 264.

248. *See id.*

249. Nevertheless, if school districts spend different amounts on books, the quality and quantity will not be equal. *See id.*; *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973).

250. Goslin, *supra* note 91, at 61.

251. Morrison, *supra* note 6, at 11.

the deductive reasoning used in forming an answer.²⁵² As currently used, the failure of competency tests to consider this type of comprehension is one of the standardized exams' major flaws. The rewarding of fortuitous guesses is common. Students who logically reason out answers that are "incorrect" get no credit. This should not be allowed.

There are more appropriate ways of assessing a student's thought processes than through objective standardized tests. Essay or short answer exams provide a better indication of what a student really knows.²⁵³ With these alternative formats, "near miss" answers could be given partial credit. Illustrating the thought process of the students reduces any remaining problems with "subjective" grading. In addition, if students who failed the test were given an appeal process in which their exam could be re-graded by another teacher, the risk of subjective discrimination could be substantially reduced.

VI. Conclusion

State implementation of a more rigorous education system is generally a good thing. Students who graduate without basic skills are done a grave disservice. Competency tests are one way of addressing a school's ability to educate students. The standardized test, however, such as the one used by Florida, has clear discriminatory effects. As it currently stands, it must be eliminated because it violates the rights of minority students. Children have a constitutional right to racially nondiscriminatory testing.²⁵⁴ In addition, any test the government uses must have some rational relationship to a given state goal, such as educational reform.²⁵⁵ Competency tests which are used to deny high school diplomas punish the victim of an inadequate educational system. Access to higher education, jobs, and financial success often stems from a quality education. Employers usually accept a high school diploma

252. The Florida legislature expressed a desire to help children cope with real world problems. See Fla. Stat. §§ 299.55-57 (1977). Certainly seeing the child's deductive reasoning would help to achieve this.

253. See Strenio, Jr., *supra* note 6, at 292-95. In early 1989, as this article went to press, both ACT and SAT announced new plans to revise their exams. As a result of the revision process, the SAT could end up being an essay examination of verbal skills and may contain open-ended rather than multiple choice mathematics questions. Critics of the exams remain wary, however, and it is yet to be seen whether standardized testing reform can remove the racial inequities many see. See generally Edward B. Fiske, *More Sophisticated Skills Stressed In Changed College Entrance Test*, N.Y. Times, Jan. 3, 1989, at 1, col. 1.

254. See *Hobson v. Hansen*, 269 F. Supp. 401, 405-06 (D.D.C. 1967).

255. See *Larry P. v. Riles*, 343 F. Supp. 1306, 1309 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

as proof of basic skills. A state must use extreme caution when it moves to deprive students who have satisfied course work requirements on the basis of a single exam.²⁵⁶ Moreover, such tests are not reliable assessments of literacy or math skills.²⁵⁷

Today's standardized tests are the descendants of exams used to discriminate against Eastern European immigrants in the early part of the twentieth century.²⁵⁸ Those unable to achieve a certain score on IQ tests were deported by the thousands. To see such tricks repeated today is abhorrent. Passive acceptance of the denial of diplomas to minority children because of their failure to pass a faulty test is the worst kind of racism. In defining racism, Stokely Carmichael maintained that it was not enough to refrain from "bombing a Black church . . . or ston[ing], burn[ing] or rout[ing] out" Black families who move into a white neighborhood.²⁵⁹ Not being a racist sometimes includes being concerned enough to take action when "Black people [are] locked in dilapidated slum tenements, subject to the daily prey of exploitive slumlords, merchants, loan sharks and discriminatory real estate agents."²⁶⁰ The time has come to stop "pretend[ing] [we] do not know of this situation, or [that we are] in fact incapable of doing anything meaningful about it."²⁶¹ Competency tests present a threat to minority students. No one interested in the quality of education or basic fairness can ignore the tests' discriminatory results.

256. The denial of a diploma is certainly as detrimental and stigmatizing as being placed in classes for the learning disabled on the basis of a single standardized test score. The latter has been ruled an unconstitutional violation. See *Hobson*, 269 F. Supp. at 489.

257. See *supra* notes 153-83 and accompanying text.

258. See *supra* note 109.

259. Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* 4 (1967).

260. *Id.*

261. *Id.*