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Discriminatory Job Knowledge Tests, Police Promotions, and What Title VII Can Learn from Tort Law

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DISCRIMINATORY JOB KNOWLEDGE TESTS, POLICE PROMOTIONS, AND WHAT TITLE VII CAN LEARN FROM TORT LAW

MARK S. BRODIN

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MARK S. BRODIN*

Abstract: Nationally, the continued use of selection devices by police departments—such as multiple-choice examinations requiring memorization of police manuals—stifles advancement for a disproportionate number of otherwise qualified minority candidates, and hinders the desired diversification of the upper ranks. These exams have little to do with predicting success as a sergeant or other police supervisor. The traditional Title VII approach, a disparate impact challenge, has proven unsatisfactory given the relative ease with which the exams can be “content validated” in court. This Article proposes a new approach familiar to tort lawyers—the inference of intent from actions taken with foreseeable or inevitable consequences. When a police agency routinely administers multiple-choice exams, fully aware of the exclusionary impact on minorities, the results can no longer be deemed “unintentional,” and the matter should be treated as disparate treatment. Significantly, each U.S. Department of Justice report following the incidents of police killings of unarmed civilians in Ferguson, Chicago, Baltimore, and elsewhere, found poor supervision of line officers and lack of diversity in supervisory positions to be major contributing factors to these tragedies. Title VII of the Civil Rights Act of 1964, landmark legislation designed to open employment opportunities to minorities and women, is uniquely positioned to address the problem. But to do so, courts must disentangle these litigations from the hyper-technical world of test validation, and instead apply a common-sense definition of intentional discrimination as applied in tort litigation.

[W]hat the Court has said to employers . . . is that while you still can't commit blatant, obvious acts of discrimination against minorities and women, if you are sophisticated and discreet about it, we will look the other way. You cannot hang a “no blacks allowed” sign on your door, but if you're clever and come up with a standardized test or some other superficially neutral ruse that achieves exactly the same result, no one

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*will stand in your way. You can be a bigot, in other words, so long as you are a kind and gentle one.*¹

*It is clear that the employers around the country are increasingly sophisticated in the validation of tests . . . We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as a result of the validation of those tests. In other words, we do not see the kind of causal relation that I think, when the great — and I regard it as a great — new enforcement tool [Title VII] was discovered some years ago, we do not see quite the causal relationship we had expected to see . . . So if the commission, in effect, says to employers, as long as you validate your tests we're really not concerned about you anymore . . . it is saying that the presence of real people who are not in the work force, is not as important as making sure that the tests have been validated.*²

*Today, government employers as well as unions continue to extol the use of written merit exams as the best way to hire the most “qualified” persons for the job, notwithstanding the lack of evidence to support this. While the intent to discriminate may be absent, the exams continue to adversely affect persons of color in both police and fire departments.*³

INTRODUCTION

In the 1970s, as a staff lawyer with the Boston Lawyers' Committee for Civil Rights,⁴ I worked on several cases challenging the use of multiple-choice “job-knowledge” examinations for the promotion of public safety officers. They all fit a familiar pattern—near total exclusion of minority applicants, and no evidence showing that the devices could meaningfully predict successful job performance as a supervisor. Rather, these closed-book tests screen for the ability to memorize sections of police manuals,⁵

¹ 136 CONG. REC. 22,006 (1990) (statement of Rep. Owens) (debate over the Civil Rights Act of 1991).

² Barbara Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 40 n.62. (quoting comments of Chairwoman Eleanor H. Norton at the Equal Employment Opportunity Commission Meeting on December 22, 1977).

³ Norma M. Riccucci & Margaret Riccardelli, *The Use of Written Exams in Police and Fire Departments: Implications for Social Diversity*, 35 REV. OF PUB. PERS. ADMIN. 352, 353–54 (2015).

⁴ I had the pleasure to work with fellow Lawyers' Committee for Civil Rights (“LCCR”) staff lawyers Judy Tracy (then Bernstein) and Alan Jay Rom.

⁵ The questions are typically drawn from manuals on a reading list provided to test-takers in advance of the exams. See, e.g., *Lopez v. City of Lawrence*, 823 F.3d 102, 109–10 (1st Cir. 2016) (*Lopez II*), *aff'g* No. 07-11693-GAO, 2014 U.S. Dist. LEXIS 124139, at *37 (D. Mass. Sept. 5, 2014) (*Lopez I*). An example of the approach of these tests may be found in an announcement

and candidates for key supervisory positions requiring varied skills, abilities, and personal qualities are thus reduced to a single score. Although these cases often ended in consent decrees in which the appointing authorities agreed to validate subsequent exams (i.e., demonstrate that they reliably predict job performance),⁶ such commitments have very rarely been honored.⁷

These second-generation discrimination cases followed earlier ones that focused on entry-level hiring. Some of the minority preference orders that resulted are still in effect; others have expired as the department's minority representation at the patrol officer-level reached parity with the community's population.⁸

There are currently dozens of challenges to police promotional practices in Massachusetts.⁹ Two recent cases come to opposite results. The First Circuit Court of Appeals in *Lopez v. City of Lawrence* concluded that the statewide multiple-choice test for promotion to sergeant was "minimally valid," "albeit not by much," thus countering its undisputed exclusionary effect on minorities.¹⁰ In contrast in *Smith v. City of Boston*, the U.S. District Court for the District of Massachusetts held that virtually the same test, used to select and rank candidates for promotion to lieutenant, violated Title

directing applicants to the portions of the manuals they are expected to study and, in effect, memorize. See *infra* Appendix A, also available at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-7/brodin-appendices.pdf> [<https://perma.cc/LUF8-TPRE>].

⁶ See, e.g., *Mass. Ass'n of Afro-American Police v. Bos. Police Dep't*, 973 F.2d 18, 20 (1st Cir. 1992).

⁷ As of 1998, only one such exam had been validated as "fair." See *Bos. Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 15 (1st Cir. 1998). The Massachusetts experience is not unique. See *Johnson v. City of Memphis*, 770 F.3d 464, 467–68 (6th Cir. 2014) ("Despite the City's repeated assurances of adopting race-neutral promotional processes, . . . as of the mid-1990s, 'incredibly, the City continue[d] to make police and fire department promotions according to procedures that have not been validated as racially neutral.'" (quoting *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir.1994) (en banc))).

⁸ See *NAACP v. Beecher*, 504 F.2d 1017, 1022 (1st Cir. 1974) (finding multiple-choice exams for selection of firefighters discriminatory and non-job related); *Castro v. Beecher*, 334 F. Supp. 930, 943 (D. Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725 (1st Cir. 1972), *on remand*, 365 F. Supp. 655 (D. Mass. 1973) (holding a civil service examination discriminatory and non-job related for police officers).

⁹ See generally *Sullivan v. City of Springfield*, 555 F. Supp. 2d 246, 248–50 (D. Mass. 2008) (recounting the long history in Massachusetts); *Cotter v. City of Boston*, 323 F.3d 160, 160 (1st Cir. 2003) (finding that certain promotions of minorities did not violate equal protection); *Bos. Police Superior Officers Fed'n*, 147 F.3d at 13 (challenging a finding that the promotional exam was not fair); *Stuart v. Roache*, 951 F.2d 446, 446 (1st Cir. 1991) (addressing an equal protection challenge to promotional practices in Massachusetts); *Tatum v. City of Worcester Police Dep't*, No. 94-SEM-0589, 2006 WL 662739, at *4 (Mass. Comm'n Against Discrim. Mar. 6, 2006) (noting that Boston has a "problematic record in promoting minorities over a significant period of time").

¹⁰ *Lopez II*, 823 F.3d at 114.

VII as it rejected minority candidates at a disproportionate rate and could not be validated as predictive of job performance.¹¹

When I was approached about contributing to an amicus brief on behalf of the plaintiffs in *Lopez*, I was quite surprised to learn that police departments were *still* relying on selection devices that predictably produced nearly all white supervisory ranks. This form of screening had long been discredited by courts¹² and experts.¹³ The City of Boston itself acknowledged the illegality of its selection processes in a 2002 brief to the First Circuit¹⁴ (defending its decision to deviate from strict rank order promotions in order to reach additional minority candidates):

The Boston Police Department has a long history of discrimination in its hiring and promotional practices, a history well documented in a number of decisions of this Court and of the District Court. There was undisputed evidence before the District Court that despite the best efforts of the Department's current leadership, the effects of the Department's past discrimination continued to be felt through the period at issue, including a continuing gross statistical disparity between the selection percentage of black officers and the selection percentage of white officers.

¹¹ 144 F. Supp. 3d 177, 177 (D. Mass. 2015), *aff'd on reconsideration*, 267 F. Supp. 3d 325 (D. Mass. 2017).

¹² *See, e.g.*, *Nash v. Consol. City of Jacksonville*, 837 F.2d 1534, 1538–39 (11th Cir. 1988), *vacated by* 490 U.S. 1103 (1989), *op. reinstated on remand*, 905 F.2d 355 (11th Cir. 1990) (“The best that can be said of the City’s [multiple-choice] test based on the evidence at trial was that it may have been valid with respect to reading materials provided to the applicants. This is immaterial, however, to whether the content of the questions related to the performance of the job [of fire lieutenant].”); *Vulcan Pioneers v. N.J. Dep’t of Civil Serv.*, 625 F. Supp. 527, 539 (D.N.J. 1985), *aff’d*, 832 F.2d 811 (3d Cir. 1987) (noting that multiple-choice tests are “more probative of the test-taker’s ability to recall what a particular text stated on a given topic than of his firefighting or supervisory knowledge or abilities”).

¹³ *See, e.g.*, *THE BLACK-WHITE TEST SCORE GAP 57–58* (Christopher Jencks & Meredith Phillips eds., 1998) (discussing how the selection devices used hurt minorities); Winfred Arthur, Jr. et al., *Multiple-Choice and Constructed Response Tests of Ability: Race-Based Subgroup Performance Differences on Alternative Paper-and-Pencil Test Formats*, 55 PERS. PSYCHOL. 985, 991–92 (2002) (exploring the differences in testing scores caused by the types of exams employed by many police departments); George C. Thornton III & David M. Morris, *The Application of Assessment Center Technology to the Evaluation of Personnel Records*, 30 PUB. PERS. MGMT. 55, 56 (2001) (“The written examination certainly provides the best way to evaluate whether a candidate knows the rules of the organization and conceptual principles of policing. That information is a basic, necessary starting point for good supervision, but it is not sufficient for success in police administration and leadership.”); Neal Schmidt et al., *Adverse Impact and Predictive Efficiency of Various Predictor Combinations*, 82 J. APPLIED PSYCHOL. 719, 719–29 (1997) (discrediting the selection devices used by many police departments).

¹⁴ *See generally* Brief of Appellee the City of Boston, *Cotter*, 323 F.3d 160 (Nos. 02-1404, 02-1458, 02-1459), 2002 WL 34217275.

Moreover, there was undisputed evidence that the 1996 examination on which the promotions were based was not validated and had an adverse impact on African-American officers taking the test.

....

It is also undisputed that the Commissioner had real and legitimate concerns that . . . individual minority officers affected by the promotional process, or others would bring suit against the City and the Department if promotions were made in strict rank order. Given the undisputed evidence of adverse impact, such litigation would have been meritorious.¹⁵

Continued reliance (*à la Ground Hog Day*)¹⁶ upon rote memory tests has resulted in the severe underrepresentation of minorities in supervisory ranks in departments like Boston, where less than one-fifth of such positions are filled by minorities.¹⁷ Chicago too has what one federal judge described as a “tortured history of challenges to the CPD’s promotion processes [primarily exams] stretch[ing] back as far as 1971.”¹⁸ And, in apparent frustration, the Sixth Circuit Court of Appeals wrote of the Memphis Police Department:

The City’s promotional processes have engendered controversy for nearly forty years, prompting numerous lawsuits alleging racial and gender discrimination by such parties as the United

¹⁵ *Id.* This despite a Consent Decree entered in 1980 and extended to the 1990s requiring that promotional examinations be validated according to the EEOC’s Uniform Guidelines (29 C.F.R. § 1607.1 (2012)). See *Mass. Ass’n of Afro-American Police*, 780 F.2d at 6.

¹⁶ See generally *GROUNDHOG DAY* (Columbia Pictures 1993) (a 1993 movie starring Bill Murray and Andie MacDowell, where the main character wakes up each day only to experience an exact repetition of the day before).

¹⁷ Isaiah Thompson, *Boston Police Diversity Hitting Old Roadblocks: Promotions*, WGBH (July 12, 2016), <https://news.wgbh.org/2016/07/12/local-news/boston-police-diversity-efforts-hitting-old-roadblock-promotions> [<https://perma.cc/F9SF-Q3FW>]. The percentage of minorities in Massachusetts serving as sergeant varies between one-half and one-third their percentage in the entry-level officer ranks. See Brief of Amici Curiae Massachusetts Ass’n of Minority Law Enforcement Officers, NAACP-New England Area Conference, Urban League of Eastern Massachusetts & Professor Mark Brodin in Support of Plaintiffs-Appellants at 8, *Lopez II*, 823 F.3d 102 (No. 14-1952), 2015 WL 1754366 (presenting statistics regarding the presence of minorities in different supervisory roles throughout Massachusetts). The City of Worcester did not promote a minority to sergeant until 2001, and only four of fifty-two were promoted after. Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 7, *Lopez I*, No. 07-11693-GAO.

¹⁸ *Barnhill v. Chi. Police Dep’t*, 142 F. Supp. 2d 948, 950 (N.D. Ill. 2001). The history began with a ruling in 1976 that the sergeant’s exam discriminated against African-Americans, Hispanics, and women. *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976); see also *Allen v. City of Chicago*, 351 F.3d 306, 307 (7th Cir. 2003) (explaining the history of remedial measures in Chicago since 1976).

States Department of Justice, the Afro-American Police Association, and white and minority officers. . . . Despite the City's repeated assurances of adopting race-neutral promotional processes, we observed that, as of the mid-1990s, "incredibly, the City continue[d] to make police and fire department promotions according to procedures that have not been validated as racially neutral."¹⁹

A public administration study confirms that "[w]ritten exams have historically been an obstacle for persons of color," perhaps "the biggest obstacle for police and fire departments to achieve social diversity based on race and ethnicity."²⁰ Yet there is little incentive to abandon them, given their low cost and ease of administration,²¹ as well as support from police unions.²²

¹⁹ *Johnson*, 770 F.3d at 467–68.

²⁰ Riccucci & Riccardelli, *supra* note 3, at 352–53, 363. As to the reasons minorities have typically underperformed on these exams, the factors include educational and economic inequalities, as discussed below in Part IV. There are certainly other obstacles to minority advancement, notably the absolute veterans' preference, which has historically benefitted white applicants. and the bypassing of minority candidates for questionable reasons. See Jan Ransom, *Rejected Boston Police Candidate Challenges Department's Hiring Decision*, BOS. GLOBE, Apr. 8, 2017, at A4 (discussing a potential candidate's challenge to the hiring process in Boston); Jan Ransom, *At BPD, Diversity Elusive: Veterans Preference Complicates Hiring*, BOS. GLOBE, Mar. 28, 2017, at A1. (discussing how the veteran's preference has benefitted white applicants and hurt minorities).

²¹ The test consulting firm of Morris & McDaniel emphasizes the cost can be under \$20 per candidate. See *FDLE Approved CJBAT Examinations*, MORRIS & MCDANIEL, INC., <http://www.morrisandmcdaniel.com/pages/fdle.htm> [<https://perma.cc/R74H-4XHU>]. Although a Massachusetts police department can opt to utilize a custom-made exam, the municipality must bear the costs. This amounted to \$1.3 million for a 2002 multi-component exam developed for Boston. *Smith*, 144 F. Supp. 3d at 189. Cost is of course no legal justification for continuing practices that unfairly exclude protected groups. See Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 320 (1987) (noting that cost should not justify testing practices that exclude minorities); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 370–71, 371 n.454 (2003) (discussing the use of cost as a justification for potentially discriminatory testing methods). And, looking simply at out-of-pocket expense ignores the hidden costs of promoting individuals who are ill-suited to the position and likely to fail. As Susan Strum and Lani Guinier put it:

Standardized testing is more efficient if efficiency is measured only in the short run and in relation to the cost of the enterprise. However, this narrow and static definition of efficiency is short-sighted and counterproductive. An investment of resources up front has the potential to enhance the overall productivity of the organization, both by identifying more productive individuals and by enabling the institution to adapt better to its changing environment.

Susan Strum & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Model*, 84 CAL. L. REV. 953, 1003 (1996). Moreover, cities may have to spend millions of dollars defending these exams in court. NYC paid \$98 million in back wages and damages to minorities whose fire careers were delayed or thwarted. See DAVID GOLDBERG, *BLACK FIREFIGHTERS AND THE FDNY 2* (Heather Ann Thompson et al. eds., 2017). Budgetary constraints were explicitly a basis for the District Court's upholding of a job knowledge test in the Jackson Mississippi police department. See *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 742 (S.D. Miss. 2003).

Thus, what began decades ago as well-intended civil service reform directed at patronage hiring²³ has now calcified into a rigid regime of standardized testing with little if any connection to the jobs in question and with dramatic exclusionary results—“a protected enclave for white ethnics,” as one sociologist has described it.²⁴

The unfortunate consequences of these one-dimensional sorting devices extend far beyond the minority candidates unfairly denied advancement. Communities are policed by departments that do not reflect their demographics, and the police may be seen as an occupying force in the neighborhood.²⁵ Former Attorney General Eric Holder responded to the police shooting of Michael Brown in Ferguson by urging that “police forces should reflect the diversity of the communities they serve.”²⁶

²² See Riccucci & Riccardelli, *supra* note 3, at 359–60 (noting that labor unions may contribute to the use of the multiple-choice exams); see also GOLDBERG, *supra* note 21, at 7 (discussing institutional approval of these types of exam in the FDNY).

²³ See LEAGUE OF WOMEN VOTERS OF MASS., *THE MERIT SYSTEM IN MASSACHUSETTS: A STUDY OF PUBLIC PERSONAL ADMINISTRATION IN THE COMMONWEALTH* 3–5 (1961).

²⁴ Kelefa Sanneh, *Color Corrected: Is ‘Diversity’ an Improvement on Affirmative Action, or the End of it?*, *NEW YORKER*, Oct. 9, 2017, at 74 (quoting Roger Waldinger). The exclusionary effect of standardized testing is of course widespread in our society. See, e.g., Stephanie Elbert, *Diversity Gap at Boston Latin Proving Stubborn*, *BOS. GLOBE*, May 21, 2017, at A1 (explaining that minorities are underrepresented at exam schools). Would law schools be comfortable admitting students in rank order of their LSAT scores, without looking at the applicant’s GPA, work experience, or personal essay?

As observed by Kingsley R. Browne:

In applying anti-discrimination laws, the courts must bear in mind that separating the competent from the incompetent, the highly qualified from the minimally qualified, the minimally qualified from the unqualified, all require human judgment. . . . Subjectivity does not imply arbitrariness. . . . [P]eople do not ordinarily make decisions in an entirely quantifiable way. . . . Deciding which applicant to hire or which employee to promote is necessarily a subjective process.

Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 *CASE W. RES. L. REV.* 287, 336–37 (1993).

²⁵ See MALCOLM D. HOLMES & BRAD W. SMITH, *RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA* 75 (2008) (noting the potential effects of police forces that greatly differ in ethnicity from their communities); Chris Hayes, *Policing the Colony: From the Revolution to Ferguson*, *THE NATION*, Apr. 17, 2017, at 16–17 (explaining how the racial differences between the community and the police force exacerbated problems in Ferguson).

²⁶ Eric H. Holder, Jr., Opinion, *From Eric Holder: A Message to the People of Ferguson*, *ST. LOUIS POST-DISPATCH*, Aug. 20, 2014, at A19; see also U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 88–89, 95–96 (Mar. 4, 2015) [hereinafter *FPD DOJ REPORT*], https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/9SED-VJZU>] (identifying lack of diversity as a critical factor in community distrust). For example:

The Dallas suburb where a white police officer shot and killed a 15-year-old black youth as he left a party has a population that is just 20 percent white but a police de-

It is the thesis of this Article that the promise of the landmark Civil Rights Act of 1964, Title VII of which broadly prohibits workplace discrimination, has been betrayed by courts all too ready to validate dubious testing devices²⁷ and to defer to public safety employers who resist less discriminatory and more job-related alternatives.²⁸ Where a discriminatory test is found to violate Title VII because it cannot be validated, liability and appropriate remedies follow. But where the test passes the low validation bar, even if in a long line of such devices *with predictable, virtually inevitable* exclusion of minorities, current Title VII jurisprudence provides no relief.

I propose a fresh approach deriving from tort and criminal law principles—the drawing of an inference of discriminatory intent. All parties in the *Lopez v. City of Lawrence* litigation agreed that the adverse impact of the examination was “significant,”²⁹ as it had been on *all* previous such exams. Indeed the District Court acknowledged that “[i]t is widely recognized among organizational psychologists, including the four experts who testified at trial, that minority candidates as a group tend to perform less well relative to non-minority candidates on written multiple-choice examinations such as [those administered by the Boston Police Department].”³⁰ The District Court further acknowledged that “experience has demonstrated that in the aggregate the use of written exams alone tends to have an adverse impact on minority applicants for promotion.”³¹ This confirms “a consensus in the scholarly literature that as a statistical matter, a [test of that kind] is likely to have something approaching one standard deviation of disparate racial impact on Blacks.”³²

In tort and criminal law, where actors are deemed *to intend* the foreseeable consequences of their actions,³³ such repetitive conduct would likely be considered *intentional*. Courts have often characterized employment

partment that’s 80 percent white. . . . “When you have a police force that’s completely the opposite the makeup of the town, I do think it’s a problem,” [the youth’s family lawyers] said.

Most Officers in Town Where Black Teen Was Slain Are White, BOS. GLOBE, May 4, 2017, at A3.

²⁷ See *infra* notes 157–198 and accompanying text (critiquing the courts’ validation approach).

²⁸ See *infra* notes 157–198, 233–272 and accompanying text (arguing that the courts’ approach defers to public safety employers).

²⁹ *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *37.

³⁰ *Id.* at *27–28. One expert testified that “there will be continuing adverse impact in the promotional decisions that are based on the test scores if the system doesn’t change.” Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 17, *Lopez I*, No. 07-11693-GAO.

³¹ *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *63.

³² Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2159 (2013).

³³ See *infra* notes 233–270 and accompanying text (discussing the potential role intent can play in Title VII).

discrimination claims as tort actions,³⁴ and this concept had been imported into civil rights law in many other contexts.³⁵ Police departments, like Boston's, that for years have systematically excluded minorities from promotion by way of job knowledge exams would properly be deemed to have *intended* that result, and meaningful Title VII remedies would follow accordingly.³⁶ "Evidence of historical discrimination [has long been deemed] relevant to drawing an inference of purposeful discrimination."³⁷

Additionally, *Rex v. Smith*, the Brides-in-the-Bath case tried at London's Old Bailey in 1915 (and featured in most Evidence casebooks), teaches the importance of looking at the bigger picture as opposed to a myopic view of discrete events. Mr. Smith would likely have been acquitted of the murder of his wife on his plausible defense that she had accidentally drowned in their bathtub. The court wisely allowed the jury to learn that Smith's *two other wives* had also drowned in their baths, "accidentally" as Smith would have it. The design that so clearly emerged from the bird's-eye view led to a conviction in a matter of minutes.³⁸ This is the wider perspective urged here.

I begin with an exploration of the critical importance of effective police supervision, and the attributes we seek in a police supervisor, then take a close look at job knowledge exams and their severe limitations.³⁹ I follow with a survey of the exam validation process and its severe dilution in recent years, using *Lopez* as a case study in the limits of Title VII test challenges.⁴⁰ After discussing the unduly narrow interpretation courts have given to the less discriminatory alternative requirement, which should result in displacement of job knowledge tests with devices that more reliably predict

³⁴ See generally L. Camille Hebert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345 (2014) (discussing sexual harassment in the workplace as a tort); Sandra F. Sperino, *Discrimination Law: The New Franken-Tort*, 65 DEPAUL L. REV. 721 (2016) (considering discrimination under tort law); Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107 (2014) (using tort law to analyze discrimination claims) [hereinafter Sperino, *Let's Pretend Discrimination Is a Tort*]; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012) (looking at discrimination through the lens of a tort).

³⁵ See *infra* notes 233–272 and accompanying text.

³⁶ As was observed in another context involving race discrimination, "[o]ne who is stumbled over often enough may, understandably, notice that these cumulative impacts bear a certain functional resemblance to kicks." Kenneth Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977).

³⁷ *Rogers v. Lodge*, 458 U.S. 613, 625 (1982).

³⁸ *Rex v. Smith*, 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915).

³⁹ See *infra* notes 42–156 and accompanying text (discussing the qualities required to make an effective police supervisor and critically exploring the job examinations used in hiring these supervisors).

⁴⁰ See *infra* notes 157–232 and accompanying text (analyzing the *Lopez* litigation).

success as a supervisor, I conclude with a proposal to expand the scope of Title VII liability and remedies in these cases by importing basic tort and criminal law understandings of “intent.”⁴¹

I. THE CRITICAL IMPORTANCE OF SELECTING SKILLED POLICE SUPERVISORS

As in any organization, effective supervision is a key to success of the enterprise. This is particularly the case with paramilitary agencies like police departments. The investigative reports prepared by the United States Department of Justice (DOJ) between 2015 and 2017 following the highly-publicized police shootings in several of our cities focus needed attention on this fact:

It has long been recognized that first-level supervisors, through their action or inaction, profoundly affect the performance of the officers under their command. In the patrol setting, sergeants are most directly involved in setting the tone of policing on the street. Sergeants who take a lax approach to supervision foster an environment in which mediocrity and misconduct flourish.⁴²

The Report on the Ferguson Police Department (“FPD”) exposed the failures of supervision of line officers, especially with regard to “constitutional and other legal restrictions on officer action, as well as additional factors officers should consider before taking enforcement action (such as police legitimacy and procedural justice considerations).”⁴³ DOJ observed:

The recommendations set out here cannot be implemented without dedicated, skilled, and well-trained supervisors who police lawfully and without bias. . . . FPD should: Ensure that an adequate number of qualified first-line supervisors are deployed in the field to allow supervisors to provide close and effective supervision to each officer under the supervisor’s direct command, provide officers with the direction and guidance necessary to im-

⁴¹ See *infra* notes 233–272 and accompanying text (proposing the use of tort and criminal law definitions of intent by the courts to resolve the problems of discriminatory testing).

⁴² U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 106 (Jan. 13, 2017) [hereinafter CPD DOJ REPORT], <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/2SFD-BXZN>].

⁴³ FPD DOJ REPORT, *supra* note 26, at 95.

prove and develop as officers, and to identify, correct, and prevent misconduct.⁴⁴

With particular pertinence to this paper, DOJ concluded:

There are widespread concerns about the lack of diversity, especially race and gender diversity, among FPD officers. FPD should modify its systems for recruiting hiring and promotion to: Ensure that the department's officer hiring and selection processes include an objective process for selection that employs reliable and valid selection devices that comport with best practices and federal anti-discrimination laws [and] implement validated pre-employment screening mechanisms to ensure temperamental and skill-set suitability for policing.⁴⁵

In finding that the Baltimore Police Department ("BPD") "has engaged in a pattern or practice of serious violations of the U.S. Constitution and federal law that has disproportionately harmed Baltimore's African-American community and eroded the public's trust in the police,"⁴⁶ DOJ pointed to "deficient policies, training and accountability systems," as well as "insufficient oversight from supervisors."⁴⁷ In some cases, unconstitutional stops resulted from superior officers' explicit instructions:

During a ride-along with Justice Department officials, a BPD sergeant instructed a patrol officer to stop a group of young African-American males on a street corner, question them, and order them to disperse. When the patrol officer protested that he had no valid reason to stop the group, the sergeant replied, "[t]hen make something up." This incident is far from anomalous.⁴⁸

⁴⁴ *Id.*

⁴⁵ *Id.* at 95–96.

⁴⁶ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Finds a Pattern of Civil Rights Violations by the Baltimore Police Department (Aug. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> [<https://perma.cc/4ABU-9TTP>].

⁴⁷ U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE POLICE DEPARTMENT 5, 10 (Aug. 10, 2016) [hereinafter BPD DOJ REPORT], <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/3TZT-5WNC>].

⁴⁸ *Id.* at 29. A lieutenant portrayed in *The Wire*, the highly acclaimed real-life HBO drama about policing in Baltimore, arrived at the scene where a black teenager had been brutally assaulted by a white officer without any justification. The following conversation ensued:

Lieutenant: Now tell me, who cold-cocked the kid?

Officer: Me.

Lieutenant: Why?

Officer: He pissed me off.

....

[After an unlawful stop and beating of a civilian, t]he sergeant who responded to the scene “confirmed that the involved officers tased the man twice and hit him in the face with their fists,” yet the sergeant’s report of the incident concluded that the “officers showed great restraint and professionalism...” [Further, w]e found evidence that BPD supervisors have explicitly condoned trespassing arrests that do not meet constitutional standards, and evidence suggesting that trespassing enforcement is focused on public housing developments. A shift commander for one of BPD’s districts emailed a template for describing trespassing arrests to a sergeant and a patrol officer. The template provides a blueprint for arresting an individual standing on or near a public housing development who cannot give a “valid reason” for being there—a facially unconstitutional detention. Equally troubling is the fact that the template contains blanks to be filled in for details of the arrest, including the arrest data and location and the suspect’s name and address, but does not include a prompt to fill in the race or gender of the arrestee. Rather, the words “black male” are automatically included in the description of the arrest.⁴⁹ The supervisor’s template thus presumes that individuals arrested for trespassing will be African American.⁵⁰

DOJ determined that “BPD supervisors conduct minimal substantive review of officers’ justifications for stops, searches, and arrests,” and “almost universally sign off on the bases for stops and searches—even where officers describe facially unlawful activity.”⁵¹ BPD supervisors viewed their role “as merely documenting officer activity, not reviewing it for compliance with policy and law.”⁵² The result is “overwhelming statistical evi-

Lieutenant: No, Officer Pryzbylewski, he did not piss you off. He made you fear for your safety and that of your fellow officers. I’m guessing now, but maybe he was seen to pick up a bottle and menace officers Hauk and Carver both of whom had already sustained injury from flying projectiles. Rather than use deadly force in such a situation maybe you elected to approach the youth, ordering him to drop the bottle. Maybe when he raised the bottle in a threatening manner you used a [flashlight], not the handle of your service weapon to incapacitate the suspect. *Go practice.*

The Wire: The Detail (HBO television broadcast June 9, 2002).

⁴⁹ See *infra* Appendix B, also available at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-7/brodin-appendices.pdf> [<https://perma.cc/LUF8-TPRE>].

⁵⁰ BPD DOJ REPORT, *supra* note 47, at 30, 37.

⁵¹ *Id.* at 44.

⁵² *Id.* at 45.

dence of racial disparities in BPD's stops, searches, and arrests."⁵³ In some cases, BPD supervisors instructed their subordinates to specifically target African-Americans. Even when individuals formally complain about racial bias, "BPD supervisors almost universally misclassify the complaint as minor misconduct—such as discourtesy—that does not reflect its racial elements."⁵⁴

An officers' use of force, even deadly, is rarely monitored:

One sergeant informed us during an interview that judging an officer's tactics is simply not part of a use of force investigation; he did not deem it to be his job to "second-guess" an officer's tactics. This is a failure in supervision—it is a sergeant's job to mentor officers in areas where they may benefit from additional guidance. The sergeant's statement here reflects a lack of understanding of the role of a supervisor, and indicates a Departmental failure to train sergeants on how to be effective supervisors.⁵⁵

DOJ found in fact that the BPD "fails to adequately supervise its officers:"⁵⁶

This lack of supervision manifests itself in multiple ways, including a failure to guide officer activity through effective policies and training; a failure to collect and analyze reliable data to supervise officer enforcement activities; and the lack of a meaningful early intervention system (EIS) to identify officers who may benefit from additional training or other guidance to ensure that they do not commit constitutional violations. . . . In an agency of BPD's size, command-level and supervisory training is critical to ensuring that the values of the agency are reinforced by its leaders on a consistent, day-to-day basis.⁵⁷

DOJ similarly attributed the widespread unlawful use of excessive (often deadly) force in the Chicago Police Department ("CPD") particularly directed at minorities, to "a critical failure of leadership at the first line of supervision within CPD."⁵⁸ The City has paid over *half a billion* dollars to settle police misconduct cases since 2004, but the offending officers have

⁵³ *Id.* at 48.

⁵⁴ *Id.* at 66.

⁵⁵ *Id.* at 106.

⁵⁶ *Id.* at 128.

⁵⁷ *Id.* at 128, 133.

⁵⁸ CPD DOJ REPORT, *supra* note 42, at 106.

rarely been disciplined⁵⁹ and the accountability structure is completely dysfunctional.⁶⁰

“Good supervision,” DOJ continues, “would correct improper arrests by an officer before they became routine,”⁶¹ yet sergeants played no role in reviewing use of force by CPD officers, thus contributing to the “pattern or practice of unconstitutional force.”⁶²

[W]ith notable exceptions, supervisors do not lead. . . . [S]ergeants are “not there to ruffle any feathers.” Rather than ensuring that officers under their watch are policing constitutionally, many sergeants instead focus on keeping their subordinates out of trouble when there may be reason for discipline. Supervisors do not review the personnel records of the officers they are supervising, either because they do not know how, they do not have access to the information, or they do not see the value in doing so. . . . [Supervisors] are more concerned with being “friends” with their subordinates than providing adequate supervision [and] stay “too close” to their former peers after being promoted.⁶³

“Dedicated, highly qualified supervisors are vital to ensuring CPD officers are able to police safely while valuing and respecting the rights of all community members,” the DOJ concluded, “but under CPD’s current promotions system, officers can be promoted to detective, sergeant, or lieutenant based on test scores or evaluation of other merit-based criteria.”⁶⁴ DOJ recommended that “[p]romotional exams must be reviewed regularly to ensure they are fair and lawful.”⁶⁵ The problems are traced directly back to the selection process:

In Chicago, a lack of transparency around promotional systems and decisions, and years of litigation regarding CPD’s promotion process, have created a narrative among the rank-and-file that CPD does not value good leadership, and that current leaders are unqualified to lead. Despite attempts at reform, officers we interviewed continue to view the promotions system with skepticism, which has decreased officer morale and undermined effective supervision. CPD’s promotions system should be regularly reviewed, and re-

⁵⁹ Lydialyle Gibson, *Policing the Police*, ABA J., Sept. 2016, at 60.

⁶⁰ CPD DOJ REPORT, *supra* note 42, at 46–47.

⁶¹ FPD DOJ REPORT, *supra* note 26, at 22.

⁶² CPD DOJ REPORT, *supra* note 42, at 44, 105.

⁶³ *Id.*

⁶⁴ *Id.* at 13.

⁶⁵ *Id.*

vised if necessary, with the aim of increasing transparency and ensuring the promotion of candidates who will make CPD better able to police effectively and respectfully, while continuing to abide by court orders put in place to ensure that candidates are not unlawfully excluded from promotions on the basis of race or sex.⁶⁶

As a Boston Police Commissioner has testified, “[t]he sergeant’s position is really where the rubber hits the road as far as supervising individuals, and it’s really the most important link.”⁶⁷ A police management manual agrees:

[T]he first-line supervisor plays an indispensable role in the enforcement of American law Upon them rests most of the responsibility for providing the cohesive force that wields the working force into a well-functioning, smoothly operating unit. No matter how capable the leaders are at or near the top level of management, they will operate in a near vacuum if wise leadership is not provided at the operational level where the day-to-day work is done The supervisory officer must be adept at applying the principles of wholesome human relations with common sense so that he can best integrate the needs of employees with the goals of management.⁶⁸

In sum, selection of the supervisors of police officers in our communities is far too important to be left to the vagaries of a dubious job knowledge exam. Yet in each of the troubled departments investigated, as in Boston, these exams continue to play the determinative role in who becomes a first-line supervisor. Promotion to sergeant in Baltimore requires passing a qualifying written test before moving on to an oral exam.⁶⁹ Ferguson’s selection process also begins with a written exam followed by a citizen oral interview board, a law enforcement oral board, a problem-solving exercise, and finally an interview with the Chief.⁷⁰ Candidates in Chicago

⁶⁶ *Id.* at 129.

⁶⁷ Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 8, *Lopez v. City of Lawrence*, No. 07-11693-GAO (D. Mass. Sept. 5, 2014) (*Lopez I*) (Testimony of Commissioner Edward Davis); see also U.S. DEP’T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, HOW POLICE SUPERVISORY STYLES INFLUENCE PATROL OFFICER BEHAVIOR, at ii (2003), <https://www.ncjrs.gov/pdffiles1/nij/194078.pdf> [<https://perma.cc/92T9-5F7D>] (noting that studies find that a supervisor’s behavior may heavily impact the behavior of his or her subordinates).

⁶⁸ NATHAN F. IANNONE ET AL., SUPERVISION OF POLICE PERSONNEL, at viii, 1–2 (2001).

⁶⁹ City of Baltimore, Dep’t of Human Res., Promotion Job Poster (Mar. 2013) (on file with author).

⁷⁰ City of Ferguson, Office of the Chief of Police, Promotion Job Poster (Dec. 2012) (on file with author).

must similarly pass a multiple-choice qualifying exam, but in recognition of its limitations, an alternative process was instituted for thirty percent of the promotions “to identify CPD members with supervisory potential who do not necessarily score well on promotional exams, given that previous promotional exams had an adverse impact on minority eligibility for promotions.”⁷¹

II. WHAT WE WANT IN A POLICE SUPERVISOR: KNOWLEDGE, SKILLS, AND CHARACTER

It is universally recognized that “[b]eing an effective [police] supervisor or manager requires more than ‘book smarts’; candidates must be able to effectively manage real world situations requiring interactions with others.”⁷² What are the requisite attributes for success in such a position?⁷³

As a deputy chief of police stated, “you can have all the skills and knowledge of a great supervisor, but you’ll struggle without the right people skills.”⁷⁴ “It makes sense,” he asserts, “to place primary reliance on past performance evaluations to assess how the candidate functions within the unit.”⁷⁵ Good judgment under stress is best assessed through “in-basket” exercises that present hypotheticals requiring a recommended course of action.⁷⁶

Police supervisors require “good management skills, including the ability to motivate employees, and to communicate information between

⁷¹ CPD DOJ REPORT, *supra* note 42, at 130.

⁷² *Public Safety Promotional Testing*, PSI SERVS. LLC, <https://www.psonline.com/talent-measurement/public-safety/promotional-testing/#tktest>: [<https://perma.cc/2UWR-A2EL>]; *see also* PAUL M. WHISENAND, SUPERVISING POLICE PERSONNEL, at viii (2001) (discussing the skills needed by supervisors).

⁷³ The Chicago P.D.’s long list of skills, abilities, and personal characteristics for its supervisors includes: Analytical Thinking and Problem Solving, Judgment and Decision Making, Written and Oral Communication, Interpersonal Relations, Coaching and Developing Others, Resolving Conflicts and Negotiating with Others, Open-Mindedness, Leadership, Planning and Organizing, Professional Orientation and Commitment, Personal Integrity, Initiative and Self Development, Stress Tolerance, Adaptability, and Dependability. CHI. POLICE DEP’T, LIEUTENANT PROMOTIONAL PROCESS: WRITTEN JOB KNOWLEDGE (QUALIFYING) EXAMINATION, ORIENTATION, AND PREPARATION GUIDE 2–4 (2014).

⁷⁴ Interview with Gary Gasseling, Deputy Chief of Police, Eastern Washington University (Nov. 15, 2016) (on file with author). Mr. Gasseling is a former Washington State Patrol Officer and SWAT Team member.

⁷⁵ *Id.*

⁷⁶ *Id.* Regarding such “judgment” questions, a testing expert cautioned that, “there is certainly no reason to believe that a person taking this test will experience the same emotions and really relive the same experience if he were actually confronted with the situation. So, what he may say he would do under these circumstances may be vastly different from what he would actually do.” *Guardians Ass’n of NYPD v. Civil Serv. Comm’n of City of N.Y.*, 431 F. Supp. 526, 544 (S.D.N.Y.), *vacated and remanded*, 562 F.2d 38 (2d Cir. 1977).

ranks.”⁷⁷ Communication skills are key.⁷⁸ This is particularly true as many departments move towards a community policing and de-escalation model.⁷⁹ Training subordinates is a vital function performed by sergeants, and the potential of candidates to do this successfully should be meaningfully measured.⁸⁰

Equally important is “command presence,” the “natural manner of an individual indicating a complete command of his mental and physical faculties and emotions,” and the “ability and qualifications to take command of any situation.”⁸¹ The process of selection should also identify the candidate’s traits of “honorableness, courageousness, and vitality.”⁸²

As set out in the next Part, job knowledge tests woefully fail in all these regards, at the cost of excluding candidates who may very well have the skills to excel as supervisors, while promoting those who do not. Among the former, minorities are disproportionately represented. This has wide-ranging ramifications, including the matter of wealth inequality between black and white citizens, as it is well-documented that minorities on the whole earn significantly more in the public sector than in the private.⁸³ Police and fire positions are a ticket to becoming “solidly middle-class.”⁸⁴

Also, at stake is the perceived illegitimacy of a police force that does not reflect the demographics of the community it serves, a matter that goes to the heart of its effectiveness.⁸⁵ As one journal puts it:

⁷⁷ *Smith v. City of Boston*, 144 F. Supp. 3d 177, 185 (D. Mass. 2015).

⁷⁸ Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 9, *Lopez v. City of Lawrence*, No. 07-11693-GAO (D. Mass. Sept. 5, 2014) (*Lopez I*) (Testimony of Commissioner Edward Davis); IANNONE ET AL., *supra* note 68, at 98.

⁷⁹ Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 10, *Lopez I*, No. 07-11693-GAO.

⁸⁰ IANNONE ET AL., *supra* note 68, at 61–62.

⁸¹ *Id.* at 35–36.

⁸² *Id.* at 9.

⁸³ Rebecca M. Blank, *An Analysis of Workers’ Choice Between Employment in the Public and Private Sectors*, 38 INDUS. & LAB. REL. REV. 211, 223 (1985). The average salary of police officers in Massachusetts is approximately \$56,000, and supervisors start at \$82,000, with additional amounts for overtime, special paid details, et cetera. Breana Noble, *What Is the Average Salary of a Police Officer in Massachusetts?*, NEWSMAX (July 15, 2015, 9:29 PM), <https://www.newsmax.com/FastFeatures/average-salary-police-officerMassachusetts/2015/07/15/id/657320/> [<https://perma.cc/9WX7-T8N4>].

⁸⁴ Sanneh, *supra* note 24, at 74.

⁸⁵ For the large literature on legitimacy, see generally Joseph Gustafson, *Diversity in Municipal Police Agencies: A National Examination of Minority Hiring and Promotion*, 36 POLICING 719 (2013) (examining “crises of legitimacy” in American policing); Riccucci & Riccardelli, *supra* note 3, at 354 (discussing the role of legitimacy). The story goes back at least to the Kerner Commission (National Advisory Commission of Civil Disorder), convened after the disturbances in Watts in 1967 prompted by allegations of police brutality.

[C]ompromised police legitimacy [as a result of poor minority representation] has been expressed in the form of non-cooperation and perceptions of distrust among the minority urban public. . . . Agencies reflecting the demographics of their surroundings better understand the perspectives of residents and can communicate with them more effectively.⁸⁶

Lack of acceptability may encourage higher violent crime rates, as disaffected citizens resort to self-help.⁸⁷

Achieving diversity throughout, including the supervisory ranks, is thus particularly beneficial to both the internal and external operation of the police department.⁸⁸

III. JOB KNOWLEDGE EXAMS—THE MASSACHUSETTS EXPERIENCE AND BEYOND

Massachusetts' Civil Service utilizes multiple-choice job knowledge tests for its selection of first-line police supervisors. Although such tests are in widespread use around the country,⁸⁹ the Commonwealth is somewhat unique in its near *sole reliance* on these devices for determining promotions.⁹⁰ Some departments use the exams as initial screening tools to determine who should go forward in a multi-component process; others give the written exam significantly less weight than Massachusetts.⁹¹ One observer has noted that the exams have “become such a pattern and practice, so in-

⁸⁶ Gustafson, *supra* note 85, at 719–20.

⁸⁷ Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469, 470–71 (2005).

⁸⁸ Gustafson, *supra* note 85, at 732.

⁸⁹ One study surveying the use of written examinations across the nation found that only two of the sixty-one cities studied did not rely on them in their selection process. Riccucci & Riccardelli, *supra* note 3, at 358–59.

⁹⁰ *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 174 (D. Mass. 2006).

⁹¹ Justice Ginsburg, in her dissent from *Ricci v. DeStefano* in 2009, contrasted New Haven's experience with that of nearby Bridgeport, where minority firefighters held one-third of lieutenant and captain positions:

Bridgeport . . . had once used a testing process similar to New Haven's, with a written exam accounting for 70 percent of an applicant's score, an oral exam for 25 percent, and seniority for the remaining five percent. Bridgeport recognized, however, that the oral component, more so than the written component, addressed the sort of “real-life scenarios” fire officers encounter on the job. Accordingly, that city “changed the relative weights” to give primacy to the oral exam. Since that time . . . Bridgeport had seen minorities “fairly represented” in its exam results.

557 U.S. 557, 614 (2009) (Ginsburg, J., dissenting).

grained in the cultural fabric of public sector human resources that . . . the use of written tests is not even being questioned.”⁹²

The Massachusetts tests (always closed-book) typically consist of eighty or one hundred multiple-choice questions, comprising eighty percent of the applicant’s total score. The other twenty percent factor, the “education and experience” or “E & E” rating, merely inventories courses taken and years of experience, all very common to typical applicants for promotion. In reality, the “E & E” has virtually no effect on one’s rank, leaving the exams as determinative.⁹³

The exams purport to measure “the knowledge, skills and abilities which can be practically and reliably measured and which are actually required to perform the primary or dominant duties of the position,” as required by civil service law.⁹⁴ The text of the questions are drawn directly, sometimes verbatim, from police manuals identified in a reading list provided in advance of the exams.⁹⁵

The applicants’ task is to memorize these manuals, and the brass ring goes to those who best accomplish this goal.⁹⁶ In upholding the challenged exam in *Lopez v. Lawrence* in 2016, the First Circuit Court of Appeals referenced the following question without apparently realizing that the prompt asked *not what the right answer was, but instead what the manual said*:

According to [a criminal investigations textbook on the reading list], a warrantless search and seizure is acceptable:

⁹² Riccucci & Riccardelli, *supra* note 3, at 357–59.

⁹³ *Lopez v. City of Lawrence*, 823 F.3d 102, 108–09 (1st Cir. 2016) (*Lopez II*), *cert. denied* 137 S. Ct. 1088 (2017).

⁹⁴ MASS. GEN. LAWS ch. 31, § 16; *see also Lopez II*, 823 F.3d at 109 (discussing the civil service law requirements). Although Chapter 31 envisions “written, oral, practical or performance tests, training and experience rating, assessment centers, other generally accepted selection procedures, or combinations of these, which in the discretion and judgment of the administrator, are appropriate for the position title or occupational group being tested,” implementation in Massachusetts and many other localities has typically focused on written exams. Riccucci & Riccardelli, *supra* note 3, at 358–60.

⁹⁵ The Houston P.D. Job Poster for Police Sergeant, for example, instructs that the source material for the exam will be “based solely” on the texts on the reading list. Hous. Police Dep’t, Job Promotion Poster (May 2012) (on file with author).

⁹⁶ The Third Circuit found such tests:

rewarded test-taking ability rather than the knowledges, abilities, and skills necessary for the [fire captain] position; that the test focused on a candidate’s ability to recall data from particular texts rather than his knowledge or abilities; that test questions were ambiguously phrased; and that questions tested knowledge of terminology rather than of the underlying concepts.

Vulcan Pioneers, Inc. v. N.J. Dep’t of Civil Serv., 832 F.2d 811, 815 (3d Cir. 1987).

- A. after stopping a vehicle for a traffic violation and writing a citation.
- B. after obtaining the consent of the person, regardless of whether obtained voluntarily or nonvoluntarily.
- C. when possible loss or destruction of evidence exists.
- D. when a quick search of the trunk of a motor vehicle is desired.⁹⁷

Similarly, the Chicago exam for promotion to lieutenant instructs: “You must recall from memory the information contained in the related references required to answer the questions.”⁹⁸ There are fully *nine pages* of references. These are sample questions:

- When an officer discharges a chemical agent within the City limits, the officer must notify the Office of Emergency Management Communication (OEMC), his or her supervisor, and the:
 - A. District Field Lieutenant in the district of occurrence. B. Crime Prevention and Information Center (CPIC). C. District Station Supervisor (DSS) in the district of occurrence. D. Bureau of Investigative Services Detective Division.
- As the Watch Operations Lieutenant, you need to change the day-off group assignment of some of your officers. You only need two volunteers, however, six officers have volunteered. Under these circumstances, who should you choose?
 - A. Two volunteers with the least seniority on the watch. B. Two volunteers with the greatest seniority on the watch. C. Two volunteers on the watch who applied first. D. All six of the officers on the watch who volunteered.
- Pat Bane is a street vendor and has permission to peddle in a public alley. According to the Municipal Code of Chicago (MCC), Pat may conduct this activity only during the hours of:
 - A. 8:00 am–6:00 pm. B. 7:00 am–7:00 pm. C. 5:00 am–7:00 pm. D. 7:00 am–5:00 pm.

⁹⁷ *Lopez II*, 823 F.3d at 110.

⁹⁸ CHI. POLICE DEP’T, LIEUTENANT PROMOTIONAL PROCESS, *supra* note 73, at 3.

- You notice that within the last week Sergeant Boll is not performing to his usual standards. He has been slow in responding to assignments and is not interacting with others in his usual manner. How would you handle this situation?

A. Sit down with Sergeant Boll and ask if he is having any problems, discuss the behaviors you have observed, and explain the expectations he is to meet on the job. B. Conduct a formal counselling session with Sergeant Boll and document the session on the appropriate form. C. Talk with other sergeants on the watch to see if they are aware of any problems Sergeant Boll may be having prior to talking with him.⁹⁹

The Houston Sergeants' exam instructs:

Questions 1–8 are taken from Hess and Orthmann, *Management and Supervision in Law Enforcement*, 6th edition, and are to be answered in accordance with this text.

1. Leadership has been defined as:

A. the administrative ordering of things and people. B. working with and through individuals and groups to accomplish, organizational goals. C. the skillful oversight of people and tasks. D. planning, organizing, and directing organizations.

Questions 9–14 are taken from Perez and Moore, *Police Ethics: A Matter of Character*, 2nd edition, and are to be answered in accordance with this text.

9. Which of the following is cited as the “baseline paradox of police work”?

A. The contradiction between the legal authority to exercise power and the exercise of that power in practical, real-life situations. B. The conflicting realities of police work as depicted in the training academy or university program and the nature of police work required on the street. C. Conflicting ethical standards among the citizens, the police and other elements of the criminal justice system. D. The multiple, conflicting, and vague nature of what the police do created confusion for the police, distrust of the police,

⁹⁹ *Id.* at 7–8.

and difficulties that directly impact the discussion of what ethical conduct is.

12. Which of the following statements about Kant's Categorical Imperative is correct?

A. It tests the moral validity of any action. B. It applies universally to all situations. C. It has the force of a law of reason and is not in any respect optional. It is absolute. D. All of the above.¹⁰⁰

A question on Alexandria Virginia promotion exam is similarly taken directly from the police manual:

Your officers have collected a loaded gun and ecstasy pills as evidence. If the evidence needs laboratory analysis, how many separate Property Inventory forms (APD-39) are needed?

A. 1. B. 2. C. 3. D. 4.¹⁰¹

Do such questions meaningfully aid in the selection of police supervisors, or could such "job knowledge" be gained readily on the job, or looked up when necessary,¹⁰² or imparted in modest training?¹⁰³ As one court skeptically questioned, "Is there a clear link between the information needed to answer the question and work performance?" and "Is the knowledge required to answer the question required of the incumbent to perform the work?"¹⁰⁴

Although police departments may claim (as Boston has) that the exam's purpose is "not to test memorization of facts, but to test situational judgment, interpersonal relations, communication ability, and knowledge of rules and regulations,"¹⁰⁵ that is clearly belied by the fact that the answers are taken directly from the assigned texts, not from the judgment of the

¹⁰⁰ HOUS. POLICE DEP'T, SERGEANT: SAMPLE TEST (2012) (on file with author).

¹⁰¹ ALEXANDRIA POLICE DEP'T, 2015 SERGEANT PROMOTIONAL PROCESS, PREPARING FOR THE MULTIPLE-CHOICE TEST 21 (2015) (on file with author).

¹⁰² See *Guardians Ass'n of NYPD v. Civil Serv. Comm'n of City of N.Y.*, 431 F. Supp. 526, 542 (S.D.N.Y.), *vacated and remanded*, 562 F.2d 38 (2d Cir. 1977) ("The types of knowledge, skills or behaviors [tested should not] include those which can be acquired in a brief orientation to the job."); Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. § 1607.15(C)(3) (2018).

¹⁰³ See Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1173 (1991).

¹⁰⁴ *Rudder v. Dist. of Columbia*, 890 F. Supp. 23, 42 (D.D.C. 1995), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996).

¹⁰⁵ *Smith v. City of Boston*, 144 F. Supp. 3d 177, 189 (D. Mass. 2015).

candidate. The Chicago exam manual actually advises candidates to “[u]se flashcards to memorize and quiz yourself on factual information or definitions.”¹⁰⁶ The Columbus Ohio tests were found by the trial judge to be “little more than a test of reading comprehension and memory,” but the Sixth Circuit Court of Appeals nonetheless ruled them sufficiently related to the requirements of job.¹⁰⁷ This despite the recognition that they measured knowledge and not performance, that the skills tested were not represented in proportion to what would be utilized on job, and that one-third of multiple-choice questions were taken from a police management textbook that was not even assigned.¹⁰⁸

Massachusetts Civil Service readily acknowledges that “some of the skills identified as important . . . could not be evaluated by a written test, such as the ability to establish rapport with persons from different ethnic, cultural, and/or economic backgrounds,” admitting that “assessment of the performance of these skills and abilities would require the use of selection devices outside the scope of the written, multiple-choice format.”¹⁰⁹ Also conspicuously absent from measurement are: (a) “ability to make and carry out decisions quickly”; (b) “ability to give clear, concise verbal orders”; (c) “ability to communicate orally and in writing”; (d) “ability to bring claim to control surroundings when in stress producing situations”; and (e) “ability to establish rapport with surroundings when in stress producing situations.”¹¹⁰

¹⁰⁶ CHI. POLICE DEP’T, LIEUTENANT PROMOTIONAL PROCESS, *supra* note 73, at 19.

¹⁰⁷ Police Officers for Equal Rights v. City of Columbus, 916 F.2d 1092, 1098 (6th Cir. 1990).

¹⁰⁸ *Id.*; see also *Ricci*, 557 U.S. at 633 (Ginsburg, J., dissenting) (“Courts have long criticized written firefighter promotion exams for being ‘more probative of the test-taker’s ability to recall what a particular text stated on a given topic than of his firefighting or supervisory abilities.’” (quoting *Vulcan Pioneers v. N.J. Dep’t of Civil Serv.*, 625 F. Supp. 527, 539 (D.N.J. 1985))).

¹⁰⁹ *Smith*, 144 F. Supp. 3d at 187. Another format, for example, is PSI Services’ oral examination:

PSI’s oral work sample simulations are designed to assess the supervisory and managerial abilities of candidates at all promotion ranks. Trained assessors observe candidate performance in simulated subordinate counseling sessions, incident command scenarios, witness interviews, meetings with community groups, internal policy/program development meetings, critical incident reviews and structured interviews. Test materials are customized to reflect the specific issues, practices and procedures of relevance to each agency.

Public Safety Promotional Testing, *supra* note 72. For additional discussion of alternative methods, see *infra* notes 233–272 and accompanying text.

¹¹⁰ Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 32, *Lopez v. City of Lawrence*, No. 07-11693-GAO (D. Mass. Sept. 5, 2014) (*Lopez I*). Judge Wyzanski, assessing the entry level exam in the first police case, observed:

No doubt appropriate tests should be part verbal. But appropriate tests would also seek, and not necessarily by written examination, to discover how effective a po-

Two former police commissioners in Boston have testified about the tight constraints these tests put on their ability to achieve diversity and promote those with the most potential for success. They would substitute assessment centers [discussed below in Part VII] and evaluations of past job performance as far better indicators of future success as a supervisor.¹¹¹ Robert Di Grazia, Boston police commissioner during the turbulent years of 1972 to 1976 when the federal court's school desegregation order sparked racial tensions and violence that ripped the city apart, discarded the memorization exams in favor of oral boards to determine management and leadership skills.¹¹² His reforms met considerable resistance from the police officers' union and did not survive his resignation in 1976.¹¹³

Not only do the exams woefully fail to meet the legal standard as "job related for the position in question and consistent with business necessity,"¹¹⁴ they disproportionately exclude minority candidates.¹¹⁵ The explanation for the underperformance is perhaps best summed up by Susan Sturm and Lani Guinier stating: written tests "tell us more about past opportunity [i.e., education, family resources, etc.] than about future accomplishments on the job or in the classroom."¹¹⁶ "Testing itself may favor the affluent because, for instance, they are more familiar with written examinations. Those raised in impoverished neighborhoods may possess equal potential but less

liceman is as an embodiment of authority, as a community worker charged with the mediating and counselling functions of a patrolman, as a mature individual restraining and simultaneously educating young or unstable members of the community, as a street official directing traffic, as a watchman guarding persons and property threatened with harm, as an investigator reporting incidents to superior officers, as a witness testifying in courts

Castro v. Beecher, 365 F. Supp. 655, 666 (D. Mass. 1973).

¹¹¹ *Smith*, 144 F. Supp. 3d at 203 n.31.

¹¹² William J. Bratton & Chuck Wexler, *A Top Cop Who Made a Difference*, BOS. GLOBE, May 4, 2018, at A11.

¹¹³ Lee A. Daniels, *Bostonians Not Neutral of New Montgomery Police Chief*, WASH. POST, Jan. 4, 1977, at A8.

¹¹⁴ 42 U.S.C § 2000e-2(k)(1)(A)(i) (2012).

¹¹⁵ The adverse impact extends beyond tests for public safety positions. In *Connecticut v. Teal*, for example, the written promotion test for promotion in the Department of Income Maintenance produced a pass rate for black applicants that was only sixty-eight percent the rate for whites. 457 U.S. 440, 443 (1982).

¹¹⁶ Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Model*, 84 CAL. L. REV. 953, 957 (1996); see also *Smith*, 144 F. Supp. 3d at 197 (noting multiple factors, including historical factors, that influence the testing disparity); Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case and the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 222–25 (2011) (explaining that the differing opportunities presented to minorities compared to whites likely influences the scoring disparity).

opportunity to demonstrate such potential due to inadequate schooling or mentorship.”¹¹⁷

The defendants’ own expert in *Lopez v. City of Lawrence* acknowledged that “cognitive tests measure many constructs associated with social status and privilege (i.e., scholastic knowledge and skills), giving rise to sizable black-white differences on these tests. Indeed, racial subgroup differences on cognitive tests are so large that they will create substantial reductions in the number of black applicants hired, to an extent that far exceeds the performance advantages of these tests.”¹¹⁸ The expert even coined the phrase “performance-irrelevant race-related variance” (“PIRV”) to capture the wide disconnect between test scores and job performance.¹¹⁹ Efforts to design written police exams with reduced racial impact have not been very successful.¹²⁰

The multiple-choice format relies on convergent thinking (selecting a *single* best answer) as compared to divergent thinking (generating multiple solutions to a problem), and experience has taught that minorities perform better on the latter rather than the former.¹²¹ If police supervisory work requires “thinking outside the box,” job knowledge exams are advancing the wrong candidates and excluding the right ones.

With all their deficiencies, how have job knowledge exams been able to survive judicial scrutiny? The answer lies in large part in the significant watering down of the standards for validation, as set out in the next Part.

IV. THE CURRENT REGIME: THE VALIDATION GAME AND THE DILUTION OF STANDARDS

To pass muster under Title VII once disparate impact has been established, the employer must (as noted above) demonstrate that the challenged device is both “job related” for the particular position and justified by “business necessity.”¹²² It must be shown to measure characteristics that

¹¹⁷ Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 484 (2003).

¹¹⁸ James L. Outtz & Daniel A. Newman, *A Theory of Adverse Impact*, in ADVERSE IMPACT: IMPLICATIONS FOR ORGANIZATIONAL STAFFING AND HIGH STAKES SELECTION 53, 54–55 (James L. Outtz ed., 2010). Dr. Outtz criticized the use of unnecessarily difficult words in several questions on the exam in the *Lopez* litigation, including “synoptic,” “homogeneous,” “unequivocal,” and “apportioned.” See Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 79, *Lopez I*, No. 07-11693-GAO.

¹¹⁹ Outtz & Newman, *supra* note 118, at 55–56.

¹²⁰ See, e.g., *Hayden v. Cty. of Nassau*, 180 F.3d 42, 52 (2d Cir. 1999).

¹²¹ Outtz & Newman, *supra* note 118, at 81–92.

¹²² 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). Use of a professionally developed test is a defense to a disparate impact case, provided this demonstration is made. *Id.* § 2000e-2(h).

constitute “important element[s] of work behavior,” and that the outcomes are “predictive of or significantly correlated with the characteristic.”¹²³ There must be, in sum, “a demonstrable relationship to successful performance of the jobs for which [the device] is used.”¹²⁴ This is the process of validation. Validation standards were strictly interpreted in the Supreme Court’s early cases, but have been diluted significantly since, especially for public safety employers.

In 1975, the Supreme Court in *Albemarle Paper Co. v. Moody*¹²⁵ adopted the professional methodology to determine validation established by the American Psychological Association and incorporated the EEOC Guidelines.¹²⁶ A statistically significant correlation between test results and job performance was required.¹²⁷ In *Moody*, test takers were “followed” onto the factory floor and their performance evaluated by supervisors in a concurrent criterion validation study.¹²⁸ The goal was to assess the *actual predictive* power of the device. The EEOC Guidelines are particularly skeptical of pen and pencil tests, which must be “closely reviewed for job relevance,” and are most appropriate where the job primarily requires writing, not interpersonal, skills.¹²⁹

Yet only one year later, in a case involving the District of Columbia Police Department, the bar of validation dropped precipitously (albeit in

¹²³ *Smith v. City of Boston*, 144 F. Supp. 3d 177, 179, 201 (D. Mass. 2015).

¹²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹²⁵ 422 U.S. 405, 405 (1975).

¹²⁶ 29 C.F.R. § 1607.1 (2018).

¹²⁷ *Moody*, 422 U.S. at 431–36.

¹²⁸ *Id.* at 430; see 29 C.F.R. § 1607.5(B). A concurrent criterion-related validity study is “where the examination is administered to a group of job incumbents prior to administering it to job candidates or administering it at the same time and then measuring the job performance of the incumbents to determine whether their test scores are correlated to their job performance.” *Stewart v. City of St. Louis*, No. 4:04CV00885 RWS, 2007 WL 6211634, at *15 (E.D. Mo. May 25, 2007), *aff’d*, 532 F.3d 939 (8th Cir. 2008). On this exacting standard, the multiple-choice exam used by the Boston Fire Department was found to be invalid in its first challenge. See *NAACP v. Beecher*, 504 F.2d 1017, 1017 (1st Cir. 1974) (holding that the examination was not sufficiently related to the job of a firefighter).

¹²⁹ 29 C.F.R. § 1607.14 (B)(3) (2018). The Uniform Employee Selection Guidelines Interpretation and Clarification (Questions & Answers) #78 provides that:

Paper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper and pencil form (e.g., editing and bookkeeping). Paper-and-pencil test of effectiveness in interpersonal relations (e.g., sales or supervision), or of physical activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are not close enough approximations of work behaviors to show content validity.

Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers), BIDDLE CONSULTING GRP. (2015), <http://uniformguidelines.com/questionandanswers.html> [<https://perma.cc/VV7F-VQFB>].

context of a primarily constitutional, not Title VII challenge). In *Washington v. Davis*,¹³⁰ the Supreme Court deemed a forty question verbal skills exam a valid selector for police officers, despite its disproportionate exclusion of black candidates, because there was a “positive relationship” between Test 21 and *training school performance*, as measured by *another verbal skills test*.¹³¹ The Supreme Court reversed the D.C. Circuit Court of Appeals’ ruling that struck down the written test because it was not shown to be predictive of performance *on the job*.¹³² Justices Brennan and Marshall dissented, arguing the decision unwisely weakened the mandate for validation.¹³³

The courts have since moved even further away from the original conception. Although the EEOC Guidelines had required a showing that *empirically-demonstrated predictive* validation was not feasible in the particular case before alternative methods could be used,¹³⁴ a relaxed “content validation” is now the norm—a showing that the test *appears to be job related* because it purports to replicate key job tasks.¹³⁵ And where the standard

¹³⁰ 426 U.S. 229, 229 (1976).

¹³¹ *Id.* at 250–54.

¹³² *Id.* at 253.

¹³³ If the decision stands, the dissenters observed, “employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course.” *Id.* at 269 (Brennan & Marshall, JJ. dissenting). “[The defendants] should have been required to prove that the police training examinations either measure job-related skills or predict job performance.” *Id.* The Second Circuit agreed in another police case: “[W]ithout a showing that performance at training school correlated with performance on the job, demonstration of a high correlation between entry level test scores and training school performance meant little.” *Guardians Ass’n of NYPD v. Civil Serv. Comm’n of City of N.Y.*, 431 F. Supp. 526, 546 (S.D.N.Y. 1977), *vacated and remanded*, 562 F.2d 38 (2d Cir. 1977).

¹³⁴ *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm’n*, 354 F. Supp. 778, 788–89 (D. Conn. 1973), *aff’d in part, rev’d in part*, 482 F.2d 778, 788 (2d Cir. 1973).

¹³⁵ Section 1607.14(C)(4) of the EEOC Guidelines provides:

[T]o be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles the work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

29 C.F.R. § 1607.14(C)(4). Writing in 2005, class counsel in the on-going monitoring of the *Castro v. Beecher*, 365 F. Supp. 655, 666 (D. Mass. 1973) consent decree observed that “there has never been an effort to correlate the actual job performance of tenured police officers or firefighters with their own scores on entry level examinations, a correlation that might or might not support the reliability of test scores as a predictor of performance.” Toni G. Wolfman, Background

originally required that the exam test for “all or nearly all important parts of the job,” and in proportion to the actual importance of the function,¹³⁶ courts like the First Circuit Court of Appeals in *Lopez v. City of Lawrence* are now upholding exams that admittedly test only small portions of the skills required of the position.¹³⁷

As one court admitted, validation is largely a matter of guesswork: “Of course, after this test is administered, post-test analysis of the job performance of successful candidates will support or undermine a conclusion of ranking validity. But the task here is, as accurately as possible, to determine *prospective validity*.”¹³⁸ In other words, any deficiencies inherent in the selection process will show up only *after* the officer is already on the job. In all the years Boston has administered these exams, there has been no apparent effort to “follow” the test-takers’ performance on the job to determine how predictive their scores actually were.¹³⁹

The classic illustration of content validity is a typing test, which directly demonstrates an applicant’s proficiency.¹⁴⁰ In contrast, it is questionable if a test of one’s ability to memorize a police manual truly captures the complex tasks of a police supervisor. More enlightened decisions recognize the wide gap between job *knowledge* and job *performance*.¹⁴¹

The courts have granted special deference to public safety employers in their use of multiple-choice exams, often finding them valid in the face of the obvious limitations of such devices, as illustrated by the *Lopez* litigation (discussed in the next Part) as well as by the Supreme Court’s “once-over-easy” validation of the firefighter promotion exam in *Ricci v. DeStefano* in 2009.¹⁴² In 2014, in *Johnson v. City of Memphis*, the Sixth Circuit Court of

Paper on Police and Firefighter Consent Decrees (2005) (unpublished manuscript) (on file with author).

¹³⁶ *United States v. City of Chicago*, 573 F.2d 416, 425–26 (7th Cir. 1978) (discussing racial discrimination in fire department testing) (quoting EEOC Guidelines, 29 C.F.R. § 1607.5(a) (1973)).

¹³⁷ See *Lopez v. City of Lawrence*, 823 F.3d 102 (1st Cir. 2016) (*Lopez II*), *cert. denied* 137 S. Ct. 1088 (2017); see also *infra* notes 199–232 and accompanying text (discussing less discriminatory alternatives).

¹³⁸ *Norwalk Guardian Ass’n v. Beres*, 489 F. Supp. 849, 854 (D. Conn. 1980); see also *Banos v. City of Chicago*, 398 F.3d 889, 893 (7th Cir. 2005) (discussing what is required to find validity).

¹³⁹ See *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 736 (S.D. Miss. 2003) (“[T]here is no evidence to indicate that the City sought to measure the job performance of candidates who were promoted to sergeant such that some correlation between the test and job performance could be made.”)

¹⁴⁰ See *Banos*, 398 F.3d at 893 (“A typing test for secretaries exemplifies this [content validity] kind of approach.”)

¹⁴¹ See, e.g., *Bridgeport Guardians*, 354 F. Supp. at 788.

¹⁴² 557 U.S. 557, 557 (2009); see Brodin, *supra* note 116, at 208–21 (discussing the deference the Supreme Court grants to public safety employers in their use of these tests).

Appeals made this explicit: “When the employment position involves public safety, we accord greater latitude to the employer’s showing of job-relatedness and business necessity.”¹⁴³ But is it not precisely in these crucial positions where selection of the best qualified candidates is *most urgent*?

The harm to minority candidates is all the greater when scores are used (as they routinely are) for rank ordering, thus excluding even passers unless they are high enough on the eligible list to be reached. The *Lopez* court acknowledged the “marked disparate impact because the selection rates of Black and Hispanic officers for promotion to sergeant were so much lower than the selection rates of the other officers that we can fairly exclude random chance as the explanation for the difference.”¹⁴⁴ In Boston, the 2008 exam produced a mere two promotions out of thirty-seven for minority candidates.¹⁴⁵ Scores were more than 6.5 points lower on average for non-white takers.¹⁴⁶

Yet courts have given short shrift to the additional requirement of a showing “that a higher score on a content valid selection procedure *is likely to result in better job performance*” before “the results may be used to rank persons who score above minimum levels.”¹⁴⁷ Justice William Brennan long ago criticized public employers’ stubborn reliance on insignificant differences in civil service scores to make hiring and promotion decisions, often to the detriment of woman and minorities.¹⁴⁸

¹⁴³ 770 F.3d 464, 478 (6th Cir. 2014) (citations omitted). “We recognize that a police department’s selection of testing criteria is largely a matter within the professional judgment of the test writer based upon the particular attributes of the job in question.” *Id.* This lax scrutiny was first reflected in *Beazer v. Transit Authority*, 440 U.S. 568, 587 (1977), and *Spurlock v. United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972).

¹⁴⁴ *Lopez II*, 823 F.3d at 111. Used merely as “a pass/fail screening device,” the exams would have less disparate impact. *See id.* at 111, 117.

¹⁴⁵ Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 17, *Lopez v. City of Lawrence*, No. 07-11693-GAO (D. Mass. Sept. 5, 2014) (*Lopez I*).

¹⁴⁶ *Lopez II*, 823 F.3d at 110; Plaintiffs’ Proposed Findings of Fact & Rulings of Law at 69, *Lopez I*, No. 07-11693-GAO.

¹⁴⁷ *Lopez II*, 823 F.3d at 118. “The use of a ranking device requires a separate demonstration that there is a relationship between higher scores and better job performance.” *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *16–17. The EEOC Guidelines, provide: “Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines.” 29 C.F.R. § 1607.5(G) (2018). Civil Service law requiring employers to promote in rank order is, of course, trumped by Title VII to the extent it produces a discriminatory result. *See Smith*, 144 F. Supp. 3d at 210–11 (explaining that Title VII defeats civil service law where that law may allow for discrimination).

¹⁴⁸ In 1987, in *Johnson v. Santa Clara Transportation Agency*, a male applicant complained that he was the victim of reverse discrimination when his employer promoted a female with a civil service score of 73 over his score of 75. 480 U.S. 616, 624–25 (1987). Justice Brennan observed:

At best, the validation status quo requires disappointed minorities seeking advancement to challenge each successive test administration, bearing the burden of securing counsel for lengthy litigation and a battle of test experts.¹⁴⁹ The Sixth Circuit lamented regarding the Memphis Police Department that “[a]fter more than thirteen years of litigation, including a bench trial, numerous preliminary injunctions, and a previous appeal affirming the grant of injunctive relief for some plaintiffs, three consolidated cases challenging the City of Memphis’s police promotional processes as racially discriminatory return on cross-appeals.”¹⁵⁰ *Lopez I* was filed in 2007, took eighteen days to try in 2010, was not decided by the trial judge until 2014, and was finally resolved by the First Circuit against the plaintiffs in 2016.¹⁵¹

Justice Scalia’s dissent predicts that today’s decision will loose a flood of “less qualified” minorities and women upon the work force [That speculation] ignores the fact that “[i]t is a standard tenet of personnel administration that there is rarely a single, ‘best qualified’ person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. [F]inal determinations as to which candidate is ‘best qualified’ are at best subjective.” This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least.

Id. at 641 n.17 (quoting Brief for the American Society for Personnel Administration as Amicus Curiae Supporting Respondents, *Johnson*, 480 U.S. 616, 1986 WL 728160). Both Professor Selmi and I have noted how “remarkable” it is that the two-point test score differential could be thought to tell us anything meaningful about the qualifications of these candidates. See Brodin, *supra* note 116, at 229–30, 230 n.464; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 U.C.L.A. L. REV. 1251, 1253 (1995).

¹⁴⁹ See Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. TIMES, July 24, 1991, at A1 (documenting the difficulties of retaining counsel in cases challenging exams that require expert witnesses and considerable up-front money, and with relatively low success rates).

¹⁵⁰ *Johnson*, 770 F.3d at 467. Judgment for the plaintiff officers was reversed on the determination that they had failed to demonstrate equally valid less discriminatory alternatives to the promotional process. *Id.* at 477–78.

¹⁵¹ See *infra* notes 199–232 and accompanying text. Michael Meltsner relates the tale of a NAACP Legal Defense Fund challenge brought to a statewide test in New York that was disproportionately excluding black and Puerto Rican teachers from achieving permanent status as principals, notwithstanding their successful performance in an acting capacity. MICHAEL MELTSNER, *THE MAKING OF A CIVIL RIGHTS LAWYER* 167–69 (2006). The tests had little to do with prospects for success on the job, and much to do with the coaching available to white applicants from their white colleagues. “Challenging the tests for over six years consumed [plaintiff’s attorney] and her team of lawyers and consultants.” *Id.* She began the litigation as a junior attorney, and before it was over she had left the office, become director of another public interest legal center, and joined the Harvard Law Faculty. The courts finally halted the testing, and when promotions were made on the basis of job performance evaluations, the percentage of minority principals rose from twenty-eight percent to forty-two percent. *Id.*

Similarly, litigation challenging the FDNY's testing regime dragged on for a full decade.¹⁵²

Validation has become a hyper-technical enterprise, completely reliant on retained (and well-compensated) psychometricians, statisticians, and industrial psychologists. District court judges must choose between opposing credentialed experts pontificating in the arcane "science" of test construction and reliability.¹⁵³ One judge, in view of the complexity of the issues, found it necessary to appoint a Special Master to assess the challenged exam and oversee the development of a new one.¹⁵⁴ Another candidly acknowledged the unavoidable judicial deference granted the experts: "This court will not substitute its less qualified judgment for that of the professionals herein involved."¹⁵⁵

The end result is police departments like Boston's, with largely all-white managerial ranks occupied by officers chosen not for their supervisory skills, but their memorization abilities—all with a chilling effect on potential minority applicants for promotion.¹⁵⁶

V. *LOPEZ V. CITY OF LAWRENCE* AND THE INADEQUACY OF THE VALIDATION APPROACH

Lopez v. City of Lawrence is emblematic of the troubled regime of testing challenges.¹⁵⁷ Underscoring the rote memorization character of the challenged eighty question closed-book exam, each multiple-choice either quoted directly or paraphrased the texts on the reading list distributed to applicants. The questions were drafted not by experts, but by a layperson at the Human Resources Division (Civil Service).¹⁵⁸ Yet the District Court (affirmed by the First Circuit Court of Appeals) upheld it as "minimally valid," whatever that means.

Reducing the already low bar of content validation (as discussed in the previous Part), the district judge construed the modest defense burden as fol-

¹⁵² See GOLDBERG, *supra* note 21, at 1.

¹⁵³ In a rare *Daubert* challenge, in 2000, the Seventh Circuit in *Bryant v. City of Chicago* found the testing expert's testimony met the standards for reliability. *Bryant*, 200 F.3d 1092, 1097–98 (7th Cir. 2000). See generally *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) (defining a trial court judge's gatekeeping role under Fed. R. Evid. 702).

¹⁵⁴ *United States v. City of New York*, 717 F.3d 72, 80 (2d Cir. 2013).

¹⁵⁵ *Norwalk Guardians Ass'n*, 489 F. Supp. at 854.

¹⁵⁶ See GOLDBERG, *supra* note 21, at 235 (discussing the prejudicial results of these examinations).

¹⁵⁷ No. 07-11693-GAO, 2014 U.S. Dist. LEXIS 124139 (D. Mass. Sept. 5, 2014) (*Lopez I*), *aff'd*, 823 F.3d 102 (1st Cir. 2016) (*Lopez II*), *cert. denied* 137 S. Ct. 1088 (2017).

¹⁵⁸ Plaintiffs' Proposed Findings of Fact & Rulings of Law at 35, *Lopez I*, No. 07-11693-GAO.

lows: “[T]he essence of validity [is that it] allow[s] one to predict *at a level great[er] than—significantly greater than chance as to how well someone will perform.*”¹⁵⁹ The exam, in other words, has to beat a flipped coin.

The defense expert conceded at trial that the exam did *not* satisfy even this standard, as it addressed *approximately half* of those abilities identified as key to the job of sergeant.¹⁶⁰ Critical skills “essential to the position, such as leadership, decision making, interpersonal relations, and the like” were admittedly beyond the capabilities of the written exam to measure.¹⁶¹ He further readily concurred in plaintiffs’ position that an assessment center that evaluated a candidate’s “interpersonal skills through observed social interaction, or some kind of device for measuring an applicant’s oral communication skills” would have been far preferable.¹⁶²

Nonetheless, he insisted that the “education & experience” (“E & E”) component (which actually accounted for only five to seven percent of the candidate’s score) somehow pushed the selection process into the “minimally valid” and “acceptable” range.¹⁶³ This suspect conclusion was reached notwithstanding his acknowledgement that the E & E merely awarded points for years in rank, a minimum of which *all candidates* had to have to be eligible for the exam, and for courses taken, which again most candidates could check off.¹⁶⁴ As the First Circuit put it (in an understatement):

This is not to say that [the defense expert’s] testimony trumpeted a wholehearted endorsement of the scheme used by Boston to identify candidates for promotion. [The defense expert] agreed with the Officers that the validity of the Boston examination could have been improved, perhaps by incorporating a “well-developed assessment center” to evaluate an officer’s interpersonal skills through observed social interaction, or some kind of device for measuring an applicant’s oral communication skills. [The defense expert] was clear that his opinion solely concerned

¹⁵⁹ *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *49 (quoting defense expert) (emphasis added).

¹⁶⁰ *Id.* at *54.

¹⁶¹ *Id.* at *60.

¹⁶² *Lopez II*, 823 F.3d at 113; *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *61.

¹⁶³ *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *60.

¹⁶⁴ *Lopez II*, 823 F.3d at 113. “The level and extent of work and educational experience and accomplishments listed by each applicant,” the expert testified, “served as a useful, if imperfect, proxy for the kinds of qualities that were deemed to be important to a sergeant’s daily responsibilities.” *Id.* He conceded that the gain in validity from the E & E was “only marginal.” *Id.*

the selection device's compliance with his profession's minimum standards as translated into the EEOC's Guidelines.¹⁶⁵

Based on this testimony the challenged exams were deemed “minimally valid”—i.e., they “reliably predict[ed] a candidate's suitability for the job, such that persons who perform better under the test methods are likely to perform better on the job.”¹⁶⁶ Stating the obvious, that “knowledge of the constitutional and regulatory law applicable to police work is critical to a police sergeant's ability to effectively perform as a supervisor,”¹⁶⁷ the matter of the other missing critical skills identified by the defense expert was dismissed, as well as the unaddressed matter of whether memorization of texts was a meaningful indicator of such knowledge.

Taking refuge in the clear error standard, the First Circuit affirmed.¹⁶⁸ Its half-hearted endorsement of the exams as predictors of success as a police supervisor, *and in strict rank order of score*, is reflected in its startlingly low bar—the exams were “better predictors of success *than would be achieved by random selection.*”¹⁶⁹

¹⁶⁵ *Id.* The very same expert, retained by plaintiffs, came to the opposite conclusion when he criticized rank-ordered hiring from a similar exam used by another department. See *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1142–43 (2d Cir. 1991). He was similarly critical of the process in the New Haven Fire Department. See Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents at 3, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428 & 08-328), 2009 WL 796281. Dr. Outtz has acknowledged that cognitive examinations are largely irrelevant in predicting job performance. See *Outtz & Newman*, *supra* note 118, at 55.

¹⁶⁶ *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *61. The District Judge found further evidence of validity in the fact that incumbent sergeants who took the lieutenant's exam, which shared fifty-three common questions with the sergeants' exam, did significantly better on those questions than the entry-level patrol officers. *Lopez II*, 823 F.3d at 118–19; *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *56–57. Attributing this to the relation between the questions and job performance, the district judge missed the more obvious explanation—that the incumbent sergeants had secured their promotions by doing well *on the very same exam*. Job knowledge exams are most useful at predicting success on other job knowledge exams. Another questionable basis for the finding of validity is that, as the E & E measures years on the job, it “is generally recognized [that seniority is] relevant to the ability to perform well in a supervisory position such as sergeant.” *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *59. It is not surprising that there is no source cited for this proposition, as seniority does not automatically assure successful job performance. See Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 975–85 (1984) [hereinafter Brodin, *The Role of Fault*]. Nor is there any support for the District Court's bizarre conclusion that officers who had taught courses “evidenced oral communication skills important to the position of sergeant.” *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *60. With no indication as to *the success* of the teaching, no conclusions as to oral skills could reasonably be drawn.

¹⁶⁷ *Lopez II*, 823 F.3d at 115.

¹⁶⁸ *Id.* at 122.

¹⁶⁹ *Id.* at 116–17.

Judge Torruella parted company with the majority. Recognizing that the exams did not test for the “critical knowledge, skills, and abilities (“KSAs”) necessary to qualify for the position of police sergeant,” he disputed that the E & E could somehow elevate the process: “As the majority concedes, this component had a minimal effect on score.”¹⁷⁰ In fact, “[t]he E & E component that purportedly compensated for the . . . deficit, edging the exams into the realm of validity, consisted of a single sheet requiring candidates to bubble in responses as to length of work experience in departmental positions by rank, educational background, and teaching experience.”¹⁷¹ “The exams here may have tested the knowledge a supervisor must have,” Judge Torruella observed, “but omitted any meaningful test of *supervisory skill*, which is unquestionably essential to the position of police sergeant.”¹⁷²

Concluding that the District Court committed “clear error in finding that the challenged tests were valid when placed under the legal prism of Title VII,” Judge Torruella cautioned that this would be “a perilous precedent that all but encourages corner cutting when it comes to Title VII.”¹⁷³

Lopez is far from an outlier. A job knowledge test used by the Jackson Mississippi Police Department for promotion to sergeant was deemed content valid notwithstanding the finding that it could evaluate only “two of the twelve dimensions [technical knowledge and legal knowledge] identified in the job analysis.”¹⁷⁴ The defense expert conceded that a more stringent criterion validation would have been preferable, comparing test performance to job performance, but that such study was not feasible.¹⁷⁵ The exam had not been evaluated before its administration by subject matter experts, as was the usual protocol, and eight of the ninety-nine questions had to be discounted after the test was administered because they were later found to be defective.¹⁷⁶

The Jackson exam had a conceded disparate impact—it excluded all but twenty-one of the 106 black candidates, foreclosing them from proceeding to the second and third stages, simulation exercises and a structured interview.¹⁷⁷

¹⁷⁰ *Id.* at 124 (Torruella, J., concurring in part, dissenting in part).

¹⁷¹ *Id.*

¹⁷² *Id.* at 125 (emphasis added). Judge Torruella noted that “[w]ritten tests of supervisory skill have been found by other courts to be altogether inadequate to evaluate that attribute.” *Id.*; see *Vulcan Pioneers v. N.J. Dep’t of Civil Serv.*, 625 F. Supp. 527, 547 (D.N.J. 1985), *aff’d*, 832 F.2d 811 (3d Cir. 1987); see also *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 513 (8th Cir. 1977).

¹⁷³ *Lopez II*, 823 F.3d at 122, 125.

¹⁷⁴ *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 735 (S.D. Miss. 2003) (emphasis added).

¹⁷⁵ *Id.* at 737.

¹⁷⁶ *Id.* at 739–40.

¹⁷⁷ *Id.* at 731.

Minorities tend to have more success there, and those devices are viewed as more job related.¹⁷⁸ Cost concern was the ostensible justification for limiting the group going into the final stages of the process.¹⁷⁹ Plaintiffs' claim that the City's reliance on the test results in the face of their discriminatory consequences raised an inference of intentional discrimination was dismissed.¹⁸⁰

In *Johnson v. City of Memphis* in 2014, defendant's testing expert admitted that the best approach to determining reliability would have been by testing and then retesting.¹⁸¹ Because that was not feasible, all he did was measure the tests' internal consistency, but even that produced poor reliability scores. The results also showed considerable bunching of scores, separated by only one point, putting the validity of rank order selection in serious issue. The best that could be said was that the exam "was able to differentiate between those candidates *with more* job knowledge from those with *less knowledge*."¹⁸² The court nonetheless validated the exam, placing considerable reliance upon the testing industry's own publications and standards,¹⁸³ notwithstanding the self-serving nature of such validation.

In sum, federal judges seem quite willing to stamp approval of flawed devices,¹⁸⁴ and are not deterred even where the test itself has been destroyed by the employer and thus can no longer be evaluated.¹⁸⁵

To be sure, some courts have held police departments to more exacting standards of validation. In 2015, as noted above, U.S. District of Massachusetts Judge William Young evaluated a promotional exam very similar to the one upheld in *Lopez* and reached the opposite conclusion in *Smith v. City of*

¹⁷⁸ *Id.* at 741. For the experience of the Bridgeport fire department, where minorities excelled on the oral interviews, see *Ricci v. DeStefano*, 557 U.S. 557, 614 (2009) (Ginsburg, J. dissenting).

¹⁷⁹ *Hearn*, 340 F. Supp. 2d at 735, 742.

¹⁸⁰ *Id.*

¹⁸¹ 770 F.3d 464, 479 (6th Cir. 2014).

¹⁸² *Id.* at 484 (emphasis added).

¹⁸³ *Id.*

¹⁸⁴ See *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 263 (2d Cir. 2012) (finding the challenged fire promotional exams to be job-related despite the fact that job analysis was based on statewide, and not citywide, assessment of job tasks); *Bryant v. City of Chicago*, 200 F.3d 1092, 1092 (7th Cir. 2000) (upholding rank-order promotions to lieutenant based on an initial qualifying job-knowledge test consisting of 150 multiple-choice questions, all derived from source materials, despite its severe disparate impact); *Police Officers for Equal Rights v. City of Columbus*, 916 F.2d 1092, 1092 (6th Cir. 1990) (upholding the lieutenant's examination notwithstanding the fact that it measured officers' knowledge and not their potential performance, that the skills tested were not tested in proportion to how they would be utilized on job, and that one third of the questions were taken from a textbook not assigned).

¹⁸⁵ See *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1509–10 (C.D. Cal. 1995) ("The fact that the test was unavailable is therefore insufficient to invalidate the showing that the City has made. The Court is thus satisfied that the City has carried its burden of production as to a business justification for the examination.")

Boston.¹⁸⁶ At issue was the Boston's lieutenants' exam, consisting of 100 multiple-choice questions and the same E & E rating used in *Lopez*. Many of the questions were identical to those that appeared in the sergeant's exam. After a bench trial, Judge Young found the exam had a racially disparate impact,¹⁸⁷ compounded by rank ordering,¹⁸⁸ and was not sufficiently job-related to survive Title VII scrutiny.¹⁸⁹ The court explained:

[T]he evidence does not support the necessary inference that those who perform better on the exam will be better performers on the job, primarily because the exam did not test a sufficient range of KSAs [it only tested job knowledge], and there was no evidence that the exam was reliable enough to justify its use for rank ordering.¹⁹⁰

Ignored were critical "interpersonal skills, presentation skills, reasoning and judgment skills, oral communication skills, analytical skills, ability to give constructive criticism, ability to speak in front of groups, ability to counsel subordinates, ability to counsel and comfort families of victims, and ability to make sound decisions quickly."¹⁹¹

Judge Young's colleague, District Judge Patti Saris, similarly found in *Bradley v. City of Lynn* that the cognitive ability examination for entry-level firefighter positions violated Title VII by causing severe disparate impact without the justification of job relation—such exams, she observed, "have a relatively low correlation with overall job performance."¹⁹²

Additionally, the Eleventh Circuit Court of Appeals in *Nash v. Consolidated City of Jacksonville* took a skeptical view of Jacksonville's multiple-

¹⁸⁶ 144 F. Supp. 3d 177, 177 (D. Mass. 2015). Judge Young reaffirmed his decision in July 2017, in light of *Lopez II*. See *Smith v. City of Boston*, 267 F. Supp. 3d 325 (D. Mass. 2017).

¹⁸⁷ On the 2005 exam, the passing rate for minorities was 50%, and for whites, 88%; just one black and one Hispanic candidate were promoted. On the 2008 exam, the passing rate for minorities was 69%, and for whites was 94%; only 5 of 33 promotions went to blacks. *Smith*, 144 F. Supp. 3d at 190–91.

¹⁸⁸ *Id.* at 199–200, 208–10.

¹⁸⁹ *Id.* at 180–81.

¹⁹⁰ *Id.* at 203. "If a test only examines knowledge . . . while ignoring a broad swath of necessary skills and abilities, it hardly seems plausible that a higher score is likely to result in higher job performance, or even that the procedure measures aspects that differentiate among levels of job performance." *Id.* at 209.

¹⁹¹ *Id.* at 207–08. The Massachusetts state courts reached a similar conclusion when a multiple-choice exam for police lieutenants was found not to meet the Civil Service mandate that the test measure the necessary supervisory skills. See *Bos. Police Superior Officers Fed'n v. Civil Serv. Comm'n*, 624 N.E.2d 617 (Mass. App. Ct. 1993).

¹⁹² *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 173 (D. Mass. 2006); see also *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 512 (8th Cir. 1977) ("[T]here is no good pen and paper test for evaluating supervisory skills.").

choice examination for promotion to fire lieutenant, as no questions related to supervisory skills.¹⁹³ The test failed to address the one key aspect that differentiated the job of firefighter from fire lieutenant—the supervisor’s job requires “complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple-choice test.”¹⁹⁴

Perhaps the closest scrutiny of such a test occurred in in 1989 in *Hamer v. City of Atlanta*,¹⁹⁵ in which the Eleventh Circuit examined a criterion-related concurrent validation study¹⁹⁶ that correlated test scores with on the job performance ratings for the fire lieutenants and captains. The test was administered to candidates only after the study was completed.

There are many alternatives to job knowledge tests. Chicago is not alone in now using a multi-component process that follows the test with an “In-Basket Exercise” based on hypothetical reports that a candidate might face on the job, requiring assessment of the situation and assignments to officers, and then an oral briefing exercise intended to demonstrate analytical abilities and communication skills, simulating a roll call.¹⁹⁷ This approach has obviously more potential to identify effective supervisors and leaders. It is reported that over two-thirds of U.S. municipalities now rely on selection methods other than, or in addition to, paper-and-pencil tests.¹⁹⁸

¹⁹³ *Nash v. Consol. City of Jacksonville*, 837 F.2d 1534, 1535 (11th Cir. 1988).

¹⁹⁴ *Id.* at 1538; *see also* *Isabel v. City of Memphis*, 404 F.3d 404, 414 (6th Cir. 2005) (noting that “the written test did not approximate a candidate’s potential job performance” as a police lieutenant); *Brunet v. City of Columbus*, 58 F.3d 251, 255 (6th Cir. 1995) (“[A] selection procedure that ranks only on the basis of [cognitive ability test] scores is not acceptable.”); *Vulcan*, 832 F.2d at 812 (finding that the challenged job-knowledge test rewarded test-taking ability rather than the knowledges, abilities, and skills necessary for the position, and focused on a candidate’s ability to recall data from particular texts rather than his actual knowledge or abilities).

¹⁹⁵ 872 F.2d 1521, 1521 (11th Cir. 1989).

¹⁹⁶ The Eleventh Circuit explained:

At the heart of criterion-related validity is the statistical correlation between performance on the test and objective measures or ‘criteria’ of performance on the job. This is measured in one of two ways. In a ‘predictive’ study, all applicants for a position are given the examination. Those applicants selected for the position are allowed to work at the job for a period of time and their job performance is then measured. Their preemployment test scores are then compared to their job performance ratings. In a second method, known as ‘concurrent’ validation, the test is administered to existing employees and their scores are compared to their job performance.

Id. at 1525.

¹⁹⁷ *Bryant*, 200 F.3d at 1096–97; *see* *Banos v. City of Chicago*, 398 F.3d 889, 891 (7th Cir. 2005) (explaining Chicago’s use of assessment exercises); *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1109–10 (N.D. Ill. 2001) (detailing Chicago’s in-basket exercise).

¹⁹⁸ *Andrea A. Curcio et al., Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 219 (2014).

But can such alternatives be *judicially imposed* on reluctant departments? This question is explored in the next Part.

VI. LESS DISCRIMINATORY ALTERNATIVES

It would be next to impossible to find a responsible testing expert, or police chief, who would fully underwrite the sole or even primary use of a job knowledge test to select police supervisors in strict rank order of scores (where missing one or two correct answers may translate into dropping hundreds of places),¹⁹⁹ particularly given the many alternatives to these exams.

Indeed, the very same expert used by the defendants in *Lopez v. City of Lawrence* to defend the singular use of the exam, when previously retained by the City of Bridgeport, Connecticut, constructed a selection process in which the exam counted for only about half of the candidate's total score.²⁰⁰ Dr. Outtz combined the multiple-choice device with an oral component designed to test for *the actual skills* required by a sergeant on the job. Video simulations of crime scenes would be projected onto a screen, after which the candidate would indicate how he or she would respond to the events depicted. "Though recognizing that video simulations would be more expensive than the traditional tests, Dr. Outtz urged the substitution in order to improve the examination and to reduce the possibility of its adverse impact on minority candidates."²⁰¹ The mayor, however, refused to authorize the funds for the video portion.²⁰²

When the written test went forward, the passing rate for black candidates was less than one-half (30% compared with 68%) the rate for whites.²⁰³ Hispanics passed at only 46%.²⁰⁴ All nineteen promotions went to white candidates, the highest scorers. Dr. Outtz opposed the strict rank-order selections, concluding that "certain differences in test scores may not be significant."²⁰⁵ He recommended that selections be made instead by "banding" (or grouping) the scores, permitting promotions on the basis of other factors including race or ethnicity, gender, work experience, and past job performance.²⁰⁶ (After reviewing the final scores from the 2008 exam,

¹⁹⁹ See, e.g., GOLDBERG, *supra* note 21, at 234.

²⁰⁰ *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1142–43 (2d Cir. 1991).

²⁰¹ *Id.* at 1143.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1144. Banding has worked effectively to diversify public safety agencies like the San Francisco Fire Dept. See GOLDBERG, *supra* note 21, at 269 (discussing the use of banding); Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*,

Boston's test consultant similarly recommended, unsuccessfully, banding the results in nine-point increments).²⁰⁷ When Bridgeport refused, minority plaintiffs sued. The District Court found in their favor, finding a Title VII violation because banding scores would be a less discriminatory alternative ("LDA") that would achieve the same quality of selections. The Second Circuit Court of Appeals affirmed.²⁰⁸

LDA is a concept originating in case law²⁰⁹ and codified in the 1991 Amendments to Title VII.²¹⁰ Even if an employer meets the burden of proving that its devices are job related, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"²¹¹ It fits neatly within Title VII's balance of interests of employer and employee²¹² in that it seeks to achieve the former's goals with the least injury to the latter's right to equal opportunity.²¹³ LDA also puts to the test an employer's claim that the challenged device is *essential* to its operations.

One writer has aptly summarized the significance of the concept: "[E]mployment testing is legal and permissible only if the test[']s disproportionate exclusion on the basis of a protected trait is *unavoidable*. . . . [The] statute incentivizes the use of the least discriminatory selection procedure that accomplishes the employer's selection needs."²¹⁴

46 WAKE FOREST L. REV. 1035, 1076–77 (2011) (discussing the benefits of using banding to evaluate candidates in relation to test scores).

²⁰⁷ *Smith v. City of Boston*, 144 F. Supp. 3d 177, 191 (D. Mass. 2015); *see also* *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 174 (D. Mass. 2006) ("As all experts agree, there is no rational, statistically valid basis for distinguishing between candidates within a band of eight points because of the examination's reliability. A score of 100 is thus no different from a score of 92 in predicting job performance.")

²⁰⁸ *Bridgeport Guardians*, 933 F.2d at 1142.

²⁰⁹ *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (explaining the origin of a less discriminatory alternative ("LDA") selection device).

²¹⁰ 42 U.S.C. § 2000e-2(k)(1)(C) (2012). *See generally* Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L. REV. 473 (1999) (discussing the amendments to Title VII).

²¹¹ *Moody*, 422 U.S. at 425.

²¹² *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to 'No Cause' Employment*, 81 TEX. L. REV. 1177, 1212 (2003) (discussing the balance of interests behind Title VII).

²¹³ One Title VII scholar has suggested that plaintiffs be permitted to skip entirely the job relation/business necessity stage of the impact case, and upon a showing of disparate impact, proceed directly to demonstrating less discriminatory alternatives. *See* BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE* 107–09 (1998).

²¹⁴ West-Faulcon, *supra* note 206, at 1046 (emphasis added).

There is no shortage of attractive alternatives to the job knowledge test.²¹⁵ Perhaps most promising is an assessment center that confronts candidates with real-world situations and allows them “to demonstrate [before multiple assessors] how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test.”²¹⁶ This represents a shift *from cognitive to competency testing*.²¹⁷ Several localities use these devices as a supplement to the written test.²¹⁸ Assessment centers are widely recognized as more reliable predictors of job success, and especially better able to identify and measure leadership capacity, problem-solving skills, and command presence.²¹⁹ The holistic approach has been found to produce less adverse impact on minorities.²²⁰

But courts have been reluctant *to impose* alternative selection practices on law enforcement or public safety agencies.²²¹ Noting that assessment center exercises “can require considerably more resources to administer, including both money and personnel, and thus can be cumbersome and expensive,” the District Court declined to mandate them in *Lopez v. Lawrence* in 2014.²²² Although the First Circuit Court of Appeals acknowledged that

²¹⁵ Personality and life experience tests are two further alternatives in addition to those listed here. See *Bradley*, 443 F. Supp. 2d at 174 n.16-17.

²¹⁶ *Ricci v. DeStefano*, 557 U.S. 557, 570 (2009).

²¹⁷ Ronald A. Ash, et al., *The Practice of Competency Modeling*, 53 PERS. PSYCHOL. 703, 711 (2000).

²¹⁸ Riccucci & Riccardelli, *supra* note 3, at 352.

²¹⁹ See Floyd Delon, *Assessment Center Screenings for School Administration Certification and Employment: Possible Legal Challenges*, 43 ED. L. REP. 841 (1988) (examining the use of assessment centers in school administration hiring); Charles Hale, *Assessment Centers*, LAW & ORDER, Feb. 1, 2005, at 22 (discussing the effectiveness of assessment centers); Chris Williams, *Video Assessments Gain Ground as Way to Grade Future Teachers*, BOS. GLOBE, Nov. 3, 2010, at A4 (discussing the success of assessment centers in education hiring); Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents at 4–5, 28–33, *DeStefano*, 557 U.S. 557 (Nos. 07-1428 & 08-328), 2009 WL 796281 (discussing the use of assessment centers).

²²⁰ See GEORGE C. THORNTON & DEBORAH E. RUPP, ASSESSMENT CENTERS IN HUMAN RESOURCE MANAGEMENT 15 (2006) (“Assessment centers predict future success, do not cause adverse impact, and are seen as fair by participants.”); HERMAN AGUINIS & WAYNE F. CASCIO, APPLIED PSYCHOLOGY IN HUMAN RESOURCE MANAGEMENT 372 (6th ed. 2005) (“[R]esearch has demonstrated that adverse impact is less of a problem in an [assessment center] as compared to an aptitude test.”); Ellen Zweig, *Challenges to Employment Testing Under Title VII: Creating “Built In Headwinds” for the Civil Service Employer*, 12 FORDHAM URB. L.J. 703, 748 (1984) (noting how holistic approaches help avoid equal protection challenges).

²²¹ It has been observed that “[a]fter all . . . if the employer . . . could implement an alternative practice that serves its needs as cheaply as the original practice but with less discriminatory impact, would it not have done so initially, to avoid the expense of litigation?” Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 42 (1990).

²²² No. 07-11693-GAO, 2014 U.S. Dist. LEXIS 124139, at *65 (D. Mass. Sept. 5, 2014) (*Lopez I*), *aff’d*, 823 F.3d 102 (1st Cir. 2016) (*Lopez II*), *cert. denied* 137 S. Ct. 1088 (2017); see

its “own review of the record does disclose testimony convincingly establishing that, as a general matter, incorporation of selection tools such as use of ‘hurdles,’ banding, oral interviews, so-called assessment centers, and open ended ‘situational judgment’ questions generally tend to result in less adverse impact than does a reliance on multiple choice exams,” it nonetheless affirmed the District Court’s ruling, explaining:

Boston’s prior attempt to employ assessment centers with situational exercises and oral questioning in its 2002 promotional exam resulted in a cost of \$1.2 million to develop the exam and the required “transporting, housing, and training a substantial number of police officers from throughout the country who acted as the assessors,” without generating any convincing support that repeating such an approach in 2005 or 2008 would have reduced adverse impact. In concluding that the City was not required to again incur such costs without any demonstration that adverse impact would be materially reduced, the district court acted well within its discretion in making the judgments called for by the applicable law. Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.²²³

Another cautionary tale can be found in the experience of Memphis, Tennessee where in 2014, in *Johnson v. City of Memphis*, the District Court found that plaintiffs had met the burden of demonstrating equally valid less discriminatory alternatives to the job knowledge test used by the police department, particularly a role-playing exercise that required candidates to respond to simulated law enforcement scenarios, and had been validated and

also *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1512 (C.D. Cal. 1995) (“[A] proposed alternative that represents a substantial financial and time burden [like an assessment center] does not constitute an equally effective alternative.”)

²²³ *Lopez II*, 823 F.3d at 121 (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 998 (1988) (“Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”)); see also *Ferguson v. City of Charleston*, 186 F.3d 469, 481 (4th Cir. 1999) (discussing the potential use of less discriminatory alternatives); *Davey v. City of Omaha*, 107 F.3d 587, 593 (8th Cir. 1997) (holding that costs and other burdens may be weighed when making an LDA determination). Boston had two false starts with assessment centers. In 1987, an assessment center consisting of in-basket exercise, a video performance exercise, and a leaderless group exercise, was abandoned when information about it was leaked. In 1992, another assessment device was scuttled when a group of white officers filed an action challenging the promotion of minorities with lower written test scores. See *Mass. Ass’n of Minority Police Officers v. Abban*, 748 N.E.2d 455, 457–58 (Mass. 2001).

used with success before.²²⁴ The Sixth Circuit Court of Appeals acknowledged “that the existence of such alternative measures and methods belies . . . Defendants’ position that they had no choice but to go forward with the 2002 promotion process despite its adverse impact because no alternative methods with less adverse impact were available.”²²⁵ But it nonetheless overturned the lower court’s ruling because of security concerns with the simulations—leaked information and candidate coaching compromised both prior administrations.²²⁶ The trial judge was found to have also ignored “the City’s concern regarding the impracticability of the 1996 simulation, which required numerous actors to portray the two-hour law enforcement scenarios and took nearly three months to evaluate more than 400 applicants.”²²⁷

Costs and logistical burdens thus inhibit the practicality of LDAs, severely limiting their use.²²⁸ The Supreme Court has also cautioned that “[c]ourts are generally less competent than employers to restructure business practices.”²²⁹ “[C]onsequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff’s alternative selection or hiring practice in response to a Title VII suit.”²³⁰

Although Title VII has thus not proven effective in imposing LDAs on reluctant police departments, the concept itself evidences an important insight: Employers are legally required, where their selection devices disadvantage minorities, *and even if they can validate them to the satisfaction of a court*, to utilize alternatives that can achieve their goals with less discriminatory effect. As the Second Circuit has recognized, where an employer refuses to consider effective alternatives and persists in utilizing selection devices with adverse impact, that will “believe a claim . . . that [its] incumbent practices are being employed for non-discriminatory reasons.”²³¹ Should that employer not be adjudged to be *intentionally* discriminating?

As originally conceived, the premise behind the LDA concept was indeed one of *intentional* discrimination:

If an employer does then meet the burden of proving that its tests are “job related,” it remains open to the complaining party to show that other tests or selection devices, without a similarly un-

²²⁴ 770 F.3d 464, 476–78 (6th Cir. 2014), *cert. denied*, 136 S. Ct. 81 (2015).

²²⁵ *Id.* at 473.

²²⁶ *Id.* at 474.

²²⁷ *Id.* at 465.

²²⁸ *Id.* at 474–75 (collecting cases).

²²⁹ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 661 (1989) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

²³⁰ *Id.*

²³¹ *Id.*

desirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." *Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.*²³²

Tort law would bring the same result, as set out in the next Part.

VII. FASHIONING A NEW THEORY OF DISCRIMINATION— FORESEEABLE ADVERSE IMPACT EQUALS INTENT

As U.S. District Judge Charles Wyzanski ruled many years ago: "Inasmuch as the [police] civil service examinations were not job related and were discriminatory against the plaintiffs, any state or city official, *who innocently or otherwise*, used the results of those examinations to deprive a plaintiff of a job opportunity deprived him of the equal protection of the laws."²³³ What about exams that are deemed validated (by the low bar described above), but *used with the knowledge and expectation that minorities will be pushed aside*?

Judge Young began his opinion in *Smith v. City of Boston* (as discussed above) by emphasizing "this is not a case about conscious racial prejudice. Rather, the Plaintiffs' case is rooted in their allegation that the seemingly benign multiple-choice examination promotion process, while facially neutral, was slanted in favor of white candidates."²³⁴ The outcome, however, was *the functional equivalent of deliberate discrimination*—the exclusion of nearly all minorities from consideration for promotion.

Under the current regime, as set out above, the fate of groups who have long suffered exclusion from supervisory positions hinges on the rarefied air of psychometrics and statistics. Given that most judges are unschooled in such matters, and may not even see the challenged exams themselves in the course of the litigation,²³⁵ results depend largely on the persua-

²³² *Moody*, 422 U.S. at 425 (emphasis added); see also *Jones v. City of Boston*, 845 F.3d 28, 36–37 (1st Cir. 2017) (holding that the refusal of the Boston Police Department to adopt a viable less discriminatory alternative to challenged hair drug test may constitute a finding of intentional discrimination); Blumoff & Lewis, *supra* note 221, at 42–43.

²³³ *Castro v. Beecher*, 334 F. Supp. 930, 943 (D. Mass. 1971) (emphasis added), *aff'd in part, rev'd in part*, 459 F.2d 725 (1st Cir. 1972). Judge Wyzanski compared Massachusetts's low rate of minority participation with that of other communities more successful in employing minority officers, blaming Civil Service for "over-emphasizing scholastic skills, paper and pencil capacities, and performance in tests" with little if any ability to predict job performance. *Castro v. Beecher*, 365 F. Supp. 665, 666 (D. Mass. 1973) (on remand).

²³⁴ 144 F. Supp. 3d 177, 180; see also *Lopez v. City of Lawrence*, No. 07-11693-GAO, 2014 U.S. Dist. LEXIS 124139, at *9–10 (D. Mass. Sept. 5, 2014) (*Lopez I*), *aff'd*, 823 F.3d 102 (1st Cir. 2016) (*Lopez II*), *cert. denied* 137 S. Ct. 1088 (2017).

²³⁵ See *Sanchez v. City of Santa Ana*, 928 F. Supp. 1494, 1509–10 n.174 (C.D. Cal. 1995).

siveness of the opposing experts and the resources the parties can put behind them.

As neither the modest requirements for validation nor the obligation to use less discriminatory alternatives has proven a reliable means of redress from the scourge of job knowledge tests, I propose that Title VII should find liability and impose appropriate remedies in cases like *Lopez v. City of Lawrence* where repeated use²³⁶ of the same exclusionary devices *predictably* stifles minority advancement over the long term. Justification can be found in: 1) the inference that the foreseeable discriminatory results are *intended*;²³⁷ 2) recognition that such repetitive conduct is, at the very least, *negligent*;²³⁸ or 3) disparate impact theory writ large—i.e., to protect against the persistence of macro-built-in-headwinds against minority advancement.

Application of the widely recognized concept in tort and criminal law—that an actor *intends* the natural and foreseeable consequences of its actions, and that where he believes the consequences are *substantially certain* to follow, he *intends* those consequences²³⁹—would treat selection

²³⁶ “An important reason that the law focuses on the frequency of injury associated with certain kinds of conduct lies in the value of predictability. That ability to predict the likelihood of a type of event has an obvious relation to fairness concerns.” MARSHALL S. SHAPO, PRINCIPLE OF TORT LAW § 19.02(c), 107 (3d ed. 2010).

²³⁷ As Catherine E. Smith has perceptively observed, the “evolving recognition of discriminatory harms should continue to include the developments in our understanding of how discrimination operates” Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1207, 1209 (2014).

²³⁸ It has been suggested that “the employer may be held liable for its negligence in failing to consider all of the possible ways to make a certain decision.” Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 99 (2011); *see also* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PENN. L. REV. 899, 967 (1993). Negligence is of course the basis for employer liability in sexual harassment cases. *See Sperino, supra*, at 111–12 (discussing the role of negligence in harassment cases).

²³⁹ *See* WILLIAM L. PROSSER, THE LAW OF TORTS, § 8, at 32 (3d ed. 1964); *id.* § 9, at 302 (“Where a reasonable man in the defendant’s position would believe that a particular result was substantially certain to follow, he will be dealt with . . . as though he intended it.”); *see also* RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965) (“The word ‘intent’ is used throughout the Restatement of this subject to denote that the actor desires the consequences of his act, or that *he believes that the consequences are substantially certain to result from it Intent is not, however, limited to consequences which are desired. If the actor knows the consequences are certain or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.*”) (emphasis added). *See generally* Brodin, *The Role of Fault, supra* note 166, at 975–85.

Derek Black argues the tort-based concept of intent should be imported generally into civil rights doctrine:

When the defendant causes racially disparate results or harms, liability would be determined by objective factors: whether the government was, or should have been, aware of the consequences of its actions; whether other less harmful reasonable alternatives were or are available; and whether there is any reason or competing interest

practices like Boston's, used repeatedly with the same predictable exclusionary results, as *intentionally* discriminatory.²⁴⁰

Justice Stevens observed in 1976 regarding the use of the entry-level police officer exam in *Washington v. Davis*:

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally[,] the actor is presumed to have intended the natural consequences of his deeds. [T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. . . . [W]hen the disproportion is as dramatic as [here] it really does not matter whether the standard is phrased in terms of purpose or effect.²⁴¹

The District Court in *Personnel Administrator v. Feeney*²⁴² invoked the same "presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions" in concluding that the absolute veterans' preference for Massachusetts civil service jobs constituted "intentional" and "purposeful" discrimination against women, given their historical exclusion from the military.²⁴³ Although rejecting this conclusion on review, Justice Stewart conceded that it would be:

[D]isingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable. . . . Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of

that dictates against implementing an available alternative. The final inquiry requires the defendant to justify its choice to perpetrate or continue a racial harm—in spite of available alternatives—with some purpose or interest that outweighs the harm.

Derek Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, & Standards*, 60 RUTGERS L. REV. 259, 325 (2008). "Indifference to consequences" is sufficient to support an award of punitive damages in a § 1983 civil rights action. *Smith v. Wade*, 461 U.S. 30, 43 (1983). A counterpart in criminal law is the doctrine of willful blindness. WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 186 (3d ed. 2017); LAURIE L. LEVINSON, *THE GLANON GUIDE TO CRIMINAL LAW* 31 (4th ed. 2015).

²⁴⁰ A funded study by the Police Executive Research Forum in Washington, D.C. recommends that police executives periodically audit their agency's selection processes to assess whether they have an adverse impact on minority applicants. LORIE FRIDELL ET AL., *RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE* 73 (2001).

²⁴¹ 426 U.S. 229, 253–54 (1976).

²⁴² 442 U.S. 256, 235 (1979).

²⁴³ *Feeney v. Massachusetts*, 451 F. Supp. 143, 147, 151 (D. Mass. 1978).

[the veterans' preference], a strong inference that the adverse effects were desired can reasonably be drawn.²⁴⁴

For dissenters Marshall and Brennan, the preference constituted *intentional* discrimination.²⁴⁵

The Supreme Court has relied on the tort standard to find violations of equal protection on several occasions. In 1979 in *Columbus Board of Education v. Penick*,²⁴⁶ a school de-segregation case, the Court ruled:

[T]he District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. [Our] cases do not forbid “the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.” Adherence to a particular policy or practice, “with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.”²⁴⁷

And civil rights statute 42 U.S.C. § 1983 has long been read “against the background of tort liability that makes a man responsible for the natural consequences of his actions.”²⁴⁸

Incorporation of the presumption has in fact already occurred in Title VII contexts. In 2011, in *Staub v. Proctor Hospital*, for example, the Supreme Court described the circumstances under which an employer is liable

²⁴⁴ *Feeney*, 442 U.S. at 278, 279 n.25.

²⁴⁵ *Id.* at 283–84 (Marshall J., dissenting).

²⁴⁶ 443 U.S. 449, 464–65 (1979).

²⁴⁷ *Id.*; see also *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536 n.9, 538 (1979) (noting that “proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct”); *United States v. Sch. Dist. of Omaha*, 521 F.2d 530, 535–36 (8th Cir. 1975) (reversing the District Court because it failed to presume intent based on the “natural, probable and foreseeable consequences” of the defendant’s actions); *Hart v. Cmty. School Bd. of Educ.*, 512 F.2d 37, 50–51 (2d Cir. 1975) (inferring intent to segregate from the “foreseeable consequences of action taken [by the school board]”); *Morgan v. Kerrigan*, 509 F.2d 580, 588 (1st Cir. 1974) (noting that the “pattern of selective action and refusal to act can be seen as consistent only when considered against the foreseeable racial impact of such decisions”); *Oliver v. Mich. State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974) (noting that a “presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials’ action or inaction was an increase or perpetuation of public school segregation”).

²⁴⁸ *Monroe v. Pape*, 365 U.S. 167, 187 (1974); see also 42 U.S.C. § 1983 (2012).

for the discriminatory acts of its supervisor by reference to whether the latter's act was *intended* to cause adverse action against the plaintiff—which included the situation where the supervisor believed it was *substantially certain* to cause that result.²⁴⁹

In 2011 in *United States v. City of New York*, U.S. District Judge Nicholas Garaufis held that New York City's use of written firefighter exams constituted *intentional* discrimination because the demonstrable disparate impact and lack of meaningful job-relatedness should have been readily apparent.²⁵⁰ Overseeing the latest in the “forty-year struggle to integrate the F.D.N.Y.,” which he described as “a stubborn bastion of white male privilege,”²⁵¹ Judge Garaufis found:

[T]he evidence in this case has established that the FDNY has not remained segregated-in-fact for over forty years by accident. In its opinions and findings of fact in this case, the court has extensively detailed how policies, procedures, and practices adopted by the City of New York are responsible for systematically excluding black and Hispanic firefighter candidates from the ranks of the FDNY. The result of these actions—*deliberately undertaken by the City of New York despite its officials' knowledge of their discriminatory effects*—has been exactly the kind of systematic employment discrimination Congress intended to eradicate and prevent when it passed Title VII of the Civil Rights Act of 1964. That this discrimination has been allowed to persist in New York City for so long is a shameful blight on the records of the six mayors of this City who failed to take responsibility for doing what was necessary to end it.²⁵²

²⁴⁹ 562 U.S. 411, 422 n.3 (2011).

²⁵⁰ No. 07-CV-2067 (NGG) (RLM), 2011 WL 4639832, at *11 (E.D.N.Y. Oct. 5, 2011) (*City of New York II*), vacated and remanded by 717 F.3d 72, 91 (2d Cir. 2013) (*City of New York III*); see also *United States v. City of New York*, 683 F. Supp. 2d 225 (E.D.N.Y. 2010) (*City of New York I*) (finding that the use of the exams constituted a pattern and practice of intentional discrimination). Deeming the matter premature for summary judgment, the Second Circuit vacated and remanded for trial. *City of New York III*, 717 F.3d at 91. Judge Pooler dissented from the panel opinion in *City of New York III* because he found the persistent use of the exams to be evidence of discriminatory intent. *Id.* at 113 (Pooler, J., dissenting). Compare *id.* with *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 743 (S.D. Miss. 2003) (rejecting plaintiffs' claim that by using the results of a test that the City knew had a discriminatory impact, it had engaged in intentional discrimination because the officials had reasonably misinterpreted the Justice Department's comments on the exam).

²⁵¹ *City of New York II*, 2011 WL 4639832, at *1. The first decision striking down the exam was authored by Judge Weinfeld in 1973. See *Vulcan Soc'y v. Civil Serv. Comm'n of City of N.Y.*, 360 F. Supp. 1265, 1265 (S.D.N.Y. 1973) (holding that the exam was not valid).

²⁵² *City of New York II*, 2011 WL 4639832, at *1.

Given “the numerous times the City has been sued for the same basic failure to design and administer civil service examinations that are job-related and do not have a disparate impact upon minority groups,” the District Court concluded that “use of discriminatory testing procedures constituted a pattern and practice of *intentional discrimination* against black firefighter candidates.”²⁵³ The Second Circuit Court of Appeals agreed that the issue of discriminatory intent on remand would focus on “whether the City’s use of the Exams, once their racially disparate impact was known, proves, in light of the history of low minority hiring, that the City used the Exams with the intent to discriminate.”²⁵⁴

The F.D.N.Y. multiple-choice exam (like its counterparts in Boston and elsewhere) was the modus operandi for reserving for white men what was advertised as “the best job in the world.”²⁵⁵ The City had been “deliberately indifferent” to the racially exclusionary effects of the successive exams, and “had made conscious decisions to permit them to continue.”²⁵⁶ The relevant decision makers were long aware that the hiring practices discriminated against black applicants but “nonetheless refused to take steps to remedy this discrimination.”²⁵⁷ In a city with a black population of more than 25%, representation in the F.D.N.Y. was a mere 3.4%.²⁵⁸

It is hard to imagine a more compelling case for the application of the tort presumption than a situation involving decades of similar-format exams with the same exclusionary results. The First Circuit Court of Appeals’ introduction to *Lopez* (like Judge Young’s in *Smith v. City of Boston* noted above)—“There is no claim in this case that defendants intentionally selected the test in order to disadvantage any group of applicants”²⁵⁹—is a function of an unduly cramped definition of “intent.”²⁶⁰ What is missing is the recognition that utilizing selection devices that inexorably exclude minori-

²⁵³ *Id.* at *2 (emphasis added).

²⁵⁴ *City of New York III*, 717 F.3d at 91.

²⁵⁵ *City of New York II*, 2011 WL 4639832, at *2. “Firefighters can’t be outsourced, and the benefits and pay are far more generous than at working-class jobs in the private sector, which have steadily declined over the past four decades.” GOLDBERG, *supra* note 21, at 243 (quoting Steven Thrasher, *Will the FDNY Remain Over 90 Percent White and Male?*, VILLAGE VOICE (Mar. 7, 2012), <https://www.villagevoice.com/2012/03/07/will-the-fdny-remain-over-90-percent-white-and-male/> [<https://perma.cc/3RB2-HDKK>]).

²⁵⁶ GOLDBERG, *supra* note 21, at 310.

²⁵⁷ *City of New York I*, 683 F. Supp. 2d at 250.

²⁵⁸ *City of New York II*, 2011 WL 4639832, at *2.

²⁵⁹ *Lopez II*, 823 F.3d at 107.

²⁶⁰ The First Circuit appears to recognize only the most familiar form of intentional discrimination: “Rank ordering [based strictly on the multiple-choice exam] furthers the City’s interest in eliminating patronage and *intentional racism* under the guise of subjective selection criteria.” *Id.* at 119 (emphasis added).

ties cannot properly be said to be *unintentional*. Indeed, such conduct would be considered culpable as “knowing” under the Model Penal Code, where the actor “is aware that it is practically certain that his conduct will cause such a result.”²⁶¹

Alternatively, a theory of “negligent discrimination”²⁶² would hold the employer liable where it “fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur.”²⁶³ Employers would have an affirmative “duty to avoid harm” to minorities.²⁶⁴ “Even if the selection device meets the busi-

²⁶¹ MODEL PENAL CODE § 2.02(2)(b) (AM. LAW INST. 1962).

²⁶² The term “negligent discrimination” was apparently coined by David Benjamin Oppenheimer in his classic article “Negligent Discrimination.” See generally Oppenheimer, *supra* note 238.

²⁶³ *Id.* at 900. This includes situations where the employer continues to make employment decisions “that have a discriminatory effect, without first carefully examining its processes, [and] searching for less discriminatory alternatives.” *Id.*

²⁶⁴ Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STANFORD L. REV. 1381, 1403 (2014); see also Black, *supra* note 239, at 272–73. Ford states that:

This would also constitute a shift in emphasis from reparative justice to deterrence; a shift away from a conception of fault and injury to a conception of conflicting activities that entail joint costs; a shift away from the notion of objectively injurious actions to an idea of legally imposed duties of care that define legal injury; and a shift away from the goal of individual reparation to one of reducing the social costs of necessarily conflicting activities.

Ford, *supra*, at 1386.

Ford uses *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), to illustrate how this approach would operate:

[T]he crux of the Wal-Mart plaintiffs’ claim wasn’t really that Wal-Mart, as a corporation, had actively encouraged sex discrimination. It was that Wal-Mart hadn’t taken sufficient care to prevent it. Wal-Mart’s policies were vulnerable to sex discrimination by individual managers, but Wal-Mart did nothing to change the policies to reduce the risk of discrimination. Why not? Did Wal-Mart’s management secretly want its managers to discriminate? There’s little evidence of such a motivation, and what’s more, there are obvious business justifications for Wal-Mart’s policies: in a service industry, subjective factors are relevant to job performance, but information about varying local conditions in such a large enterprise is costly to obtain and evaluate centrally. Decentralized decision-making is an efficient way of organizing personnel decisions. To be sure, there will be mistakes—local prejudices and rogue managers who act on the basis of whim or bias—but these costs are probably outweighed by the benefits and savings of a decentralized and discretionary system. And there is the added benefit that a decentralized system effectively limits any liability for unlawful practices to the level of the individual store: if there is no centralized policy or decision-making apparatus, there is unlikely to be company-wide liability.

....

In Wal-Mart’s case, there was a conflict between protecting women from sex discrimination and employing its preferred personnel policies, which may well have

ness necessity test, if the employer knew or should have known of a less discriminatory device that met its legitimate needs, it should have avoided the harm caused to women and minorities [as well as the society as a whole] by using the less discriminatory device.”²⁶⁵ Otherwise the decision makers have been “deliberately indifferent” to the interests of the black applicants.²⁶⁶

If a town were responsible for a traffic intersection where, because of obvious defects in design, serious accidents occurred with great frequency, and the town failed to remedy the defects, recovery for gross negligence or recklessness would likely follow. Yet public safety agencies have stifled the careers of minorities, as well as the potential to diversify ranks, while ignoring alternative selection methods that are better able to identify competent supervisors.

Griggs v. Duke Power Company sought to “remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”²⁶⁷ Successive use of job knowledge exams is one such stubborn barrier that has been allowed to persist by combination of “minimal” validation and resistance to less discriminatory alternatives.

This new approach would have significant benefits for enforcement of equal employment opportunity. First, liability would be extended to employers whose exclusionary personnel policies have persisted over time, but who have been able in court to isolate each device’s impact and avoid confronting the cumulative effects of the pattern. Second, the range of available remedies would be expanded because victims of intentional discrimination (unlike those harmed by disparate impact) would be entitled to compensatory and punitive damages.²⁶⁸ And affirmative relief, including preferential hiring or promotion, would be appropriate where the defendant has “intentionally or egregiously engaged in a practice of discrimination that is likely to have discouraged members of the protected group from becoming mem-

been desirable for other reasons, such as cost or ease of administration. Wal-Mart chose to retain the risky policies.

Ford, *supra*, at 1387.

²⁶⁵ Oppenheimer, *supra* note 238, at 935.

²⁶⁶ *City of New York I*, 683 F. Supp. 2d at 264.

²⁶⁷ 401 U.S. 424, 429–30 (1971); see also Mark S. Brodin, *Reflections on the Supreme Court’s 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 5–11 (1989); William T. Matlack, Note, *Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees with the Equal Protection Claims of Majority Employees*, 28 B.C. L. REV. 1007, 1011–12 (1987) (noting the policy behind Title VII as expressed by the Court in *Griggs*). “*Griggs* was rightly concerned,” the Supreme Court later observed, “that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).

²⁶⁸ 42 U.S.C. § 1981a(a)(1) (2012).

bers of the applicant pool at any stage. [And where] the defendant's discrimination has been intentional, or there has been a long-continued pattern of egregious discrimination."²⁶⁹

Third, a liability finding entitles plaintiffs to attorneys' fees, designed to encourage the crucial enterprise of private enforcement of Title VII.²⁷⁰ In a matter such as *Lopez*, plaintiffs' counsel face the bleak prospect of a decade or more of enormously expensive and labor-intensive litigation, in an effort to persuade a federal district judge (perhaps reluctant to second-guess a public safety agency's personnel decisions) to credit their experts over defendants'. And a rare victory at trial just takes the case into the long grind of the appellate process.

A closely divided Supreme Court chastised the City of New Haven when it voluntarily took action to end a long streak of multiple-choice exams that had preserved a white firefighter supervisory force in a majority-minority city. The Court in *Ricci v. DeStefano* found the City liable in a reverse-discrimination action when it discarded an exam that had eliminated virtually all minority candidates and was of dubious validity, ruling the action constituted disparate treatment against the successful white test takers.²⁷¹ One hopes the Court would take a more enlightened approach today, as it has regarding voluntary affirmative action in higher education.²⁷² In any event, Title VII should provide redress against public safety employers who insist on recycling the misguided selection devices of the past.

CONCLUSION

"While a diverse police department does not guarantee a constitutional one, it is nonetheless critically important for law enforcement agencies . . . to strive for broad diversity among officers and civilian staff."²⁷³ "Achieving diversity in entry level recruiting is important," the Final Report of the President's Task Force on 21st Century Policing observed, "but achieving systematic and comprehensive diversification throughout each segment of the department is the ultimate goal . . . to help improve the culture of police

²⁶⁹ *City of New York II*, 2011 WL 4639832, at *4. "Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation." *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 448 (1986).

²⁷⁰ *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 412 (1978) (noting that "the plaintiff is Congress's chosen instrument to vindicate 'a policy that Congress considered of the highest priority . . .'" (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968))).

²⁷¹ 557 U.S. 557, 557 (2009).

²⁷² See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

²⁷³ FPD DOJ REPORT, *supra* note 26, at 89.

departments and build greater trust and legitimacy with all segments of the population.”²⁷⁴ The Report continued:

As our nation becomes more pluralistic and the scope of law enforcement’s responsibilities expands, the need for more and better training has become critical. Today’s line officers and leaders must meet a wide variety of challenges including international terrorism, evolving technologies, rising immigration, changing laws, new cultural mores, and a growing mental health crisis. All states and territories and the District of Columbia should establish standards for hiring, training, and education. The skills and knowledge required to effectively deal with these issues requires a higher level of education as well as extensive and ongoing training in specific disciplines. The task force discussed these needs in depth, making recommendations for basic recruit and in-service training, as well as leadership development in a wide variety of areas: Community policing and problem-solving principles; interpersonal and communication skills; bias awareness; scenario-based, situational decision making; crisis intervention; procedural justice and impartial policing; mental health issues; analytical research and technology; languages and cultural responsiveness.²⁷⁵

All too often we read in the news about the tragic consequences of unrepresentative police forces staffed by unskilled supervisors. Title VII is uniquely situated to address this problem, as it functions not only to address individual claims but also to assure fair treatment of racial groups by encompassing the “broad sweep of societal employment practices.”²⁷⁶

Law enforcement agencies should not be free to indefinitely perpetuate their nearly all-white supervisory staffs by using “quasi-academic hurdles.”²⁷⁷ But the current doctrine regarding standardized testing has hampered the statute’s potential by bogging it down in the arcane world of industrial psychology and psychometrics, thereby permitting these questionable devices to masquerade as color-blind selection tools.²⁷⁸

²⁷⁴ U.S. DEP’T OF JUSTICE, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 16–17 (2015), <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf> [<https://perma.cc/HY6U-ZWWB>].

²⁷⁵ *Id.* at 51.

²⁷⁶ D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 734, 751 (1987).

²⁷⁷ *Nash v. Consol. City of Jacksonville*, 837 F.2d 1534, 1538 n.7 (11th Cir. 1988), vacated by 490 U.S. 1103 (1989), *op. reinstated on remand*, 905 F.2d 355 (11th Cir. 1990).

²⁷⁸ See GOLDBERG, *supra* note 21, at 307.

In its sixth decade, Title VII has evolved and adapted to the changes in the workplace and the surrounding society.²⁷⁹ It was slow to embrace claims of sex harassment²⁸⁰ and sex stereotyping,²⁸¹ but they are now routinely litigated. Courts should similarly now recognize the myriad of harms caused by the testing practices discussed here, and read Title VII to embrace claims against serial offenders who persist in the face of predictable exclusionary outcomes.

Over the decades, police departments like Boston's have been able to bat down successive Title VII actions challenging tests that have little if anything to do with supervisory potential. When these employers *know*, as they do from their own experience and from what the experts tell them, that the exams will keep minorities out of the upper ranks, there must be meaningful redress under Title VII for what is properly treated as *intentional* discrimination. Otherwise we are not only abandoning the qualified minority officers denied career advancement, but risking continued tragic discord in the diverse communities that are served.

²⁷⁹ As Catherine E. Smith has perceptively observed, the "evolving recognition of discriminatory harms should continue to include the developments in our understanding of how discrimination operates" Smith, *supra* note 237, at 1209; see also Sperino, *Let's Pretend Discrimination Is a Tort*, *supra* note 34, at 1125.

²⁸⁰ Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

²⁸¹ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Appendix A



CHARLES D. BAKER
Governor

KARYN E. POLITO
Lieutenant Governor

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
HUMAN RESOURCES DIVISION
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Chief Human Resources Officer

PLEASE POST PROMINENTLY
READING LIST ANNOUNCEMENT

TO: Fire Department Appointing Authorities
Fire Chiefs

FROM: George J. Bibilos, Director, Organizational Development Group/Civil Service Unit

DATE: May 15, 2017

SUBJECT: READING LISTS FOR THE PROMOTIONAL EXAMINATIONS

FIRE LIEUTENANT

FIRE CAPTAIN

EXAMINATION DATE – SATURDAY, NOVEMBER 18, 2017

Examinations for these ranks are scheduled for November 18, 2017. All applicants are responsible for reading all the texts and other materials listed below and on all pages of this announcement. Please note carefully which edition and/or date of publication is listed for each item. All chapters, appendices, glossaries, etc., are included unless otherwise noted. All examination questions will be based on these materials.

LIEUTENANT AND CAPTAIN

Fire and Emergency Services Company Officer, Fifth Edition, 2014. (IFSTA)

Lieutenants: Part A, Chapters 1, 2, and 3: entire chapters; Chapter 4: Only pp. 81-97 (start at beginning of p. 81 and stop at p. 97 before "Labor/Management Relations"); Chapter 5: entire chapter; Chapter 6: Only pp. 143-151 (start at beginning of p. 143 and stop at p. 151 before "Budget Process"); Chapters 7 and 8: entire chapters; Chapter 9: entire chapter, excluding "Canadian Workplace Hazardous Materials Information System" on p. 240 and "U.S. and Canadian Safety Color Codes" on pp. 240-241; Chapters 10 and 11: entire chapters; and Part B, Chapter 12: Only pp. 352-366 (start at p. 352 "Types and Forms of Governments" and stop at p. 354 before "Provincial and Territorial Governments"; start at p. 355 "Agencies of State and Provincial Governments" and stop at p. 356 before "Canadian Federal Government and Agencies Involved in Fire Protection"; start at p. 357 "Local Aid Agreements" and stop at the end of chapter; Chapter 13: entire chapter; Chapter 15: entire chapter; Chapter 16: Only pp. 438-441 (start at p. 438 "Postincident Analysis and Critique" and stop at the end of p. 441); Chapter 17: entire chapter. Exclude appendices and glossary.

Captains: Same chapters and sections as lieutenants and including the following additional information:

Chapter 4: pp. 97-98 on "Labor/Management Relations"; Chapter 12: pp. 350-352 on "Company Officer II Roles and Responsibilities" and "Communications"; and Chapter 16: pp. 430-437 on "Multi-unit (Multiple Alarm) Emergency Scene Operations" and "Developing and Implementing Operational Plans"

Fire Inspection and Code Enforcement, 8th Edition, 2016. (IFSTA)

Chapters 1-7, 9, 11-14, and 16, and all glossary terms related to these chapters. Exclude appendices.

Hazardous Materials for First Responders, Fifth Edition, 2017. (IFSTA)

Entire book, except Chapters 7, 12, and 14.

Exclude appendices, metric equivalents, glossary, tables, and figures.

National Incident Management System, Federal Emergency Management Agency, U.S. Department of Homeland Security P-501, December 2008. (FEMA)

Entire book, including Appendix B, Glossary of Key Terms, and Acronyms.

Exclude Appendix A.

Massachusetts General Laws, Chapter 148 (as amended through the release date of this reading list).

Pumping and Aerial Apparatus Driver/Operator Handbook, Third Edition, 2015. (IFSTA)

Chapter 5: Entire chapter.

Chapter 6: Entire chapter.

Chapter 7: Only pp. 209-246.

Chapter 8: Only pp. 281-284 (start at p. 281 "Flowmeters" and stop at p. 284 before "Hydraulic Calculators").

Chapter 9: Entire chapter.

Chapter 10: Only pp. 335-366.

Appendix B

Trespassing Wording

ON **(Date)** AT APPROXIMATELY **(Time)** OFFICER JOHN DOE WAS WORKING IN A UNIFORM CAPACITY IN THE **(Address in Housing Location)** WHICH IS A HIGH DRUG TRAFFICKING AREA AND AN AREA KNOWN FOR VIOLENT CRIMES. OFFICER DOE OBSERVED A BLACK MALE LATER IDENTIFIED AS **(Name of Suspect)** (LOITERING, INVOLVED IN NARCOTIC ACTIVITY, ETC) IN THE **(Address)**. OFFICER DOE THEN APPROACHED **(Suspect)** AND ASKED HIM WAS HE A RESIDENT OF THE **(Name of Development)** PUBLIC HOUSING DEVELOPMENT, WHICH HAS SIGNS POSTED "NO TRESPASSING" PLACED IN A CONSPICUOUS MANNER THROUGHOUT THE DEVELOPMENT. **(Suspect)** ADVISED OFFICER DOE THAT HE WAS NOT A RESIDENT OF **(Development)** OFFICER DOE THEN ASKED **(Suspect)** WHAT WAS HIS REASON FOR BEING ON HOUSING PROPERTY. AT THIS POINT **(Suspect)** COULDN'T GIVE A VALID REASON FOR BEING ON HOUSING PROPERTY. **(Suspect)** WAS THEN PLACED UNDER ARREST AND TRANSPORTED TO CBIF FOR PROCESSING.

