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## Testing, Discrimination, and Opportunity: A Reply to Professor Harvey Gilmore

Dan Subotnik\*

In December 2013 I published an article, *Does Testing = Race Discrimination?: Ricci, The Bar Exam, the LSAT, and the Challenge to Learning*.<sup>1</sup> I began with a defense of the Supreme Court's decision in *Ricci v. DeStefano*<sup>2</sup> and went on to defend testing more generally against charges of irrelevance, racial obtuseness, and most seriously, race discrimination. Professors Andrea Curcio, Carol Chomsky, and Eileen Kaufman have responded to my piece, as has Richard Delgado.<sup>3</sup>

I learned in April 2014 that the *Seattle Journal for Social Justice* would be publishing a response to my earlier piece. Written by Professor Harvey Gilmore, this response focuses mostly on the SAT and the LSAT.<sup>4</sup> Professor Gilmore is a former student of mine, a mentee, and an old friend. He is also an African-American and identifies as one, which makes his response especially relevant. He provides a personal and even intimate perspective on an important issue that is normally discussed only in academic terms. For these reasons, I both feel compelled—and am happy—to reply to his challenge.

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\*Dan Subotnik is a Professor of Law. Touro College, Jacob D. Fuchsberg Law Center. He thanks Professor Gilmore for jumping into these turbulent waters. He thanks his own wife Rose Rosengard Subotnik for her editorial help.

<sup>1</sup> Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, The Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS L. REV 332 (2013).

<sup>2</sup> *Ricci v. DeStefano*, 557 U.S. 557 (2009).

<sup>3</sup> See generally Andrea Anne Curcio, Carol L.Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Response to Professor Subotnik (and Others)*, 9 U. MASS L. REV. 206 (2014)(Urging, among many things, that diversity is a credential for prospective employees); Richard Delgado, *Standardized Testing as Discrimination*, 9 U. MASS L.REV 98 (2014) (Implying by its very title that standardized testing is actionable).

<sup>4</sup> See generally Harvey Gilmore, *A Response to Professor Subotnik: Does Testing = Race Discrimination? Even Today, It Still Can*, 13 SEATTLE J. FOR SOC. JUST. 1 (2014).

Professor Gilmore teaches a wide range of courses in tax and law at Monroe College, a well-regarded business school in the New York City area. The title to his article (*A Response to Professor Subotnik: Does Testing = Race Discrimination? Even Today, It Still Can*) might suggest to readers that he is building a Title VII case against testing. He is not. Professor Gilmore, rather, focuses on his experience in finding a place in the professional world, expressing concern that he might well have been kept out of a career that he loves because of a low LSAT score,<sup>5</sup> and worrying about others like him. I cannot help but wonder whether, because I support testing for law school and college admissions, he thinks that I would have kept him and others like him out of law school if I had had the power to do so.

I would not have. I agree wholeheartedly with Professor Gilmore that “life experience, passion, desire, and perseverance”<sup>6</sup> are important predictors of success. Professor Gilmore applied to law school five years after he earned a master’s degree in taxation from C.W. Post/Long Island University, which was eight years after he earned a bachelor’s degree in accounting. He showed what he could do by working successfully as an accountant between graduate school and law school. Knowing those programs as I do and the kind of professional work he was doing, I would have welcomed him with open arms then, as I would welcome a similar candidate now. Professor Gilmore is a treasure.

#### I. MY RESPONSE TO PROFESSOR GILMORE

I wrote my article to counter a stubborn claim that the bar exam and LSAT fail their intended purposes.<sup>7</sup> For critics of standardized testing, there

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<sup>5</sup> *Id.* at 35.

<sup>6</sup> *Id.* at 15.

<sup>7</sup> Andrea Curcio, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447–52 (2002) (The bar exam fails “to measure in any meaningful way” whether those who pass the exam are “minimally competent to practice law”).

are two fundamental problems with these and other standardized tests. First, they do not measure learning ability and knowledge, as claimed; and second, even if they do, tests are not valid because professional and academic success are less a function of knowledge than of conscientiousness and communication skills.<sup>8</sup>

But standardized tests such as the bar exam and LSAT correlate to grades,<sup>9</sup> and grades are surely tied to conscientiousness, or, as Professor Gilmore puts it, to “passion, desire, and perseverance.”<sup>10</sup> It is hard to imagine that Professor Gilmore means to say that grades do not matter. Students who learn well are more likely to like the process than those who do not. They have developed their learning skills and presumably liked doing so. Moreover, good students demonstrate communications skills. For whatever limitations they may have, the SAT and LSAT have an essay writing component, which is designed to measure clear and persuasive writing.<sup>11</sup>

For Professor Gilmore, the SAT is a “fraud” because “all testing roads still lead to race and class.”<sup>12</sup> By this he means that the SAT, and by implication other tests, are tied to white middle-class values.<sup>13</sup> If we ask two

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<sup>8</sup> See generally Curcio et. al., *supra* note 3.

<sup>9</sup> See Subotnik, *supra* note 1, at nn. 244 & 245.

<sup>10</sup> Gilmore, *supra* note 4, at 15.

<sup>11</sup> The LSAT writing sample dates back to 2006. See LSAC, <http://www.lsac.org/jd/lsat/prep/writing-sample> (last visited Jun 6, 2014) (the essay is not graded); The SAT writing sample dates back to 2005. See SAT, <https://sat.collegeboard.org/practice/writing/sat-essay> (last visited Jun 6, 2014) (this is graded).

<sup>12</sup> See Gilmore, *supra* note 4, at 16.

<sup>13</sup> *Id.* at 4, 21–26 (suggesting that test like the SAT “can be racially and culturally biased”). In one respect, Professor Gilmore is right on target. Because of “point bi-serial correlation” (BBSC) in use on the SAT, questions “favoring” lower-achieving students are more likely to be thrown out than questions favoring other students. Because the former group is disproportionately black, scores for this group are likely to suffer more. The problem is that the foregoing test is a standard statistical procedure, which is designed to screen out misleading questions. The notion is that if significant number of high-achieving students miss a question, there is something wrong with it. See generally SEEMA VARMA, EDUCATIONAL DATA SYSTEMS, INC., PRELIMINARY ITEM STATISTICS USING POINT-BI-SERIAL CORRELATION AND P-VALUES, available at <http://www.eddata>.

students with different socioeconomic backgrounds a question, Professor Gilmore posits, we cannot expect the same right answers.<sup>14</sup> This inconsistency, however, hardly makes the SAT a fraud.

Professor Gilmore admits that he was a high-school dropout and that high-achieving students in his day took abuse from classmates, especially in minority communities. Indeed, black classmates ridiculed Professor Gilmore for being a “braniac.”<sup>15</sup> As a result he lost precious years relative to his middle class white classmates who were not so harassed, and, might I suggest, this probably had an impact on his LSAT score.

## II. USING THE SAT AND LSAT

How should employers and schools respond to educational gaps that are reflected on tests? Hard-nosed as it may sound, there seems to be no practical alternative to insisting that people in the lower socioeconomic classes compete with those more privileged in the same way that students whose parents are not teachers must compete with classmates whose parents are teachers. Not doing so would result in more class-based admissions, education, and employment decisions, as a middle-class background would become a prerequisite for acceptance and employment. We all, furthermore, have strengths and weaknesses. Affirmative action is one thing, but a handicap, practically speaking, cannot be given on a wide scale to individuals merely based on their lack of preparation for relevant work. If this is wrong, Professor Gilmore should explain how an admission system should work. How would he value the potential of those who did not have the high level of work experience that he had?

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com/resources/publications/EDS\_Point\_Biserial.pdf (last visited Oct. 7, 2014). The extent to which BPSC is inappropriate in this particular context and to which this hurts scores of minority students is beyond the scope of this paper.

<sup>14</sup> See Gilmore, *supra* note 4, at 17.

<sup>15</sup> See *id.* at 4.

Professor Gilmore criticizes SAT questions. Might I point readers to Professor Gilmore’s question number 8.<sup>16</sup> The SAT, as is well known, is a general purpose exam designed to measure readiness for college study. Readers will likely agree with me that using words such as “sparse” and “ornate” to test reading skill level is not over the top.<sup>17</sup> Additionally, math questions are at least in principle designed to say something useful about aptitude for engineering and science. Professor Gilmore, however, is resolutely opposed to the current reliance on aptitude testing.<sup>18</sup>

We should home in on Professor Gilmore’s complaints about the LSAT. Let’s talk about Fred.<sup>19</sup> Professor Gilmore says that the problem is not

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<sup>16</sup> *Id.* at 19.

8. Favoring economy of expression in writing, the professor urged students toward a \_\_\_\_\_ rather than an \_\_\_\_\_ prose style.

- (A) spare . . . ornate
- (B) terse . . . opinionated
- (C) personal . . . academic
- (D) baroque . . . embellished
- (E) repetitive . . . intricate

*Id.* citing COLLEGE BOARD, OFFICIAL SAT PRACTICE TEST 2013–14 15 (2013), available at [https://satonlinecourse.collegeboard.org/SR/digital\\_assets/assessment/pdf/F4D31AB0-66B4-CE32-00F7-F5405701F413-F.pdf](https://satonlinecourse.collegeboard.org/SR/digital_assets/assessment/pdf/F4D31AB0-66B4-CE32-00F7-F5405701F413-F.pdf) (last visited Aug. 31, 2014).

<sup>17</sup> *See id.*

<sup>18</sup> *See Gilmore, supra* note 4, at 53.

<sup>19</sup> *Id.* at 27–28. Professor Gilmore reproduces an academic example of an LSAT multiple-choice question that asks test takers to use logical reasoning to determine what is true about “Fred.”

Fred is tall, dark, and handsome, but not smart.  
 People who are tall and handsome are popular.  
 Popular people either have money or are smart.  
 Joan would like to meet anyone with money.

If the statements above are true, which of the following statements must also be true?

- I. Fred is popular.
- II. Fred has money.
- III. Fred is someone Joan would like to meet.

- (A) I only
- (B) II only
- (C) III only

related to anything that law students have to face.<sup>20</sup> Yes and no. Lawyers, as Professor Gilmore surely understands, must keep general rules, exceptions, and exceptions to the exceptions apart in their heads. Such distinctions are also critical in tax, a field that he and I share. Tax students, for example, start out with the notion that income from sales is taxed like “ordinary” income from services only to learn two months later about capital gains. A week or two after that, students learn that many of the kinds of property excluded from capital gain treatment are included as Section 1231 assets with rules all their own. The last step of a 360-degree spin is when 1231 transactions are explicitly overridden by Section 1245, or “recapture,” which returns income to the ordinary category.

### III. THE LSAT PROTECTS APPLICANTS FROM FAILURE AND DEBT

Professor Gilmore shows little recognition of the highly charged debate over the value of a legal education<sup>21</sup> and over the soundness of job placement data released by law schools to induce applications and enrollment.<sup>22</sup> I regularly hear students charge law schools with being tuition vacuums. Some go on to complain about how they will never extricate themselves from the jaws of insolvency. This is not to disagree with Professor Gilmore’s contention that there are students who might be successful in law school but who are screened out by the LSAT because it

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(D) I and II only  
(E) I, II, and III

*Id.* citing Leslie G. Espinoza, *The LSAT: Narrative and Bias*, 1 AM. U. J. GENDER & L. 121 (1993).

<sup>20</sup> *Id.* at 28.

<sup>21</sup> *See, e.g.*, AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS I (2014) available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).

<sup>22</sup> *See, e.g.*, *Harnish v. Widener University School of Law*, 931 F.Supp.2d 641 (D.N.J. 2013).

“is by no means a wholly accurate predictor of student success.”<sup>23</sup> But this in itself is not a meaningful argument against that test. Limiting standards to those that impose no external costs would, however, require junking every institution created by human beings.

In fact, the economic burden of open admissions, which Professor Gilmore may be advocating, would be crushing. The average graduate of a private law school emerges with school debt of \$125,000 and needs a substantial source of income to carry this debt.<sup>24</sup> A colleague pointed out that there are an estimated 150,000 law school graduates who never passed the bar exam.<sup>25</sup> Data show that African-Americans are considerably less likely to pass the bar.<sup>26</sup> Knowing Professor Gilmore as I do, I doubt that he is prepared to let everyone into law school. Sometimes consumers need protection against their own dreams, even if the cost of the protection is to exclude some individuals who could make it through law school, pass the bar exam, and get a job.

I have good reason for speculating about Professor Gilmore’s philosophy. Professor Gilmore defends the CPA exam.<sup>27</sup> His point is that the CPA exam is OK because students have or should have competency in that field. To take that exam, he reports, students are required to have a “bachelor’s degree in accounting and have earned a minimum of 150 college credits.”<sup>28</sup>

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<sup>23</sup> *Gilmore*, *supra* note 4, at 33; Sylvia Wood, *Law Schools Face Lawsuits over Job-Placement Claims*, NBC NEWS (Feb. 2, 2012, 12:31 PM), [http://usnews.nbcnews.com/\\_news/2012/02/02/10302339-law-schools-face-lawsuits-over-job-placement-claims](http://usnews.nbcnews.com/_news/2012/02/02/10302339-law-schools-face-lawsuits-over-job-placement-claims) (noting that more than a dozen schools have been sued).

<sup>24</sup> Debra Cassens Weis, *Average Debt of Private Law School Grads is \$125K; It’s Highest at these Five Schools*, A.B.A.J. (Mar. 28, 2012, 5:29 AM) [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m/](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/).

<sup>25</sup> Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 20 (2010).

<sup>26</sup> For first-time passage rates, see, e.g., *General Statistics Report July 2013 California Bar Examination*, CALIFORNIA BAR (Jan. 22, 2014) [http://admissions.calbar.ca.gov/Portals/4/documents/gbx/JULY2013STATS.012214\\_R.pdf](http://admissions.calbar.ca.gov/Portals/4/documents/gbx/JULY2013STATS.012214_R.pdf).

<sup>27</sup> See *Gilmore*, *supra* note 4, at 38–41.

<sup>28</sup> *Id.* at 38.



But this line of reasoning suggests that the bar exam is fair because it too tests knowledge and presupposes, if one includes college and law school, even more than 150 hours of study. If so, is the LSAT not also worth keeping if it can do a respectable job of screening out those who will not pass the bar exam? Can the same not be said of the GMAT? Professor Gilmore gives little credence to this protective purpose of the LSAT.<sup>29</sup>

Going beyond a standardized test to evaluate a student's "entire body of work"<sup>30</sup> is an excellent idea. What Professor Gilmore has not shown is that the whole student approach will produce an appreciably different result in admissions from that produced through testing—and through grades,<sup>31</sup> which he admits are important. Professor Gilmore himself showed that he had the right stuff through his work experience. He does not say, however, that all applicants with low scores on the SAT or LSAT have high GPAs that compensate for these low scores, or would be able to successfully make it through law school as he did.

To conclude, seats in law school are precious commodities; there are always more applicants than seats. Although Professor Gilmore raises important questions about the use of the LSAT and SAT in admissions decisions, his claim that the LSAT is not "foolproof"<sup>32</sup> misses the point, which is that tests do include questions that require the same skills that will be required of students and lawyers, and may effectively protect applicants by screening out those who would be unlikely to succeed in the profession and pay off their educational debts.

The foregoing conclusion will not help solve the problem of racial disproportion in law schools. It would be good to hear Professor Gilmore's further thoughts on this issue.

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<sup>29</sup> See *id.* at 34–35

<sup>30</sup> *Id.* at 52

<sup>31</sup> *Id.* at 38.

<sup>32</sup> *Id.* at 31.