

The SAT, LSAT, and Discrimination: Professor Gilmore Again Responds to Professor Subotnik

Harvey Gilmore[†]

Abstract

Harvey Gilmore responds to Professor Dan Subotnik's *Testing, Discrimination, and Opportunity: A Reply to Professor Harvey Gilmore*, 13 SEATTLE J. SOC. JUST. 57 (2014). Professor Gilmore continues to disagree with Professor Subotnik's unquestioned reliance on standardized testing, despite its history of racial exclusion.

Introduction

In December 2013, my friend, Professor Dan Subotnik, who teaches at Touro Law in New York, published a piece in the *Massachusetts Law Review* called *Does Testing = Race Discrimination? Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*.¹ His article responded to long-standing allegations that standardized exams like the Scholastic Aptitude Test (SAT) and the Law School Admission Test (LSAT) are racially and culturally biased.² Professor Subotnik defended standardized testing, warts and all, as the best way to predict a student's success in college and in law school.³

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1. Dan Subotnik, *Does Testing = Race Discrimination? Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013) [hereinafter Subotnik, *Testing = Discrimination?*].

2. *Id.*

3. *See id.* (arguing that aptitude tests are, in general, the best predictors of job performance).

Professor Subotnik was kind enough to send me his article for my reaction. I emailed him my responses to many of the salient points in his piece.⁴ Professor Subotnik mentioned that several other people were in the process of writing articles in response to his piece and that I might consider doing so as well.⁵ I hesitated at first—admittedly, I wanted to just lie around and do nothing during my semester break,⁶ and I really did not want to dive head-first into another meticulous research project.

However, the more I thought about writing a rebuttal, the more I liked the idea. So I did the heavy lifting and ended up finishing the one thing I did not think I had the stamina for: writing a law review article. By the Grace of God, I eventually put together a fifty-five page response to Professor Subotnik's piece. In October 2014, the *Seattle Journal for Social Justice* published my article, *Standardized Testing and Race: A Reply to Professor Subotnik*.⁷ In that article, I explained that the historical origin of standardized testing was based on the alleged intellectual superiority of Northern European Whites to everyone else, especially to Blacks.⁸ I also argued that standardized testing is a means of keeping minorities out of higher education because test questions are deliberately designed to be culturally favorable to White test takers.⁹ Finally, I challenged Professor Subotnik's assertions that (1) the LSAT is the best predictor of success in law school;¹⁰ (2) the problem with minority test takers is that they do not learn enough;¹¹ and (3) minority students who score poorly on

4. Email from author to Dan Subotnik (Feb. 14, 2014) (on file with author).

5. Email from Dan Subotnik to author (Feb. 15, 2014) (on file with author).

6. I am a college professor, and I teach law at Monroe College in New York.

7. Harvey Gilmore, *Standardized Testing and Race: A Reply to Professor Subotnik*, 13 SEATTLE J. SOC. JUST. 1 (2014) [hereinafter Gilmore, *Reply to Professor Subotnik*].

8. *Id.* at 14.

9. *See id.* at 14–15.

10. *Id.* at 4 (“The problem with Professor Subotnik’s very blind faith in the accuracy of the LSAT is that I can personally disprove the accuracy of LSAT predictions by my own performance throughout law school.”).

11. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 380 (“But [the Society of American Law Teachers] ‘hostile learning environment’ claim also needs a more full-throated response. The charge is scandalous and destructive and, lacking evidentiary support, seems designed only to take minority students off the hook for not learning enough.”); *see also* Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 6 (“I have no way of knowing how hard any of the parties in *Ricci* studied, and I do not think that Professor Subotnik knows that fact either.”); *id.* at 11 (“Frankly, Professor Subotnik’s response here is just as ridiculous and insensitive as his previous commentary about the minority firefighters in *Ricci* not studying harder. Just as I argued above that neither Professor Subotnik nor I know how diligently any of the *Ricci* firefighters prepared for their certification exam, Professor

the LSAT, but who go on to excel in their legal careers, “are merely lucky exceptions and not legitimate proof that these students can be successful.”¹²

Once I showed Professor Subotnik my draft, he wrote a rejoinder to my piece, *Testing, Discrimination, and Opportunity: A Reply to Professor Harvey Gilmore*,¹³ which was published in the same edition of the *Seattle Journal for Social Justice*.¹⁴ Let me say, for the record, that in addition to being a great guy and a good friend, Professor Subotnik is one of the wittiest, most erudite people I have ever met. In reading many of his other thought-provoking pieces throughout the years, I can say that he has a way with words that is sui generis, to say the least, and one that I cannot hope to match.

Now to the substance of this Article. In his most recent response, Professor Subotnik continued his defense of standardized testing as the be-all and end-all in determining one’s future academic and professional competence. In doing so, he also attempted to poke holes in my arguments, as any good attorney would.

I was going to call this article *Professor Gilmore Responds to Professor Subotnik’s Response to Professor Gilmore’s Response to Professor Subotnik*. However, that sounded too much like the classic Abbott and Costello sketch, *Who’s on First?*¹⁵ Happily, the current title turned out much better.

In any event, this is my next response.

Subotnik presents no personal knowledge of, nor research regarding how hard minority students, myself included, prepared for the LSAT. His statement here is made all the more asinine by his previous acknowledgment that the LSAT itself was based on maintaining racial purity.”).

12. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 9.

13. Dan Subotnik, *Testing, Discrimination, and Opportunity: A Reply to Professor Harvey Gilmore*, 13 SEATTLE J. SOC. JUST. 57 (2014) [hereinafter Subotnik, *Reply to Professor Gilmore*].

14. *Id.*

15. See *The Kate Smith Hour* (1938), https://ia600402.us.archive.org/7/items/otr_abbottandcostello/Abbott_and_Costello_-_Whos_On_First_Original_30_Min_Live_Rad.mp3.

I. Professor Subotnik's Claim that Minority Students Do Not Learn Enough

Professor Subotnik's commentary about minority firefighters in his discussion of *Ricci v. DeStefano*,¹⁶ along with his response to the Society of American Law Teachers' (SALT) criticism of the LSAT and minority LSAT exam takers,¹⁷ is based upon a horrendous generalization. As a member of the latter group, I take umbrage with his commentary.

In *Ricci*, the U.S. Supreme Court held that the record before it did not show enough evidence of disparate impact to invalidate the results of a municipal firefighter's exam, despite the fact that White test takers overwhelmingly outscored their minority counterparts.¹⁸ In defending the Court's decision, Professor Subotnik asked the following question: "Whose civil rights case is stronger when plaintiffs did nothing wrong, the minority firefighters could have studied harder, and New Haven invalidated its own test *post hoc*?"¹⁹

The minority firefighters *could have studied harder*? As I said in my previous response to Professor Subotnik, I take issue with this commentary precisely because he *assumes* that the minority firefighters did not study hard enough.²⁰ Thus, I would like Professor Subotnik to clarify how he defines "studying harder" and to show how he knows the study habits of the minority firefighters in *Ricci*.

In addition, Professor Subotnik attempts to refute SALT's assertions that the LSAT does not accurately predict a person's success in law school and that minority students fare worse academically due to a hostile learning environment.²¹ When doing so, he seems to take minority students to task for, as he argues, "not learning enough."²² According to Professor Subotnik, "SALT's 'hostile learning environment' claim needs a more full-throated

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

17. See, e.g., Subotnik, *Testing = Discrimination?*, *supra* note 1, at 380 ("SALT[] . . . take[s] minority students off the hook for not learning enough.").

18. *Ricci*, 557 U.S. at 585.

19. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 401.

20. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 6 ("I take offense to his highly insulting statement. His statement automatically assumes that the minority firefighters in the *Ricci* case did not study as hard as the higher-scoring plaintiffs. Interestingly, Professor Subotnik does not give a conclusive definition of what 'study harder' truly means, at least as he sees it. He also does not give any proof as to how he knew the minority firefighters did not study as hard as the plaintiffs.").

21. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 379–80.

22. *Id.* at 380.

response. The charge is scandalous and destructive and, lacking evidentiary support, seems designed only to take minority students off the hook for not learning enough. SALT should either mind its language or produce evidence.”²³

Professor Subotnik’s self-described “full-throated” response uses incendiary language to distract from his circular argument. Professor Subotnik ignores the minority students (myself included) who graduate from colleges, graduate schools, medical schools, and law schools every single year.²⁴ In order for minority students to earn undergraduate and graduate degrees, they certainly must learn *something* along the way. Passing exams and earning course credits require that one develops the working knowledge necessary to be academically and professionally competent. And one certainly cannot do those things without learning enough. Many minority students have gone on to do well in their professional lives as doctors, lawyers, accountants, and college professors, among various other professions.²⁵ This simple truth torpedoes Professor Subotnik’s allegation that minority students do not learn enough.

Professor Subotnik’s assertion is not only absurd, but unfounded. In his seventy-one page manifesto, Professor Subotnik cites no research, no personal knowledge, nor even any anecdotal evidence to support his claim.²⁶ As Professor Subotnik was so quick to throw the gauntlet for SALT to either “mind its language or produce evidence,”²⁷ I invite him to practice what he preaches and either cite his sources or mind *his* language. At a minimum, he should explain—at least to *this* minority student—what he means when he says that minority students do not “study hard enough” or “learn enough.” I look forward to his response.

23. *Id.*

24. See NAT’L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIS., U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2016: DEGREES CONFERRED BY RACE/ETHNICITY, https://nces.ed.gov/programs/coe/pdf/coe_svc.pdf.

25. See AM. INST. OF CPAS, CPAS OF COLOR, http://www.aicpa.org/Career/DiversityInitiatives/DownloadableDocuments/MIC_E-Book2541-331.pdf; *Black Faculty in Higher Education: Still Only a Drop in the Bucket*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/features/55_blackfaculty.html (last visited Oct. 27, 2015); *Black Men Increasingly Hard to Find in Medical Schools*, AM. MED. NEWS, <http://www.amednews.com/article/20130225/profession/130229975/2/> (last visited Oct. 27, 2015); *Diversity Scorecard: How the Firms Rate*, AM. LAW., <http://www.americanlawyer.com/id=1202657037862?slreturn=20150927122614> (last visited Oct. 27, 2015).

26. See Subotnik, *Testing = Discrimination?*, *supra* note 1, at 379, 380.

27. *Id.*

II. My Charge That the SAT Is a Fraud

In my earlier article, I argued that the SAT is a fraud.²⁸ I stand by that assertion. I called the SAT a fraud precisely because of what the College Board's own website says: The SAT "tests what you already know."²⁹ If the original idea of standardized testing was to stratify the races based on educational access to knowledge, then it logically follows that the SAT could not have been created with the best of intentions where minority test takers are concerned.³⁰ In fact, I mentioned Carl Brigham, the creator of the SAT, in my original piece.³¹ Brigham wrote a book in which he unequivocally stated that Blacks were intellectually inferior.³² If the creator of the SAT felt that way about Blacks, it logically follows that Black students would, at best, have an uphill fight to get a respectable score on Brigham's exam.³³

My article also noted the observations of Dr. Ibram Kendi, Dr. Roy Freedle, and Mr. Jay Rosner, who have all stated that SAT organizers regularly discard test questions that favor minority students.³⁴ Since the SAT is rigged in this fashion, minority test takers cannot answer biased test questions based on what *they* know. And, as long as this practice continues, minority students have little hope of closing the scoring gap.

28. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 16.

29. *Why Take the SAT*, THE COLLEGE BOARD, <http://sat.collegeboard.org/about-tests/sat/why-take-the-test> (last visited Sept. 20, 2015).

30. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 14 ("One of the earliest proponents of standardized testing as a means of intellectual purity was Carl Campbell Brigham, creator of the SAT, who was stalwart in his opinion of the intellectual pecking order, and wrote a book in which he stated his theory about people of color's place in the intellectual landscape.").

31. *Id.*

32. *Id.* at 14–15 ("Consequently, Brigham's thesis stated in no uncertain terms that he believed that [B]lacks were at the low end of the intellectual food chain."); see also CARL BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* 190 (1923) ("Our results showing the marked intellectual inferiority of the negro are corroborated by practically all of the investigators who have used psychological tests on [W]hite and negro groups.").

33. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 15 ("If an individual with a view like Brigham's actually created the SAT, a de-facto college entrance exam that high schools use to this very day, then one has to at least question the structural fairness of a test that is supposed to be objective.").

34. *Id.* at 23–25 (citing Ibram X. Kendi, *New Mind-Boggling Evidence Proves SAT Bias*, DIVERSE ISSUES HIGHER EDUC. (Dec. 2, 2012), <http://diverseeducation.com/article/49830/>); see Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What To Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 193 (2006) (citing Jay Rosner, *On White Preferences*, NATION, April 14, 2003, at 24)).

Professor Subotnik claimed that I inaccurately characterized the SAT as a fraud.³⁵ He argued that testing students' knowledge of words like "spare" and "ornate" is not "over the top" to evaluate ordinary college preparedness.³⁶ According to Professor Subotnik, even if the SAT plays to White middle class values,³⁷ and students from completely dissimilar racial and socio-economic backgrounds are unlikely to come up with the same right answer, that "hardly makes the SAT a fraud."³⁸

To this I can only say that I question how any standardized test that intentionally removes certain questions to favor White test takers, and then willingly misrepresents that it tests what one already knows, can be fairly characterized as anything but a fraud. This is especially evident because not all test takers have access to the same information or have the same frame of reference.

As a final point on this issue, I noticed that Professor Subotnik made two very inconsistent statements in his SAT defense. First, he mentioned that "the SAT, as is well known, is a general purpose exam designed to measure readiness for college study."³⁹ In theory, I agree with this "general purpose" statement. However, Professor Subotnik later supports the validity of some of the math questions on the SAT by saying that they "are at least in principle designed to say something useful about aptitude for engineering and science."⁴⁰ I admit that I certainly have no aptitude for engineering or science.⁴¹ In my opinion, engineering cannot be considered a general-purpose subject, and I am not sure that science can be so considered either. Therefore, I ask Professor Subotnik why questions geared toward the *specific* subjects of science and engineering show up on a supposedly *general*-purpose exam.

35. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 59–60.

36. *Id.* at 61.

37. *Id.* at 59–60.

38. *Id.* at 60.

39. *Id.* at 61.

40. *Id.*

41. This may explain why a large part of my time in high school was an unqualified disaster.

III. The Unreliability of My Own LSAT Score

As I mentioned in my earlier piece, I scored a 142 when I took the LSAT.⁴² Although this score did not land me in the upper stratosphere,⁴³ I was nevertheless accepted into law school. And, at the risk of sounding immodest, I did reasonably well in law school, finishing with a B average.⁴⁴ I certainly could not have done that well over the course of a three-year full-time program if I had lived down to what my LSAT score “predicted.” As Professor Subotnik mentioned in his original piece on testing, good grades are a result of paying attention to detail.⁴⁵ I completely agree with that assessment. Like many other law school graduates who outperformed a subpar LSAT score, I can bring my law school track record to the table with anyone and never be insecure about it. This is one reason why the LSAT is completely overrated.

Professor Subotnik’s response focused on my admitted distrust of SAT questions.⁴⁶ I certainly had expressed my displeasure over SAT questions due to the SAT’s exclusionary history: “In my opinion, not only are these questions skewed toward excluding minority students from higher education, I am also hard-pressed to see how the majority of these questions are even relevant to everyday life.”⁴⁷ I also questioned the reliability of the LSAT for many of the same reasons—particularly the fact that the typical LSAT question does not require the level of legal analysis necessary to succeed in law school.⁴⁸ In my previous

42. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 13 (“In February 1994, when I was 29 years young, I took the LSAT. I scored 142.”).

43. The lowest possible score on the LSAT is 120, and the highest possible score is 180. *Your LSAT Score*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/jd/lSAT/your-score> (last visited Jan. 24, 2016). Individuals who took the LSAT in 2013–14 had an average score of 150.59. SUSAN P. DALESSANDRO, LISA C. ANTHONY & LYNDY M. REESE, LAW SCH. ADMISSION COUNCIL, *LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2007–2008 THROUGH 2013–2014 TESTING YEARS* 9 tbl.1 (2015), [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-14-02.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-14-02.pdf).

44. Southern New England School of Law, Transcript (Aug. 27, 1999) (on file with author) [hereinafter Southern New England School of Law Transcript]; see Harvey Gilmore, *Misadventures of a Law School Misfit*, 51 DUQ. L. REV. 191, 192 (2013) [hereinafter Gilmore, *Misfit*].

45. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 388.

46. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 61 (“Professor Gilmore criticizes SAT questions.”).

47. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 19.

48. *Id.* at 27–29.

article, I mentioned my LSAT score to show that many people, myself included, have overcome low LSAT scores to succeed in law school and in their professional lives.⁴⁹

IV. The Idea of Protecting Overmatched Students from Themselves

American Bar Association (ABA) Standard 501(b) addresses the issue of student progress as follows: “A law school shall not admit an applicant who does not appear capable of satisfactorily completing its program of legal education and being admitted to the bar.”⁵⁰ One can certainly make the argument that the LSAT can help a possibly overmatched student avoid wasting time and money on a legal education for which he or she is unqualified and might not finish. I certainly understand that argument, and I definitely know that the current cost of legal education can be prohibitive.⁵¹

Perhaps for these reasons, the ABA has denied accreditation to law schools that have admitted students with LSAT scores below 143, and it has never accredited a school that has admitted any student with an LSAT score below 140.⁵² Just think—what if I had missed one or two more questions when I took the LSAT? My score would have been less than 140, and, conceivably, I might never have seen the inside of a law-school classroom.⁵³

To reframe my argument: if I want to attend law school, and I know the potential risks (financial and otherwise), why should I not be given a chance to prove myself? I think a student should have a right to at least try. If I were to go to law school and completely fall on my face, my failure would convince me that law school was not for me. I could accept that outcome a lot more

49. See Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807, 829–30 (2011) (“A difference in average LSAT scores between [B]lack and [W]hite students does not delegitimize the presence of the group with lower scores, harm the student, or serve as an accurate indicator of longtime future success.”).

50. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 Standard 501(b) (AM. BAR ASS'N 2015), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_5.authcheckdam.pdf.

51. See Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It's Highest at These Five Schools*, ABA J. (Mar. 28, 2012, 10:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

52. See Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission To Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 123 (2012).

53. Obviously, I am speculating twenty years after the fact.

easily than if I had been kept out in the first place by a minimum LSAT score requirement—a requirement that would not let me out of the dugout, let alone let me step into the batter's box.

While I believe that students should have reasonable opportunities to prove themselves, Professor Subotnik seems to argue that the front door ought to be slammed in some of their faces, irrespective of their potential for success.⁵⁴ According to Professor Subotnik, “[s]ometimes 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.”⁵⁵ I think Professor Subotnik underestimates potential students’ abilities to recognize when they are in over their heads. I think that most people are astute enough to realize that a particular dream may be beyond their grasps and will adjust their career plans accordingly. Sometimes a person needs to come face-to-face with his or her own failure before making adjustments and changing an academic or professional pursuit. Until that *aha!* moment comes, I do not see any harm in letting a person try. Professor Subotnik needs to clearly explain whether he would be willing to give a person in a similar position that benefit of the doubt.

Professor Subotnik’s citation to the case of Dr. Martin Luther King, Jr. illustrates my point.⁵⁶ Dr. King initially attempted to get his doctorate in sociology,⁵⁷ but because he struggled in statistics, he instead pursued a doctorate in theology.⁵⁸ Consequently, Dr. King ended up altering the course of history as both a theologian and a civil rights activist.⁵⁹ Thus, it may take a failure to help a person realize his or her ultimate (and perhaps previously undiscovered) dream in another field.

Professor Subotnik also mischaracterized my willingness to let students prove themselves as somehow providing no protection to those who might fail.⁶⁰ Professor Subotnik stated: “Knowing Professor Gilmore as I do, I doubt that he is prepared to let

54. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 63.

55. *Id.*

56. Subotnik, *Testing = Discrimination*, *supra* note 1, at 387 (citing Martin Luther King, Jr., *The Three Dimensions of a Complete Life*, Speech at New Covenant Baptist Church (Apr. 9, 1967)).

57. *Id.*

58. *Id.*

59. *About Dr. King*, KING CTR. (Oct. 12, 2015, 8:00 AM), <http://www.thekingcenter.org/about-dr-king>.

60. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 63.

everyone into law school.”⁶¹ But Professor Subotnik is mistaken on this point for two reasons. First, as Professor Subotnik certainly knows, law schools have minimum GPA requirements for graduation and can impose remedial measures—including academic probation, repeating classes, and, ultimately, academic dismissal.⁶² Thus, a student who could not pass his or her courses would not be allowed to attend law school in perpetuity, hemorrhaging money to pay school expenses before flunking out. Frankly, for a variety of reasons, not everyone can get into college, graduate school, or law school. Indeed, a college graduate with a GPA of barely 2.0 and an LSAT score of 124 probably does not belong in law school, as shown by my (very fictitious) resume below:

61. *Id.*

62. For example, Touro Law, where Professor Subotnik teaches, has a student handbook that discusses these alternatives in great detail. TOURO LAW, LAW STUDENT HANDBOOK 2015–2017, at 13–61 (2015), http://www.tourolaw.edu/pdf/Student_Handbook.pdf.

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2375 JEROME AVENUE – ROOM 107
BRONX, NEW YORK, 10468
987-654-XXXX (Home)
646-321-XXXX (Cell)
E-MAIL: BIGSEXYH@GODADDY.COM

Objective: To get me a accounting job to become a accountant and get rich. I count good and I are smart.

Experience:

Bookkeeping Assistant, Al's Fish, Chips, and Insurance, Brooklyn, NY

October 2012–Present

Opened Mail for Controller and handed it to him. Filed monthly bank reconciliation. Got coffee, donuts, lunch, and other refreshments for staff members. Learning Quickbooks Software. Read a Financial Statement Once

Greeter, Sands Hotel, Atlantic City

March 2012–April 2012

Held open doors for gamblers, vacationers, and other passersby's.

Tax Preparer, Brooklyn, NY

April 1, 2012–April 16, 2012

Prepared my mother's tax returns for 2006 and 2007 during April 2012

Bonequesha's Hair and Nails, Skunk Hollow, WV

December 2001–June 2007

I sweeeps up

Education:

Nondescript University, Skunk Hollow, WV

B.A., Accounting, June 2009

G.P.A: 1.9997 (expected to increase to 2.01 after successful grade appeal in my Fundamentals of Modern Dance class)

- Major Area Courses: Accounting I & II, Intermediate Accounting I & II, Advanced Accounting, Cost Accounting, Federal Taxation, Auditing, Business Law I, II, & III, Computerized Accounting I & II, Principles of Finance I, II, III, and IV (Overall Major GPA 2.02)
- Other Courses: Fundamentals of Modern Dance, Principles of Philosophy, Introductory Basket Weaving, Principles of Bird Watching, Master Hama's Advanced Finger Painting Seminar
- Best Courses: History of Baboons I and II (my 2 only A's)

Interests:

Sleeping Late, Meeting Women, Making Money, Getting Rich, Meeting Women. I also voted.

Required Salary:

A gazillion dollars.

Academic Accomplishment:

(From Bird Watching class) Today I seen a parrot.⁶³

References:

~~Geoffrey Smith~~ (no, not him) Lessie Branch, Stephanie Kendrick, Mo Hack, Anthony Abongwa, Keithroy Nanton, my cousin's boyfriend Aloysius, my mom, my brother and a few others I forgot here.

63. See *The Honeymooners: Ralph Kramden, Inc.* (CBS television broadcast Feb. 4, 1956) (showing Norton note that he saw a parrot in his birdwatching diary).

Needless to say, a resume like this probably would not get me a job as an exotic dancer, let alone get me accepted into law school. Unfortunately, sometimes a person's dreams might outrun his or her actual ability, so there should be protective measures in place to keep that person from wasting time and money and completely embarrassing him- or herself. Because I acknowledge that higher education is not for everyone, I do not suggest that an open admissions policy is the best solution.

That said, the second reason I think Professor Subotnik is wrong is my belief that it is unjust to exclude a student who *could* deliver the goods and graduate. As I said above, if a student is admitted and later flunks out, that student at least had a shot. But Professor Subotnik ignores the fact that, while minimum test score requirements may save an overmatched student from failure and debt, they may act to exclude other students who *can* make it through law school and into the profession. It is most unfair to relegate that person to a potential lifetime of regret, perpetually asking *what if?* It is one thing to perhaps save those who might be in over their heads from flunking out and going into potentially insurmountable debt. But it does not make sense to save that person at the expense of excluding a person who *could* succeed. That is like saying it is better to keep the one person who would cure cancer out of medical school to save 100 other people who would be overmatched by the rigors of the curriculum and thus flunk out. I refuse to support that type of admission policy.

V. Validating My Own Law School's Faith

In his reply, Professor Subotnik applied the issue of academic competence to my own situation.⁶⁴ After mentioning my academic and accounting backgrounds before law school, Professor Subotnik graciously wrote: "Knowing those programs as I do and the kind of professional work [Professor Gilmore] was doing, I would have welcomed him with open arms then, as I would welcome a similar candidate now."⁶⁵ In the summer of 1995, the admissions committee of the Southern New England School of Law (now the University of Massachusetts-Dartmouth School of Law) thought the same thing about me. The committee was willing to take a chance on me, and it gave me the opportunity to prove myself. By the Grace of God, I justified everyone's faith in me. I am now enjoying the fruits of that confidence, which include successfully

64. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 58.

65. *Id.* In that same comment, Professor Subotnik then said, "Professor Gilmore is a treasure." *Id.* To this I say, thanks, Dan.

navigating Professor Subotnik's estate and gift tax course⁶⁶ and gaining a lifelong friend in Professor Subotnik.⁶⁷ My point is that I would always prefer to have the freedom to try and fail rather than be arbitrarily locked out and left to wonder if I could have succeeded as a lawyer. Thanks to Southern New England Law School's faith in me, I can always say: "Thank God, I did it!"

VI. The Relevance of Grades

As I have said, there are many people—myself included—who have done well in law school and professional life despite a low LSAT score.⁶⁸ Again, this confirms my belief that standardized test scores cannot be the sole dispositive factor in determining academic quality. But Professor Subotnik seems to argue that I believe that grades are irrelevant.⁶⁹

Admittedly, I fail to understand how Professor Subotnik arrived at such a conclusion. I clearly stated the following in my prior article: "I strongly believe that an overall track record of semester grades gives a better indication of a student's competence."⁷⁰ In any case, I could not agree more with Professor Subotnik that grades do matter. Grades matter because they are based on a student's body of work during a particular school term. In college and graduate school, students are responsible for homework assignments, term papers, projects, and mid-term and final exams. Similarly, in law school, in addition to mid-term and final exams, a student's body of work normally consists of reading and briefing cases, completing research assignments, creating course outlines to reinforce the material learned during the semester, and, most importantly, discussing cases during class. As Professor Subotnik can certainly attest to from his experience as a professor, a student's level of preparation determines the quality of his or her class participation. That student's final grade will be based on the quality of his or her work product, as determined by the final exam. Indeed, Professor Subotnik correctly mentions the correlation of grades with desire and diligence "[p]resumably because they signal ambition, stick-to-it-

66. I took this course while going through the LL.M. program at Touro Law.

67. See Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 1.

68. *Id.*

69. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 59.

70. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 38.

iveness, and attention to detail.”⁷¹ Professor Subotnik thus argues that students who do well also tend to like the process.⁷² Again, I could not agree more.

As my own law school transcript shows, I took (and passed) twenty-eight credit bearing courses.⁷³ Since Professor Subotnik and I both have accounting and tax backgrounds, we both know a little something about numbers. Even Professor Subotnik must admit that, arithmetically, twenty-eight is greater than one. So which was the better evidence of my prowess and eventual success in law school: Twenty-eight law school exams? Or the one-time aptitude test that predicted that I would not make it through law school? The answer is obvious.

As rewarding as my time was in college and graduate school, I had a blast in law school. I loved law school, and I really hit my stride there.⁷⁴ For me, law school was the springboard that launched me from being a burned-out ex-accountant into the academic career that I enjoy to this day.

For the reasons shown above, I reiterate my belief that a student’s overall track record is a much better indicator of competence than a one-time “general-purpose” admissions test score. For example, which of these two hypothetical law students would be more likely to succeed after the first year? The student who had an LSAT score of 144, but got straight B’s in all of his classes? Or the student who had an LSAT score of 162, but got straight D’s (or worse) in all of his classes? Again, I think the answer is quite obvious.⁷⁵

71. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 388.

72. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 59 (“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.”).

73. Southern New England School of Law Transcript, *supra* note 44.

74. Gilmore, *Misfit*, *supra* note 44, at 206 (“One of the most important reasons I was blessed to do as well as I did in law school was because I actually had fun in law school. Part of the fun was that I was a native New Yorker attending law school in Massachusetts.”). I just happened to be a Yankees fan attending law school in the heart of Red Sox Nation. See Tom Giratikanon et al., *Up Close on Baseball’s Borders*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/interactive/2014/04/23/upshot/24-upshot-baseball.html>.

75. See Alexia Brunet Marks & Scott A. Moss, *What Makes a Law Student Succeed or Fail? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 12 J. EMPIRICAL LEGAL STUD. (forthcoming) (“LSAT is overweighted compared to other, less univariate academic metrics such as a broad view of not only UGPA but college quality and college major; work experience truly is the positive that many believe it to be, with work in teaching especially positive; certain backgrounds make for quicker or slower adjustment to law study; and various markers of personal qualities—maturity, work ethic, and motivation—truly are significant positives or negatives.”), <http://papers.ssrn.com/sol3/papers.cfm?>

VII. The CPA Exam and the Bar Exam: Apples, Meet Oranges!

In my earlier piece, I took great pains to distinguish between the Certified Public Accountant (CPA) exam and the SAT.⁷⁶ As I argued at length, the CPA exam is especially different from the SAT for one very important reason: The CPA exam requires a candidate to be a college graduate with a degree in accounting.⁷⁷ By that time, a candidate's SAT is firmly in the past.⁷⁸ I also argued that because the CPA exam tests specific accounting knowledge, rather than the general knowledge, it is not as inherently race-specific as the SAT.⁷⁹ The CPA exam tests four specific subject areas: auditing and attestation; financial accounting and reporting; regulation; and business environment and concepts.⁸⁰ I think even Professor Subotnik would agree that the CPA exam is not racially exclusive.

Unlike the CPA exam, the SAT is merely a *de facto* college entrance exam that, as I⁸¹ and others⁸² have argued, is based on a racially exclusionary motive.⁸³ Professor Subotnik tries to piggyback onto my CPA exam argument by saying that the bar exam is also fair because it tests *specific* legal knowledge.⁸⁴ I will concede that his description of the bar exam is spot on. Unfortunately, his argument for the bar exam *in this context* falls completely flat.

abstract_id=2627330. *But see* LISA ANTHONY STILWELL, SUSAN P. DALESSANDRO & LYNDIA M. REESE, LAW SCH. ADMISSION COUNCIL, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2009 AND 2010 LSAT CORRELATION STUDIES 17 (2011) ("[T]he combination of LSAT score and UGPA is an even more superior predictor of [First Year Average] than either variable alone.").

76. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 39.

77. *See, e.g.*, *Initial License*, N.Y. DEPT. OF EDUC., <http://www.op.nysed.gov/prof/cpa/cpalic.htm>. Individuals who lack a degree in accounting, but who have at least fifteen years of accounting experience, may take the exam with the approval of the review board. *Id.*

78. *See* Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 39.

79. *See id.* ("The knowledge of those subjects does *not* depend on the test taker's racial or socio-economic background.").

80. *See Initial License*, *supra* note 77.

81. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 16–26.

82. *See, e.g.*, Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 609–10 (2001); Kendra Johnson, *Racially Biased SAT I/ACT Blocks College Access: Is it Constitutional for College Officials To Condition Admissions on a Racially Biased Assessment?*, 33 U. BALT. L.F. 2, 9–10 (2003).

83. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 14–15.

84. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 63–64.

Substitute the bar exam for what I have said about the CPA exam,⁸⁵ and we have the exact same argument with the exact same result. Just like the CPA exam, the bar exam tests specific legal topics.⁸⁶ The multi-state part of the bar exam tests on contracts, torts, property, constitutional law, evidence, and criminal law and procedure.⁸⁷ Similarly to the CPA exam, topics on the bar exam are not race specific.⁸⁸ Of course, one typically has to be a law school graduate to be able to take the bar exam.⁸⁹

This also ties in quite nicely with my argument that stresses that anyone who sits for the CPA exam is already a college graduate. How is that? Because, according to the American Bar Association, having a Bachelor's Degree is a condition precedent to be admitted into law school.⁹⁰ So, if a student is already a college graduate and is in law school, this obviously means that both the SAT *and* the LSAT exams are already in that student's rear-view mirror.

Professor Subotnik compares apples to oranges when discussing post-graduate exams alongside admissions exams. The CPA exam and bar exam are specific-purpose exams that test accounting and legal knowledge, respectively. The SAT and LSAT, on the other hand, are general-purpose exams that supposedly predict one's success in college and in law school, respectively.⁹¹

85. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 38–40.

86. See Kimber Russell, *The Bar Exam Is Changing in 2015: What You Need to Know*, KAPLAN BAR REV. (Mar. 14, 2015), <http://www.barexam.com/2015/03/14/the-bar-exam-is-changing-in-2015-what-you-need-to-know/>.

87. *See id.*

88. *Id.*

89. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, BAR ADMISSION REQUIREMENTS 2016, at 3, 8–11, <http://www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=23>.

90. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 Standard 502 (AM. BAR ASS'N 2015), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_5.authchECKdam.pdf.

91. *See, e.g.*, JENNIFER L. KOBRIN ET AL., COLL. BD., VALIDITY OF THE SAT FOR PREDICTING FIRST-YEAR COLLEGE GRADE POINT AVERAGE 6 (2008), https://professionals.collegeboard.com/profdownload/Validity_of_the_SAT_for_Predicting_First_Year_College_Grade_Point_Average.pdf (finding that SAT scores have predictive value for first-year college grades). *But see, e.g.*, WILLIAM C. HISS AND VALARIE W. FRANKS, NAT'L ASS'N OF COLL. ADMISSION COUNSELING, DEFINING PROMISE: OPTIONAL STANDARDIZED TESTING POLICIES IN AMERICAN COLLEGE AND UNIVERSITY ADMISSIONS 61 (2014), <http://www.nacacnet.org/research/research-data/nacac-research/Documents/DefiningPromise.pdf> (“[S]tudents with strong [high school grade point averages], even without testing, are likely to succeed in college, and students with low [GPAs], even with a broad range of testing, have much lower college GPAs and graduation rates.”).

As I argued in my earlier piece, and as I wholeheartedly believe, the SAT and LSAT were created with the dual goals of racial exclusivity and of promoting the supposed intellectual superiority of Whites.⁹² The SAT notoriously tests subject areas for which minority students do not have the same frame of reference as White students.⁹³ The College Board's open boast on its website that the SAT tests "what you know"⁹⁴ could not be further from the truth.

As I see it, there is a logical progression that comes with racially biased exams like the SAT. If I get enough questions about "regattas,"⁹⁵ "pirouettes,"⁹⁶ and "polo,"⁹⁷ wrong on the SAT because I do not have those life experiences, then the odds are much higher that my college applications will be rejected, and I will never be able to get into college. And if I wanted to become both a CPA and a tax attorney, those dreams would be forever short-circuited—I would never have to worry about studying for the CPA or bar exams.

In taking my argument that the CPA exam is fair, and arguing that the bar exam is also fair—which I agree with—Professor Subotnik claims that the LSAT is, by default, a similarly fair exam:

I have good reason for speculating about Professor Gilmore's philosophy. Professor Gilmore defends the CPA exam. 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." But this line of reasoning suggests that the bar exam

92. See Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 21–27.

93. *Id.* at 22 ("As Professor Delgado explains, '[o]ne study of the SAT found items requiring knowledge of golf, tennis, pirouettes, property taxes, minuets, kettle drums, tympani, polo, and horseback riding, items that are scarcely common in minority communities.'").

94. See *SAT: About the Tests*, C. BOARD, <http://sat.collegeboard.org/about-tests#> (last visited Sept. 20, 2015).

95. A regatta is "[a]ny of certain boat races held on the Grand Canal in Venice," or a "boat or yacht race [or] an organized series of such races, forming a prominent sporting or social event." *Regatta*, OED ONLINE, <http://www.oed.com/view/Entry/161205?redirectedFrom=regatta&> (last visited Jan. 25, 2016).

96. A pirouette is defined as "[a]n act of spinning round on one foot or on the points of the toes, as performed by a ballet dancer, etc." *Pirouette*, OED ONLINE, <http://www.oed.com/view/Entry/144525?isAdvanced=false&result=1&rskey=GNOET5&> (last visited Jan. 25, 2016). The term is also used in dressage to describe "[a] full circle move by a horse pivoting on a hind leg while walking or cantering." *Id.*

97. "Polo" is "[a] team game resembling [field] hockey, played on horseback with long-handled mallets and a wooden or plastic ball." *Polo*, OED ONLINE, <http://www.oed.com/view/Entry/147001?result=1&rskey=jLoMZN&> (last visited Jan. 25, 2016).

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.⁹⁸

I unashamedly admit that I did, and still do, give little credence to the allegedly protective purpose of the LSAT. But was the true purpose of the LSAT really to protect academic prowess, as Professor Subotnik suggests? Or was the LSAT's motive more sinister? Professor Subotnik actually provides the answer:

After the American Bar Association, a then [W]hites-only fraternity, had unwittingly admitted three [B]lack lawyers, the ABA asked its membership to vote on possible expulsion, emphasizing to the membership the importance of "keeping pure the Anglo-Saxon race." There is no denying that the LSAT, developed in 1947, can be traced to these themes.⁹⁹

Therefore, I argue that, just like the SAT, the LSAT's original intent was to maintain racial exclusivity—academic integrity was a mere by-product of a deliberately closed academic "competition."

VIII. Professor Subotnik's Response to My Charge That the LSAT Is Not Wholly Accurate

To support my position that law students can be successful despite a low LSAT score, I pointed to the Academic Resource Center at the Seattle University School of Law.¹⁰⁰ This program helps lower-scoring students reach their potential and ultimately succeed both academically and professionally.¹⁰¹ Students who have participated in this program have gone on to become student bar association presidents and law review editors.¹⁰² Professionally, many have become prosecutors, judges, and educators.¹⁰³ This, to me, firmly suggests that a low LSAT score certainly cannot, and should not, derail an opportunity for a legal

98. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 63–64 (citations omitted).

99. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 365–66; *see also*, Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, 101 (2006) ("Thus, the original LSAT had historical roots in efforts to substantiate racial inequality and nativism.").

100. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 8.

101. *See id.* at 8–9.

102. *See id.* at 9 ("Professor Lustbader also cites many examples of former ARC students who have gone on to professional success.").

103. *See id.*

education. I am in my seventeenth year as a college professor. It was my success in law school that opened the door to a successful career in academia. So, I can say without fear of contradiction that the LSAT is *not* foolproof in assessing student success.¹⁰⁴

After discussing several success stories, including my own, that demonstrate that the LSAT is not completely reliable, Professor Subotnik once again summarily dismissed my assertion despite the evidence:

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 "is by no means a wholly accurate predictor of student success." But this in itself is not a meaningful argument against that test.¹⁰⁵

I could not disagree more. Why exactly is this not a meaningful argument? When it has already been proven that people can outperform their LSAT scores, and when we assume that their successes both in law school and in professional life are no accidents, we have what is indubitably the best argument that the LSAT is "not wholly accurate."¹⁰⁶

Professor Subotnik further attempts to discredit my arguments against the LSAT by suggesting that I am completely unaware of the current debate over whether a legal education is still valuable: "Professor Gilmore shows little recognition of the highly charged debate over the value of a legal education. . . ."¹⁰⁷ As a person who fairly regularly reads publications that highlight the high cost of a legal education¹⁰⁸—and who has paid off his own student loans—I certainly know that law school is quite expensive and that the job market for attorneys is over-saturated. Again, I

104. *See id.* at 9–10.

105. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 63–64.

106. *Id.*

107. *Id.* at 62.

108. The *National Jurist*, for example, frequently covers such stories. *See, e.g.*, Brian Tamanaha, *The Quickly Exploding Law Graduate Debt Disaster*, NAT'L JURIST (Apr. 18, 2012), <http://www.nationaljurist.com/content/quickly-exploding-law-graduate-debt-disaster>; *Law Grad Refused Bar Admission for Debt*, NAT'L JURIST (Feb. 14, 2011), <http://www.nationaljurist.com/content/breaking-news/law-grad-refused-bar-admission-debt>. The popular blog *Above the Law* also discusses high education costs. *See, e.g.*, Elie Mystal, *Every Law School Mistake Ever, From One Lady*, ABOVE L. (Sept. 30, 2014), <http://abovethelaw.com/2014/09/every-law-school-mistake-ever-from-one-lady/>; Joe Patrice, *Student Loan Calculator Is Brutally Honest About Law School*, ABOVE L. (Oct. 27, 2014), <http://abovethelaw.com/2014/10/student-loan-calculator-is-brutally-honest-about-law-school/>; Stacy Zaretsky, *Graduate of Elite Law School Forced To Live off Welfare Due to Terrible State of Job Market*, ABOVE L. (Oct. 30, 2014), <http://abovethelaw.com/2014/10/graduate-of-elite-law-school-forced-to-live-off-welfare-due-to-terrible-state-of-job-market/>.

am at a complete loss as to how Professor Subotnik could think that I am oblivious to the issues of law-school debt and the arguably diminished value of a law degree. My own students ask me all the time if going to law school is worth it, and I tell them that I think it is.. But in giving them my advice, I discuss the pros and cons from both sides. I certainly could not give such advice if I were not in a position to know about this issue.

Professor Subotnik then says in his rebuttal: “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.”¹⁰⁹ Here, Professor Subotnik again misses the mark by comparing apples to oranges. The fact that law graduates rightly complain about large post-law-school debt and the dearth of legal jobs has nothing to do with the reliability of standardized testing. At the point in time where loan repayment and the job market become relevant, how these individuals might have scored on the LSAT is a moot issue. Interestingly, *Above the Law* recently posited that the LSAT may not be the best predictor of bar exam success.¹¹⁰ The exam “does[not] measure ‘raw’ intelligence, however you want to define that term. It measures your ability to take the LSAT.”¹¹¹ Again, I can only insist that admissions committees do a better job of looking at a person as a total package instead of putting excessive weight on a one-time, so-called “assessment test,” since, “[a]t the beginning of the admissions cycle, admissions officers have much more discretion in evaluating other factors beyond your LSAT and GPA.”¹¹²

109. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 62.

110. See, e.g., Elie Mystal, *What's the Best Predictor of Bar Exam Success? It's Not the LSAT*, ABOVE L. (Sept. 13, 2013), <http://abovethelaw.com/2013/09/whats-the-best-predictor-of-bar-exam-success-its-not-the-lsat/> [hereinafter Mystal, *What's the Best Predictor*]; see also *My LSAT Score Sucked! Now What?* LETTERS TO L. STUDENT (Feb. 10, 2013), <http://letterstoalawstudent.wordpress.com/2013/02/10/my-lsat-score-sucked-now-what/> (“[The LSAT is] a mere psychological hurdle that you can overcome.”).

111. Mystal, *What's the Best Predictor*, *supra* note 110.

112. See ANTHONY SOLANA, JR., A GUIDE TO THE LAW SCHOOL APPLICATION PROCESS FOR PEOPLE OF COLOR AND MEMBERS OF OTHER HISTORICALLY UNDERREPRESENTED GROUPS 7 (2005), http://www.aap.ucla.edu/mentoring/pdf/02_a_guide_to_law_school_application.pdf.

IX. Diversity and Competence in the Context of Law School Competition

Professor Subotnik's major complaint about the events in *Ricci* was that the City of New Haven's refusal to certify the firefighters' exam scores was tantamount to moving the finish line.¹¹³ But the fact that the city had a good-faith motive to try to make the firefighters' promotion pool more representative of the ethnic makeup of the city is hardly moving the finish line. Indeed, Justice Ruth Bader Ginsburg's dissenting opinion takes dead aim at the fact that New Haven residents—the majority of whom are Black and Hispanic—are still served by a predominantly White fire department.¹¹⁴ And this is the direct result of an exam where the White applicants scored appreciably higher than the Black applicants.¹¹⁵ Such a result begs the question: Was this the *only* test that New Haven could have given to ensure that it was a fair, competitive test for all concerned? An exam where *none* of the Black applicants scored high enough to make it into the top ten percent?¹¹⁶ I certainly hope not.

I argued in my earlier piece that standardized testing was a means of keeping minority students away from higher education. And, in applying this paradigm to civil service employment, it is plausible that civil service exams could have used the same methodology to keep otherwise-qualified minority applicants from those jobs.¹¹⁷ In response to Professor Subotnik's claim that New Haven wrongly attempted to move the finish line, I say that the city's original sin was deliberately not allowing minorities to participate in the game and show what they could do. After all—letting more runners join the race does not move the finish line.

As Professor Subotnik certainly knows, law school is one big competition.¹¹⁸ Students compete for grades, for positions on the law review, and for spots on mock trial teams. In every law school class, each student has access to the same information. They all begin at the same starting line and run to the same finish line—passing their exams and ultimately graduating. In contracts class, students have to determine whether there is enough consideration and genuine assent to make a contract enforceable. In income tax,

113. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 338.

114. *Ricci v. DeStefano*, 557 U.S. 557, 608 (2009).

115. *Id.* at 562.

116. *Id.* at 566.

117. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 46.

118. See Gilmore, *Misfit*, *supra* note 44, at 203 ("Like it or not, competition is part of the law school experience.").

students have to determine whether an item is a deductible expense reducing taxable income or is instead added to the cost basis of a fixed asset. In trusts and estates, students have to determine whether a testator had sufficient capacity such that a will is legally valid. The examples are endless and are light years removed from defining what a “regatta”¹¹⁹ is on the SAT. And, since some law students do better than others, and only one can become the class valedictorian, the professor has to make the call on each student’s performance and competence on an exam. That is part of the law school competition—and, I might add, it is for the most part race neutral—and we all know about this going in.

In another recent piece,¹²⁰ Professor Subotnik made this startling claim: “No future Barbara Grutter could graciously or otherwise accept being denied a seat in a law school in favor of someone who was not even making an effort to compete.”¹²¹ Barbara Grutter was the plaintiff who challenged the race-conscious admissions policy of the University of Michigan Law School.¹²² Professor Subotnik’s remark that Barbara Grutter was denied in favor of someone not attempting to compete makes extreme, even vitriolic assumptions. Even assuming that minority applicants did not have academic credentials similar to Barbara Grutter, I have to believe that they applied to law school knowing what they were getting themselves into and that they were willing to do the work necessary to succeed. Why else would they apply to law school? As I have explained above, law students certainly put in long hours reading, briefing cases, and outlining their courses. For Professor Subotnik to suggest that the minority students who were admitted instead of Barbara Grutter chose not to compete is unconscionable. Such a belief is indefensible in light of the fact that he has no way of knowing how vigorously those students might have competed and performed.¹²³

119. I did not know this definition until I wrote my article. See *Regatta*, *supra* note 95.

120. Dan Subotnik, *Contesting a Contestation of Testing: A Reply to Richard Delgado*, 9 U. MASS. L. REV. 296 (2014) [hereinafter Subotnik, *Contesting*].

121. *Id.* at 300–01.

122. See *Grutter v. Bollinger*, 539 U.S. 306, 316–17 (2003).

123. This is not the first time Professor Subotnik has made comments questioning someone’s competence or work ethic without knowing the facts. See, e.g., Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 6, 11 (stating that Professor Subotnik provided no “proof as to how he knew the minority firefighters [in the *Ricci* case] did not study as hard as the plaintiffs”).

X. Who Gets in, and How?

What follows are my ideas for how law schools can select the best candidates for admission without relying on standardized tests. First, law schools could establish a minimum grade point average ("GPA") basis for admission. In other words, law schools could set aside a specified number of seats for automatic admission based solely upon satisfying the minimum GPA requirement (and any other requirements the law school may impose).

For example, let us assume that a law school sets a minimum GPA of 3.6 for automatic admission. Under that system, someone who has a GPA of 3.25 would not make the cut. However, this would not destroy that candidate's chance of admission. For any applicants who may not satisfy the GPA requirements for automatic admission, law schools could allow a limited number of applicants to be admitted on a probationary basis. Once those students have satisfied the probationary requirements, they could be fully admitted. In fact, this is what happened to me in graduate school. When I applied to the graduate tax program at Long Island University, the admissions committee admitted me on a probationary basis, during which I had to maintain a minimum GPA of 3.0 for my first twelve credits. Once I cleared that hurdle, I was fully admitted, and I graduated with my Master's degree in the summer of 1990.¹²⁴

Law schools could easily institute a similar practice. For instance, a school could require that probationary students take—and excel in—a limited number of classes such as contracts, torts, and legal writing. Once those students satisfy the law school's requirements, they could be fully admitted and eventually progress to graduation. Even under current admission practices, not every law school student who is admitted and graduates can be a valedictorian or a member of Phi Beta Kappa. I certainly was not, and I did not embarrass myself in college, graduate school, or law school. I see this option as neither farfetched nor unworkable.

Still, I believe that Professor Subotnik is somewhat unimpressed with my argument that students with less-than-sparkling credentials should have an opportunity to prove themselves. Professor Subotnik argues:

Going beyond a standardized test to evaluate a student's "entire body of work" is an excellent idea. What Professor Gilmore has not shown is that the whole student approach will

124. Long Island University, Academic Record (Oct. 15, 1990) (on file with author).

produce an appreciably different result in admissions from that produced through testing—and through grades which he admits are important.¹²⁵

Admittedly, I have no way of knowing for sure whether looking at a student's entire record would show a dramatic difference compared with the current overreliance on standardized testing.¹²⁶ However, as colleges have become increasingly SAT-optional,¹²⁷ they can certainly report data on whether their changes to their admissions policies have generated a significant difference in student performance. In addition, deemphasizing an assessment test and looking at a student's overall work record is not exactly reinventing the wheel.

Much of my earlier piece dealt with the fact that standardized testing was a means of keeping minority students out of higher education.¹²⁸ Standardized testing was created with a proven exclusionary motive¹²⁹ and with racial and cultural biases that remain to this day.¹³⁰ Yet admissions committees still give these tests excessive weight when deciding who gets admitted and who does not.¹³¹ This admissions practice is wrong.

125. Subotnik, *Reply to Professor Gilmore*, *supra* note 13, at 64.

126. *But see, e.g.*, HISS & FRANKS, *supra* note 91, at 61 (“[S]tudents with strong [high-school GPAs], even without testing, are likely to succeed in college, and students with low [high-school GPAs], even with a broad range of testing, have much lower college GPAs and graduation rates.”).

127. *See, e.g.*, Eric Hoover, *DePaul Becomes Biggest Private University To Go “Test Optional,”* CHRON. HIGHER EDUC. (Feb. 17, 2011), <http://chronicle.com/article/DePaul-U-Will-Make-SAT-and/126396/> (“Admissions officers have often said that you can’t measure heart,” said Jon Boeckenstedt, associate vice president for enrollment management. “This, in some sense, is an attempt to measure that heart.”); Michael A. Wilner, *Getting in Without the SAT*, N.Y. TIMES (Mar. 1, 2013, 5:58 AM), <http://thechoice.blogs.nytimes.com/2013/03/01/getting-in-without-the-sat/> (“We’re interested in your work, but we’re not playing the game that says these tests are some indication of I.Q.”).

128. *See, e.g.*, Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 15–18 (“Test scores are highly correlated with economic status. In the old days, elite schools achieved status by admitting students with the best family backgrounds, which of course included the right race, ethnicity, and religion.”); Laura Bruno, *More Universities Are Going SAT Optional*, USA TODAY (Apr. 4, 2006, 9:47 PM), http://usatoday30.usatoday.com/news/education/2006-04-04-standardized-tests_x.htm (“Whether they get 1300 or 1250 doesn’t really tell you anything about them as a person or a student,” says Ken Himmelman, Bennington dean of admissions. All the attention to numbers ‘becomes so crazy it’s almost a distraction.”).

129. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 14–16.

130. *Id.* at 21–27.

131. *Id.* at 53 (“Similarly, I cannot understand how admissions officers, supposedly in good faith, can summarily disqualify a candidate with other admission-worthy credentials by placing undue, disproportionate weight on a test score.”).

In their final analyses, admissions committees have some discretion as to whom they will admit. In exercising that discretion, these committees could sometimes take a chance on a person who might not have the most brilliant credentials, but who would hit his or her stride and blossom anyway. For me, this is a great thing. But to others such as Professor Subotnik, removing this kind of discretion guarantees that unqualified applicants will never be admitted. If this is true, I would love for Professor Subotnik to clarify how this approach guarantees that no one would underachieve in or otherwise flunk out of school.

XI. The Place of White Students in Higher Education

Some might misconstrue my arguments here as deliberately ignoring the place of White students in higher education. But the historical makeup of this country, as well as the history of this country's education system, automatically puts White students at the head of the class. I am not ignoring any legitimate rights that White test takers might have in the test taking process, nor am I trying to advance the rights of minority test takers at the expense of White test takers. In any event, I do not think that anyone can deny that the benefits afforded exclusively to White students in higher education, at least historically, *is still the elephant in the room*.

In defending the *Ricci* verdict, Professor Subotnik seems to argue that *any* effort to find a race-neutral remedy to ensure that exams are fair to all test takers is somehow wrongfully placing "race above all,"¹³² as if diversity and excellence *must* be mutually exclusive. He then makes this comment about the usefulness of diversity: "Diversity and excellence may not be mutually exclusive; but they are not synonymous either."¹³³ I believe Professor Subotnik made that comment without really considering the ramifications of his words. If diversity is indeed severable from excellence, as Professor Subotnik argues, the mammoth achievements of noted African-Americans like Jesse Owens, Jackie Robinson, Althea Gibson, Wilma Rudolph, Arthur Ashe, David Dinkins, Thurgood Marshall, Eric Holder, and Barack Obama,

132. See Subotnik, *Contesting*, *supra* note 120, at 298 ("I chastised the Court minority for placing 'race above all.'"); Dan Subotnik, *Race Indeed Above All: A Reply to Professors Andrea Curcio, Anna Chomsky, and Eileen Kaufman*, 9 U. MASS. L. REV. 278 (2014) [hereinafter Subotnik, *Race Above All*].

133. Subotnik, *Race Above All*, *supra* note 132, at 284.

among many others¹³⁴ are neutralized. Why? Because if diversity and excellence are really incompatible, then it has to mean that the achievements of these highly accomplished people were nothing more than lucky accidents that slipped through the cracks and that it does not matter that these individuals consistently proved their excellence. On a much lesser scale, my own success over the past twenty years would also be a fluke. I therefore invite Professor Subotnik to clarify why he feels that diversity and excellence are not synonymous, especially when the above examples clearly show otherwise.

I mentioned in an earlier piece that this country was built, in part, on racial injustice¹³⁵ and that the original premise of standardized testing helped to perpetuate that injustice.¹³⁶ I would analogize that premise this way: If a homeowner forces someone at gunpoint to build his or her house, the homeowner's legal right to the house is recognized, and the poor soul who was strong-armed into building the house has nothing more than the rights of an invitee at best, and an interloper at worst. Or I could offer the more blunt example of how European powers forcibly pushed Native Americans off their own land¹³⁷ and forcibly dragged Black slaves off the African continent to work on American soil.¹³⁸ Further, I could point out how these Europeans made it illegal to teach a slave how to read in order to make sure that the status quo remained intact.¹³⁹ In light of all that, I would ask Professor Subotnik the following: *Are these not heinous examples of "race above all?"* If education was intentionally calibrated to remain out of a Black person's reach, then White students are the beneficiaries of a legal and educational system that *automatically favors them*. This is not hard to miss.

134. For more on these individuals' achievements, along with those of other successful Black Americans, see generally *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY* (Paul Finkelman et al. eds., 2009).

135. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 46.

136. *Id.* at 14–15, 26–27.

137. See DAVIE E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 69–70* (1992); JAMES WILSON, *THE EARTH SHALL WEEP: A HISTORY OF NATIVE AMERICA 70* (1998).

138. See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY 80* (2006); JAMES OLIVER HORTON & LOIS E. HORTON, *SLAVERY AND THE MAKING OF AMERICA 27* (2005); PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 20 (2003).

139. See, e.g., *Slaves Are Prohibited To Read and Write by Law*, HIST. IS WEAPON, <http://www.historyisaweapon.com/defcon1/slaveprohibit.html> (citations omitted); *The Slave Experience: Education, Arts, & Culture*, PUB. BROADCASTING SERV. (2004), <http://www.pbs.org/wnet/slavery/experience/education/docs1.html> (citations omitted).

All test takers, *irrespective of race*, should have access to the same information necessary to prepare for any test. Only then would the playing field be level for all concerned. When a host brings more chairs to the dinner table and invites more guests to partake of the meal, the host hardly takes food out of the mouths of the guests who are already seated.

Conclusion

I can never overstate my belief that standardized testing cannot tell the full story about a test taker's ability to perform well in higher education. There are several problems with standardized tests like the SAT and LSAT, even apart from the racial stratification they cause. First, the system places so much weight on these exams that they take on the aura of an all-or-nothing affair that will ultimately determine a student's future. As one high school student recently observed: "I find myself spending countless hours a day doing homework, studying for that math test and even studying for a test that I have been told 'determines which college I will attend.' I find it ridiculous that so many colleges base success off . . . a nationwide test."¹⁴⁰

Second, as I have consistently argued, standardized tests tend to disregard students' overall bodies of work and reduce their higher education opportunities to a throw of the dice.¹⁴¹ Can a one-time aptitude test really have so much power that it can unilaterally place a student with a 3.8 GPA into Bronx Community College instead of Columbia University? If so, and if that one test really has that much probative value, then maybe taking a semester's worth of classes year after year is moot after all.

Third, the ability to succeed in college, graduate school, or law school comes down to much more than a standardized test score.¹⁴² Once students are admitted, they have to do the work and prove mastery of the subject matter by passing all of their exams.¹⁴³ This is a function of students' "passion[s], desire[s], and

140. See, e.g., Kaitlyn Kaminski, *Is There a Need for College Entrance Exams Like the SAT/ACT?*, HUFFINGTON POST (May 1, 2014, 12:36 PM), http://www.huffingtonpost.com/kaitlyn-kaminski/standardized-testing_b_5227841.html.

141. *Id.*

142. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 2, 52–53.

143. *Id.* at 3, 38.

perseverance”¹⁴⁴ as well as their solid “attention to detail.”¹⁴⁵ Not only does an antiseptic standardized test fail to take the entire person into consideration, but, most importantly in my opinion, it does not account for the fact that a person might not hit his or her academic stride until later in life.

This is exactly what happened to me. As I mentioned in my original piece, I was a demoralized high-school dropout.¹⁴⁶ Although I took the SAT (and scored 830 out of 1600), I saw it as just one more wasted exercise in high school pointlessness. At that time, college was the furthest thing from my mind, and I just wanted the nightmare that was high school to come to an end.¹⁴⁷ I admit, I did not care anymore, and I mentally checked out of high school long before I stopped physically going to class.

Later on in my life, even though my admissions-exam scores for graduate school and law school were not outstanding, the various admissions committees believed that my academic and professional experience showed that I could succeed. By the Grace of God, I earned undergraduate and graduate degrees because those committees were willing to look past my test scores and to the overall package and allowed me the opportunity to prove myself. Is it too much to ask that others in a similar position be given that same consideration?

144. *Id.* at 15.

145. Cf. Subotnik, *Testing = Discrimination?*, *supra* note 1, at 388 (noting that grades are the best predictors of law school success).

146. Gilmore, *Reply to Professor Subotnik*, *supra* note 7, at 1.

147. See *id.* (“By the time I took the Scholastic Aptitude Test (SAT), I was not thinking about applying to college, and thus did not care about my test score.”).

