MORE PLAIN TALK ABOUT TESTING AND RACE - A FINAL REPLY TO PROFESSOR DAN SUBOTNIK
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“How can you think of saying to your friend, ‘Let me help you get rid of that speck in your eye,’ when you can’t see past the log in your own eye?” ¹

INTRODUCTION

I recently had a piece that I wrote accepted for publication by the University of Minnesota Journal of Law and Inequality (“L and I”). It is called, “The SAT, LSAT, and Discrimination: Professor Gilmore Again Responds to Professor Subotnik.” ² Dan Subotnik, who is white and I, who am black, had debated the issue of the reliability of standardized testing previously when the Seattle Journal of Social Justice accepted an article I wrote ³ in response to a prior piece Professor Subotnik published in the University of Massachusetts Law Review. ⁴ The Seattle of Social Justice also published Professor Subotnik’s initial response to me. ⁵

My next response to Professor Subotnik has, for better or worse, generated a little controversy. L and I initially invited Professor Subotnik to write a response to my piece. As he and I know each other very well, and are good friends despite our deep difference of opinion here, I was very happy with this turn of events. I looked forward to his response knowing that the hallmark of any good debate is that all sides are allowed to be heard. That way, anyone who

¹ HOLY BIBLE, Matthew 7:4 (New Living Translation).
hears/reads the opposing viewpoints can at least make a fully informed decision of which one of us is right.

Unfortunately for reasons that completely escape the both of us, L and I stunningly rejected Professor Subotnik’s response. Professor Subotnik and I had kept in touch during the process and I showed him a copy of my draft which prompted his response, which took him two months to put together.6 Thus, there is no way he can plausibly claim that he was sandbagged or otherwise surprised by what I had to say. Admittedly, I had found some of Professor Subotnik’s prior commentary on this topic unjustifiably harsh in some spots, and I pointed that out more than once. The second part of the controversy was that after L & I rejected Professor Subotnik’s piece, L & I asked me to restate some of my prior commentary. I did everything I could to convince L & I to keep my original text so that when Professor Subotnik eventually found a forum in which to respond, readers would have the full context of our disagreement.

Unfortunately for the both of us, Professor Subotnik could not find another journal to publish his piece and I could not convince L & I to restore my original text. Eventually, Professor Subotnik posted his piece on his SSRN author page7 and I put the original unedited version of my piece with L and I on my SSRN author page.8 It is his latest response to which I answer now, which will be my final reply.

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7 Id.
8 Gilmore, Prof. Gilmore Again Responds to Prof. Subotnik, supra note 2.
RESPONSE TO DAN SUBOTNIK: STRONG WORDS AND...HURT FEELINGS...?

The above biblical reference is the perfect backdrop to which I give this reply. It is one thing to write a law review article as an opposing response to another author. It is one thing to use some strong language to make sure the point gets across. It is something completely different to write a hatchet job against an opponent and then try to pass it off as a scholarly piece…friendship notwithstanding. Sadly, this is what Professor Subotnik has done here and he’s clearly swung the hatchet at me.

Professor Subotnik claims to have hurt feelings resulting from my latest piece.9 I respond with the only word I believe answers his claim: BALDERDASH!10 That claim is laughable beyond words. If he is as hurt as he claims, it surely is not because of anything I wrote; perhaps his own words have come home to roost and maybe that is what really hurts. Professor Subotnik, as a tenured law professor and published author, is certainly an individual with thick skin. He has debated11 well-known attorneys and law school professors with far more experience than I, and he has never mentioned getting his feelings hurt. Now comes little ol’ me who throws a little heat his way by calling him out on some of his less-than-kind commentary and we’re supposed to believe he’s so hurt by what I said? That dog just won’t hunt.

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9 Subotnik, supra note 6 at “Hurt can be real.”
Professor Subotnik firmly goes on the attack by saying he finds my tone to be “abusive.”¹² This is both ironic and hilarious when one considers some of his very own commentary against his critics, myself included, to be less than charitable. Naturally, one person’s pointed commentary can always be (mis)construed to be someone else’s “abuse.” On that score, Professor Subotnik certainly cannot plausibly claim sainthood here. Along those lines, here are a few of Professor Subotnik’s “greatest hits:”

- Blasting Harvard Professor Lani Guinier’s take on standardized testing in her book, “Tyranny of the Meritocracy - Democratizing Higher Education in America”:¹³ “Because of this nobility in her fatuity, Guinier cannot simply be dismissed. Indeed, if one thinks even in the face of severe educational deficiencies that show up in international comparisons that class inequality is the most serious problem we face, as Guinier seems to do, one might reasonably conclude for that reason that the need for formal education has been exaggerated. But for all the counter-cultural, even iconoclastic pleasures that taking on the educational system might bring, that premise has to be laid out and carefully evaluated, not just assumed. That evaluation, however, should not come from Guinier, who earns her keep providing the very formal education she disparages, one, who is, additionally, shielded by a tenure bubble behind the sturdy walls of the ivory tower. An argument in terms of efficiency by one so removed from the flame of competition, can have no credibility and can lead only to cynicism in public discourse. One can only wonder whether Harvard Law hires faculty other than on the strength of their learning.”¹⁴

- Blasting Professor Guinier’s position yet again: “In Guinier’s romantic world, where you do not have to know much, ignorance loses its stigma and socioeconomic otherness takes its place. Where the overriding goal is democratic merit,” ignorance becomes conflated with creativity; the uneducated become cheered as the experimenters and collaborators.”¹⁵

- Suggesting that students who might have been the beneficiaries of a race conscious admissions policy, intended to try to remedy past discrimination, somehow refuse to compete: “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.”¹⁶

- A shot at me: “Gilmore goes on solipsistically to imagine how unfulfilled he might feel today if he had not been able to study law.”¹⁷ Actually, he might be right if I were the

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¹² Subotnik, Plain Talk, supra note 6 at 1.
¹⁵ Id. at 351.
¹⁶ Dan Subotnik. Contestation, supra note 11 at 300-301.
¹⁷ Subotnik, Plain Talk, supra note 6 at 13.
only person in the six-thousand plus year history of civilization to have had that experience and mindset. I am reasonably sure that I am not. I don’t need to mention how wrongheaded his particular statement here is.

- A shot at Professor Richard Delgado as being perhaps disingenuous: “Of course, Delgado does not speak plainly here. Nor, perhaps, should we expect him to.”
- Finally, a not-so-subtle shot at anyone who questions the reality of racial gaps in testing is somehow insincere with a hidden agenda: “Like so many others, it would appear, CCK are so discomfited by racial gaps in testing that they will do anything to avoid recognizing their true significance.”

More to the point, he and I have discussed our opposing viewpoints via e-mail, as well as face to face many times, and we have discussed our situation with L & I on many occasions as well via e-mail and in person. If his feelings were as bruised as his response would have readers believe, well, he certainly had ample opportunities to let me know that face to face. The strongest thing he has ever said to me in all this time about my commentary was that I “misinterpreted” a lot of what he said. Misinterpretation hardly rises to the level of vitriol that would suggest hurt feelings. And, in light of our thirteen year friendship, I would have done everything within reason to set things right were he so injured. That said, Professor Subotnik must surely understand that even a decades long friendship is no defense against the truth, either. After all, what’s a little candor between friends?

Next, Professor Subotnik also not-so-subtly suggests a hint of cowardice on my part: “Ideally, I readily acknowledge, Gilmore’s draft should be available as a companion essay to mine. But I cannot make his 30 page piece available; it is his property and, as suggested, will likely never see the light of day.” (Emphasis added by author.) Well, as mentioned above, my draft IS available on SSRN as a companion piece to his, and evidently isn’t suffering any adverse effects from exposure to the light of day. Thus, any attempt on his part to accuse me of

18 Subotnik, Contestation, supra note 16 at 301.
19 Dan Subotnik, Race Indeed Above All, supra note 11 at 294.
20 Subotnik, Plain Talk, supra note 6 at 2.
turning and running collapses under the weight of its own illogic and inaccuracy given the chronology of this discourse and our personal relationship.

Professor Subotnik then attempts to portray my personal feelings about him in light of my latest response as a touch disingenuous:

Putting aside the fact some people are drawn to the disreputable, the critic using the foregoing terms, paradoxically, also labels the target of the abuse, the present author, writing here in his own defense as “one of the wittiest, most erudite people I’ve ever met,” and “a great guy and a good friend.” How beyond the pale can this author be?21

I state unapologetically, long before this controversy, and definitely in spite of it now, he and I remain friends to this day. By the way, Professor Subotnik and I even had a recent e-mail correspondence we both agreed that this little dustup, if nothing else, has strengthened our decade plus friendship.22 And to show that this is not a one-sided admiration society, Professor Subotnik makes this observation about me regarding my potential for law school admission in the Seattle Journal for Social Justice:

“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.”23

Well then, I guess my being a “treasure” and longtime friend in his eyes puts him just as far beyond the pale as I am, doesn’t it? Like it or not, we’re both joined at the neck.

In discussing the issue of race, Professor Subotnik claims “whites are raced too.”24 Perhaps, but let us consider this all too common scenario involving law enforcement (and the resultant distrust of law enforcement in minority communities): if Professor Subotnik and I are

21 Subotnik, Plain Talk, supra note 6 at 3.
22 Email from author to Dan Subotnik (November 20, 2015) (on file with author); Email from Dan Subotnik to author (November 20, 2015) (on file with author).
23 Subotnik, Reply to Gilmore, supra note 5 at 58.
24 Subotnik, Plain Talk, supra note 6 at 5.
walking down a dark street and we both have our hands in our pockets reaching for our car keys, and a white cop comes up to us from the other direction, which one of us does one think that cop will automatically assume is reaching for a gun? If the answer is elusive, look no further than the cases of Amadou Diallo,\textsuperscript{25} Sean Bell,\textsuperscript{26} and Timothy Stansfield,\textsuperscript{27} innocent, unarmed black men shot to death by white cops, all of whom claimed the victims were armed... yet none of whom was ever found criminally culpable for murder, manslaughter, or even criminally negligent homicide.

As to the issue of how standardized testing definitely impacts race, I pointed out the following:

- Historical origin of standardized testing\textsuperscript{28}
- Life experience and access to information\textsuperscript{29}
- Deliberate practice of pruning exam questions where minority test takers outperform white test takers.\textsuperscript{30}

\textsuperscript{25} See e.g., Jane Fritsch, The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges, N.Y. TIMES, Feb. 26, 2000.
\textsuperscript{26} See e.g., Tara Palomer and Daniel Prendergast, Former Cops Still Reeling 7 Years After Sean Bell Horror, N.Y. POST, Nov. 30, 2013.
\textsuperscript{28} Gilmore, Reply to Subotnik, supra note 3 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. Brigham’s thesis, that white races were superior in intelligence to people of color, was based on previous psychological examinations conducted by the United States Army. Brigham’s manuscript also shows that he was certainly no fan of black people: ‘[W]e have the most sinister development in this history of the continent, the importation of the negro.’”)\textsuperscript{29}
\textsuperscript{29} Id. at 20. (“First, minority students in poorer neighborhoods do not have the same cultural exposure as many white students where they could expand their vocabulary to include the words in these questions. African-American leaders contended that the SAT verbal exam is culturally biased against the poor because the questions relate more to upper middle-class white life.”)\textsuperscript{30}
\textsuperscript{30} Id. at 23. (“If that is not bad enough, what happens if a question shows up on the SAT that is actually favorable to a minority or economically disadvantaged test taker? When this has happened in the past, the SAT administrators have left those specific questions ungraded or eliminated them from future tests. This again raises questions about the idea that standardized testing in general, and the SAT in particular, is really race neutral.”)
DO MINORITY STUDENTS “LEARN ENOUGH?”

One point in his defense of standardized testing to which I admittedly took umbrage was this: in a response to certain criticisms of the society of American Law Teachers, Professor Subotnik mentions his belief that minority students do not learn enough:

But SALT’s “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. SALT should either mind its language or produce evidence.\textsuperscript{31}

And then, in an additional show of defiance to make sure that everyone has no doubt that he meant what he said and said what he meant, he mentions it yet again in his latest missive against me: “Referring to this national affliction, I said in my previous article that black law students were not “learning enough” in school.”\textsuperscript{32}

That assertion is just wrongheaded and vitriolic beyond words. No matter how he tries to dress it up as some sort of tough love (however misguided), that assertion is just plain indefensible. I don’t think this assertion is that far removed from the late Justice Antonin Scalia’s recent comments questioning whether minority students are better off enrolling at so-called slower track schools.\textsuperscript{33} If Professor Subotnik really believes his assertion that black students do not learn enough, then he has very obviously ignored very reputable institutions of higher learning like Grambling, Howard, Morehouse, and Spellman, among many others. These institutions are also HBCU’s – Historically Black Colleges and Universities. I also have no doubt that he ignores the many success stories of minority graduates from Harvard, Yale, Columbia,

\textsuperscript{31} Subotnik, supra note 6 at 17.
\textsuperscript{32} Id.
and Stanford, again among many others. In light of his statement of black students not learning enough, I responded thusly:

Professor Subotnik’s “full-throated” reply completely ignores the minority students (myself included) who graduate from colleges, graduate schools, medical schools, and law schools every single year. 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 develop the necessary working knowledge of the subject matter to be academically and professionally competent, and one certainly cannot do those things without learning enough.34

Professor Subotnik goes on to mention this:

“In response, Gilmore calls the charge both ‘laughable’ and ‘vicious.’ Is it also unspeakably vile, asinine et al. and an expression of white cultural imperialism? The only inference seemingly to be made from the race-based grade and bar passage gap is that black students need to know more and, in the process, wholly and permanently refute any lingering supposition that they cannot compete. Is it helpful to hear this statement as hate speech worthy of a venomous response?”35

Interestingly, as per several of his prior quotes shown above…laughable and vicious as they may be, Professor Subotnik has shown himself too many times as being quick to throw the gauntlet down at his critics. Yet, when that same gauntlet boomerangs back at him, like now, he cries “hate speech.”36 Perhaps he’s a touch less thick skinned than I gave him credit for. Oh well…

As he is so obviously firm in his conviction that minority students don’t learn enough, perhaps I might have to reassess my own position on this issue. If I, as a minority student, did not “learn enough,” then perhaps all I had going for me was a 3 year lucky streak while pursuing my J.D. Once I graduated from the Southern New England School of Law, I had to have caught lightning in a jar a second time when I took Professor Subotnik’s tax class in the LL.M. program

34 Gilmore, supra note 2 at 157.
35 Subotnik, Plain Talk, supra note 6 at 17.
36 Id.
at Touro Law School (coming within spitting distance of winning a CALI award\textsuperscript{37} for the course, I might add). And I must have caught that same lightning strike when I graduated from Touro. Perhaps, every minority law student who succeeded in his classes in Trusts & Estates and Taxation was just as lucky. Maybe a lucky fluke does go a long way…in my case, sometimes even twice.

That said, this is not the first time his prior commentary could lead one to believe these and similar success stories were just lucky accidents and little else.\textsuperscript{38} I cannot say this too many times: \textit{WE LEARNED ENOUGH!} This is a major point in the story Professor Subotnik just doesn’t get…or perhaps never will.

I now take this one step further – If Professor Subotnik is that convinced minority students don’t learn enough, I invite him now to at least give some thought to the following before making such a nonsensical generalization:

- He might want to re-read my above quote; minority students do learn enough to earn degrees.
- He might look around at the minority students who attend the very law school where he is a tenured professor; they certainly learned enough to get admitted to law school…and graduate.
- He might perhaps spend some time with the Black Law Students Association at the very law school where he teaches. Again, these students must have learned

\textsuperscript{37} Computer Assisted Legal Instruction (“CALI”) Award for the highest grade received in every law class. \url{http://www.cali.org/content/cali-excellence-future-awards-0}\url{http://www.cali.org/content/cali-excellence-future-awards-0} In Professor Subotnik’s Estate & Gift Tax class, I finished second…RATS! I did win one for Negotiable Instruments & Payment Systems in the Spring 2004 semester at Touro Law School.

\textsuperscript{38} Gilmore, \textit{Reply to Subotnik, supra} note 2 at 9.
enough to earn undergraduate degrees and earn admission to law school…and graduate.

- He might look at some of the minority professors…colleagues…who teach at the very same law school he does.
- He might consider the track record of the present author (who by the way scored the second highest grade as a student in his Estate and Gift Taxation class in the spring 2003 semester). I submit that I, like many other minority students did much more than just get lucky. One more time: We DID learn enough!

Interestingly, in all of his writings about race and education, Professor Subotnik has been conspicuously silent about the fact that low scoring test takers do beat the odds and succeed in higher education. Why the silence? What might that suggest? Could it be that the fact that people can overcome long odds and attain academic & professional success is not a fluke after all? (Again, look no further than yours truly…his former student.)

Finally, Professor Subotnik takes one more shot at me when I admittedly mocked his statement suggesting that diversity and competence are not necessarily synonymous. He goes on to say the following: “I do not get it. Is race (i.e., blackness) for Gilmore a credential like knowledge?” Since he admits that he doesn’t get it, here’s precisely WHY he doesn’t get it:

I definitely agree that knowledge IS THE CREDENTIAL, irrespective of race. At least, it should be. But as history has shown us, when race is used as an arbitrary DISQUALIFIER to keep otherwise qualified applicants OUT of the competition, a minority applicant has no

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39 Subotnik, Plain Talk, supra note 6 at 9, 10 (“Gilmore ridicules my statement that ‘diversity and excellence may not be mutually exclusive; but they are not synonymous either.’”).
40 Id. at 10.
opportunity to prove his competence otherwise. I do not think anyone needs to debate the unfairness of such a situation.

**THE CONTROVERSY WITH THE UNIVERSITY OF MINNESOTA**

Professor Subotnik rightly suggests that his response to me would have been “red meat”\(^{41}\) for L & I, a law journal that addresses discrimination issues. I could not agree more. Even in this day and age, considering this country’s history, there are few issues as polarizing as race. We need look no further than the recent nationwide protests against police brutality, campus racism, and other racial injustices throughout these (supposedly) United States. Certainly, my original draft along with Professor Subotnik’s response should have been a slam dunk for publication in L & I’s current issue.

As both Professor Subotnik and I would have ardent supporters and detractors in a discourse like this, our further discussion of this topic could not help but inspire further debate which would only spread like wildfire. The very fertile battle grounds where this debate could have gone further would have included, among many others:

Teacher/Student
Mentor/Mentee
Black/White
Conservative/Liberal
Testocrat/Proponent of Test Optional

When I received notification from L & I that my piece had been accepted for publication,\(^{42}\) I forwarded the acceptance to Professor Subotnik, along with my original draft. In

\(^{41}\) *Id.* at 1

\(^{42}\) E-mail from L & I to author (June 14, 2015) (on file with author).
my excitement, however, I forgot to remove the managing editor’s e-mail address, a mistake that she rightfully called me out on. Nevertheless, once Professor Subotnik read my draft, he sent both the managing editor and me a terse e-mail requesting he have an opportunity to respond.\footnote{E-mail from Dan Subotnik to author (June 17, 2015) (on file with author).} I immediately sent the managing editor an e-mail expressing my support for Professor Subotnik’s request.\footnote{E-mail from author to L & I (June 17, 2015) (on file with author).} I mentioned that this was a golden opportunity to present our opposing viewpoints, however hyperbolic at times, in all their purity.

Knowing Professor Subotnik’s position on this topic and some of the hard-nosed language of his prior writings, I wrote my original piece not only to match his tenor, but was also reasonably confident he would jump at the chance to respond. And he certainly did not disappoint: “did he want to bait me into continuing and even escalating the disputation? Clearly, given how Gilmore ends his piece: ‘Your serve, Dan.’”\footnote{Subotnik, \emph{Plain Talk}, supra note 6 at 6.} Admittedly, knowing Professor Subotnik as well as I do, I could not have written my original draft as I did without knowing he would surely come gunning for me.

Sadly, I think L & I fumbled away a marvelous opportunity to give a proper forum to an honest, spirited debate on a very timely, relevant topic. If we accept the proposition that an academic institution is a “marketplace of ideas,”\footnote{See Abrams v. United States, 250 U.S. 616, 630 (1919). \textit{See also} Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).} then there could not have been a better forum for this debate than a law review called “Law and Inequality.” Unfortunately, L & I’s rejection of Professor Subotnik’s response and subsequent watering down of my own prose turned what could have been a legendary law review debate into a stinging defeat of the First Amendment. I am truly sorry for all of us.