“I LOVED it”
Professor Harvey Gilmore (referring to an earlier draft of this piece)

Plain Talk about Testing and Race:
A Reply to Professor Harvey Gilmore and a Law Review Publishing Drama

Dan Subotnik*

NOTE TO READER: The following is my response to an essay that was accepted in May 2015 by the University of Minnesota’s “Law & Inequality” for its winter issue. ¹ The essay in question continues a disputation that I and a number of others have engaged in on the subject of testing and race. In brief, I favor continued use of testing for admission in law school, although with liberal allowance for alternative measures of readiness for law study. Professor Harvey Gilmore, the author of the essay, believes that tests such as the LSAT are virtually useless and that just about any college graduate who wants to go to law school should be able to do so.

For reasons that will be clear at the outset, I found Gilmore’s tone to be abusive. I also found many analytical flaws. Perhaps sensing that his word would, and maybe should, not be the last on the subject, Gilmore, whom I know well, sent me a copy of his essay in which he explicitly invites my response. On the same theory, “Law & Inequality” also invited me to respond.

“Law and Inequality,” for whom my piece could have been red meat,” has now rejected my submission. In addition, after reading my draft the journal is urging Gilmore to make changes, something the editors committed to not doing if my article was accepted. But nullifying a full summer’s work of mine will not do. My essay not only needs to be read, but it needs to be read in the light of the essay that was originally accepted. Adjusting Gilmore’s article in response to my draft does not solve the problem I identify—that only validated views on race are publishable. That is to say, both the writing and the acceptance of Gilmore’s article as is, is central to the story.

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¹ Relevant emails for this Note are on file with the author. More background information is provided below.
Let me explain. We do not talk about race openly and honestly. As an author of a book (published by
NYU Press) and numerous articles on race, I have written on this very subject. Neither “Law &
Inequality” nor any of the race/law journals, for example, would have accepted for publication a
vituperative and intellectually mushy article such as Gilmore’s that was directed at a person or people of
color. Conversely, pieces that bash whites individually or as a group, the bêtes noirs of American society,
are warmly welcome. Colorblindness may be in disrepute in some quarters, but it has not been repealed
as an ethical test. One cannot hesitate to apply it.

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. I can, however, present and comment on his argument.

If not with Law & Inequality’s full blessing, I do so here with Gilmore’s. Gilmore has emailed me that he
“LOVED” the piece I submitted, and he has graciously authorized me to “quote freely” from his
unpublished draft. This is of course not to say that he agrees with my analysis or that he will not reply in
the near future.

The point is that here is a chance for the reader to listen to a side of the education story that Gilmore
and Ta-Nehisi Coates—who roundly condemns American culture and lays the responsibility on it for
solving our most serious social problems—will not tell.

I conclude here with two questions for the reader: In an academic environment where faculty often pat
themselves on the back for “telling truth to power,” might not all, including the powerless, need some
truth-telling as well? More specifically to the point: Was it right for “Law & Inequality” to scotch my
response?

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Why might readers subject themselves to ideas of mine characterized as “unspeakably vile,”
“insulting,” “vicious,” “incendiary,” “heartless,” “crass,” “unconscionable,” and, striking at intellect
rather than character, “asinine,” and even “beyond asinine”? Ideas whose origin lies in “imbecility” and
“vitriol?”

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2 See Harvey Gilmore, The SAT, LSAT, and Discrimination: Professor Gilmore Again Responds to Professor Subotnik, (unpublished manuscript—so far) (on file with author), LAW AND INEQUALITY (forthcoming). Gilmore is a professor of law at Monroe College, N.Y. (page citations omitted in this paragraph)
There are, in fact, a variety of reasons. Putting aside the fact some people are actually 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 have ever met,” and “a great guy and a good friend.”

How beyond the pale can this author be?

On another level, the writing process often requires overstatement; this helps writers to both organize their thinking and justify their laborious and solitary work. Messages writers dispatch need to be understood in that light. All the more should readers come to the task with skepticism today when to be heard above the communications din, writers often feel the need to dispense with both balanced judgment and good manners.

But there is a deeper reason to question the soundness of the above characterizations, one rooted in contemporary epistemology. That is to say, claiming offense today has not only promotional but also apparently probative value. Professor Alan Dershowitz captured this phenomenon twenty years ago in a syllogism: “I am offended,” therefore you must be wrong—and by extension, I, the speaker, must be right.

The problem of concern here is not the critic who develops a sense of moral superiority that precludes evaluation of competing argument; it is, rather, the reader who takes the critic’s words at face value, backs off, and thus cedes the point. In this setting, the greater the offense claimed, the greater the perceived righteousness of the underlying cause. Savvy students of rhetoric in our media-quickened

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3 Id. at 3.
4 “[U]sually, in order to turn out a piece of work,” Pulitzer Prize-winning author Ernest Becker explains, “the author has to exaggerate the emphasis of it, to oppose it in forcefully and in a competitive way, to other versions of the truth; and he gets carried away by his own exaggeration, as his distinctive image is based on it.” ERNEST BECKER, THE DENIAL OF DEATH 16 (1973).
culture cannot help but learn quickly that exaggerating and even feigning offense can pay off; it can help divert attention from any weakness in the case. It would be surprising then if rational writers failed to make use of a stratagem readily available to them.6 This in turn suggests that, more than ever, the academic’s and the law review’s responsibility today is to scrutinize the claims of those claiming greatest offense in a cool and measured manner.

Alas, it has not worked that way. Nowhere is dialogue more phony—no other word will do-- and pusillanimous than in the race area, the focus of this essay. Consider: “No Euro-American person,” writes acclaimed black Harvard sociologist Orlando Patterson, “except one insensitive to the charge of racism, dares say what he or she really means.”7 Readers should try to let that statement sink in.

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6 Things reportedly have not changed in the last 20 years. “[A]s we see every day in social media,” writes Meghan Daum, “the blogosphere and the shout-o-sphere of cable news, ad hominem attacks and self-righteous posturing are the new disagreeing.” Meghan Daum, “Has Millennials’ Self-Esteem Become Self-Righteousness?” LOS ANGELES TIMES, April 29, 2015.

The consequences of the *incommunication* could have been predicted. Political and legal talk in the race area, as I have found over the course of my career, is hopelessly unproductive.

Let me be clear: I do not suggest here that claimed offense is always or even usually manipulative, and thus to be ignored. Hurt can be real. So we need to tell those around us when they are really stepping on our toes. They can then tell us about their need to walk down the street. If indeed the truth hurts, what this boils down to is that a claim of offendedness should open the analysis not close it.

Can this disconnect continue? Bedeviling us today are events that took place in Ferguson, Baltimore, Cleveland, and Charleston, and, generally, issues such as segregation, crime, and financial and educational disparities. How can we even begin to work toward a meeting of the minds on law and inequality if the relationship between the two cannot be debated openly? To free ourselves from the conversational morass, Patterson rightly urges both “Afro-Americans and Euro-Americans [to] treat each other exactly alike: as responsible moral agents. We do not need any special sets of sensitivities.”

Allowing himself such free rein, and using the unusually strong language highlighted above, Professor Harvey Gilmore, who is black, has challenged positions I, who am white, have taken on testing. But minorities are not the only ones with purchase on race. Whites are raced too. I hope that, perhaps as a result of this introductory note, readers will keep their minds open, thereby giving a white man a chance to defend his scholarly efforts and contribution to the public weal.

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8 See Patterson, *supra* note 7 at 115; See also Harlon Dalton, *Racial Healing* 94, 4 (1995); (“If engagement is the first step in healing then the second is pure unadulterated struggle. We will never achieve racial healing if we do not confront one another, take risks. . . . say the things we are not supposed to say in mixed company.”). Dalton, who is black, is a professor emeritus at Yale Law School.
This essay has its origins in an article I wrote in 2012 defending the LSAT and bar exam against challenges that they were racially discriminatory. Except to emphasize that I do not speak to the issue of affirmative action, I will not reproduce my argument here. Professor Harvey Gilmore responded to me, and I in turn replied to him. He is engaging me now in a follow-up essay. Did he want to bait me into continuing and even escalating the disputation? Clearly, given how Gilmore ends his piece: “Your serve, Dan.”

Wielding my racquet, I begin where Gilmore begins, with his claim that I defend the SAT and LSAT as the “best way to predict a student’s success in college and law school”; in fact, I did defend testing generally as helpful in education and employment settings, and I did specifically endorse use of the SAT. I did not, however, make the stated claim, the ostensible citation to my work notwithstanding.

More important in this essay is the claim about the tie between the LSAT and “success . . . in law school,” by which I think he means grades. While I in no way have “blind faith in” the LSAT—or any other form of standardized testing—I did indeed make the claim. But that does not mean that the LSAT is a particularly good metric. It should, as I will make clear, neither be sacralized nor sacrificed. Moreover, far from speaking off the top of my head—and his citation confirms this—I back up my claim

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11 Harvey Gilmore, LAW & INEQUALITY (forthcoming).
12 See Gilmore, supra note 1 at 33.
13 Id. at 1.
14 Id. at note 3. I do not hold, further, that standardized testing is the “be all and end all in determining one’s future academic and professional competence.” See id. at 3.
15 See supra note 2 at 1.
16 Id.
about the LSAT with a reference to two authors who have written extensively about testing, legal education, and first-year grades. Professor Gilmore offers up despair but no data to refute this point, much less to identify alternate testing criteria.

The debate heats up when Gilmore writes about *Ricci v. DeStefano*, a U. S. Supreme Court case in which firefighters in New Haven were competing for promotions. After no black firefighters scored high enough on the test to be promoted, New Haven invalidated the test in the hope of starting the promotion process over again. At this point some “winning” white and Hispanic firefighters sued under Title VII to reinstate the results. In a city with a large minority population, Gilmore asks, is it fair “to have an exam in which NONE of the candidates scored in the top ten percent? I certainly think not.”

I will have more to say about this later. For now, consider that Gilmore himself admits that minority populations suffer from test-related disadvantages.

Professor Gilmore goes on to find my suggestion “insulting” that the minority firefighters “could have studied harder”: “[Subotnik] ASSUMES the minority firefighters did not study harder.”

Is the comment insulting? Obviously, no empirical showing of disparate group preparation for the test is possible. My statement was premised on the common-sense idea that a test of knowledge is one that

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20 *Id.* at 7, 19.

21 See *id.* at 4. I had contrasted the powerlessness of the successful candidates in this setting with the ability of the minority candidates to be successful. See Subotnik, *supra* note XX, at 401.
anyone can prepare for through study of recommended test materials. And the more preparation, the better the chance of success. This would be the case whether the test subject was literary theory or calculus—which this test was most definitely not. Equally important to emphasize, I did not say that black candidates studied less hard than did white candidates.

Human beings cannot help but draw inferences from what they read and experience. Under the circumstances, what inference would Gilmore have preferred that I draw from the lack of success of the black candidates? If not that they indeed could have studied harder, is it that they are either lacking in aptitude or are so far behind academically that in any head-to-head competition with whites they could never prevail? I do not believe that for a minute. That they were not properly guided by the fire department? That nonminorities should have slacked more in preparation for the test? That Gilmore offers no theory for why the fire candidates would not have benefited from harder study suggests that for all the fulmination, the complaint is hot air.

Getting back to the SAT, Professor Gilmore quotes me as justifying a math component on the grounds that test results say “something useful about aptitude for engineering and science.”22 He argues that engineering is not—and science may not be—a “general purpose” subject.23 In this technological age, where measurement and statistical analysis is at the heart of so many jobs, the claim is especially baffling. Quite apart from the fact that the math and other components of the test are scored separately, so that failure in one domain does not have to taint performance in the other, surely we can

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22 See Gilmore supra note 2, at 8.
23 Id.
admit that math skills are important. We cannot all expect to find work as language teachers, much less as innumerate business people or even innumerate lawyers.\textsuperscript{24}

The SAT, according to Gilmore, is tainted not only by its range but also by its cultural bias. Minority students are disadvantaged by references beyond their experience to pirouettes and polo.\textsuperscript{25} No citation is provided to the existence of such terms on contemporary SATs so the charge cannot be addressed.\textsuperscript{26} SAT administrators do say that they work hard to eliminate such cultural bias.\textsuperscript{27}

Most problematic for Gilmore, it would seem, is that the very definition of a fair test is one that produces correspondence between race and success. Recall the argument about the unfairness of the test in \textit{Ricci}.\textsuperscript{28} How can a test be fair if it results in the exclusion of all the black test-takers? Similarly, citing the successes of David Dinkins, Barack Obama, Jackie Robinson, Thurgood Marshall, and many others, Gilmore ridicules my statement that “diversity and excellence may not be mutually exclusive; but

\begin{itemize}
\item \textsuperscript{24} Should all law students not know what a standard deviation is—even if they cannot compute it—so as to be able to understand data relevant to their clients’ needs?
\item \textsuperscript{25} See Gilmore, supra note 2 at 19.
\item \textsuperscript{26} Gilmore cites an article by Richard Delgado for this claim. But Delgado himself only cites testimony before a House subcommittee in 1987.
\item \textsuperscript{27} See Lynne Letukas, \textit{Nine Factors about the SAT that Might Surprise You}, College Board Statistical Report (2015), at 1:
\begin{quote}
\(\text{(E)very question that contributes to a section or total SAT score undergoes a rigorous pretest phase so it is highly unlikely that a biased question, let alone series of questions, would ever reach the point where it would be scored. Psychometricians, or professionals who study the theory and technique of educational measurement, perform differential item functioning (DIF) analysis on test items to make sure that items do not unfairly advantage one group over another. Using DIF analysis, psychometricians ensure that people of the same ability level have the same probability of answering an item correctly, regardless of the race or gender group to which they belong. Items that exhibit even moderate DIF during the pretest phase are not included in the operational test. In addition, psychometricians examine if there is any difference in predictive ability among groups. Moreover, all items undergo extensive qualitative review by expert fairness reviewers. (bold in original)}\)
\end{quote}
\item \textsuperscript{28} See supra note 18 and accompanying text.
\end{itemize}
they are not synonymous either.” 29 “If diversity is indeed severable from competence,” he tries to explain, “that seemingly neutralizes the mammoth achievements” of the above individuals. 30 I do not get it. Is race (i.e., blackness) for Gilmore a credential like knowledge? Gilmore challenges me to prove that it is not.

But I did—without contesting the racial elements in the towering achievements of Thurgood Marshall, Jackie Robinson et al., I pointed out that harrowing racial gaps appear in grades and test scores in kindergarten and increase during school years, and that they can be seen even at top integrated high schools. 31 Disparities exist, moreover, notwithstanding that black students are told that they have to be twice as good to as whites to be successful. 32 Is it fair to conclude that standardized testing is the problem? How could racial disparities not show up on a test taken by firefighters?

To be sure, Gilmore adduces the unsettling fact that the SAT was fathered 90 years ago by a man who thought little of black students. 33 The exclusionary impact of the SAT, in his view, makes it a “FRAUD.” But ascribing such motives to contemporary SAT administrators is no fairer than ascribing them to the military today. Or to Harvard. In an interview last year the College’s Dean of admissions reported that

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29 See Gilmore, supra note 2 at 29.
30 Id.
31 See Subotnik, supra note 77, at 362. See also Roland G. Fryer, Jr. and Steven D. Levitt, Understanding the Black-White Test Score Gap in the First Two Years of School, 86 THE REVIEW OF ECONOMICS AND STATISTICS, No. 2 (May, 2004), at 447; Fryer and Levitt find that controlling for a variety of characteristics including such as birth weight and socioeconomic status the disparity disappears, Id. and also RICHARD SANDER AND STUART TAYLOR, MISMATCH 17, 262 (2012). For a detailed study of the gaping gap at an excellent high school, see JOHN OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF DISENGAGEMENT 188-89 (2003). In this same school system, black youths had average GPAs one full letter grade below that of white youths. ROLAND FERGUSON, TOWARD EXCELLENCE WITH EQUITY 149-50 (2007). If these assembled data seem patchy, it is surely because we do not want to publicize racial gaps that evoke deep embarrassment.
33 See Gilmore, supra note 2 at 6 (referring to Carl Brigham).
due to the volume of applications, he could not do his job without the SAT or some version of it.\textsuperscript{34} Is Harvard a party to the fraud?

Professor Gilmore also reports on a study claiming that SAT preparers exercise questions on which minorities do well, a most troublesome claim, if true. Here special caution is needed. The SAT is used by colleges to rank students. Questions on which virtually all students get the right answers must of necessity be eliminated. Whether or not this is the case, requires further study, not reflexive condemnation.

This brings us to post-college experience, especially in relation to law school. Is the LSAT also an artifact of white supremacy? Not likely. ABA standards, which require testing of some kind,\textsuperscript{35} also demand racial nondiscrimination in admission\textsuperscript{36} and, beyond that, “concrete steps” by law schools to achieve a diverse faculty and student body.”\textsuperscript{37} It would be cynicism bordering on paranoia and hypocrisy to hold that the ABA would countenance an exam which was biased. For its part, the Law School Admission Council, which administers the LSAT, reports that far from hurting minority admissions candidates, the test (slightly) overpredicts their law school performance and thus does not hurt them.\textsuperscript{38} The LSAC also claims to go to great lengths to eliminate bias by carefully scrutinizing questions that produce racial disparities.\textsuperscript{39}

\textsuperscript{34} See A Change for the Better, Harvard Gazette March 19, 2004. (Interview with William Fitzsimmons (available at (http://news.harvard.edu/gazette/story/2014/03/a-change-for-the-better/)).
\textsuperscript{35} See ABA Standard 503.
\textsuperscript{36} See ABA Standard 211(b).
\textsuperscript{37} See ABA Standard 212(a) and 212(b).
\textsuperscript{38} See \url{http://www.lsac.org/jd/lSAT/policies/lsat-fairness-procedures}.
\textsuperscript{39} See \url{http://www.lsac.org/docs/default-source/research-%28lsac-resources%29/tr-12-02.pdf} A representative of the LSAC has informed me that the LSAC uses the Mantel-Haenszel method to detect DIF, (Differential Item Functioning) the metric for evaluating test questions that produce racial disparities. (email to present author 7/14/2015)
Ignoring these efforts, Gilmore argues that students who have earned their degrees have had to learn “something.” ⁴⁰ They know both what they can do and what they want to do and thus should be allowed a “reasonable opportunity to prove” themselves in law school. ⁴¹

Sounds reasonable, but does it compute? Every faculty member I know can name a dozen students who should not be in law school—which is not to say that this is necessarily knowable by faculty or anyone else in advance. A major study five years ago reported a trivial intellectual growth rate for half of American students in the first two years of college. ⁴² Any admissions director will similarly report how poorly thought out the decision to apply to law school often is. ⁴³ Wisdom and self-knowledge do not seem to be strong suits of the millennial generation, baptized as its members are in self-esteem. That students may need help in making career choices is evident from the drop-out rate and the fact that 150,000 law graduates today have never passed the bar exam. ⁴⁴ Nonetheless, the choice of going to law school, for Gilmore, should remain with the student. Perhaps especially the minority student. ⁴⁵

Gilmore offers himself up as evidence. Acknowledging that his own LSAT score was at the bottom of the range for accepted law students, he says that he “loved law school.” ⁴⁶ He did “reasonably well,” ⁴⁷ and

⁴⁰ See Gilmore supra note 2, at 5. (emphasis in original)
⁴¹ Id. at 10. “Most people are astute enough to realize that a particular dream may be beyond their grasp, and can adjust accordingly.” “But until that (ahal) moment comes, I do not see any harm in letting a person try.” Id. at 10 and 11.
⁴² See Richard Arum and Josipa Roksa, Academically Adrift (2010).
⁴⁵ “I have to believe that they applied to law school knowing what they were getting into, and were willing to do the work to be successful. Why else would they apply to law school?” See Gilmore, supra note 2, at 25. Jane Yakowitz, however, suggests that perhaps 43% of incoming black students do not ever become certified as lawyers. See Jane Yakowitz, An Empirical Investigation of Law School Graduates who Fail the Bar Exam 60 J. Legal Educ. 3, 20 (2010).
⁴⁶ See Gilmore, supra note 2, at 16.
⁴⁷ Id. at 8.
has had a deeply satisfying career. “I really hit my stride in law school.” “That is why the LSAT is completely overrated.”

Gilmore goes on to imagine how unfulfilled he might feel today if he had not been able to study law. It is thrilling for a law professor to know that his student feels that way. But the argument that “I wouldn’t have gotten into law school if the LSAT were all-controlling” is dubious, however admirable Gilmore’s public spiritedness might be. For in assessing Gilmore’s personal counterfactual “I would not have the [rewarding and self-actualizing] life as I know it” argument, one cannot but recall the intimate—but for most Americans ultimately unpersuasive—argument of a number of pro-lifers in the abortion debate: “if abortion had been legal, I might not be here.” No one, I suggest, has a right to satisfaction of his existential needs.

Perhaps recognizing the point, Professor Gilmore posits that the nation would be better off training 101 doctors even if all fail but one, if that one person would cure cancer. In this setting, per Gilmore, there is no reason to not give a minority student or anyone else a chance. Fair enough, if this were a realistic proposition. But it is not; it is a contrivance. If the goal of the admissions process is to admit students who will be successful cancer researchers, priority should be given to those who are best prepared for such a role, black or white.

\textsuperscript{48} Id. at 21.
\textsuperscript{49} Id.
\textsuperscript{50} His happiness, says Gilmore, had he not been admitted to law school, would be reduced to just a “fluke.” Id. at 30. “Just think, if I had missed one or two more questions when I took the LSAT . . . I might have never seen the inside of a law school classroom.” Id. at 10.
\textsuperscript{51} See Gilmore, supra note 2 at 14. “If Professor Subotnik wants to have that on his conscience, that is his call. I will not have it on mine.” (sic) Id.
There are more and even better reasons to be skeptical of what is effectively Gilmore’s open admission system. To provide a legal education you need a law school. Since there are 12,000 more applicants than there are acceptances, law schools might have to expand. The matter of jobs aside, if schools believe that candidates for admission will drop out or be forced out, or not pass the bar exam, schools will not accept them; reputation in the law school or as in any service business is everything. Law schools, like law school applicants, do not incline toward financial suicide.

To avoid making self-destructive admissions decisions, law schools will use whatever metric is available. Inevitably this will involve the use of probabilities—admissions Moneyball—since no metric or group of metrics comes close to being perfect. Given that the LSAT is a useful predictor of success in school, if only 30% of admission candidates with an LSAT score of, say, 142 make it through law school and through the bar exam, students with such credentials should probably not be accepted.

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52 Unable to accept the full implications of open admission, Gilmore backtracks a bit. Id. at 13. While holding that students should be allowed to make their own career choices, he concedes that maybe GPAs of 2.0 and the LSAT of 124 should be a barrier to law school admission. See Gilmore, id at 12. That of course is about the lowest bar that could be set for a college student seeking admission to law school.

53 See http://www.lsac.org/lsacresources/data/lsac-volume-summary. In 2014 there were 55,700 applications and 45,500 enrollments for ABA schools. Open admission would surely trigger considerably more applications.

54 Some have argued that the bar exam should be scrapped both because it fails to measure what lawyers need to know in order to practice and because of the racial disparities. See Andrea Curcio, SOCIETY OF AMERICAN LAW TEACHERS STATEMENT ON THE BAR EXAM, 52 J. LEGAL EDUC. 446, 450 (2002). I have participated in this debate. I will not do so here because, as shown, Gilmore admits that unlike the LSAT, the bar exam measures skills needed on the job and thus is fair. See supra note 4 at 18. If the bar exam is valid, one might wonder, why was the test in Ricci unfair? Gilmore does not say.

55 See supra note 17 and accompanying text.

56 Gilmore makes the point that schools should use conditional admits for those they consider at risk and says that he himself was admitted to a graduate tax program on such a basis. See Gilmore supra note 1, at 26. Good idea. For some reason these kinds of programs, which exist, seem not to have spread. Instead, law schools seem not to want to advertise the existence of two classes of students. As for passing the bar exam, Pepperdine professor Robert Anderson has developed an “experimental” predictor for bar success based on LSAT score, rank in class, rank of law school, and bar state. That the LSAT matters can be gleaned from a student taking the bar in NY who is, say, in the bottom 20 to 30%, in a non-top 150 school. With a LSAT score of 142, 152, and 162, he or she will pass at a 39%, 60% and 77% rate respectively. See http://witnesseth.typepad.com/blog/2013/08/what-are-my-chances-of-passing-the-bar.htm (checked August 8, 2015). A student in a 51-100 ranking law school with the same class rank would pass at 76%, while a student with a 162 would pass at a 99% rate. Id.
Should admission to law school be made a civil right? And should that right extend to medical and architecture school? Gilmore’s opinion would seem crucial; he does not, however, say.

That some students need more time to find their way than others in this world, as Gilmore suggests, changes nothing. Students can be judged only on the basis of what they bring to the admissions table at the time of application. This is not to say that a snapshot of a student’s ability at a particular point in time should stand as the permanent measure of a student’s ability. Evidence of intellectual growth should always be admissible, whether it ties to grades in graduate school, work experience, achievement tests, journalistic writing, or political success. The admissions system, I suggest, worked more or less as it should have when Professor Gilmore showed through his work experience at a business establishment that he had the right stuff for law school.

Inevitably, there will be false negatives, candidates who might have made it if admitted. That is unfortunate. Probabilities, however, work that way. Surprisingly, Gilmore, a business school professor, cannot seem to understand this.

Further on the subject of open admission, there is the issue of student debt. What if the LSAT score and other evidence suggest that law school will be a steep uphill climb for a particular student? “I do not see any harm in letting a person try.” Students must be allowed to pursue the dream. Professor Gilmore claims to know all about school debt; he has been paying off his own.

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57 See Gilmore, supra note 2 at 32.
58 Id. at 11.
59 “It is most unfair to relegate [a person] to perhaps a lifetime of regret, perpetually asking, What if...?” Id. at 14. Again, would Gilmore say the same thing about a candidate for medical school? Architecture school?
60 Id. at 22.
Easy for Gilmore to pooh-pooh debt when he, like me, has a degree and a good job. Success is sweet. But a student who drops out, or is thrown out, of law school after a year and emerges with $60,000 in debt, no certified skill from that year to make a living (much less pay off loans), and deep psychological scars, might feel differently. Surely the ABA is justified in requiring law schools to do what they can to ensure that admitted students have what it takes to make it through law school and into the profession.\(^{61}\)

To be fair, such a requirement would have to apply to all students, black as well as white. But now the rub. The claim of minority disadvantage—which is regularly made in affirmative action and other political settings-- is not a trope; it has real meaning. At this point in time, sad to say, black students are not on average competitive with white students in American law schools in grades and on the bar exam.\(^{62}\) One could argue that these measures are irrelevant. For Gilmore, however, unlike the SAT and LSAT, tests of knowledge such as grades and the bar exam are important to show preparation for

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\(^{61}\) ABA Standard 501 (b). “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.” Assuming that employment data are relevant to incoming students, should law schools not also concern themselves with whether students will be able to get a job in the current tight market?

\(^{62}\) See Richard Sander, A Systemic Analysis of Affirmative Action in American Law Schools, 57 STAN L. REV. 367, 426-27 (grades) and Andrea Curcio, supra note XX. A good part of the grade gap, according to Richard Sander, can be attributed to affirmative action which, whatever its social benefits, puts minority students in a position where it is hard for them to be academically competitive. See Sander & Taylor, supra note XX generally. Another, if one believes in the value of testing, may lie in preparation for law school as reflected on the LSAT. The latest reported mean LSAT score of white law LSAT takers was 152 compared to 141 for black takers. See Law School Admission Council LSAT Technical Report 14-02 October 2014. Current data are very hard to come by for the bar exam. We do know that for the July 2011 bar exam the respective black/white first-time pass rates in California for ABA approved schools were, respectively, roughly 58% and 81%. See GENERAL STATISTICS REPORT JULY 2011 CALIFORNIA BAR EXAMINATION: OVERALL STATISTICS 2 (2011), available at http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=PL6VLVgQEIM%3D. See also in this connection Jane Yakowitz, supra note 45.
practice. Referring to this national affliction, I said in my previous article that black law students were not “learning enough” in school.

The charge, for Gilmore, is 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?

Consider in the current environment the burden on a black job candidate of persuading an employer that he is better than a white candidate. The competitive advantage of whites on measurable and objective tests generally being so striking, can it help but carry over in the public mind--including that of the employer--to all aspects of economic and social life? A judge who may be called to decide the matter is, to be sure, required to ignore averages and focus on the individual case. But if in that disparate impact case the judge holds for the black plaintiff in spite of lower test scores for knowledge and skills, is it hard to imagine the baleful implications for American racial politics?

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63 See Gilmore, supra note 2, at 20 (bar exam) and 15 (grades).”I could not agree more with Professor Subotnik that grades do matter.” Id. As for tests of knowledge more generally, I have found no evidence that the distribution of scores differs appreciably from that of the SAT.
64 See Subotnik, supra note 9, at 380.
65 See Gilmore, supra note 2, at 5.
66 Gilmore does not refer to it as such. But he might as well have. Compare: “[C]losing the racial achievement gap is the most important civil rights battle of the twenty-first century.” Roland G. Fryer, Racial Equality in the 21 Century, HANDBOOK OF LABOR ECONOMICS v. 4B, at 926 (2010). Fryer, an African American, is a professor of economics at Harvard.
To conclude: First, as I hope I have shown, Professor Gilmore’s critique cannot be defended as an exaggeration; it is ungrounded and uncivil. It is one thing to call an argument wrong-headed and another unconscionable. This latter label can help explain much of the vapidity of discourse on race. Knowing how deeply racial identity is felt, few academics-- no matter how cogent and valuable their views-- will want to risk this kind of abuse.

We pay a price for the stasis that ensues; and ensue it does for there can be no progress without honest discourse. His dyspeptic response to me notwithstanding, Gilmore at least understands this; hence his courageous invitation to me to respond. 67 For most others, I suggest, it is not honest talk but fear of giving offense to certain groups that drives decision-making. Beating up on and giving offense to whites, of course, is another story; hence Law & Inequality’s acceptance of Gilmore’s bilious response and its disregard of my sensibilities among others.’

Indifference to honest discourse is even clearer in the reasons given for rejection of my piece. My 18-page submission, Law & Inequality explained, was turned down for reasons of “space.” But I had informed the journal that I would be coming in at about that length. So size was not the issue. More telling as a clue to Law & Inequality’s true motive, the rejection was tendered not only for the winter issue, but also for the indefinite future. 68 Professor Patterson would understand: some views on race are not fit to print these days. 69 But are they nevertheless sound and useful?

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67 See supra note 12 and accompanying text.
68 The editor explains: “our journal has not reserved space for your response in any future Issues of the journal” (Email received August 28, 2015) (on file with author).
69 See Patterson, supra note 8 and accompanying text. I hope that the reader will understand why I did not tell the whole story up front—and why it is crucial to tell it now. See supra note CC. I did not want to risk having the reader write off the essay—written essentially in its entirety long before I received the rejection—solely, or primarily, as the lament of yet another disgruntled author.
Second, and more directly to the point, while imposing an additional burden on an already burdened class may well seem unfair and unbecoming, nevertheless, if racial equality is our national goal, as it must be, there simply is no alternative for African Americans to a full-tilt educational lean-in. In denouncing standardized tests, which is the only way we can know whether efforts to close gaps are successful, Gilmore is standing in the way. Maybe Law & Inequality does not want to know.

Nor apparently do other academics. Law professors have devoted their energy to broadening civil rights; in more than thirty years of law teaching I can remember no article referring to what black people need to do to help themselves. Social scientists have generally pushed structural societal change such as housing policy. Such changes to the racial power gap are necessary but will not be nearly enough.

The foregoing implies that if we are to undo the massively pernicious legacy of racism, we must also look elsewhere, perhaps to the culture in the black community.\textsuperscript{70} No one has made this point as systematically and forcefully as Orlando Patterson. I can deal with his new 580-page opus only summarily here.\textsuperscript{71} Reporting on a top northeastern suburban school district with middle- to upper middle-class parents, he notes that while the girls did well, “the boys performed poorly academically.” Indeed, “no black boy (whatever his academic achievement) became popular for academic success.”\textsuperscript{72} Another study of a middle-class school found that “academically inclined black males, by going out of their way to conform [to black youth masculinist values], all tended to underperform.”\textsuperscript{73}

\textsuperscript{70} For what “culture” might encompass, see infra note 77.  
\textsuperscript{71} Orlando Patterson, \textit{The Cultural Matrix: Understanding Black Youth} (2015).  
\textsuperscript{72} \textit{Id.} at 59.  
\textsuperscript{73} \textit{Id.} at 60.
In black working-class high schools, he further reports, the story seems grimmer, with no silver lining for girls. While among these students "some education takes place," the number of students who acquire the procedural knowledge necessary for college is extremely small. 74 The problem may not be the absence of a belief in the importance of education, but a reluctance to act on that belief, an "attitude-achievement paradox." 75

Patterson, one can suppose, would not think it vile and laughable that black students should "study harder" or even that the same prescription issuing from a white person would make it so. Nor does Patterson go after the usual suspects in these cases—racism, the schools, socioeconomic disparities. 76 However tough the educational challenge, given the resources available and our historical conditioning, the ball, he tells us, is in the black as well as the white court. "[T]here will be no substantial change among the millions of disadvantaged youth and their families in the inner cities," he concludes, "until black Americans assume full responsibility for the internal social and economic changes that are essential for success in the broader mainstream capitalist society." 77

Asking for the black community in this setting to step up must not be interpreted as blaming the victim. A catcher will call for the best pitch that is needed only if he is sure that the pitcher has done his part in mastering it. Solving the problem of disparate performance will similarly require all of us to show our best stuff.

74 Id. at 67.
75 Id. at 68.
76 Patterson is clear on what he wants. This essay cannot, however, do him justice. Suffice to say here that the key to educational progress in the black community for him lies in parenting practices. This includes educational monitoring, involvement, and enforcement of family rules. Id. at 66-67.
77 Id. at 554. Query: Is such change consistent with MacArthur “Genius” Award winner Ta-Nehisi Coates’ claim that the appeal to respectability in the black community is “one of the most disreputable traditions in American politics”? Randall Kennedy, Lifting as We Climb: Progressive Defense of Respectability Politics, Harper’s (October 2015), at 26 (quoting Coates).