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**TYRANNY OF THE MERITOCRACY?:
A DISPUTATION OVER TESTING WITH PROFESSOR LANI
GUINIER**

*Dan Subotnik**

*[I]f you hate to go to school
You might grow up to be a mule***

The origins of a brand-new book on testing, *The Tyranny of the Meritocracy*,¹ (“Tyranny”) can be tied to December 3, 1966, when author Lani Guinier sat for the SAT.² Staring back at her was the following question on the Data-Sufficiency part of the Math Section:

- “Who has more US coins?
a. Pete has 24 cents and Ed has 26 cents.
b. One of Ed’s coins is a quarter.”³

With an adolescent’s conviction that the test question “didn’t make sense,” she registered her dismay two days later in a letter, a copy of which she seems to have cherished for almost fifty years.⁴ She cannot remember whether she ever got an answer back from the addressee, the College Board, which administers the test.⁵ In this review of the higher education implications of her book, Guinier will

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** JIMMY VAN HEUSEN & JOHNNY BURKE, *SWINGING ON A STAR* (Decca Records 1944). The song was first performed by Bing Crosby in *GOING MY WAY* (Paramount Pictures 1944).

¹ LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (2015).

² *Id.* at 135.

³ *Id.* Guinier provides no further details about the question. Was it a multiple choice question with only two answer choices?

⁴ *Id.* at 136.

⁵ *Id.*

finally get the courtesy of a response.

But not quite yet and here is why. Guinier's argument in short is that contemporary aptitude tests, like the SAT, do not tell us anything useful about a test-taker's future success in school or beyond, and that even if intellectual aptitude could be tested, it is wildly overrated as a metric.⁶ This will be a heady notion for readers who have suffered through aptitude testing all their lives. Heady, however, is not the same as sound. So, like all provocative notions, Guinier's thesis needs to be tested—and without the prejudice that might follow revelation of her viewpoint at this juncture.

Introductions are designed to tantalize tentative readers. But if testing the meaning of the SAT and LSAT is insufficient for law review readers to stick with the project at hand, they might want to consider this. The law school world is deeply hierarchical; indeed, hierarchy touches every aspect of student life. No need to talk about the profound influence of U.S. News & World Report on entering students. Then there is class rank, CALI awards, moot court, job interviews and law review. Consider in this last connection the law review editor, who after carefully screening and then accepting an article for submission, learns from the author that he or she is going elsewhere, or worse, is simply waiting for the next publishing cycle because the editor's school is not highly enough ranked. Hierarchy does not end with graduation; for then comes the bar exam. In sum, measurement and opportunities for failure are everywhere. As psychological studies of law students regularly show, the self-doubt, fear, and guilt of many students are debilitating. One can easily imagine the pain of rejection, condescension, and failure carrying over into subsequent professional and even academic life.⁷

What is the connection with Guinier's book? A renowned author, Lani Guinier first came to national attention when she was nom-

⁶ See GUINIER, *supra* note 1, at x–xi.

⁷ Consider that professors at low ranking schools have lower salaries and higher course loads. They have less time to work on their articles, which are far less likely to be accepted into prominent journals; thirty-six percent of Harvard Law Review articles are by Harvard Law professors while *no* articles are by half of American law professors, *i.e.*, those at Tier 3 and Tier 4 schools. Dan Subotnik & Laura Ross, *Scholarly Incentives, Scholarship, Article Selection Bias, and Investment Strategies for Today's Law Schools*, 30 TOURO L. REV. 615, 625, 627 (2014). This advantage brings even greater prestige and power. When you are Harvard, they think you really know. There is no suggestion here, of course, that high status is independent of talent. Rather, the point is that the perks of the Tier 1 professoriate are self-reinforcing and that this book review, however incisive, would not have been accepted at the Harvard Law Review, with all the frustration that that implies.

inated by President Bill Clinton to be the Head of the Civil Rights Division of the U.S. Department of Justice.⁸ When the nomination was subsequently withdrawn in a political firestorm not unrelated to this paper, she accepted a full professorship of Law at the University of Pennsylvania Law School before ascending to a professorship at Harvard in 1998, where she has been ever since.⁹ If, because of a winning tradition, a sports fan can get wrapped up in Yankees, New England Patriots, or San Antonio Spurs games, law review readers should similarly enjoy a locking of horns with Guinier. If she gets properly rebutted in the process, they may well conclude—and gain needed solace from the fancy—that they too should be teaching at Harvard Law.

Professor Guinier begins her book with a story of a high school student, *A*, son of a computer engineer, who answers a question in class correctly and proceeds to congratulate himself out loud: “Oh, I’m so smart.”¹⁰ When a classmate, *B*, a policeman’s son, chastises him for bragging, the former retorts: “I can I can . . . when I got a 1600. Bitch.”¹¹

Here is the moral frame for Tyranny. *A* is a jerk, a budding Master of the Universe whose high SAT score feeds a sense of entitlement to the privileges of adult life.¹² That sense is unjustified because it is family circumstances that have given him the advantages that made his score possible.¹³ Having just as much potential, but without *A*’s family advantages, *B* cannot compete on the SAT and so will be subordinated in the faux meritocratic world we are forced to inhabit.¹⁴

The story makes for high drama. It is designed to rile readers up, and it does. *A* is doing a victory dance in the end zone after a touchdown. You don’t have to be a cop’s son to long for *A* to get his come-uppance. The story, however, is apocryphal. At least, Guinier

⁸ See Who We Are, MINERSCANARY.ORG, http://www.minerscanary.org/whoweare/lani_guinier.htm (last visited Feb. 6, 2015).

⁹ Ethan Bronner, *Lani Guinier Joins Faculty of Law School at Harvard*, N.Y. TIMES (Jan. 24, 1998), available at <http://www.nytimes.com/1998/01/24/us/lani-guinier-joins-faculty-of-law-school-at-harvard.html>.

¹⁰ See GUINIER, *supra* note 1, at viii.

¹¹ *Id.*

¹² *Id.* at x.

¹³ *Id.*

¹⁴ *Id.*

provides no citation. Is it conceivable that this has happened? Sure. Is it typical? Not likely. This reader, for one, has never witnessed such a scene.

Guinier is right on the money on one point—SAT scores do correlate with family income.¹⁵ That tie, however, is far less intimate than Guinier wants us to believe. A recent study finds the correlation rate to be 25%, an appreciable but hardly overwhelming burden on *B*.¹⁶ Moreover, as Guinier herself admits, hundreds of colleges have now either abandoned or deemphasized the SAT.¹⁷ Tyranny of the Meritocracy? Hardly. If not quite tyrannical, however, is the SAT nothing more than irrelevant and annoying?

Guinier quotes from Bard University president Leon Botstein:

No scientist, engineer, writer, psychologist, artist, or physician—and certainly no scholar, and therefore no serious university faculty member—pursues his or her vocation by getting right answers from a set of prescribed alternatives that trivialize complexity and ambiguity.¹⁸

The multiple choice question is indeed artificial. No established scholar learns this way. But almost certainly that person became a scholar through schooling, a part of which was measured by multiple choice exams.¹⁹ The question is why multiple choice questions make up a significant part of the SAT and many final exams. Answer: they are easy to grade. One can readily conceive of a question that required test-takers to “fill in the blank,” instead of selecting a letter answer. What is hard is to see how that is oppressive.

By providing a narrow range of answers, the test cuts off responses that take the test-taker far afield (as determined by the test-maker). In this way, the choice element *helps* the test-taker.

¹⁵ See *An Hereditary Meritocracy*, THE ECONOMIST, Jan. 24-30, 2015, at 17 (Chart).

¹⁶ See David Z Hambrick & Christopher Chabris, *Yes, IQ Really Matters*, SLATE (Apr. 14, 2014, 11:54 PM), http://www.slate.com/articles/health_and_science/science/2014/04/what_do_sat_and_iq_tests_measure_general_intelligence_predicts_school_and.html. For what it is worth, among my schoolmates whose parents were least advantaged was someone who went to an Ivy League school, became a partner in a major law firm, rose to senior federal district court judge, and then was appointed Attorney General of the United States.

¹⁷ See GUINIER, *supra* note 1, at 18. Whether these schools have lost faith in the test or are trying to attract more applicants is an open question.

¹⁸ *Id.* at 26.

¹⁹ I know for a fact that one of my colleagues has complained about multiple choice exams, but actually uses them.

As for any argument that the multiple choice element limits the imagination of the creative test-takers—and thus throws them off—there is a simple response. SAT tests have an essay writing component. There, the test-taker can exercise his or her judgment and defend it. That no appreciable difference has been shown on average in multiple choice and in essay scores suggests that those attacking multiple choice questions are shooting with blanks.

Taking another shot at the SAT, Guinier writes that an “independent study” found that “only a meager 2.7 percent of grade variance in the first year of college can be effectively predicted by the SAT.”²⁰ The reader is thus led to believe that the SAT *by itself* predicts only a tiny part of first-year GPA. But the study, if anything, reports only that the *incremental* predictability of the SAT (*i.e.*, above and beyond other admission factors) is small. That would reduce the importance of the SAT in one way, but it would also suggest that the SAT is not misleading, but only superfluous, *if* other factors are valid. Guinier does not address this point. As to the link between the SAT alone and grades, studies report an appreciable correlation,²¹ a relationship that is made clear another way in a chart provided by the College Board.²²

Guinier’s main point, as suggested, is that intelligence is overrated in our culture, as evidenced by institutions of higher learning that admit students based largely on tests such as the SAT.²³ But, she goes on, what we need in the twenty-first century is to deal with the reigning problems of “global warming, an expanding technological landscape, and the equitable distribution of opportunities,” and the way to do this is not through competition but only through “collabo-

²⁰ See GUINIER, *supra* note 1, at 19.

²¹ The College Board has reported a .34 correlation between SAT score and first-year college grades. When combined with high school GPA, the correlation rises to .48. Lynn Letukas, *Nine Facts About the SAT that Might Surprise You*, at 4 (2014) (citing REBECCA ZWICK, *FAIR GAME? THE USE OF STANDARDIZED TESTS IN HIGHER EDUCATION 85-85* (2002)), available at <http://research.collegeboard.org/sites/default/files/publications/2015/1/sat-rumors-stat-report.pdf>. As for upper-level—in major GPA, correlations with SAT score ranges between .35 and .50 have been found, depending on the major. The investigators, who worked with University of Oregon data, concluded that for UO and similar schools their data supports that “a strong case can be made for use of SAT scores in admissions.” Stephen D.H. Hsu & James Schombert, *Data Mining the University: College GPA Prediction from SAT Scores*, at 2 (2010), available at <http://arxiv-web3.library.cornell.edu/abs/1004.2731>.

²² Higher SAT scores correlate with greater completion rates for each year of college. See *The SAT: Supporting Retention and Graduation*, COLLEGEBOARD, <http://sat.collegeboard.org/landingpages/higher-ed> (last visited Feb. 15, 2015).

²³ See GUINIER, *supra* note 1, at x.

ration, experimentation, creativity, and optimistic perseverance²⁴ How do we get there? Diversity plays a central part.²⁵ More broadly, we need to “redefine merit” as “democratic merit,” to emphasize not only “possession of individual talent and related personal success but also the ability to collaborate and the commitment to building a better society for more people.”²⁶

Few will dispute the excessive use of the SAT and the centrality of the problems identified by Guinier. Global warming and economic inequality are on the agenda of many Americans. As for technology, writes Leon Wieseltier, “there is no more urgent task . . . than to think critically about the salience, even the tyranny, of technology in individual and collective life.”²⁷ What about the solutions proposed by Guinier? Whatever one’s point of view, *i.e.*, whether because of, or in spite of, their Marxian overtones, they too must be tested. We can, perhaps even mostly, accept the importance of working together here. For Guinier, many advantages accrue to students when working in groups.²⁸ Among other things, those with technical knowledge are forced to explain it to others, and this can benefit both groups.²⁹ Group work, however, probably should not be fetishized. “Individual decision-making often goes radically askew,” writes the famed essayist Michael Walzer in a review of the literature on group deliberations; “[a]nd the behavioral studies show that members of groups, deliberating together, do even worse than individuals thinking alone.”³⁰ In any event, though there were surely many to choose from, Guinier chose to write *Tyranny* without a collaborator.

Experience teaches, moreover, that many students, far from expressing enthusiasm for their partners in joint projects, resent having to collaborate with free riders who either lacked the wherewithal, the skill, or the desire to contribute. Like Wieseltier, Guinier understands that the technocratic elite itself will not necessarily protect the

²⁴ *Id.* at 106. In another place, Guinier lists “collaborative problem solving, independent thinking, and creative leadership.” *Id.* at 26.

²⁵ *Id.* at 110-11, 120-21.

²⁶ *Id.* at xi, xiii.

²⁷ Leon Wieseltier, *Among the Disrupted*, N.Y. TIMES (Jan. 7, 2015) (book review), available at http://www.nytimes.com/2015/01/18/books/review/among-the-disrupted.html?_r=0.

²⁸ See GUINIER, *supra* note 1, at 82-83.

²⁹ *Id.* at 85-86.

³⁰ Michael Walzer, *Is the Right Choice a Good Bargain?*, N.Y. REVIEW OF BOOKS, Mar. 5, 2015, at 23. To be sure, Walzer discusses some situations where groups might be better decision-makers.

interests of the nation. But, unlike Wieseltier, Guinier does not call for philosophical education to engage with technology.

Beyond this, there would seem to be a disconnect between the problems identified above and the need for intelligence, which I define here as the ability to learn. Global warming and the solutions thereto, for example, would seem to require intense study. There would similarly seem to be a connection between intelligence and the other identified ingredients for success. One need not hold that intelligence is the *sine qua non* for success. The point is that those who can learn quickly and know more will be better, not less, able to make connections, *i.e.*, to be creative, not get discouraged, and thus stick with their projects.

Consider a question from the SAT that Guinier uses to highlight what she considers the test's excesses. The question is slightly modified here for simplicity of exposition. A is pulling a lottery ticket from a basket of 300 white tickets, 300 blue tickets, and 200 red tickets.³¹ Question: What are the chances that a white ticket will be drawn?³² The answer—provided by Guinier in parentheses, presumably on the ground of its supposed unimportance to the reader—is 300/800 (37.5%), or the number of white tickets divided by the total number of tickets.³³

Any suggestion that the problem is inordinately abstruse is simply silly. If test-takers cannot figure out the answer to this elementary probability question, let me suggest, they will just get in the way of developing solutions to global warming or any other of the problems mentioned.

In one way, Guinier admits the importance of learning for students and employees by insisting that she does not oppose tests of knowledge, only those of “aptitude.”³⁴ But there is a connection between the two measures since the ability to learn is the ability to acquire knowledge. Is there a difference between results of aptitude and achievement tests? Guinier does not say. But it appears that there is strong connection.³⁵ Nowhere, moreover, in her book does she spell out the role for “achievement,” as measured by grades in

³¹ See generally GUINIER, *supra* note 1, at 12.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 85, 13.

³⁵ See Hsu & Schombert, *supra* note 21, at 5.

school or achievement testing. While conceding that a “minimum”³⁶ level of knowledge *is* necessary, she does not say how much weight she would give to more than that minimum, as compared to collaboration, or “experimentation, creativity, and optimistic perseverance.”³⁷

One thing that seems certain if knowledge is to give way to collaboration is that law schools should be leaning to group-based final exams. And bar examiners to group bar exams. To prepare for these tests—and to get law students truly practice ready—students should be taking such Dale Carnegie courses as “How to Win Friends and Influence People.”

The point should not be overstated. Since it is hard to deny the importance of collaboration, experimentation etc., it is worth asking whether universities are looking for them? Many universities insist that their goal is not to put together the class with the highest SAT scores.³⁸ Whether these protestations can be taken at face value is an open matter. The larger answer would seem to be that the factors in question are often hard to measure—in advance of admission. What standards does Guinier seek to apply?

That Guinier does not even address this issue suggests that she is not concerned with the level of knowledge in applicants to our universities. This is consistent with a mind-bending proposal she made almost 20 years ago in the *California Law Review*—that, knowledge being overvalued, universities and employers should use lottery systems for admission and employment.³⁹ Tyranny of the Lotter-ocracy?

³⁶ See GUINIER, *supra* note 1, at 13.

³⁷ *Id.* at 106.

³⁸ See, e.g., Colleen Walsh, *A Change for the Better*, HARVARD GAZETTE (Mar. 19, 2014), available at <http://news.harvard.edu/gazette/story/2014/03/a-change-for-the-better/> (discussing SAT scores with Harvard College Dean of Admissions William Fitzsimmons). Fitzsimmons stated:

Test scores are just one element in our holistic review. They can be helpful when they are particularly high or low but only in concert with high school grades, teacher recommendations, guidance counselor reports, interviews, essays, and all the achievements a student reports on the application. Our research indicates that students with high test grades but poor high school grades are not a good bet for success at Harvard. Those with more modest scores and strong records of achievement in their high school classroom are more likely to do well.

Id.

³⁹ Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 1012 (1996).

What this in turn suggests, again, is that what is really driving Guinier is the socioeconomic division in this country and the related advantages of class status. Guinier does not want to stoke unnecessary group resentments. Hence, her explicit dissociation with affirmative action.⁴⁰ Just switching to admissions standards that are untethered to class, she supposes, will move us in the right direction.

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;⁴¹ the uneducated become cheered as the experimenters and collaborators.

At the same time, to be sure, a much wider range of people than before will find an economic home of a kind, and this should be welcomed. As fair-minded folks will agree, it is unfortunate that educational advantage accrues so roundly to the fortunate.

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.

Guinier's Tyranny will, nonetheless, find traction. A large and growing literature has risen to contest testing.⁴² I have actively

⁴⁰ See GUINIER, *supra* note 1, at 23.

⁴¹ *Id.* at xi.

⁴² See, most recently, Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 222-31 (2014) (focusing primarily on the bar exam), Harvey Gilmore, *Standardized Testing and Race: A Reply to Dan Subotnik*, 13 SEATTLE J. FOR SOC. JUST. 1 (2014), and Richard Delgado, *Standardized Testing As Discrimination: A Reply to Dan Subotnik*, 9 U. MASS. L. REV.

participated in this debate,⁴³ most recently to defend the bar exam against claims that it serves no purpose other than to exclude the have-nots.⁴⁴

Suffice to ask here: Should we abandon tests for medicine, accounting, and psychology because of a class-based disparate impact?

In this information age, others, interested in leveling down Americans rather than raising us up—report that what counts for success is not knowledge but grit.⁴⁵ But grit at what? Are our children not best off if they can develop grit in their schooling? Would Lani Guinier not want that for her own children and grandchildren before they go on to save the world?

This brings us back to the opening question, the solution to which may seem elementary. Here, however, is Guinier's take, as expressed to the College Board: "[S]ince we have been asked who has more US coins we do not have any information on whether any or all of Pete's coins are US coins or perhaps Canadian coins." The "student," she continues, "can therefore come to the conclusion that there is insufficient data . . . to answer the question[]." ⁴⁶ Students, moreover, were "directed to focus [on] the 'sufficiency of data.'" ⁴⁷ "I don't think," Guinier had written to the College Board, "that anyone who recognized implications in the questions should be penal-

98, 101 (2014). 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 (2006), Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343 (2003), Kristin Booth Glen, *Where and When We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002), Andrea Curcio et al., *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446 (2002), and 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 (2001).

⁴³ See generally Dan Subotnik, *Does Testing = Race Discrimination? Ricci, The Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013); Dan Subotnik, *Race Indeed Above All: A Reply to Professors Andrea Curcio, Carol Chomsky, & Eileen Kaufman*, 9 U. MASS. L. REV. 278 (2014) [hereinafter *Race Indeed Above All*]; Dan Subotnik, *Contesting a Constestation of Testing: A Reply to Richard Delgado*, 9 U. MASS. L. REV. 296 (2014).

⁴⁴ See *Race Indeed Above All*, *supra* note 43, at 278.

⁴⁵ See generally PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* (2013).

⁴⁶ GUINIER, *supra* note 1, at 136.

⁴⁷ *Id.*

ized.”⁴⁸ Yes, the letter took courage; more power to her. But every question—every discourse—has embedded assumptions, and the trick for the reader is to reason them out. One wonders whether a college should admit someone with the interpretive skills reflected in Guinier’s letter.

The key problem with her interpretation, of course, is that the question specifically referred to “US coins,” not Canadian coins.⁴⁹ Most readers would almost surely assume that the term “US” in the question is meant to clarify that all of the coins are American, especially since this assumption leads directly to a solution of the problem. Guinier seems, however, to have believed that the very mention of “US” coins implies the presence of non-US coins as well. But even if a student knew that Canadians, like Americans, use “cents” and “quarters” (and how many underprivileged students are likely to know this?), what English-speaker would suppose that the term “24 cents” signifies the total of a nationally mongrel collection of coins?

Guinier now understands that her response to the College Board reflected the exuberance of a sixteen-year-old coming of age: “Look out world!”⁵⁰ This is, to be sure, a payoff from viewpoint diversity. But is it enough to excuse Guinier’s book? More generally, must all diversity be celebrated?

⁴⁸ *Id.* at 135.

⁴⁹ *Id.* at 136.

⁵⁰ *Id.*