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**STANDARDIZED TESTING, LEARNING, AND  
MERITOCRACY: A REPLY TO PROFESSOR DAN SUBOTNIK**

*Harvey Gilmore\**

**I. INTRODUCTION**

Harvard Law Professor Lani Guinier recently published a book on testing, *The Tyranny of the Meritocracy: Democratizing Higher Education in America*, in which she argues that standardized testing, as we know it, is not a fair indicator of a student's overall success in higher education.<sup>1</sup> Professor Guinier's thesis is that learning and achieving in a collective environment is better indicia of student learning and success.

My friend, Touro Law Professor Dan Subotnik, ("Professor Subotnik"), a most staunch defender of standardized testing,<sup>2</sup> published an article in the *Touro Law Review* in response to Professor Guinier's book.<sup>3</sup> His response confirms his very inflexible position that standardized testing, warts and all, is still the best predictor of one's success in higher education.<sup>4</sup> His response also shows, I believe, a complete disrespect for Professor Guinier's thesis in her book, that learning can be a collaborative effort, and that is much

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<sup>1</sup> LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* 2 (2015).

<sup>2</sup> See, e.g., Dan Subotnik, *Does Testing = Race Discrimination?: Ricci, the Bar Exam, the LSAT, and the Challenge to Learning*, 8 U. MASS. L. REV. 332 (2013) [hereinafter Subotnik, *Testing = Discrimination?*]; Dan Subotnik, *Testing, Discrimination, and Opportunity: A Reply to Professor Harvey Gilmore*, 13 SEATTLE J. SOC. JUST. 57 (2014) [hereinafter Subotnik, *Reply to Gilmore*].

<sup>3</sup> Dan Subotnik, *Tyranny of the Meritocracy?: A Disputation Over Testing with Professor Lani Guinier*, 31 TOURO L. REV. 343 (2015) [hereinafter Subotnik, *Tyranny Disputation*].

<sup>4</sup> *Id.*

more effective than an overreliance on an one-time aptitude test like the Scholastic Aptitude Test (SAT) or the Law School Admission Test (LSAT).

Upon Professor Subotnik's invitation, I jumped into this long-standing debate in October 2014, when I published an article challenging his position on standardized testing.<sup>5</sup> I come into this debate with the perspective of having survived low SAT and LSAT scores.<sup>6</sup> My SAT score was 830 out of 1600, which would be 1245 out of a maximum score of 2400 today. My LSAT score was 142.<sup>7</sup> I feel blessed to have earned undergraduate and graduate degrees, including two law degrees, after having dropped out of high school.<sup>8</sup> Because of my own academic experiences, good and bad, "I can personally disprove" the idea that standardized testing is wholly reliable.<sup>9</sup>

Finally, I am not the only person who has ever outperformed a bad assessment exam and has gone on to academic and professional success. I have cited several examples in my article,<sup>10</sup> and Professor Guinier has cited several examples in her book, some of which we will see below. However, in his prior commentary on testing, Professor Subotnik has consistently failed to acknowledge that many people do beat the odds, and I think this lack of acknowledgement could suggest that these successes are lucky accidents and little else.

## II. PROFESSOR GUINIER'S SUCCESS STORIES

Professor Guinier's book states the following: "success in college would require them to work with their peers, to create for themselves a community based on shared intellectual interests and common professional aims."<sup>11</sup> A wonderful example of Professor Guinier's thesis on the shared efforts of learning comes from the Posse Foundation.<sup>12</sup> The Posse Foundation is an organization that helps urban students score four-year scholarships from top colleges.<sup>13</sup> The

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<sup>5</sup> Harvey Gilmore, *Standardized Testing and Race: A Reply to Professor Subotnik*, 13 SEATTLE J. SOC. JUST. 1, 8 (2014) [hereinafter Gilmore, *Reply to Subotnik*].

<sup>6</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 1-2.

<sup>7</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 13.

<sup>8</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 1-2.

<sup>9</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 5.

<sup>10</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 33.

<sup>11</sup> GUINIER, *supra* note 1, at 92.

<sup>12</sup> GUINIER, *supra* note 1, at 64.

<sup>13</sup> GUINIER, *supra* note 1, at 64.

foundation's rationale is to send students who do not have the greatest SAT scores to college in groups of 10 (hence the term "posse").<sup>14</sup> In sending these non-traditional students, many of whom happen to be students of color, to college, the posse becomes a peer-support network.<sup>15</sup> Consequently, the members of the posse have the same stake in the outcome: 1) getting used to, and fitting in, the college atmosphere, and 2) becoming academically successful, despite the odds.

Professor Guinier also cites some successful college graduates due to the Posse Foundation:

- David Perez, a former gang member from Brooklyn, New York earned his Bachelor's degree from Vanderbilt University in 1997 and earned his Ph.D. at Peen State in 2010.<sup>16</sup>
- Danielle Berry, who earned her Bachelor's degree from the University of Wisconsin, and her Master's degree from Roosevelt University.<sup>17</sup>
- Shirley Collado, the daughter of Dominican immigrants, and the first in her family to go to college, would go on to earn her Ph.D. from Duke University.<sup>18</sup>

Thus, working together toward a common academic goal is hardly farfetched in helping students become successful. As the above students showed, in addition to myself and many others, one *can* overcome a mediocre-to-bad track record and do very well academically. That is not a fluke.

### III. PROFESSOR SUBOTNIK'S VERY ANTAGONISTIC VIEW OF COLLABORATIVE LEARNING

Sometimes students will get together to discuss a given topic or a given class that they are not grasping just yet. Having problems with a particular class can be something of an occupational hazard for a student. I have definitely been there. It is quite possible that when students get together to work on an assignment or a project, the fact

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<sup>14</sup> GUINIER, *supra* note 1, at 64.

<sup>15</sup> GUINIER, *supra* note 1, at 64.

<sup>16</sup> GUINIER, *supra* note 1, at 65.

<sup>17</sup> GUINIER, *supra* note 1, at 65.

<sup>18</sup> GUINIER, *supra* note 1, at 67, 69.

that they are coming to the correct resolution of the problem without the professor's voice looming can be the very vehicle that helps the study group come to the right answer. I applaud students who are willing to work together; I see it all the time. As an academician, my job is to deliver the subject matter in a way that it makes practical sense to my students (I'm reasonably sure that even Professor Subotnik has to agree here). As long as they successfully grasp the course material, that is all I can ask. Thus, whether a student (or student group) gets the correct results with me, without me, because of me, or in spite of me, getting the correct result is the goal.

Yet, Professor Subotnik shows a seeming animosity to the idea of collective learning. He states: "[e]xperience 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."<sup>19</sup> Whose experience is he referring to? His own? An empirical study? An online survey? Maybe some war stories with his colleagues? He does not so specify. Anyway, his point seemingly assumes that students are either bottom-feeding freeloaders looking to ride someone else's back to the finish line, or people who flat out refuse to share their knowledge. I do admit that there are some people in both camps, but I do not believe that this leads us to the *fait accompli* that Professor Subotnik would have us believe that it is.

If his assertion is to be believed, then study groups are just a pointless, hopeless, exercise in futility. Thus, there should never be a study group in law school, for example. And, student tutors and teaching assistants would be just as worthless. That notion is just silly. As Professor Subotnik knows as well as I do, law schools are notorious for giving students very little, if any, feedback during the semester.<sup>20</sup> Not only that, law students get only one throw of the dice

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<sup>19</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 348.

<sup>20</sup> See, e.g., Harvey Gilmore, *To Failure and Back: How Law Rescued Me From the Depths*, 10 FLA. COASTAL L. REV. 567, 579 (2009) [hereinafter Gilmore, *To Failure and Back*] ("In law school however, most classes do not have midterm exams or other graded assignments during the semester. Consequently, a student usually receives no feedback from his instructors regarding his in-class performance."); Herbert N. Ramo, *Moving Students From Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837, 837 (2013) ("Instead of frequent formative assessments that provide students with the opportunity to gauge their progress as they acquire new skills, the end-of-the-term summative examination model still dominates the law school assessment landscape. Instead of receiving timely feedback, students often have to wait weeks before receiving a grade.").

on the end of semester exam to show what they know.<sup>21</sup> How might students fill in the gaps? By banding together to figure things out on their own . . . not only to make sense of the law school subject matter, but to mitigate the culture shock that is law school. As Professor Guinier correctly points out, “Working in teams generates confidence, and most important, bolsters students’ understanding of the assigned reading over the semester.”<sup>22</sup> Eventually, when students have to take that final exam by themselves (“[j]ust like a boxer in a title fight, you have to walk in that ring all alone . . .”),<sup>23</sup> I am sure that the confidence of being with their study group all semester will help them clear that last hurdle. That’s how it was for me and my study partners.

Professor Subotnik also seems to believe that the better students in a study group must grudgingly, and perhaps involuntarily, carry the weaker students the whole way: “Among other things, those with technical knowledge are forced to explain it to others, and this can benefit both groups.”<sup>24</sup> *Forced?* Nothing could be further from the truth. In a typical law school study group, there can be members who are fresh out of college together with people returning to school after having worked in professional life for 20 years. Joining a study group is voluntary, and is usually nothing more than classmates asking each other if they want to join a study group.<sup>25</sup> This is hardly compulsion.

Next, in a study group, especially in law school, it is probably more likely than not that at least one person in the group may have some practical experience that puts him ahead of the curve in certain

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<sup>21</sup> See, e.g., Harvey Gilmore, *Misadventures of a Law School Misfit*, 51 DUQ. L. REV. 191, 198 (2013) [hereinafter Gilmore, *Misadventures*] (“In law school, however, there is only *the* exam. That means, in most law courses, an entire semester’s . . . worth of classes, preparation, and studying come down to *one* exam at the end of the semester.”); Gilmore, *To Failure and Back*, *supra* note 20, at 579 (“To make things worse, most law courses have only one final exam at the end of the semester. This means that a student has only one chance to show his professor that he understands the subject matter on a satisfactory level.”); Christopher W. Holiman, *Leaving No Student Left Behind: Learning to Learn in the Age of No Child Left Behind*, 58 HOW. L.J. 195, 215 (2014) (“Law students are generally given a single exam at the end of the semester or year, typically in fact-pattern essay format, which constitutes the majority of their grade in the course.”); HERBERT N. RAMY, HOW TO SUCCEED IN LAW SCHOOL 18 (4th ed. 2008). (“One exam – all the marbles!”).

<sup>22</sup> GUINIER, *supra* note 1, at 83.

<sup>23</sup> BILLY JOEL, *You’re Only Human, on GREATEST HITS, VOL. I & II* (Columbia Records 1985).

<sup>24</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 348.

<sup>25</sup> THE PAPER CHASE (Twentieth Century Fox 1973).

classes, and could also be beneficial to the group. I think that it would defeat the purpose of a study group if a member did not share the benefit of his knowledge with the rest of the group. In my own law school days, my prior accounting experience helped *all of us* in my study group navigate Contracts, Income Tax, and the UCC. Similarly, my best friend in our group had been a real estate broker prior to law school, and his experience helped us navigate Property and Trusts & Estates.

So the fact that a more experienced member of the group may have to steer the conversation occasionally is only a natural consequence of the dynamic of the group. Steering a conversation is completely different from dominating a conversation, and that conversation must include an honest discussion as to what is expected from each member of the group. Implicit in that is the study group relationship is based on *trust*. Why? Because once everyone commits to being in a study group, everyone knows what they are getting themselves into, each member is now expected to pull his own weight, and there is neither force nor pressure. Again, this is *strictly voluntary*.

Along those lines, I wonder if Professor Subotnik advises his tax classes never to form study groups because the one person who might have been an accountant is somehow forced to carry the group. I know he never mentioned it when I took his Estate & Gift Tax class (maybe he forgot). As I mentioned above, most law school exams are one-shot, end of the semester affairs, which amplifies the need for study groups before then. For that reason alone, Professor Subotnik's idea that the better students are somehow coerced to carry the weaker students collapses under the weight of its own illogic when it is understood going in that each member of the group must carry his share of the load in learning legal concepts. Therefore, Professor Subotnik is clearly wrong about the utility of a study group.

#### IV. PROFESSOR SUBOTNIK'S OPPOSITION TO TESTING CRITICS

Interestingly, it seems that anytime anyone dares to question or criticize the reliability of standardized testing, Professor Subotnik always responds that such criticisms are nothing more than untenable de-facto attacks on grades. Here are some of his responses:

- Others have shown that grades are the best predictors of bar exam success. Kris Glen has attacked the LSAT and bar exam for not being sufficiently differ-

ent from one another, but she holds back from a separate attack on grades. Why? Presumably because they signal ambition, stick-to-it-iveness, and attention to detail.<sup>26</sup>

- “Are critics ready to generalize that law school grades do not matter?”<sup>27</sup>
- “Nowhere, moreover, in her book does she spell out the role for ‘achievement,’ as measured by grades in school or achievement testing.”<sup>28</sup>
- “Assisting in this effort is the attack on law school grades. CCK must play down grades because they correlate with bar passage. In this attack, CCK are least convincing.”<sup>29</sup>

But are these legitimate concerns about standardized testing really disguised attacks on grades? I think not. Obviously, the previous commentaries by Professor Guinier, Professor Richard Delgado,<sup>30</sup> Professor Eileen Kaufman, Professor Anne Curcio, Professor Carol Chomsky, and myself, support our position that standardized testing is unreliable, and our supportive evidence backs that up. Professor Subotnik, on the other hand, has to resort to a straw man argument that our position questioning the reliability of standardized testing is an automatically misguided attack on grades. I guess that is because Professor Subotnik really cannot overcome the evidence against standardized testing, so his only recourse is to look for something that isn't there, such as an attack on grades.

Certainly people like Professors Guinier and Delgado, along with Professors Kaufman, Curcio, and Chomsky (who have also written in response to Professor Subotnik)<sup>31</sup> can defend themselves much more eloquently than I if called upon to do so, thus, I will speak only for myself against Professor Subotnik's empty argument on attacking grades. He implies in his article responding to me that maybe I

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<sup>26</sup> Subotnik, *Testing = Discrimination?*, *supra* note 2, at 388.

<sup>27</sup> Subotnik, *Testing = Discrimination?*, *supra* note 2, at 389.

<sup>28</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 349, 350.

<sup>29</sup> Dan Subotnik, *Race Indeed Above All: A Reply to Professors Andrea Curcio, Carol Chomsky, and Eileen Kaufman*, 9 U. MASS. L. REV. 278, 288 (2014).

<sup>30</sup> 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, 605 (2001).

<sup>31</sup> 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 (2014).

somehow think grades are irrelevant: “It is hard to imagine that Professor Gilmore means to say that grades do not matter.”<sup>32</sup> That *is* hard to imagine precisely because *I never said it*. On the contrary, I have agreed with Professor Subotnik’s position all along that grades do matter. “As I mentioned earlier, I strongly believe that an overall track record of semester grades gives a better indication of a student’s competence.”<sup>33</sup> Why do grades matter? Because they are the tangible proof that shows the students did the necessary work to pass their exams and master the subject matter.<sup>34</sup>

Similarly, in a recent response to Professor Delgado, Professor Subotnik asked the following: “Why do law firms with the biggest clout keep insisting on top grades?”<sup>35</sup> Notice here that Professor Subotnik’s question references grades and NOT the LSAT score. Perhaps it is because grades are much more reliable than LSAT scores. Let us assume the following: I just finished my first year of law school, and I apply for an internship with a sports management firm that negotiates contracts for professional athletes. Which might be the bigger factor in my being awarded the internship: the fact that I scored an A in Contracts, or my LSAT score of 142? I think the answer here is obvious.

#### V. PROFESSOR SUBOTNIK’S CONCERNS REGARDING MULTIPLE CHOICE QUESTIONS

I firmly believe that when all students have access to the same information, the presentation of the question really does not matter because the student can analyze the facts the same way to come to the right answer. For example, a question in Contracts could ask the following in multiple choice form:

The “bargained-for” exchange element in a contract is called:

- a) Capacity
- b) Consideration

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<sup>32</sup> Subotnik, *Reply to Gilmore*, *supra* note 2, at 59.

<sup>33</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 38.

<sup>34</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 52-53. (“This, I believe is more dispositive than just a test score. Again, once a student is admitted into college, graduate school, or law school, the burden is on the student to do the required assignments and pass all the exams with satisfactory grades.”).

<sup>35</sup> Dan Subotnik, *Contesting a Contestation of Testing: A Reply to Richard Delgado*, 9 U. MASS. L. REV. 296, 301-02 (2014).

2016

STANDARDIZED TESTING

395

- c) Agreement
- d) Legality

(The correct answer is b.)

The same question can be asked in a true/false format:

*Consideration requires a “bargained-for” exchange between contracting parties.* (The answer is obviously true.)

Or, the same question regarding consideration could also be given in an essay format as follows:

*X promises to pay Y the sum of \$1,000,000 if Y gives up shooting pool for one year. Explain whether this arrangement can be an enforceable contract.* (This would be a unilateral contract.)

Therefore, if a student is well versed in the law of contracts, and has the same access to the course information as his classmates, he should have no trouble answering questions when it comes time to take an exam.

Additionally, I have no issue with multiple choice questions, *per se*. In fact, a test taker can at least work his way down to the right answer via the process of elimination. This is also based on the student’s knowledge of the subject matter prior to taking an exam, whether it is a semester exam, or even a professional certification examination like the bar exam or the CPA exam. This is precisely because the students will have access to the same information during the course of the semester. The issue I have is with Professor Su- botnik’s continued protestation that multiple choice questions are not used as a tool for exclusion:

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 testmaker). In this way, the choice element *helps* the test-taker.

I say that this type of approach *can* be oppressive when it has already been proven (as I’ll discuss below) that the SAT asks ques-

tions that minority students have little chance of answering correctly.<sup>36</sup> Thus, I believe that Professor Subotnik's suggestion that multiple choice questions prevent responses from coming out of left field is nothing but a smokescreen to deflect the fact that the SAT has always been racially and culturally biased.

## VI. THE PROVEN BIAS OF STANDARDIZED TESTING

Professor Subotnik then goes on to suggest to multiple choice question critics that their objections are unfounded:

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.<sup>37</sup>

Professor Subotnik's response here to multiple choice critics exposes a point that he has clearly and consistently missed: If standardized test questions ask specific questions based on information that only a specific segment of test takers have access to, and others do not, that is an unfair question. It has been proven that the SAT, for example, routinely gives ridiculous questions that minority students have almost no experience with. As Professor Richard Delgado, one of the leading critics of standardized testing, explains: “[o]ne study of the SAT found items requiring knowledge of golf, tennis, pirouettes, property taxes, minuets, kettle drums, tympani, polo, and horseback riding, items that are scarcely common in minority communities.”<sup>38</sup> Professor Subotnik even acknowledges that there is a direct relationship between SAT Scores and economic status.<sup>39</sup>

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<sup>36</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 21-26.

<sup>37</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 347.

<sup>38</sup> Delgado, *supra* note 30, at 605.

<sup>39</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 346 (“Guinier is right on the money on one point—SAT scores do correlate with family income.”); *see also*, Delgado, *supra* note 30, at 601 (“Test scores are, however, highly correlated with economic status. In the old days, elite schools achieved status by admitting students with the best family backgrounds -- which of course included the right race, ethnicity, and religion.”).

Additionally, my own article on the unfairness of standardized testing mentioned the observations of Dr. Ibram Kendi, Dr. Roy Freedle, and Mr. Jay Rosner, all of whom are SAT experts who stated that SAT organizers regularly discard test questions that favor minority students.<sup>40</sup> Thus, with the SAT being rigged in this fashion, minority test takers really *cannot* answer biased test questions based on what *THEY* know. It logically follows that if minority students cannot answer questions that have nothing to do with their own knowledge and experience, then they have very little hope of closing the scoring gap with white students.

Professor Subotnik's suggestion that the SAT's essay writing component gives essay writers a better opportunity to answer questions and defend their answers relative to multiple choice question is well off the mark for this very important reason: If an SAT essay question requires me to write about golf, tennis, pirouettes, tympani, polo, regattas, etc., and I have no academic or life experience with any of those topics, then, irrespective of the question being essay or multiple choice, that question is *indisputably useless*. Why? Because I, as a student, am compelled to answer questions I have no frame of reference for merely because they are on the test already. This is the functional equivalent of a tennis player going into the Wimbledon final with one hand tied behind his back . . . and no racquet . . . while his opponent is fully armed. This would not be a very competitive match. Yet, this is the type of academic "competition" standardized testing forces many disadvantaged students to participate in. Consequently, if I get enough of those questions wrong due to my lack of access to information regarding to golf, polo, tennis, regattas, and the like, my SAT score will suffer to the point where my college applications will be wrongly rejected. If an athletic competition imposes the same conditions on the players in the game, there is no justifiable reason that an academic competition not do the same. If I wanted to take an accounting major in college, but I cannot get into any college because I missed too many SAT questions on regattas, golf, and tennis, then that is just unfair, unconscionable, and criminal.

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<sup>40</sup> See, e.g., Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 104–17 (Joseph A. Soares ed., 2012); see also, Gilmore, *Reply to Subotnik*, *supra* note 5, at 23 (“[T]he SAT administrators have left those specific questions ungraded or eliminated them from future tests.”).

**VII. APTITUDE + INTELLECT + KNOWLEDGE + PERFORMANCE  
(AMONG OTHERS) = SUCCESS**

Professor Guinier makes an excellent point about the unreliability of standardized tests:

What I don't believe in are aptitude tests, testing that – by whatever new code name it goes by – is used to predict future performance. Unfortunately, that is not how the SAT functions. Even the test makers do not claim it's a measure of smartness; all they claim is that success on the test correlates with first-year college grades, or if it's the LSAT (Law School Admission Test), that it correlates with first-year law school grades.

As I'll explain later, such a correlation is slight at best. In any case, it's certainly not a barometer of merit. Merit is much too big a concept to simply refer to how you're going to do in your first year of college or law school.<sup>41</sup>

I could not agree more with Professor Guinier's above commentary on the reliability of standard test scores. This is precisely because a one-time, so-called "aptitude" test does not tell the full story about how successful a student will eventually become. If I had lived down to my SAT score, then I should have never got into any college, let alone graduate. The same holds true for my LSAT score: "If the LSAT was such a great predictor of law school success, then I should have been exposed as an unqualified fraud that was over-matched in law school. That never happened as I did well enough to graduate with a respectable record."<sup>42</sup> Thus, I never have to apologize for getting admitted to, and graduating from, college, graduate school, and law school. My track record speaks for itself.

The Merriam-Webster Dictionary gives the following definitions:

Merit: the quality of being good, important, or useful.<sup>43</sup>

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<sup>41</sup> GUINIER, *supra* note 1, at 13.

<sup>42</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 5.

<sup>43</sup> *Merit Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/merit> (last visited Jan. 31, 2016).

Meritocracy: a system in which the talented are chosen and moved ahead on the basis of their achievement.<sup>44</sup>

Intellect: the ability to think in a logical way.<sup>45</sup>

Intelligence: the ability to learn or understand things or to deal with new or difficult situations.<sup>46</sup>

Knowledge: information, understanding, or skill that you get from experience or education.<sup>47</sup>

Aptitude: a natural ability to do something or to learn something.<sup>48</sup>

Performance: the act of doing a job, an activity, etc.<sup>49</sup>

If the fallacy that a standardized exam can accurately predict one's success in higher education was really true, then it would logically follow that those who have high SAT and/or LSAT scores should therefore breeze through college, graduate school, and law school. I hereby challenge Professor Subotnik here and now to explain how this idea guarantees that a student will never underachieve or otherwise fail to live up to a high test score.

I come from the opposite end of the spectrum where I outperformed my low SAT and LSAT scores by successfully earning undergraduate and graduate degrees. So I *know* beyond the shadow of a doubt that the so-called prognostications from standardized testing are at best . . . *OVERRATED!* I strongly believe that one's academic

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<sup>44</sup> *Meritocracy Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/meritocracy> (last visited Jan. 31, 2016).

<sup>45</sup> *Intellect Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/intellect> (last visited Jan. 31, 2016).

<sup>46</sup> *Intelligence Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/intelligence> (last visited Jan. 31, 2016).

<sup>47</sup> *Knowledge Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/knowledge> (last visited Jan. 25, 2016).

<sup>48</sup> *Aptitude Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/aptitude> (last visited Jan. 25, 2016).

<sup>49</sup> *Performance Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/performance> (last visited Jan. 25, 2016).

success is a combination of the factors listed above, and that standardized testing completely disregards not only those factors, but also completely disregards an individual's personal intangibles like drive, passion, and perseverance . . . as well as the fact that person can also hit his academic stride later in life.

As a matter of fact, Professor Subotnik is spot on when he mentions the importance of grades, which I wholly agree with. Indeed, Professor Subotnik rightly mentions the correlation of grades with desire and diligence: "Presumably because they signal ambition, stick-to-it-iveness, and attention to detail."<sup>50</sup>

Professor Subotnik also argues that students that do well also tend to like the process.<sup>51</sup> I agree with his assessment here. I certainly enjoyed the process from college through law school and I have no complaint with the results. A very important reason why I enjoyed the process was because a large majority of the classes I had taken showed how the subject matter was also relevant to real life. This is something that *never* happened for me in high school because the culture there was simply *learn this or else!*

#### VIII. WHICH ACADEMICIANS ARE BETTER QUALIFIED TO DISCUSS THIS ISSUE?

I ask this question because Professor Subotnik attempts (wildly and badly) to throw a roundhouse right hook at Professor Guinier with this gem:

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

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<sup>50</sup> Subotnik, *Testing = Discrimination?*, *supra* note 2, at 388.

<sup>51</sup> Subotnik, *Reply to Gilmore*, *supra* note 2, at 59 ("Students who learn well are more likely to like the process than those who do not. They have developed their learning skills and presumably liked doing so.")

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.<sup>52</sup>

If the above comment attempted to pass the laugh test, it would have been shot down in flames; it is that ridiculous. What Professor Guinier has consistently shown throughout her piece is that the SAT & LSAT are not nearly as reliable as Professor Subotnik would have us believe.<sup>53</sup> And as I have previously argued, standardized exams have been proven to be historically racially and culturally biased.<sup>54</sup>

Professor Subotnik really flies over the top when he suggests that Professor Guinier is “disparaging” formal education. He could not possibly be more wrong. Professor Guinier correctly points out that standardized exams do not always tell the full story of a student’s potential,<sup>55</sup> and that schools are willing to use alternate methods to help “non-traditional” students reach academic success.<sup>56</sup> Much to Professor Subotnik’s consternation, perhaps, Professor Guinier’s critique of standardized testing in this fashion is hardly biting the academic hand that feeds her. To his additional consternation (I think), as I alluded to earlier, for all the success stories that Professor Guinier cites, Professor Subotnik’s response is conspicuously silent on every last one of them, which I find quite telling.

The bigger problem I have with Professor Subotnik’s above comment is the idea that Professor Guinier is not the best person to give this type of critique because she is a career academic. This part of the comment just doesn’t fly. Professor Subotnik is himself a tenured professor at the law school level. So, it sure looks like that he is safely behind the sturdy walls of his own ivory tower, doesn’t it? Other than the fact that Professor Guinier and Professor Subotnik are

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<sup>52</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 351.

<sup>53</sup> GUINIER, *supra* note 1, at 13.

<sup>54</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 15, 17-27.

<sup>55</sup> GUINIER, *supra* note 1, at 81-82.

<sup>56</sup> GUINIER, *supra* note 1, at 83, 94.

tenured professors at different law schools, it appears to me that they are on the same level in the halls of academia.

Professor Subotnik's claim that Professor Guinier should somehow be disqualified because she is now far removed from the "flame of competition"<sup>57</sup> is also hard to fathom here. First, the fact that she is no longer a practitioner has nothing to do with the argument she is making. Secondly, as Professor Guinier, Professor Subotnik, and I know all too well, law school is a most competitive environment.<sup>58</sup> We as students compete for top grades.<sup>59</sup> We compete for positions on the law review.<sup>60</sup> We participate in Moot Court exercises. We compete for CALI (Computer Assisted Legal Instruction) awards for scoring the highest grade in the class.<sup>61</sup> Also, as law professors/authors, we also compete against other professor/authors to get our articles published by reputable legal journals, and we all know that some are ranked higher than others. Needless to say, in law school, competition abounds, and we as professors are quite aware of that competition.

Secondly, no one reading Professor Subotnik's comment regarding the *flame of competition* could miss the irony of the fact that as a decades-long tenured law professor himself, he too is (presumably) far removed from the flame of competition. It would logically follow, according to his own assessment, that if Professor Guinier should be disqualified from critiquing because she is not in the trenches, as it were, then Professor Subotnik should be disqualified from dissenting for the very same reason. Applying Professor Subotnik's assessment to myself, I should not be writing this response either because I have been out of the commercial world for the last 20 years, and in the academic world for nearly as long. I just cannot believe the silliness of Professor Subotnik's stance on the flame of competition.

Even though he strongly disagrees with Professor Guinier's position, he seemingly tries to suggest his argument is the better one precisely because his support of standardized testing, warts and all, is

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<sup>57</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 351.

<sup>58</sup> Gilmore, *Misadventures*, *supra* note 21, at 203.

<sup>59</sup> Gilmore, *Misadventures*, *supra* note 21, at 203.

<sup>60</sup> Gilmore, *Misadventures*, *supra* note 21, at 203.

<sup>61</sup> Gilmore, *Misadventures*, *supra* note 21, at 204. ("My CALI award was in Negotiable Instruments and Payment Systems while I was in the L.L.M. program at Touro Law School in the Spring 2004 semester.").

not a disparagement of formal education, as he sees it. I too have been critical and distrustful of the utility of standardized testing, and I agree with many of Professor Guinier's points. Does that automatically mean that, by default, I'm going out of *my* way to disparage formal education? Absolutely not; criticism and disparagement are hardly synonymous. I admit here, I fail to see the disparagement in Professor Guinier's piece that Professor Subotnik apparently sees; I hope he can enlighten us further.

Here is a hypothetical example: Student X is a student in Professor Y's class. The Professor asks the student a question, and the student answers it wrong (something I've done in real life more times than I care to admit). Here are two possible responses from the professor:

**Critique:** Mr. X, that is wrong on the facts because you missed A, B, and C.

**Disparagement:** Mr. X, you are an idiot. Get a refund of your tuition money and get out NOW!

That said, I believe an academician *is* in the best position to critique the reliability of standardized testing irrespective of which side of the issue one lands on. This is because we, as academicians, work with students quite regularly. When we give lectures, hold office hours, give exams, and the like, that gives us a bit of an opportunity to get to know our students. In all my years as a college professor, I have never asked what a student's SAT score was; that has nothing to do with the semester coursework. During the course of the semester, I can assess a student's performance in the form of exams, term papers, semester projects, and the like. When I'm calculating final grades at the end of the semester, it is the final grade that is the end result of all the work the student has done all semester. I cannot say often enough that one's SAT score does not give a complete picture of what a student is really capable of.

I make the case here that a student's work product and semester grades have nothing to do with the fraud that is standardized testing.<sup>62</sup> Again, a student's grades, based on his work product, is by far a much better indicator of a student's competence, as opposed to a

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<sup>62</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 16.

one-time, so-called “aptitude” test, which for me, is unreliable at best, and worthless at worst.<sup>63</sup> Grades certainly matter because they are based on a student’s body of work during the semester. In law school, the student’s body of work normally consists of reading & briefing cases, research assignments, writing legal briefs and memoranda, creating course outlines to reinforce the material learned during the semester, and most importantly, discussing cases during class. As Professors Guinier and Subotnik can surely attest, the student’s level of preparation will determine the quality and competence of the student’s class participation. All of this will come to fruition when the student takes the all-or-nothing, one shot end of semester exam, and the student’s final grade will be the end result of his work product. And, when a law student does well enough to pass his exams, graduate from law school, pass the bar exam and have a successful career despite a below par LSAT score, I think it is the overall work product that validates what a student does. Because of this dynamic, as I’ve discussed above, a student’s work product has to be a far better indicator of his ability than a one-time, so-called aptitude test.

## IX. CONCLUSION

Dan Subotnik and I have a long history together. I was a student in his Estate and Gift Taxation class. We have been lifelong friends in the years since then. And, yes, we have been law review adversaries on occasion. Our disagreement notwithstanding here, I say unequivocally, I truly love Dan Subotnik and I am proud and privileged to know him as a professor, a long-standing mentor, and most importantly, my friend.

I must admit here that I have enjoyed “locking [of] horns”<sup>64</sup> with Professor Subotnik on this issue for the past couple of years, and I believe my response here is a serviceable rebuttal to his position. The first problem with Professor Subotnik’s commentary has always

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<sup>63</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 16.

<sup>64</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 345. There, the author provided:  
 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.

Subotnik, *Tyranny Disputation*, *supra* note 3, at 345.

been that standardized testing is the best way to predict a student's success in higher education<sup>65</sup> despite the fact that this position has been proven wrong by me<sup>66</sup> and others.<sup>67</sup> The second problem with Professor Subotnik's commentary is that any criticism of standardized testing is automatically wrong, and thus invalid.<sup>68</sup>

I particularly enjoy *locking horns* with Professor Subotnik on this topic for this reason: his prior commentary can certainly lead one to reasonably believe that he is a testocrat, and that standardized testing can do no wrong, whereas I *lived* the experience of going from high school dropout to law school graduate, and proving the nay-sayers wrong at every turn. I am secure in the knowledge that there are many other successful people in professional life that did not live down to a subpar test score.

For the reasons stated herein, I firmly support Professor Guiner's position that standardized testing is unreliable, inconsistent, and far from the best way to predict student success. The fact that I overcame dropping out of high school and subpar test scores to reach the academic and professional fulfillment and success I enjoy today is the best argument against the unfairness of standardized testing. My personal story will *always* disprove (and perhaps discredit) standardized testing and no testocratic argument can ever say different.

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<sup>65</sup> Subotnik, *Testing = Discrimination?*, *supra* note 2, at 387, 400.

<sup>66</sup> Gilmore, *Reply to Subotnik*, *supra* note 5, at 5.

<sup>67</sup> Delgado, *supra* note 30, at 598; Curcio et al., *supra* note 31, at 224; Richard Delgado, *Standardized Testing as Discrimination: A Reply to Dan Subotnik*, 9 U. MASS L. REV. 98, 103 (2014); GUINIER, *supra* note 1, at 2; Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71 (2012).

<sup>68</sup> Subotnik, *Tyranny Disputation*, *supra* note 3, at 344; Gilmore, *Reply to Subotnik*, *supra* note 5, at 8-12.