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Goodbye to the SAT, LSAT? Hello to Equity by Lottery? Evaluating Lani Guinier's Plan for Ending Race Consciousness

DAN SUBOTNIK*

What destiny awaits us if nearly 80 percent of our youngsters in Denver fail the fourth grade reading tests, as they did last year?

Hugh Price¹

The more books you read, the more stupid you become.

Mao Zedong²

INTRODUCTION

Two beggars are standing across from the university in pre-World War II Berlin. The atmosphere is repressive, even hateful, though not yet murderous. On one side of the street is a disheveled, beaten-down old Jew huddling under a tattered coat and holding up a sign, "Help a poor but proud and good Jew in distress." On the other side is a man in his ancient, but neatly pressed, World War I uniform whose sign reads, "Proud and loyal son of the Fatherland fallen on hard times—please help me get back on my feet." The Jew has little to show for his efforts; the beggar across the street is doing rather well. A sympathetic professor stops to advise the Jew to disguise himself or to move to another block. Uninterested, the Jew tries to shoo the professor

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1. Bob Herbert, *Don't Flunk the Future*, N.Y. TIMES, Aug. 13, 1998, at A23. Price is President of the National Urban League.

2. Quoted in JUNG CHANG, *WILD SWANS*, 426 (1991) (suggesting that this remark, made on June 26, 1965, metamorphosed into the foundation of Chinese educational policy).

away, but the latter refuses to leave, insisting that the Jew has no hope in that competitive setting. After twenty minutes of badgering, the Jew can bear it no longer. Bidding the academic interloper to follow, he leads him across the street to his competitor. "Abie," he announces, "this guy's trying to teach us business."³

With no ostensible academic or professional experience in management, and in two areas where America is the envy of the world,⁴ Lani Guinier⁵ and Susan Sturm⁶ want to teach our higher education and business institutions how to run their business – in particular how to admit students and hire workers.⁷ The problem is, they tell us, that contemporary methods used to measure ability are largely ineffective because they fail to measure the capacity of applicants to do the job.

In a similar way, according to Sturm and Guinier, standardized testing at the high school level bears little, if any, relationship to aca-

3. "Stories. . . chronicles, narratives," writes Richard Delgado, "are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings [in our] legal and political discourse They can show what we believe is ridiculous, self-serving or cruel." Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413, 2415 (1989). There is a downside to the ethnic joke, of course. As Patricia Williams has pointed out with respect to another Jewish joke, "there is a real risk of destructive impact in jokes that make fun of the supposed characteristics of historically oppressed and shunned people." PATRICIA WILLIAMS, *THE ROOSTER'S EGG* 113 (1995). For a discussion of the effect and proper use of jokes, see Dan Subotnik, *The Joke in Critical Race Theory*, 15 *TOURO L. REV.* 105 (1998). This particular story is adapted from one told ten years ago by a recently arrived immigrant from Moscow who reported that it was circulating widely in the Jewish community there.

4. See Craig Whitney, *The Teacher in Charge is Taught a Thing or Two*, N.Y. TIMES, Mar. 20, 1999 at A4 (summarizing the view of Claude Allegre, France's Education Minister).

5. Lani Guinier, Professor of Law at the University of Pennsylvania Law School until 1998, was recently appointed Professor of Law at Harvard University Law School. In announcing the appointment, Dean Robert Clark characterized Guinier as a "first-rate scholar who has produced extremely important work" and as someone, who, by her presence, "will help the school to attract other top scholars of diverse backgrounds, including more women of color." See *Lani Guinier Appointed Professor of Law*, OAKLAND POST, Feb. 11, 1998 at 3.

6. Susan Sturm is Professor of Law at the University of Pennsylvania Law School. She writes in the areas of prison reform, race, and gender. University of Pennsylvania, *Faculty of The Law School at the University of Pennsylvania* (visited Oct. 22, 1999) <<http://www.law.upenn.edu/cfdocs/faculty/.on.cfm?>> (listing background and enclosing curriculum vitae).

7. See Susan Sturm and Lani Guinier, SYMPOSIUM, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). The Harvard faculty and administration have presumably found promise in the work. So, it appears, have the Mott and Ford Foundations for, under an initiative named RACETALKS, which "seeks to develop new paradigms for linking racial and gender justice to the project of building more inclusive and democratic institutions," they are funding Guinier and Sturm. Indeed, *The Future of Affirmative Action* "comes out of the work" that Guinier and Sturm are doing with Ford and Mott. See letter by Anjali Arondekar dated February 20, 1997 (on file with author). My intention here is not, as a colleague claims, to deny the authors the right to speak outside of their area of expertise. It is only to highlight that their proposal merits a kind of "strict scrutiny."

demic performance in college.⁸ Being “deeply problematic as a predictor of actual job performance” and thus “underinclusive of those who can actually do the job,”⁹ the current personnel selection method, Sturm and Guinier conclude, “does violence to fundamental principles of equity and ‘functional merit’ in its distribution of opportunities for . . . higher education, entry-level hiring, and job promotion.”¹⁰ Its overall result, they say, is a “class-linked opportunity structure that credentializes a ‘social oligarchy’.”¹¹ Sturm and Guinier would revolutionize contemporary educational and business practice by replacing much, if not all of it¹²—even hard-won affirmative action—with a lottery system.

The Sturm and Guinier article may have already won an important convert. In April 1999, the U.S. Department of Education’s Office of Civil Rights published *Nondiscrimination in High Stakes Testing: A Resource Guide*.¹³ Although labeled “for internal government handling only,” this substantial legal report has gotten out and its implications are clear to at least some who are carefully reading: Education is laying the groundwork for a major assault on standardized testing.¹⁴ While Education has since tried to allay fears of a policy change,¹⁵ the report highlights the importance of reckoning with Sturm and Guinier.

8. Sturm and Guinier’s efforts in the educational area are part of a major assault on the use of SAT and like examinations. See David Murray, *The War Against Testing*, COMMENTARY, Sept. 1998 at 37. (defending the use of standardized tests in the education setting). See also *infra* notes 13, 14 and 15.

9. See Sturm and Guinier, *supra* note 7, at 957.

10. *Id.*

11. *Id.*

12. *Id.* at 1012.

13. A copy is on file with the author. “[T]he use of any educational test which has a significant disparate impact on members of any particular race, national origin or sex is discriminatory, and a violation of Title VI and/or Title IX, respectively, unless it is educationally necessary and there is no practical alternative form of assessment which would meet the educational institution’s educational needs and would have less of a disparate impact.” *Id.* at 3

14. “We were stunned. We had no idea that this had been in process for four years,” said a high official with the College Board, which administers the SAT. “It is basically a blueprint for litigation against schools, states and admissions offices [in a case where a] test doesn’t have equal results by group.” See Edward Blum and Marc Levin, *Washington’s War on Standardized Tests*, WALL ST. J., May 26, 1999 at A22 (quoting John Childers). Donald Stewart, President of the College Board, further explains: “We have concerns that the Resource Guide seems to say that tests are ‘the problem’ in educational disparate impact, rather than identifiers of the real problems.” Letter to Norma Cantu, Assistant Secretary, Office of Civil Rights dated June 21, 1999 (copy in hands of author).

15. “We’re not saying anything here that doesn’t already exist on the books.” Amy Dockser Marcus, *Standardized Tests Could Lead to Lawsuits*, WALL ST. J., May 26, 1999 at A2 (quoting Education’s Arthur Coleman).

So, what should we think about Sturm and Guinier's project to end race consciousness? Are current evaluation systems really so fundamentally flawed that they need to be replaced? If so, is a lottery system the best substitute available? Should we disconnect input and outcome, work and success, and thereby turn a good part of our world into a giant crap game? Or, alternatively, is the Sturm and Guinier project just a critical race theory (CRT) smokescreen,¹⁶ which, in this case, is designed to obscure the wide interracial skill gap that must be eliminated if the battle for racial equality is to be won?¹⁷

But let us start at the beginning. Liberals, Sturm and Guinier announce, unwittingly work against the needs of minority communities when they support use of so-called objective tests as a means of predicting future educational or work performance. Such tests, Sturm and Guinier readily concede, were not initially a bad idea.¹⁸ But when it became apparent that, even under the test system, minorities were not getting a proportionate share of the benefits American society offers, liberals should have attacked the problem head-on by subjecting the measuring rods themselves to scrutiny.

Instead, according to Sturm and Guinier, they in effect confirmed the validity of testing by supporting affirmative action, which, rather than "challeng[ing] the overall operation of a conventional and static selection process[,] creates exceptions to that process. . . that play into existing racial stereotypes, predictably generating backlash. . . ."¹⁹ By implicitly legitimizing a selection process that operates in the name of merit, affirmative action programs reinforce that backlash," Sturm and Guinier explain, with white workers focusing "their wrath and blame on the workers perceived as beneficiaries of affirmative action."²⁰

16. For a critical evaluation of CRT, see Dan Subotnik, *What's Wrong with Critical Race Theory? Reopening the Case for Middle Class Values*, CORNELL J.L. & PUB. POL'Y 681 (1998); see also Dan Subotnik, *Critical Race Theory – The Last Voyage*, 15 *TOURO L. REV.* 657 (1999). There are a variety of reasons for labeling Guinier a critical race theorist (hereinafter CRAT), most simply her inclusion in a major CRT bibliography compiled several years ago by one of the movement's progenitors, Richard Delgado. See Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 66 *U. COLO. L. REV.* 159, 177 (1993).

17. African American college graduates have earned GPAs that are typically two-thirds of a grade lower than those of white graduates. See Claude Steele and Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* 402 (Christopher Jencks and Meredith Phillips, eds., 1998). In the workplace, another important study reveals, skill differences "explain a substantial part of the wage variation among blacks, among whites, and between blacks and whites." William R. Johnson and Derek Neal, *Basic Skills and the Black-White Earnings Gap*. Stelle & Aronson, at 494.

18. See generally Sturm and Guinier, *supra* note 7.

19. *Id.* at 956.

20. *Id.*

Would better tests of performance alleviate the problem of “testocracy”²¹ in our schools and places of employment? Sturm and Guinier’s answer would seem to be yes. “For purposes of our argument,” they write, “we accept the idea, without question, that functional capacity to perform effectively, or functional merit, is a legitimate consideration in distributing jobs and educational opportunities effectively.”²² Yet, their final answer is probably no. “We are not suggesting that the solution is to develop a new, less biased, equally universal test that more accurately predicts future performance,” they write. “We are,” they announce, “challenging the *idea* of prediction.”²³ Why? Because tests do not measure “discipline, emotional intelligence, drive to succeed, and reliability,”²⁴ factors, by all accounts, vital for success.²⁵ Predicting job success, Sturm and Guinier suggest, is especially difficult because job success correlates positively with additional features of personality that are likewise hard to measure, such as “empathy, cooperation, persuasion, and the ability to build consensus among people.”²⁶

How might an educational or business institution solve the problems of school admission and hiring? To help us understand the kind of creativity required today, Sturm and Guinier walk us through the circumstances prevailing at Lowell High School in San Francisco, Justice Stephen Breyer’s academically prestigious alma mater. In the wake of an ethnically-based dispute over admission, an astonishing 1993 consent decree limited the representation of any of the various ethnic groups—Asians, blacks, Latinos, whites—to forty percent of the school population. The racial balance of the ethnically diverse city would be kept by requiring Chinese-Americans to score sixty-six out of sixty-nine points for admission, while most whites and non-Chinese Asians would need only fifty-nine, and blacks and Latinos could qualify with fifty-six.²⁷

Sturm and Guinier commend a student in their University of Pennsylvania seminar class for coming up with a more equitable and efficient solution to a problem such as that existing at Lowell. A lot-

21. “By testocracy we refer to test-centered efforts to score applicants, rank them comparatively, and then predict their future performance.” *Id.* at 968.

22. *Id.* at 969.

23. *Id.* at 1003 (emphasis added).

24. *Id.* at 976.

25. Tests measure, instead, “qualities such as willingness to guess, conformity and docility.” *Id.* at 977.

26. *Id.* at 976 n.94.

27. *Id.* at 1017.

tery system would allow anyone scoring over fifty-six, the level established for *minimum* competence, to compete for admission in a random selection. Well, maybe not exactly random. For if the school could show that “those with a perfect sixty-nine or close to it, or with some other quality the school values—such as the likelihood of achieving a seat on the U. S. Supreme Court, winning recognition as a Westinghouse Science Finalist, or being admitted to a competitive college—then those names would be placed in the lottery twice or even three times.”²⁸ In this manner, Sturm and Guinier announce, the current racial “winner-take-all strategy” can be avoided.²⁹ How favored students are to be identified without the use of tests, Sturm and Guinier do not say.

Sturm and Guinier’s specific challenges to contemporary practice in schools and businesses raise a host of questions which, it would seem, should be answered before we overhaul admissions and hiring practices: (1) Are one-shot standardized exams, such as the ones administered at Lowell, poor predictors, as Guinier and Sturm claim? (2) Does any institution with real choices rely exclusively on standardized test numbers? A 1996 *New York Times* story reports that Harvard College rejected 165 applicants with perfect Scholastic Assessment Test (SAT) scores.³⁰ (3) Do top grades and class rank, which are clearly not one-shot measures, really guarantee acceptance? Apparently not, for Harvard reportedly rejected class valedictorians and students with 4.0 averages.³¹ (4) If these measuring rods do not—and should not—serve as guarantors of admission, do they at least evidence something about discipline, motivation, and perhaps leadership? (5) Can we learn something about the foregoing qualities from extra-curricular activities, personal essays and references, all of which currently form part of the application process? (6) Would we want to risk having a Stephen Breyer assigned, through a lottery system, to a school that is wholly inadequate to his talents?

Regarding the use of the lottery in hiring, we might wonder, what about interviews and references, without which, it would appear, no

28. *Id.* at 1018.

29. By “winner-take-all,” Sturm and Guinier presumably refer to a system in which one racial group is allowed to overwhelm all others in the admissions process. Would a class that was *randomly* all Asian be satisfactory? On the one hand, yes. On the other, the existence of racial disproportion seems to be an indicium that things are not well. See *id.* at 992.

30. Bruce Weber, *Inside the Meritocracy Machine*, N.Y. TIMES MAGAZINE, Apr. 28, 1996 at 56.

31. THE BLACK-WHITE TEST SCORE GAP (1998), *supra* note 17.

one gets a job? Might they not teach us something about a candidate's empathy and perhaps even his or her consensus-building ability? Finally, what effect would a lottery system have on motivation?

A new book on standardized testing helps to frame most of these issues.³² "[I]f racial equality is America's goal," write Christopher Jencks and Meredith Phillips, the editors, "reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad political support. Reducing the test-gap score," these affirmative action supporters continue, "is probably both necessary and sufficient for substantially reducing racial inequality in education and earnings [and probably differences] in crime, health, and family structure." If Jencks and Phillips are right, then Sturm and Guinier could not be more wrong.³³

This essay is in two parts. Part I deals with the implications of Sturm and Guinier's work for educational institutions and Part II focuses on the likely effect of a lottery system in the workplace.

PART I: THE ACADEMIC SETTING

Cheryl Hopwood, as many now know, applied for admission to the University of Texas School of Law in 1992.³⁴ For purposes of evaluating her and other applicants, the Law School Admissions Office created a *Texas Index* (TI) which was based on college grades and Law School Admission Test (LSAT) scores.³⁵

Hopwood's LSAT score was 160 and her undergraduate grade point average (UGPA) was 3.8, giving her a TI of 199, the lowest generally applicable "presumptive admit" score.³⁶ Hopwood, however,

32. *Id.* at 4.

33. SHELBY STEELE, *A DREAM DEFERRED* (1998). Shelby Steele offers a connection between the Sturm and Guinier proposal and minority uncompetitiveness. "Wherever black representation is an issue," he writes, "excellence is cast as an adversary of fairness" a position which "keeps blacks (and other minorities) down by tolerating weakness at every juncture where strength is expected of others." *Id.* at 34 and 53. Seeking relief but not real redemption from racial shame, Steele suggests, liberals "stand [only] for an engineered racial equality but not for the principles of merit, excellence, hard work, delayed gratification, individual achievement, personal responsibility and so on. . . ." *Id.* at 20. Steele illustrates the point with reference to lawsuits filed by teachers' unions in California "claiming that minority teachers are discriminated against by teacher competency examinations pitched at a mere tenth grade level." *Id.* at 52.

34. *See Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996).

35. The LSAT score was weighted approximately 60%, the undergraduate grade-point average (UGPA) 40%. *See Hopwood*, 78 F.3d at 935 n.1.

36. *Id.* at 936. A *presumptive admit* is presumably the score at which an applicant has a good chance to be admitted based on the numbers alone.

was dropped into a discretionary zone (193-198) on the grounds that she had done undergraduate work at a community college so that her GPA overstated her educational preparation.³⁷ In contrast to the generally applicable lowest presumptive admit score, blacks and Mexican-American candidates were presumptively admitted with a TI of 189.³⁸ The general "presumptive reject" number was 192; the corresponding number for blacks and Mexican-Americans was 179.³⁹ When Hopwood and three other applicants were rejected in favor of a number of minority students with lower TI scores, they brought an action against the State of Texas.⁴⁰

For Sturm and Guinier, *Hopwood v. Texas* is a prototype affirmative action dispute in academia. Student A scores higher than student B on some entrance test. A sense of entitlement is generated. When an institution does not recognize the priority of A's claim, A feels aggrieved and seeks redress. The rejected applicant's response, Sturm and Guinier insist, is inappropriate and must be changed.

To evaluate Sturm and Guinier's proposal, we need to put the LSAT into some perspective. How did the LSAT acquire its power within educational life? How could this status be unearned? To answer these questions we must go back seventy-five years (long before the first LSAT in 1948), to a time when the higher education admissions process favored those with wealth and family background. The SAT was designed to undo that system, to make merit the touchstone for admissions. After World War II universities turned in large numbers to the SAT.⁴¹ But, Sturm and Guinier claim, test results have been so skewed along racial lines that the SAT is of only little value.

37. *Id.* at 938, *Hopwood v. Texas*, 861 F. Supp. 561, 564 (1994). See Sturm & Guinier, *supra* note 7, at 991 (supporting the idea of adjustments for individual circumstances as departures from one-size fits-all measures, which they condemn. And yet this particular departure discriminates against the poor (more likely to be minority-group members), who disproportionately attend public colleges. In this latter way, they point out, "Cheryl Hopwood may well be a victim of class bias.").

38. See *Hopwood*, 78 F.3d at 936.

39. *Id.*

40. *Hopwood v. Texas*, 861 F. Supp. 561, 564 (1994).

41. See Murray, *supra* note 8, at 34. See generally Sturm and Guinier, *supra* note 7, at 966 (arguing that standardized testing "eliminated the class-linked prerequisites to work and education that governed in a pre-standardized test era, and instituted a system that presumably offered everyone a fair, unbiased, and equivalent chance to compete for educational and employment opportunities"); but see JAMES CROUSE AND DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 19 (1988) (arguing that the real motivation behind standardized test was discriminatory, as evidenced by Columbia University's decision to use standardized tests to stem the admission of Jews who some saw as working "far beyond their native intelligence").

There are, according to Sturm and Guinier, three basic problems with what they call “sameness-is-fairness” in the testing area.⁴² First, merit is increasingly judged on the “criterion of performance—the ability to get good grades on tests or perform well on tests that are designed to assess general intelligence or inherent ability.” Success on tests like these depends largely on educational achievement, and “blacks’ educational opportunities had been severely limited” as a result of stereotyping.⁴³ This educational deficit precludes the possibility that minorities will receive any real *equality of opportunity*. Sturm and Guinier’s argument here, of course, is not novel; it is the basis of contemporary affirmative action, which they reject.⁴⁴

A second objection to contemporary “testocracy” is that test performance correlates too strongly with family income and net worth. Sturm and Guinier provide extensive tables showing a high correlation between parental income and SAT scores.⁴⁵

Sturm and Guinier’s third and most elaborate objection to the SAT is that it does not successfully predict academic performance of students.⁴⁶ They point to an eight-year old study showing that the correlation between the SAT and first-year college grades ranged from only .32 to .36.⁴⁷ They argue, moreover, that the SAT score is consistently less predictive of first-year grades than is high school grade point average (HSGPA)⁴⁸ and, indeed, that class rank is an even better indicator than HSGPA.⁴⁹ Finally, they suggest, the SAT only marginally enhances predictability when added to HSGPA⁵⁰ or rank.⁵¹

42. See Sturm and Guinier, *supra* note 7, at 964 (defining this brand of fairness as emphasizing “the importance of treating everyone the same, giving everyone the same formal opportunity to enter the competition for a position, and evaluating each person’s results the same way”).

43. *Id.* Have African Americans been specifically targeted by SAT examiners? Apparently so, according to Sturm and Guinier. This “single criterion of performance [measured] was exactly the area in which blacks had been made most vulnerable, factually, legally, and mythologically.”

44. See *supra* note 12 and accompanying text.

45. See Sturm and Guinier, *supra* note 7, at 989.

46. For this purpose Sturm and Guinier rely heavily on Crouse and Trusheim. It must be noted, however, that Crouse and Trusheim do not come close to recommending a lottery. Rather, they propose substituting achievement tests for SAT-type tests. See CROUSE & TRUSHEIM, *supra* note 41, at 155-71.

47. See Sturm and Guinier, *supra* note 7, at 971; see also *id.* at 970 (stating that a .3 correlation is generally considered useful, although it explains only 9% of the variation in predicted performance).

48. *Id.* at 979.

49. *Id.*

50. *Id.* at n. 86.

51. *Id.* at 974. Other challenges to the SAT are closely tied to Sturm and Guinier’s related attack on employment tests and will be discussed in Part II.

What can we make of these three challenges to the SAT? It is beyond dispute that whites have more educational opportunities than do minorities,⁵² and that this disparity plays a role in creating differentials in test scores. The degree to which this difference in opportunity is the direct or indirect consequence of racism or, contrariwise, the product of unfortunate decisions made by some minorities, might be debated. The bottom line, however, the existence of the differential in educational achievement, is the same. But this painful reality is not a basis for abolishing standards.⁵³

As Sturm and Guinier concede, an institution can validly require applicants to perform, and given their better preparation, whites will be better able to perform successfully.⁵⁴ To the extent that racism is the underlying cause of the problem, traditional affirmative action is not an unreasonable response.⁵⁵ To go beyond this point and limit the use of tests across the board, while adopting a lottery system, one has to suppose that test scores do not matter.

As for the implications of the income advantage of whites, a recent study implies that the income/SAT correlation may cover up relationships that are far more important than income.⁵⁶ At the very least the study suggests that it is important to think precisely about how the income edge might translate into an advantage on the SAT. Is income the cause of the SAT gap because whites can give their children benefits that minorities cannot, for example, travel to other countries or after-school programs? The problem with this theory is that, as Sturm and Guinier demonstrate, minorities perform at a lower level than majority students in the same income class on the SAT.⁵⁷ Is the problem that white students from high-income families go to better schools

52. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991) and RON SUSKIND, *HOPE IN THE UNSEEN* (1998).

53. See STEELE, *supra* note 33, at 87 "The fact that some do not have the same chance to develop excellence is *not* an argument against excellence. . . . *In fact a fair standard of excellence is what both clarifies their problem and points to its solution.*" (Emphasis in original).

54. See *supra* note 19 and accompanying text.

55. For purposes here "traditional affirmative action" is defined as the system (authorized in *Bakke*) wherein a student's minority status may be used to his or her advantage in the admissions process, but no quota for minority enrollment is established.

56. See Meredith Phillips et. al, *Family Background, Parenting Practices, and the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 17, at 118, highlighting the relative importance of family educational achievement (study based not on the SAT but on the Peabody Picture Vocabulary Test-Revised). The black-white wealth (as opposed to income) gap appears to be no more significant than the income gap. *Id.*

57. See Sturm and Guinier, *supra* note 7, at 988-89. Sturm and Guinier emphasize that at 25% of the colleges in a 1984 study, the score/income correlation was greater than the score/first-year grade correlation. *Id.* One wants to know what happened with the other 75%.

than minorities with the same family income? If there is evidence for this proposition, Sturm and Guinier do not supply it.

Part of the problem in dealing with the close family income/SAT correlation is that the acquired skills of high-income earners are likely to correlate with higher academic performance in their children. Every parent has a different mix of assets and liabilities to give his or her offspring. Assets may include reading, test-taking, budgeting time, writing, mathematics or setting high standards.

While there may be an argument for controlling the amount of money passing between generations, only the most repressive society will consider prohibiting parents from sharing their wisdom and skills with their children. Accordingly, Michael Jordan's children will have a better chance of turning into basketball players than will the children of this author. We could, at least theoretically, try to mitigate these imbalances. In the Jordan case, for example, we can create school basketball clinics (from which young Jordans might be excluded). But any realistic alternative to unfettered transmission is likely to fall far short of a cure, and be undesirable for another reason. For again, if one concedes that performance is a valid criterion for determining society's rewards, the fact that minority children may not reach the same educational levels as whites because of lower parental resources, financial or otherwise, is not in itself an argument for a lottery system.

In terms of the predictive value of the SAT, Sturm and Guinier rightly point out the low SAT/UGPA correlations in the 1980s.⁵⁸ Careful scrutiny has revealed a major cause of the problem: a difference in courses taken by high and low SAT scorers from 1965 to 1985.⁵⁹ To remedy this problem, more focused measures of comparability have recently been developed, which take into account differences in grading for different college courses. When individual course grades are used (instead of first-year GPA), overall correlations have risen to .64 and, under some circumstances, to .75.⁶⁰

58. See generally WILLINGHAM, ET. AL, PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES (1990).

59. *Id.* at 24, 72-84, 90. The basic problem of comparability is discussed *id.* at 12-16.

60. See Leonard Ramist, et. al, *Student Group Differences in Predicting College Grades: Sex, Language and Ethnic Groups* 1 and 3 (College Board Rept. No. 93-1 1994). This study was available to Sturm and Guinier, as their article was published in 1996. To be sure, this and virtually all other validity studies in the last ten years, have been sponsored by the test administrators which arguably makes them suspect. The problem with this criticism is that there are no truly independent studies. Moreover, nowhere do Sturm and Guinier question the credentials or independence of the validating authors.

The SAT now does a better job of predicting grades than does the HSGPA.⁶¹

Moreover, the SAT does an even better job of predicting the performance of blacks. Indeed, as that study puts it, "the SAT increment in correlation over HSGPA for this group (for whom the predictive effectiveness of HSGPA was very low) was by far the largest among all ethnic groups."⁶² In sum, the case that the SAT is unfair to African Americans has been greatly vitiated.

This brings us to the LSAT, the exam that Cheryl Hopwood took. In challenging its validity, Sturm and Guinier rely on a University of Texas study finding that the correlation between LSAT scores and first-year law school GPAs of white students stands at only .24, and, when refined to account for actual variance in first-year grades alone, the correlation to LSAT alone accounts for only 6% of the differential.⁶³ Predicting minority student performance at the University of Texas Law School, Sturm and Guinier claim, is perhaps more problematic.⁶⁴ At the University of Pennsylvania Law School, Sturm and Guinier tell us, LSAT scores explain only 14% of disparities in first-year grades.⁶⁵

Because the two universities in question are highly selective institutions, that is, students come from a narrow band of test takers, the *restriction of range* problem is raised. As Sturm and Guinier themselves concede, in such situations relevant correlations are relatively low and statistical techniques will often be used to extrapolate "real" correlations from the data.⁶⁶ In this particular case, however, Guinier and Sturm side with what they call the "conservative response [which] is to apply no correction for restriction of range."⁶⁷ The low correla-

61. See Willingham et al., *supra* note 58, at 92. Of greater significance, a far more sophisticated study of eleven colleges and universities concludes that "controlling for gender, race, participation in varsity athletics, college and university attended, and major field of study, SAT scores are statistically significant predictors of cumulative grade point averages." See Frederick Vars and William G. Bowen, *Scholastic Aptitude Test Scores, Race and Academic Performance in Selective College and Universities*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 17, at 463. Bowen is co-author with Derek Bok on *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

62. See Willingham, *supra* note 58, at 36. See also Vars and Bowen, *supra* note 61, at 466 (suggesting that the SAT overpredicts African American performance).

63. See Sturm and Guinier, *supra* note 7, at 971.

64. *Id.* at n. 70.

65. *Id.* at 971.

66. See *id.* at 972-73.

67. *Id.* at 973-74.

tions in the Texas and Pennsylvania cases should not, therefore, be surprising.

If there were no other data on which to depend, rallying behind Guinier and Sturm on the LSAT issue would, perhaps, make sense. The problem, however, is that a broad range of data contradicts Sturm and Guinier's findings of test invalidity. This data, published by the Law School Admissions Council, is highly informative. According to the most recent study, released in December of 1993, the average correlation between first-year law school grades and LSAT score is not a low .24, but a high .49.⁶⁸ Moreover, the LSAT is a far better predictor of law school performance than is UGPA alone (.41 compared with .26).⁶⁹ The study reports a great deal of variability in coefficients among law schools.⁷⁰ Yet it concludes that a "substantial amount" of this variability "is directly attributable to the amount of variation in LSAT scores and UGPAs in the data used to estimate the validity."⁷¹ It is hard to know why these studies, which were readily available to Sturm and Guinier, were not discussed in their work.

As for Sturm and Guinier's attempt to downplay LSAT validity through their restriction of range position,⁷² little support is available. With no such correction, a major recent report concludes, validity coefficients will be underestimates.⁷³ Even as such, the report continues, coefficients "are quite reputable, particularly" when compared to GMATs and GREs.⁷⁴

Finally, and most important for our purposes, challenges to the validity of the LSAT based on minority performance are groundless.⁷⁵ A major study could not speak more clearly to the point: "The validity

68. LINDA WIGHTMAN, LSAC RESEARCH REPORT 93-95, *Predictive Validity of the LSAT: A National Summary of the 1990-92 Correlation Studies* 23 (1993). Wightman repeats her conclusions, while incorporating other research, in her most recent study, *The Threat to Legal Education: An Empirical Analysis of the Consequences of Race as a Factor in Law School Admissions*, 72 N.Y.U. L. REV. 1, 31 (1997) ("There has been substantial support for the claim of validity of the LSAT for use . . . in the admission process.") As for the Texas and Pennsylvania studies, no other validity study confirms them. Since each of these studies was limited to a single institution, while the LSAC study deals with 167 law schools, the latter surely must be presumed to be more representative. *Id.*

69. 72 N.Y.U. L. REV. at 21. The report adds that the optimal prediction of the first-year GPA is achieved when LSAT is weighted 60% and UGPA 40%.

70. *Id.*

71. *Id.* at 33.

72. See *supra* notes 65 and 66.

73. See Wightman, *The Threat* . . . , *supra* note 68, at 32-33. Wightman offers a nice discussion of the restriction of range problem.

74. *Id.* at 33, n.74.

75. See *supra* note 61 for an account of minorities and the SATs.

data do not support the concern that the LSAT score or the traditional combination of LSAT score and undergraduate grade-point average are less valid for any of the minority groups than they are for the white group.”⁷⁶ As for the relative value of the LSAT and UGPA in predicting academic success for minority and white students, the results are even more damaging to Sturm and Guinier’s claim. The study shows that, as a predictor, UGPA alone “seems to be significantly less valid for black students than for white students.”⁷⁷

In sum, if there is a case for the proposition that tests are of limited value in helping to predict future academic success, that case has not been made. Nothing discussed up to this point, however, has explicitly addressed the use of employment tests, which is the subject of the following Part.

PART II: THE WORKPLACE

Brian Gilhooly was a young firefighter in the City of Chicago when, with six years on the job and an associate’s degree in Fire Science in hand, he applied for a promotion to lieutenant. Months of study for the exam helped him emerge 175th out of 2,059 test-takers: When scores were adjusted for race, however, Gilhooly, who is white, dropped to 217th and was thus out of contention for promotion. Gilhooly felt “robbed,” after having lost not only the elevation in rank, but also the increase in salary of \$6,500 per year.⁷⁸ He tells sadly of one of the unpleasant and unanticipated consequences of this loss. His daughter, then six, was visiting the firehouse when she eyed a black paramedic. “Daddy,” she whispered to her father, “is that the man who took your job?”⁷⁹

For Sturm and Guinier, Gilhooly’s is the stock workplace anti-affirmative action story, “equat[ing] functional merit with a numerical ranking on paper and pencil tests.”⁸⁰ Pursuant to this story, a police officer or firefighter who “scored several points higher on the civil service exam [will inevitably conclude] that he is more qualified for

76. LINDA WIGHTMAN AND DAVID MULLER, LSAC RESEARCH REPORT 90-03, *An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law Students* 23 (1990). Wightman restates this conclusion in *The Threat* . . . , *supra* note 67, at 34.

77. *Id.* at 23.

78. See Donna St. George, *For White Men, Anger Taking Political Shape*, PHILADELPHIA INQUIRER, Nov. 12, 1995 at A1.

79. *Id.*

80. See Sturm and Guinier, *supra* note 7, at 961 n.24.

the job.” Underlying this view, we are led to understand, is the notion “that institutions know in advance what they are looking for, and that these functions will remain constant across time and a wide range of work sites. In particular,” they add, “standard approaches to testing and test validation assume we can predict what the job will require in the future, based on how it has operated in the past.”⁸¹

But, Sturm and Guinier tell us there are a number of problems here, just as in the case of academic prediction.⁸² First, “testers have failed to develop meaningful measures of successful performance. . . such as worker productivity or even . . . pay.”⁸³ Relying heavily on the work of Michael Selmi,⁸⁴ Sturm and Guinier claim that the best predictions of performance are correlated with only 9% of disparities in performance.⁸⁵ Even supplementing objective tests with subjective supervisor evaluations does not solve the problem because such evaluations “are notoriously unreliable measures [that] have been shown to be biased in ways that correlate with race and gender.”⁸⁶

Second, because they emerge from one-shot measures (much like the SAT), differences in test scores, even if reliable, are often statistically insignificant.⁸⁷ That is, individuals in the same relatively narrow band of test scores cannot be shown to differ appreciably from one another. Yet such differences are all too often reified as the basis of decision-making.

81. *Id.* at 1003.

82. The reader should note that Sturm and Guinier do not distinguish between the implications of testing for academic and employment as neatly as I do for purpose of presentation. Thus, some of the material that follows is equally applicable to Part I.

83. *Id.* at 969-70.

84. *See id.* at notes 89, 91, 102, 105. *See also* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 U.C.L.A. L. REV. 1251 (1995). Selmi, a professor of law, argues that the affirmative action debate has not paid sufficient attention to statistical theory. *Id.* at 1253-54. More particularly, he argues, it fails to take into account the notion of the *standard error of measurement*, which operates, especially where a test taken only a limited number of times, to recast a raw score into a range of scores to give effect to the possibility that the raw score may not be representative. He uses as his illustration the facts of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). In that case, Paul Johnson scored a 75 on the dispatcher examination, two points higher than Diane Joyce, whose raw score was 73. When Joyce got the job, which had never been held by a woman, Johnson sued. The Supreme Court held 8-1 (Scalia dissenting) that the affirmative action plan was justified primarily because of the County’s “manifest [gender] imbalance in the workforce.” *Id.* at 631-32.

85. *See* Selmi, *supra* note 84, at 1264; *see also* Sturm and Guinier, *supra* note 7, at 970.

86. *See* Sturm and Guinier, *supra* note 7, at 970.

87. The one-shot point is not invalid. Interestingly, none of the critics suggests that this problem affecting the SAT and many other tests could be easily mitigated by repeating the test, though *students* do make this choice fairly frequently.

Third, since most tests are of a linguistic or logical-mathematical variety, candidates' "abilities in other areas may be obscured."⁸⁸ The resulting "one-size-fits-all" test will invariably ignore attributes that may be crucial to the job. These include, in addition to those specified above,⁸⁹ adaptability and creativity.⁹⁰ With respect to police and fire fighting forces, Sturm and Guinier point out, civil service exams do not, and by implication cannot, test for such crucial values as "honesty, courage and ability to manage anger."⁹¹

Fourth, the standardized exam necessarily "entrenches status-quo modes of production, excluding those individuals who may perform the job just as effectively through different approaches."⁹² How can this problem be resolved? By recognizing that minorities lead lives that are different from those of the majority. This is because minorities start with different traditions and for a variety of reasons, voluntary and coercive, maintain them.

These traditions, these different modes of thinking, Sturm and Guinier emphasize, are invaluable in the ordinary business context⁹³ and especially "in a rapidly changing, unstable, and increasingly complex marketplace."⁹⁴ Since standardized exams lead to a homogenized workforce, they should be severely limited, or perhaps even abolished.⁹⁵

88. *Id.* at 976.

89. *See supra* note 26 and accompanying text.

90. To illustrate this point, perhaps for both the school and work environments, Sturm and Guinier use the experience of Hugh Price, President of the National Urban League. He writes that in spite of having law board scores which were 200 points below that of the "average white enrollee," he finished at the lower end of the middle third of the class at Yale Law School. This meant that, given the very few blacks in the class, he scored higher than many whites with higher board scores. *Id.* at 980, n.119. But surely there is little to this argument. For one thing, Hugh Price's success has not been as a lawyer. For another, LSAT test preparers themselves do not claim a perfect, or even near-perfect correlation between test performance and success. *See LSAT AND LSDAS REGISTRATION AND INFORMATION BOOK 1998-99* at 121.

91. Sturm and Guinier, *supra* note 7 at 977.

92. *Id.* at 982.

93. *See id.* at 977 (explaining that "[i]ndividual performance in both the workplace and educational environments is often enhanced when challenged by competing perspectives or when given the opportunity to develop in conjunction with the different approaches or skills of others.").

94. *Id.* at 958.

95. *Id.* at 1031. Sturm and Guinier conclude their paper with an argument that their system may be required under the American "democratic imperative":

Access to work and education is rapidly becoming a fundamental attribute of citizenship at the turn of the century. Work provides an identity that is valued by others. . . organizes and shapes a citizen's sense of self. . .[and] legitimates. Virtually every aspect of citizenship [and financial well-being] is channeled through participation in the work-

If one-size-fits-all standardized tests⁹⁶ are of limited utility in predicting performance, on what basis can employers decide whom to hire? Sturm and Guinier leave no doubt as to the implications of their work: Actual performance often correlates best with on-the-job training. Those people who do well learn their job on the job. Often those people who have been given an opportunity to do a job perform because they have been given an opportunity to learn the job. It is the opportunity to learn a job, a craft, or a skill that often predicts successful on-the-job performance. This phenomenon tracks the way many experts “learn” their expertise. Experts become skilled as a result of the opportunity to develop their expertise by tackling actual problems.⁹⁷

What, practically, does this mean? Sturm and Guinier tell us about Bernice and about the “major national company” which had no women in upper management and was looking to promote a staff member to general counsel. Bernice was allowed to compete for the job with two other employees on a trial basis over a nine-month period. As it turned out, Sturm and Guinier report, Bernice got the job, a position for which she did not initially consider herself qualified. Faced with crises, she was able to turn her problems into advantages through collaborative decision-making.⁹⁸

Sturm and Guinier also cite the case of Lewis who had quit his job as an academic administrator to start a same-day delivery service business. To find new hires he trained employees and community leaders to scout for recruits with “positive attitudes.” He did not give standardized exams to these recruits; rather, he interviewed them by replicating some of the conditions of the job. He required them, for example, to call at a precise time. If they did not do so, he concluded that they could not be trusted for the job. When candidates were invited to Lewis’ office, they might intentionally have been kept waiting to see how they would handle the delay.

place . . . medical care, pensions, social insurance. . . . In these ways, work has become a proxy for citizenship.

Id.

96. For Sturm and Guinier, the current selection system operates as unfairly as a “poll tax.” *Id.* at 1033. This argument is intriguing and requires further attention. However, because it is different from the other arguments in that the benefits it holds out accrue to the polity, not to the individual firm, the argument will be analyzed no further here. *Id.* at 957.

97. *Id.* at 1003-04.

98. According to Sturm and Guinier, males can also benefit. Jim Lehrer is cited as a model. Apparently when he started in the news business he followed a format that he was given for interviews, and neither listened to nor engaged his subject. How did he learn to conduct interviews? By doing them when he was given the opportunity. *Id.* at 1004, n. 221.

These stories are meant to illustrate successful hiring practices. Sturm and Guinier seem to concede that in some cases, which they never specify, the models will not be appropriate. Thus, Sturm and Guinier can still conclude that what is essential is that "selection should be structured to enable individuals to show what they can do and to enable decision-makers to make decisions based on an individual's capacity to perform. [But u]nless we are prepared to move to a lottery system, we cannot fairly and democratically avoid individual assessment that takes into account functionally [ir]relevant differences and [fails to provide] individuals the opportunity to demonstrate, in context, what they are capable of doing."⁹⁹

In sum, if Sturm and Guinier are right, Brian Gilhooly had no legitimate expectation that a higher test score made his claim to a job stronger. The only comfort Gilhooly can take is that he might do better in a lottery system.

In an important way, Sturm and Guinier are even less successful in analyzing the job setting than the school environment. One need not be a confirmed testocrat to conclude that Sturm and Guinier seem to have created a straw person here. Individuals are not hired ordinarily on the strength of tests without also being subjected to rigorous interviews, a point which Sturm and Guinier seem to concede.¹⁰⁰ This interview is likely to include a review of the candidate's record as reported on a resume. Here is the place to evaluate such character traits as ambition, creativity, team-playing and emotional intelligence.

It may be that in some civil service settings test scores alone are determinative of hiring, and even promotion. Where that is the case, perhaps in some fire fighting and police contexts,¹⁰¹ would it not make more sense to educate decision-makers about the importance of qualitative job factors rather than to junk the whole evaluation system?

An observation by Selmi is telling here. He speaks of how employees send important signals to employers that may otherwise go

99. *Id.* at 1035.

100. *Id.* at 965, 968. Selmi himself acknowledges that test scores are rarely the only information available about a potential employee. *See generally* Selmi *supra* note 84. Indeed, this is crucial to his conclusion. For it is precisely because subjective evaluations discriminate against women and minorities that in most cases women and minorities will emerge with lower overall scores than white males. Affirmative action is thus justified because it compensates for the discrimination in *subjective* evaluations of women and minorities. The interview, of course, is an especially important part of law placement.

101. The Gilhooly case seems to have arisen in such a test-only context. *See supra* note 78 and accompanying text.

unrecognized. With respect to education, he writes, “[t]hose who attend college may *not* acquire skills that will necessarily make them a more valuable employee but the decision to go to college reveals characteristics such as determination and future-orientation that play an important role in one’s productivity.”¹⁰² If correct, Selmi’s observation helps highlight the central contradiction in the Sturm and Guinier plan. Tests, as they claim, may be of little or no use because they do not measure such qualities as creativity, determination, and future-orientation, which are critical for success on the job. But how in the world does the lottery solve that problem?

A related point is also compelling. If going to school is an important signal to an employer, whether or not direct benefits are produced, might this not also be true of learning something in school? The school record, after all, says something about a student’s interest in learning. And grades, like the SAT score, are based on tests. Moreover, unlike the SAT, grades do not ordinarily suffer from the disadvantage of being one-shot measures. They would thus seem to be useful devices for predicting performance. If, as Sturm and Guinier suggest, the only thing certain about jobs is that they will change,¹⁰³ the ability to learn something, anything, would seem to be crucial as a predictor. What better evidence of learning ability than that the learner has mastered some skill that can actually be tested? Or are school exams also invalid as predictors? If that is the case, Sturm and Guinier should explicitly say so.

Law school grades, of course, help measure interest in learning the law. This, presumably, is why law students whose work products are unknown to an employer are ordinarily required to show, or at least summarize, school transcripts. Law school grades, it hardly need be emphasized, are also the product of tests, tests taken at different times and covering different subject matter. Should law firms under these circumstances also abandon reliance on grades and accept the cool logic of the lottery? Significantly, while Sturm and Guinier boldly raise the question of whether good law school grades correlate with good lawyering, they deliberately refrain from accepting the obvious implication that law school grades do not matter.¹⁰⁴

102. See Selmi, *supra* note 84, at 1299 (emphasis added).

103. See Sturm and Guinier, *supra* note 7, at 1004 (stating that unstable markets, technological advances, and shorter product cycles have created pressures for businesses to increase the flexibility and problem-solving capacity of workers).

104. It would be interesting to know how Guinier’s colleagues would react to such an assertion.

We come next to the argument about the importance given to minor differences in test scores. Consider a marathon race won by a hair's breadth. There is, it would seem, natural discomfort in knowing that a tiny disparity in performance creates an enormous disparity in honor and riches, and a natural inclination to want to narrow the gap through regulation. If there is only one race to be run, it might conceivably make sense to act on this impulse. But if races are regularly scheduled, the case for such regulation is much attenuated. The competition for success in school and in the workplace seems not unlike the race just described. With tenacity, imagination, and some skill, there are opportunities for success in the many races in which we compete all along the line.

Even accepting the notion of life as a one-race experience, the weakness in the case for a lottery system should be apparent. Life's decisions are frequently hard ones. Take the decision to go to law school. Not all law students who enroll in law school do so out of a single-minded commitment to the law;¹⁰⁵ some of us, at least, were seriously tempted by medical or business school or a career on the stage. The precipitating factor was, perhaps, no weightier than that the law school was down the block. Yet, no matter how close and anxiety-producing the decision to go to law school, it is not made randomly. Indeed, it is almost inconceivable that, of the over 100,000 students now in law school, a single student is currently enrolled on the basis of the functional equivalent of a lottery – a toss of a coin.

Selmi himself acknowledges the point that minor differences are not meaningless. “[I]f an employer has no other information than test scores, and no other objective than maximizing its productivity,” he writes, “then, in the long run, the employer would likely experience some gains by selecting individuals in rank order.”¹⁰⁶

Selmi's conclusion underscores the oddity of hearing law academics like Sturm and Guinier expressing such concern about the occasional, disproportionate consequences of minor differences. Our jurisprudence, it would seem, is full of such instances. Fifty-five miles per hour is a reasonable speed and all is well. If drivers go one mile

105. Law school, according to John Grisham, is a “great American babysitter for directionless postgrads.” JOHN GRISHAM, *THE RUNAWAY JURY* 309 (1996).

106. See Selmi, *supra* note 84, at 1276 (stating that even where the greater expected performance is minimal, over a large number of selections higher scores are likely to produce some utility to the employer). Having conceded the point, however, Selmi goes on to explain that “[i]t is rarely the case, however, that an employer will only have test score information available.” *Id.*

per hour faster, they risk losing a personal injury case and plunging into poverty. "Little things," in the words of the old song, "mean a lot."

Finally, in regard to test differentials, the reader should note how a system that discourages the use of minor test-score differentials as a basis for hiring or promotion decisions is one that can quickly get out of hand. Sturm and Guinier wonder about the solution to cases of "relatively indistinguishable" individuals where particular "institutional needs or values" are at stake.¹⁰⁷ Is it proper for the company to go ahead and act on these needs and values directly? Apparently not.

"A weighted lottery [presumably as in the Lowell High case] may be the fairest and most functional approach for dealing with special skills, abilities and backgrounds that are particularly needed by the institution." If even specific and legitimate institutional needs do not count for much, it should not be surprising that Sturm and Guinier's plan for ignoring relatively insignificant score differentials might get corrupted. The Gilhooly facts supposedly illustrate how scores that are only "several points higher" for one individual lead to a deep sense of entitlement.¹⁰⁸ Yet Gilhooly lost forty-two places in the rankings through race adjustment, a fact that Sturm and Guinier ignore.¹⁰⁹

Returning to a school example for the moment, *Hopwood* is probably an even better instance of a principle stretched beyond recognition. Recall that Hopwood scored a 199 on the TI,¹¹⁰ while the lowest ranking, matriculating minority student came in at 183.¹¹¹ Again, the differential might be significant.¹¹²

107. Sturm and Guinier, *supra* note 7, at 1012.

108. *See id.* at 961 n. 24.

109. *See supra* note 78 and accompanying text. Without the raw scores, of course, no conclusion can be drawn about the extent of the unfairness to Gilhooly. It seems likely, however, that we are speaking of a differential that is substantially greater than the one used by Selmi in his stock story. *See Selmi, supra* note 84.

110. *See supra* note 36 and accompanying text. This was, of course, before adjustment.

111. *See Hopwood v. Texas*, 861 F. Supp. 551, 580 (1994).

112. We cannot know for sure because the Hopwood cases do not show the absolute gap or the percentile significance of this disparity. We do have information on the component parts of the TI, specifically that applicants who were neither black nor Hispanic had median GPA and LSAT scores of 3.53 and 164, while blacks scored 3.25 and 157, and Mexican Americans scored 3.27 and 158, respectively. If the differentials are significant, and given the validity of the data discussed above, they would not necessarily undermine the case for affirmative action. It might well, however, undermine the case for a lottery system.

Whatever the size of the gap between Hopwood's credentials and those of her minority competitors, it seems fair to wonder generally about Sturm and Guinier's candor on the importance to be given to *minor* score differentials. There is, tragically, more than a minor discrepancy between white and black SAT scores. At U.C. Berkeley, for example, almost three hundred SAT points separate the average white and black student SAT scores. *See Steele, supra* note 33,

Sturm and Guinier's third and fourth objections can be addressed together. If the world is "rapidly-changing, unstable and increasingly complex,"¹¹³ and the solution to this economic and social quickening is more creative and efficient thinking, having a multiplicity of approaches on the table can certainly help. Sturm and Guinier conclude that "diversity is an independent value in generating creative solutions to problems."¹¹⁴

It could be argued, however, that an even better solution might be to force potential employees to take more, not fewer tests, in particular, IQ tests; and in the process overturn the much-celebrated *Griggs* case.¹¹⁵ Why? Among other things, the IQ test measures "g", arguably "the single most powerful single predictor of job success"¹¹⁶ because it measures "higher trainability."¹¹⁷ What better approach to an environment proclaimed so insistently to be protean?

Diversity, moreover, is not a skill; difference, as CRATs argue does not imply deficiency, but neither does it imply efficiency. Even if it did imply efficiency, other kinds of diversity besides racial are available to employers. Thus, it is important to understand what precisely racial diversity might mean, in connection with a specific job, say in microbiology.

A black microbiologist may be more interested than others in AIDS research because the disease disproportionately affects the black community. But surely nothing else in the black experience makes a black microbiologist more valuable than a white one and,

at 140. Thus, if Sturm and Guinier's lottery system is to have any real impact, test scores are going to have to be widely ignored. That there is a strong constituency for all but eliminating cognitive standards is clear. Professor Linda Gottfredson, a nationally known authority on testing, describes the case of the police exam administered in Nassau County in 1994. *See* Linda Gottfredson, *Racially Gerrymandering the Content of Police Exams to Satisfy the U.S. Justice Department*, 2 PSYCHOL. PUB. POL'Y & L. 418 (1996). Under a 1990 consent decree with the U.S. Department of Justice, Nassau County was to "develop a new exam that either does not have an adverse impact on blacks, Hispanics and females, or has been validated." *Id.* at 419. The test that emerged had no traditional cognitive component. It did, after much pressure on the testmakers, include a reading part; but in the same year that the police in the O.J. Simpson case were botching their investigation, the reading threshold was set so that 99 percent of those taking the reading test passed. *Id.* at 437-38.

113. *See also supra* note 93 and accompanying text.

114. *See* Sturm and Guinier, *supra* note, 7 at 1024.

115. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

116. *See generally* Linda Gottfredson, *Why g Matters: The Complexity of Everyday Life*, 24 INTELLIGENCE 83 (1997). For two entire journal issues on this subject *see* 29 and 33 J. VOCATIONAL BEHAV. (December 1986 and December 1988).

117. Gottfredson is hardly alone in this view. Indeed, according to Howard Gardner, an archcritic, the general-intelligence perspective is the majority position among psychologists. *See* Howard Gardner, *Who Owns Intelligence?*, ATLANTIC MONTHLY, Feb. 1999, at 68.

therefore, compensates for what might be even a marginal disadvantage in scientific knowledge, all other things being equal. If there is, indeed, a black microbiological, and for that matter sociological, approach, it has to be spelled out at the very least.

Now take the case of a black microbiologist seeking a position on a professional research team. Since an institutional need cannot be satisfied by a direct appointment of the candidate scoring highest on tests who happens to be black, or even the best black candidate,¹¹⁸ a lottery may be far less effective than traditional affirmative action in solving an individual employer's problem of achieving the benefits of a diverse perspective.¹¹⁹

Whether there is a minority microbiological and sociological *method* and whether being a minority is itself a skill, minorities, like everyone else, have to learn something in order to achieve success. When Sturm and Guinier complain about fewer educational opportunities for minorities, they bring us to the heart of the matter. Education is a debt we owe ourselves and, arguably, our communities. A lottery policy such as proposed by Sturm and Guinier, however, will hardly help us fulfill an obligation to go to and stay in school or otherwise develop our skills.¹²⁰

It should be clear that in an economic world that rewards learning, a lottery system announces openly and unmistakably: "You need not be the best, only good enough; making the extra effort may well amount to a waste of time." Sturm and Guinier have made the mediocre test-taker into the enemy of the best.

118. Such tactics go against the logic of the lottery.

119. If a Ph.D. is allowed to stand as a valid job requirement in a science environment, the chances of achieving some kind of diversity through a lottery will be tiny since only 1% of working Ph.D.'s in computer science/mathematics are black. See National Science Board, *SCIENCE AND ENGINEERING INDICATORS-1996*, 3-9 (U.S. Govt. Printing Office (NSB96-21)).

120. An entire field of educational psychology developed in the last thirty years under the heading of "locus of control" supports this conclusion. Locus of control is defined by its formulator as "the degree to which persons expect that . . . an outcome . . . is contingent on their own behavior or personal characteristics versus the degree to which persons expect the [outcome] is a function of chance, luck or fate, is under the control of powerful others, or is simply unpredictable." See J. B. Rotter, *Internal Versus External Control of Reinforcement: A Case History of a Variable*, 489 *AM. PSYCHOLOGIST* (1990). Persons who see a connection between inputs and outcomes are said to operate in *internal control* mode. See Julian Rotter, *Generalized Expectancies For Internal Versus External Control of Reinforcement*, *Psychol. Monographs: General and Applied*, v. 80 No. 1 at 1 (1966). Persons in the other category operate on a theory of *external control*. See *id.* An orientation towards achievement, not surprisingly, is linked to internal control. See GUY LEFRANÇOIS, *PSYCHOLOGY FOR TEACHING* 370 (9th ed. 1997). After all, if success is only a function of luck, there would seem to be no reason to work for it. Indeed, to improve student performance, some psychologists have developed programs to teach internal control. *Id.* at 371.

What impact will such a message have on Americans once they are on the job and beyond the range of tests? Will it lead to their demoralization, and thus a decrease in their productivity? Sturm and Guinier do not say. In attempting to justify affirmative action, however, Selmi suggests that affirmative action might well help increase overall productivity. This is because it will lead to a "tightening [of] the job market for white men, which may then provide effort incentives for those men who will now have a greater fear of unemployment."¹²¹

This argument could be extended to suggest that anyone hired will also work harder to protect his or her position against threatening newcomers. There is some sense to this notion, but perhaps not enough. If the response of minority employees to pro-white workplace bias is demoralization, and not intensification of work effort, why will that not be true for employees on the job where a lottery system is in effect for retention and promotion?¹²² Moreover, how can established employees be challenged to do better when, because a lottery system is used for new employees, the most motivated job candidates have no edge over the least motivated in the hiring process?

There is yet another problem with Sturm and Guinier's proposal. If job testing is abandoned, employees will have no objective basis for showing what they know. This would put additional burdens of supervision on supervisors. Further, testing works at cross-purposes with the needs of many minorities. If, indeed, minorities are evaluated less favorably than whites for the same work,¹²³ the absence of objective work measurement will give those in power greater opportunity to apply their judgments destructively. Sturm and Guinier are aware of this conundrum.

Here is their solution: "For each assessment, decision makers would articulate criteria for successful performance, document activities relevant to the judgment, assess candidates in relation to those criteria, and offer sufficient information about the performances of candidates to enable others to exercise independent judgment."¹²⁴ In short, in the interests of furthering the well-being of the firm, a new

121. See Selmi, *supra* note 83, at 1305. At the same time, Selmi suggests that the problem of white demoralization is exaggerated while the benefits of affirmative action are ignored. *Id.* at 1308.

122. Or, indeed, where an affirmative action plan is in effect.

123. See *supra* note 85 and accompanying text.

124. See Sturm and Guinier, *supra* note 7, at 1014 (emphasis added).

bureaucratic layer will make personnel decisions. But who is to say that first-line supervisors will not doctor the records to achieve their allegedly nefarious purposes, or given Sturm and Guinier's assumptions, that higher level supervisors will not give effect to their own prejudices?

This question leads, ineluctably, to the problem that Sturm and Guinier share with the German academic who counseled the Jewish beggar:¹²⁵ Money is not their specialty. It seems fair to say that only academics could write an eighty-two page article seeking to revolutionize admission and hiring strategies with only footnote reference to cost. The footnote references an estimate by Howard Gardner that performance-based assessment of students "might increase costs by 10 to 15 percent but probably not more."¹²⁶

What about performance-based evaluation in the workplace? Regarding the employment setting, Jencks himself acknowledges that cost is far from a negligible problem. "The economic benefits of getting the best possible workers," he writes, "will not always exceed the cost of hiring, training and firing a lot of less capable workers."¹²⁷ He draws out the inevitable implications. "When the costs of hiring mistakes are high, employers may find that it pays to rely on test scores, even if doing so excludes more competent blacks than competent whites."¹²⁸

If anything, Jencks understates the cost problem. A job notice for an assistant professorship in English or history these days can attract hundreds of applications. "[I]f the opportunity to participate . . . offers the best evidence of capacity to perform,"¹²⁹ should these applicants be brought in and given what would effectively be adjunctships to see how they perform in the classroom?¹³⁰ Or, should a lottery be used to weed out applicants? Sturm and Guinier do not say.

Nor can the Bernice and Lewis cases extricate their proposal from that difficulty.¹³¹ To be sure, Bernice is competing with only two insiders for the job of general counsel, so temporary job-sharing is

125. See *supra* note 3 and accompanying text.

126. See Sturm and Guinier, *supra* note 7, at 1021 n.279.

127. CHRISTOPHER JENCKS, *Racial Bias in Testing*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* note 17, at 81.

128. *Id.*

129. See Sturm and Guinier, *supra* note 7, at 1010.

130. Selmi would seem to say no. See *supra* note 84, at 1265 ("It is simply not possible, in all but the most unusual circumstances, to hire all of the applicants on a trial basis.").

131. See Sturm and Guinier, *supra* note 7, at 1015.

conceivable (though the fact that this practice is so uncommon may say something about real world experience). However, we should note that the absence of outsiders suggests that they were not welcome to apply. If this is the case, under the theory that many persons could do the job, the firm has only hurt itself by eliminating innumerable qualified applicants.

We might also note that the Civil Rights Movement has for many years (rightly) insisted that an important way to break the *old boys'* network is to post job opportunities so that outsiders have a chance.¹³² It is inconceivable that Sturm and Guinier would want to reverse that strategy. And yet, if they did not reverse it, we would be back to our example of the advertised vacancy in the English or history department.

As for Lewis, of course he does not rely on standardized tests in selecting employees. Consider his type of business. Is the technical skill that needs to be tested in a would-be messenger at all comparable to that of a firefighter or a law teacher?

But perhaps the best way of thinking about the viability—and perhaps even the sincerity—of Sturm and Guinier's proposals is to wonder: How do Guinier and Sturm do their own hiring, say, for research assistants? On the basis of grades? Interviews that are tainted by bias?¹³³ A lottery system? This last notion would not be absurd; after all, at the University of Pennsylvania Law School and Harvard, among the top ten schools in the nation,¹³⁴ virtually all students can be presumed minimally competent.

We might also wonder how Sturm and Guinier would hire faculty at their schools and, indeed, in the rest of academia. It seems fair to say that most people coming into teaching full-time have neither previously taught nor written serious law review articles. On what basis, then, can success be predicted? Grades? Interviews? If the work product of the academic is principally law reviews, should there be a law review-type competition? Should this competition climax with a lottery?

Whatever we imagine the responses to these queries to be, one thing is sure. Presumably using traditional methods, whether Harvard thinks that Guinier is the best by a mile or by an inch, she is still the

132. *Id.* at 1002.

133. *Id.* at 997.

134. See U.S. News and World Report Ranking, Mar. 12, 1998, at 78.

best (or at least the best that Harvard can now get). She is definitely not replaceable through a lottery.

What is not clear is Guinier's real thinking on whether thousands, indeed, tens of thousands of others around the country could successfully have stood-in for current faculty and students at Harvard if only a lottery system or a giant apprenticeship program had given them a chance. To display her good faith in this regard, perhaps she should announce publicly that she, her students, and no doubt her colleagues are nothing special, not only in an academic law review article, which the people who really count do not read, but in the *New York Times* and *The Wall Street Journal*, and in a reprint in *Harvard Magazine*. She should do her best to persuade her colleagues and students to do likewise. Those of us who have thus far failed to be certified as Harvard material could then witness the fallout with no little *schadenfreude*.

CONCLUSION

How, finally, are we to understand the Sturm and Guinier project? One distinct possibility, is that it is born of the utter despair shared by many Americans over the intractability of a major social problem—the seemingly permanent educational gap between whites and some minorities in America, and the damage to the self-esteem of those who learn upon admission to college or law school that they have some catching up to do.

In this regard, the project can be linked to a dazzling array of scholarly gyrations by critical race theorists, CRATs,¹³⁵ designed to distract minorities from their responsibilities (I say nothing of blame here) and, to place traps, minefields and snakepits in their way.¹³⁶

What is to be done? A recent pronouncement by Diane Ravitch¹³⁷ is helpful. Concerned about the consistently dismal performance of American students in international evaluations, she rejects the temptation to, as Shelby Steele puts it, “demonize the very principles—rigorous intellectual effort, skill mastery, grade and test performance—by which those who compete . . . are strengthened.”¹³⁸

135. See generally Dan Subotnik, *supra* note 16.

136. *Id.*

137. Ravitch, formerly a high ranking official at the U.S. Department of Education, is a senior research fellow at New York University and a non-resident Senior Fellow at the Brookings Institution.

138. See Steele, *supra* note 33, at 134.

Rather, she insists that American “[s]tudents need to know that their work in school will count in the world of work.”¹³⁹ To help put this idea into action, Ravitch suggests, “Employers should insist on high school transcripts when hiring [which] should provide clear information about grades, courses taken, attendance”¹⁴⁰ Ravitch’s emphasis on this point makes it very hard to ignore the anti-education strain in Sturm and Guinier’s work: Knowledge is overvalued; we can substitute a lottery for it.

Bashing education is hardly uncommon in radical literature. Since cultures tend to perpetuate themselves through education, insurrectionists must, of necessity, attack education. We know of Mao’s musings on the value of reading,¹⁴¹ now presumably, even in China, consigned to the dustbin. Mao spoke even more precisely on the subject of book knowledge when justifying the cadre of “barefoot doctors” he unleashed on that country thirty years ago. “It is not so important to have so much formal training,” he explained. “[Doctors] should mainly learn and raise their standard in practice.”¹⁴² Who can doubt that it is more important to push minority—as well as majority—Brian Gilhoolys¹⁴³ into serious study of fire science rather than to assuage potential damage to their self-esteem if they do not, by making mediocrity the standard of the day? Can anyone in this fast-moving Information Age fail to see the absurdity of devaluing information, to say nothing of drive and imagination, through a lottery system? Yet CRATs continue a bias against education as we know it today when they suggest that knowledge and epistemology are indissolubly tied to political power;¹⁴⁴ that educational standards are created by white men to further their own interests and are therefore invalid;¹⁴⁵ that the bar exam in particular is unfair to minorities;¹⁴⁶

139. DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION 185 (1998).

140. *Id.*

141. See Chang, *supra* note 3 and accompanying text.

142. *Id.* at 426. My purpose here is not to attack Mao’s educational policy for China in the 1960s. It is, rather, to highlight the connection between Guinier and Mao and, as will be clear in a moment, to ask whether such a policy makes sense in a postindustrial age.

143. See *supra* note 79.

144. See Gary Peller, *Race Consciousness*, 4 DUKE L.J. 758 (1990).

145. See John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); see also Richard Delgado, *Brewer’s Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 9 (1991); cf. STANLEY CROUCH, *THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE* 14, 15 and 44 (1995) (“We aren’t supposed to have standards because standards were all developed as forms of exclusion and oppression. . . . We all deny that tradition of our hard-won achievement whenever our conciliatory cowardice gets the better of us and we treat black people like

that it is not necessary for race scholars to carefully and dispassionately examine their own motivations in their writing;¹⁴⁷ that perhaps minority women should be exempt from the ordinary tenure process and, instead, be welcomed into academia *with* tenure;¹⁴⁸ and that black teen pregnancy—notwithstanding its clearly devastating educational implications on children—can be celebrated as heroic.¹⁴⁹

For Shelby Steele, hardly a test fetishist, such positions could not be more wrong, especially for minorities. “There is no full equality for any group,” he writes, “that is not educationally and economically competitive.”¹⁵⁰ “[We must] internalize a devotion to academic and economic excellence,” he insists, “that is *not contingent on any assistance that we might or might not get from the larger society*.”¹⁵¹ “I do not believe that minorities will ever have true respect for a reform,” he concludes, “that does not demand as much or more of them as from others.”¹⁵² If Steele is right, even if designed for the noble purpose of eliminating the stigma that affirmative action produces, Sturm and Guinier’s proposal is ultimately destructive.

An image proffered by Lani Guinier in a recent talk highlights the destructive power of CRATs in Steele’s terms. Honored as the University of Kentucky Blazer Lecturer in February 1997, she began her address by announcing that minorities and women were the miners’ canaries of our society.¹⁵³ Pondering the question of whether the canaries should be fortified in some way against the rigors of the mine, she concluded that “[no], it is not the canary that needs to be fixed; it is the . . . ‘social environment.’”¹⁵⁴

spoiled children who shouldn’t be asked to meet the standards that the best of all Americans have met.”).

146. See Cecil Hunt, *Guests in Another’s House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 729, 791-92 (1996); see also RUTH COLKER, *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM* 43-48 (1998).

147. See Catherine Wells, *The Theory and Practice of Being Trina*, 81 MINN. L. REV. 1381 (1997); see also Regina Austin, *Sapphire Bound!*, 1989 WISC. L. REV. 539, 542 (1989) (stating that “[t]he time has come for us to get truly hysterical, to take on the role of ‘professional Sapphires’ in a forthright way. . . to testify on her own behalf, in writing, complete with footnotes”).

148. See Stephanie Grillo, *Tenure and Minority Women Law Professors*, 31 U.S.F. L. REV. 747, 754 (1997).

149. See generally Austin, *supra* note 147.

150. See Steele, *supra* note 33, at 108.

151. *Id.* at 113.

152. See Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505-506 (1997). Having a fragile respiratory system, the canary succumbs more quickly to gas and thereby alerts miners to the dangers of asphyxiation and explosion.

153. *Id.* at 507.

154. See *supra* note 7.

Let us pursue this canary metaphor promoted by Guinier for the perceptions it gives about minorities (and women) in a society dominated by white males. The canary is beautiful. It sings. It is different. Yes, but it is also fragile. It was not created to work. A program of self-improvement would not only be futile, it would also be destructive because the canary is complete the way it is. Yet, for all its perfection, the canary cannot help itself survive.

It should now be clear what Guinier has accomplished with her bright metaphor and the desperate game of chance she markets with Susan Sturm under the seductive subtitle, "Reclaiming the Innovative Ideal."¹⁵⁵ If we marry Guinier's lottery proposal with her canary imagery, if we establish our own Cultural Revolution with the canary as its official bird, we deliver a message that the most hardened CRATs and white supremacists can support—that blacks and women in America today cannot aspire to serious work, that their function is to entertain and to die.

155. See Steele, *supra* note 33, at 23, 131 (giving us reason to run for the hills when we hear such appeals to our creative impulses. He summarizes his experience in four Great Society programs: "Our mission was simply to be 'innovative,' but this only meant rejecting the traditional ways of doing things, *whether that way made sense or not.*" (Emphasis added) . In other words, Steele explains, "our generation's vanity [is] our general willingness to have the glib, 'innovative' idea stand in for principle and difficult struggle.").