# LANI GUINIER, JOSEPH BIDEN, AND THE VOCATION OF LEGAL SCHOLARSHIP

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It is a pleasure to contribute to this tenth anniversary issue of *Constitutional Commentary*, which deserves great credit for its support of free-ranging scholarly reflection, unfenced by the razor wire of bluebook citations. In our profession we have great need for such spaces of informal dialogue and unconstrained deliberation.

It is in fact about our profession that I wish to meditate in this short essay, provoked by the painful and ill-fated nomination of Lani Guinier. I want to focus on a cavalier but wickedly penetrating remark of Senator Joseph Biden, the chair of the Senate Judiciary Committee that was to pass on Guinier's candidacy. After reading Guinier's scholarly articles, Biden said:

> If she can come up here and explain herself, convince people that what she wrote was just a lot of *academic* musing, who knows? . . . I suppose it's conceivable that she could be confirmed. If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, not a shot.[1]

Biden's comment candidly questions the social significance of writing that is avowedly "academic." It invites us to inquire into the nature of our vocation, to ask for whom and for what purpose we write.

Biden uses the adjective "academic" dismissively, evoking the genial condescension with which mainstream culture regarded intellectual "eggheads" in the 1950's: Academics are "theoretical," "out-of-touch," "impractical." Lost in abstraction, they cannot be entrusted with "real world" tasks. But of course anyone with any knowledge of Lani Guinier would know that none of these characterizations could be applied to her. She was

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1. Neil A. Lewis, *Senate Democrats Urge Withdrawal of Rights Nominee*, N.Y. Times, June 2, 1993, at A1 (italics added).

a tough, real-world, hard-driving litigator; she remains an articulate, hard-edged, smart, and persistent scholar.

So Biden more probably meant his use of the word "academic" to apply not to Guinier personally, but to the genre in which her work appeared. He seems to have meant that law review articles as a form can be dismissed as merely "academic." We can read Biden as establishing an opposition between the abstract and impractical work of law professors who write for law reviews, and the real and practical work of Washington officials who engage in the project of law creation and enforcement.

The question I want to pursue is how we in the legal academy ought to regard this opposition.

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At first, of course, the answer seems obvious. No self-respecting group of law professors could possibly accept an image of their work as fumbling and incompetent, relevant only to the theoretical and useless arcana of the law. But certainly there is at least one sense in which, I expect, most of us would accept Biden's opposition. The purpose of legal scholarship is the achievement of truth, whereas the purpose of the work of Washington officials is governance. And these two purposes, as Hannah Arendt has had occasion to remind us in terms that strongly echo Biden's remark, can be deeply oppositional:

> The story of the conflict between truth and politics is an old and complicated one, and nothing would be gained by simplification or moral denunciation. Throughout history, the truth-seekers and truthtellers have been aware of the risks of their business; as long as they did not interfere with the course of the world, they were covered with ridicule, but he who forced his fellow-citizens to take him seriously by trying to set them free from falsehood and illusion was in danger of his life: "If they could lay hands on [such a] man . . . they would kill him," Plato says in the last sentence of the cave allegory.[2]

Biden covers the law reviews with "ridicule," and by so doing reenacts an ancient tension.

Truth, from the perspective of power, can seem hopelessly naive and dangerously ingenuous. Power, from the perspective of truth, can seem irredeemably corrupt and unfounded. Arendt helps us to see that this tension goes very deep. For truth cannot remain truth and yield to expediency; truth demands resistance

2. Hannah Arendt, *Truth and Politics*, in *Between Past and Future* 227, 229 (Penguin, 1978).

to the blandishments of this world. And, conversely, governance cannot yield to truth without losing the forms of interaction that constitute politics. "[E]very claim in the sphere of human affairs to an absolute truth, whose validity needs no support from the side of opinion," Arendt writes, "strikes at the very roots of all politics and all governments."[3] "Seen from the viewpoint of politics, truth has a despotic character."[4]

One can see the tragic consequences of this opposition clearly at work in the Lani Guinier case. Scholarly law review articles are written to reveal the truth of their subject. Academics would consider it a betrayal for an author to alter her conclusions for reasons irrelevant to truth, as for example because of a desire to be appointed Assistant Attorney General for Civil Rights. Guinier's articles are thus legitimately read as expressing her authentic views of truth.

Politicians, however, even when guided at their best by "an 'ethic of responsibility,'"[5] always speak in ways that are constrained by considerations of role and expediency. It would be disastrous for them to be subjected to an unconditional "duty of truthfulness."[6] And since Guinier's truth was unacceptable to the political world of Washington, Biden in effect invited Guinier to convert her truth into a form of expediency, and to recharacterize her writings as inauthentically constrained by the external requirements of academic life. The articles could be rejected as mere "academic musings."

Biden thus set the repudiation of her prior truth as the price for Guinier's passage from the world of scholarship to the world of politics. Truth, however, is "despotic," and to Guinier's credit she found that price to be too high. The barrier between truth and governance proved impassable.

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There is, however, more to be learned from the confrontation between Guinier and Biden. We must ask why Guinier's truth proved to be so very unacceptable to Biden's Senate that Guinier could not even be given the opportunity to defend it. Guinier's truth was literally unspeakable in the halls of Congress. This is curious because the thrust of Guinier's scholarship was to proffer an interpretation of the legislative intent behind laws en-

3. Id. at 233.
4. Id. at 241.
5. Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays in Sociology* 77, 120, 120-27 (H.H. Gerth & C. Wright Mills eds. & trans., Galaxy, 1958).
6. Id. at 120.

acted by that very Congress. Clearly Guinier had got matters strikingly wrong. Her misapprehension seems so very fundamental as to be incomprehensible in so smart and perceptive a scholar.

Unless, of course, Guinier was never really concerned with the prosaic discovery of actual legislative intent at all. In fact the most plausible interpretation of her controversial articles is that they were intended to set forth the best possible interpretation of the Voting Rights Act. The fact that Congress did not and would not enact the statute Guinier had in mind was to her apparently irrelevant to the validity of her interpretation. In that sense her interpretation was utopian; it was truth crying out against history.

The utopian impulse shares with traditional legal scholarship a hunger for achieving the truth about the social arrangements that govern us. I was struck by the special nature of this hunger when I was asked to guest lecture in a graduate seminar offered by the Berkeley humanities center on "The Historiography of the Subject." The seminar began by having two graduate students, one in English and the other in History, comment on my work. I had submitted articles discussing the legal constitution of the subject in the tort of invasion of privacy.[7] Both graduate students were proficient in the most advanced techniques of cultural theory. They each remarked that my work contained a great deal of sociology which they did not feel competent to evaluate. They each said that they would instead take my articles as themselves "texts," and they each then proceeded to practice on those texts the elegant and standard analytic moves of post-modern analysis.

I was astonished. By repudiating the sociology in the articles, the students denied any concern with the "real world" in which they themselves lived. By flattening the articles into "texts," they nullified the possibility of arguments for legal reform. Such arguments were no longer to be engaged, but distanced, objectified, and analyzed as examples of discourse. The methodology practiced by the graduate students thus effectively erased the question, "How ought we practically to order our lives?" I realized at that moment how different from the tradition of cultural criticism was the fundamental pragmatic of my work as a legal scholar.

Without the matter ever rising to consciousness, I had written the articles guided by the unstated but central problematic of

7. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 Case W. Res. L. Rev. 647 (1991); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957 (1989).

clarifying and improving the structures established by law for our social life. I was concerned to reveal the truth of those structures. To put the matter somewhat paradoxically, I discovered at that moment that I had been dedicated to uncovering the truth of political action conducted through the medium of law. The graduate students, in contrast, were concerned to reveal the truth of discourse, of the possibility of the construction of human meaning from language. The difference between these agendas informed our vastly disparate frameworks of scholarly inquiry and technique.[8]

From the perspective of this difference, Guinier's work falls comfortably within the orientation of ordinary legal scholarship. Guinier does not read the Voting Rights Act as an objectified text to be analyzed as discourse, but as a charter for governance. Her articles seek to reform legal practice, to reveal truths about how our society ought to be ordered. And yet, in a recent shrewd and much discussed op-ed piece, Guinier's work was characterized as "exalting theory over practice,"[9] an indictment no doubt meant to allude to the accumulating charges that legal scholarship, particularly among "elite" law faculties, has become unacceptably "impractical" and "abstract."[10]

Comparing Guinier's work to that of the graduate students in the seminar, however, suggests that the opposition between theory and practice may not be a useful way to capture the most telling aspects of the confrontation between Guinier and Biden. At least when compared to our colleagues in the humanities, it is obvious that Guinier does care very much about practice. Perhaps, then, a better avenue of analysis might be to pursue the difference between utopian and traditional forms of legal scholarship.

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Traditional legal scholarship attempts to establish the meaning of a statute by extrapolating the intent of the legislature which enacted it. Guinier's controversial work, however, makes no real effort along these lines. It instead attributes to the Voting

8. For a brief discussion of an emerging style of legal scholarship that is dedicated to purposes similar to those of cultural theory, see my *Legal Scholarship and the Practice of Law*, 63 U. Colo. L. Rev. 615 (1992). For a prominent example of this alternative form of legal scholarship, see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801 (1991).

9. Mary Ann Glendon, *What's Wrong With the Elite Law Schools*, Wall St. J., June 8, 1993, at A14.

10. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 35 (1992).

Rights Act what Guinier frankly considers to be its best possible meaning.[11] This difference of technique is instructive. The method of traditional legal scholarship strives to maintain a continuity of interest between the legal implementation of statutes and the political will that enacted them. It does so because it conceives the truth of legal arrangements ultimately to be founded on the realistic possibilities of governance, and it is thus inclined to engage in incremental kinds of reform. Guinier's approach, in contrast, creates a potentially diremptive break between the law and coordinate political institutions. It does so because it conceives the truth of legal arrangements ultimately to be founded on the legitimacy of moral vision, and it is thus prepared to use law to pursue radical reconstitutions of society.

These differences, clearly visible in Guinier's methodology, capture the distinction between utopian and traditional scholarship. The latter conceives law as an art of the possible. It tends to work within and to tinker at the margins of existing legal institutions. It tends to demonstrate great solicitude for the political legitimacy of legal institutions and for, in Harlan Stone's words, the social advantages which accrue from the "continuity and symmetry of the law."[12] Utopian legal scholarship, in contrast, tends to dismiss these virtues as weak and accommodationist. It strives for a more strenuous kind of law that will directly and uncompromisingly express relevant moral principles and purposes. Whether its orientation be toward the right or toward the left, utopian scholarship tends to underplay the independent legitimacy of legal institutions, and to value rectitude more than precedent.

I mean here to be making a specifically jurisprudential, rather than political, distinction. The situation would have been quite different had Guinier framed her analysis as a frank proposal for legislative amendment of the Voting Rights Act. Her work would then properly be understood as a petition to Congress to alter the law, and Guinier would herself accordingly be regarded as a citizen advocating political change, albeit an exceptionally informed and concerned citizen. While her articles might thus have raised issues about the nature of her politics and her judgment, the question of her legal scholarship would have been quite secondary.

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11. See, e.g., Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077 (1991).

12. Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 10 (1936).

Her scholarship became primary, however, because Guinier's writing, like much published today in the law reviews, was implicitly addressed to judges. Its premise was that Guinier's view of the law, as supported and sustained by her legal scholarship, was in fact the law, and that her interpretation of the Voting Rights Act ought therefore to be implemented by courts. The distinction between utopian and traditional legal scholarship is meant to illuminate the difference between two possible settings for such a claim of legal knowledge.

Understood in this way, it is clear that traditional and utopian legal scholarship differ in matters of degree. Claims to legal knowledge can be more or less respectful of existing legal institutions; they can propose interpretations that are more or less realistic; they can identify moral principles that are more or less already immanent within legal institutions. It is instructive in this regard to contrast the Guinier affair with that of Robert Bork. Bork's proposed interpretation of the Due Process Clause was aggressively radical and utopian. Although he was repeatedly characterized as "out of the mainstream," his views were apparently close enough to provoke a lively debate, the upshot of which was to relegate Bork's perspective to the periphery of the national political consensus about the meaning of the Clause. Guinier's proposed interpretation of the Voting Rights Act, however, was evidently too radical to provoke an analogous debate. Perhaps because issues of race are so highly explosive and because the margin of publicly acceptable positions is consequently quite constricted, Guinier's views were dismissed out of hand. Given the ambient political culture, we might conclude that Guinier's scholarship was that much more utopian.

All legal scholarship seeks to attain critical distance. All legal scholarship therefore contains the potential for turning utopian. The danger of traditional scholarship is that it will lose its critical edge, that the bracketing of fundamental political questions will modulate into a self-satisfied complacency dissipating any firm sense of moral direction and purpose. The concomitant strength of utopian scholarship lies in the intensity and clarity of its moral purposes. But its weakness inheres in its arrogance, in its potentially despotic desire to impose its own agenda on those who do not share it. The concomitant strength of traditional scholarship lies in its humility, in its respect for the political reconciliation of difference and for the values of existing social institutions.

This implies, however, that utopian and traditional scholarship are complementary, rather than merely oppositional. Each supplements and corrects the potential deficiencies of the other. Yet it is also true and equally important that the two kinds of scholarship do not stand on identical footing. In the aftermath of legal realism we have no choice but to begin from the premise that law is ultimately an expression of a political will, and it follows from this that utopian scholarship can fulfill its promise of legal reformation only by radically remaking that political will through education or otherwise. This has several significant implications.

It means, first, that utopian scholarship is arduous. It sets itself the daunting task of fundamentally transforming the general political culture as that culture is expressed in already existing law. Second, utopian scholarship is dangerous because it is potentially filled with hubris. Its practitioners must be prepared to set themselves over and against the bulk of their political peers, and they thus stand in mortal danger of succumbing to the will to power. Third, to the extent that we have a stable political culture, utopian scholarship cannot be routinized and can only seldom be successful. It cannot be the stuff of ordinary, everyday scholarship.

Taken together, these implications suggest that utopian scholarship ought not to be undertaken lightly. Borrowing the language of Bruce Ackerman, we might say that traditional scholarship is fitting for "normal lawmaking," while utopian scholarship should be reserved for the far rarer moments of "higher lawmaking."[13] The judgment that such an extraordinary moment is at hand will no doubt be affected by a range of different factors. We can expect, for example, that specific sectors of the academic community will turn to utopian scholarship as they feel increasingly oppressed and marginalized by the ambient culture, increasingly distrustful of the opportunities of ordinary politics, and surely such alienation lies at the source of Guinier's own work.

The law reviews today, however, evidence a very different phenomenon. The community of legal academics seems to have turned *en masse* to higher lawmaking. There is an ever-growing predominance of utopian scholarship in the law reviews; within elite schools utopian accents have almost become *de rigueur*. The coin of utopian scholarship is concomitantly debased. Instead of a high and serious effort to clarify and reform the pur-

13. Bruce Ackerman, *We the People: Foundations* 6-7 (Belknap Press, 1991).

poses of law, it has all too often come to seem merely political petulance masquerading as academic expertise. The searching resonance of the genre is thus denied to those who are most legitimately pressed to invoke it.

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In a small way I can perceive the origins of this general turn toward utopian scholarship in my own teaching. Grading the final examinations in my class on constitutional law last semester, I realized that for my students there was no gap, no disjunction, between the Constitution and their own political perspective. As a committed legal realist, trained to discern, question, and clarify the political purposes of the law, I had apparently succeeded only in making the law for my students utterly transparent to their own political will. I took some comfort in the fact that this influence would surely prove only temporary for the vast majority of my students who would become practitioners. Practicing lawyers learn quite quickly not to confuse their own political will with that of the larger culture, from which law properly springs. For this reason practicing lawyers experience the law as textured and resistant, rather than as transparent.

I also realized, however, that there was no obvious mechanism to convey this message to those few of my students fated to become academics. In fact all our academic assumptions point in the opposite direction. Legal realism has taught us to see legal institutions as instruments of policy. We thus see law as always immanently susceptible to reform on the basis of the best possible policy perspectives, which of course we each strive to articulate. We are therefore drawn to the development and clarification of the purposes that ought to direct the law. When we address our resulting analyses to courts, and when we consequently propose our conclusions as characterizations of what the law is and how it ought to be implemented, we verge toward utopian scholarship. Only rarely and occasionally does a Joseph Biden come along and remind us, as he did on the occasion of the nominations of both Guinier and Bork, that law serves the *community*'s purposes, and that these purposes are the prerogative of common citizenship and not the preserve of academic expertise.

Surprisingly, Biden's rap on the knuckles startled me into a wholly different picture of law. Instead of seeing law as an instrument of policy, I began to imagine it as an institution situated in a field of competing policies and purposes. Many of the historical practices of legal institutions, which had before always seemed to me so obscurantist, suddenly became visible as mecha-

nisms designed to accommodate and reconcile these political differences, without thereby losing the fact of these differences. This realization in turn began to cloud the transparency of law, which now appeared to me clothed with the independent characteristics necessary to achieve this distinctive function. Indeed, I began to think that legal institutions truly subject to the direction of a single unitary will would scarcely be recognizable, and that this was an important meaning of the principle that even the sovereign is subject to the rule of law.

It also occurred to me that this alternative image of the law has natural affinities with traditional legal scholarship. If legal institutions are not transparent to political will, understanding their distinctive function surely can sustain a legitimate academic expertise. That expertise would have little to do with claims of special competence in the ascertainment and articulation of the larger political purposes which ought to be brought to bear on legal institutions. In fact such claims, if pressed as morally compulsory, might even be suspect, because they are in tension with the basic function of law to sustain the continued possibility of political difference.

The clarification and reform of political will would thus properly be allocated to the competence of the general citizenry, from which the legal scholar would not be excluded, but as to which she could not speak with the special prerogatives of expertise. Legal scholarship would ordinarily focus rather more narrowly on the operation of legal institutions, and from this would follow many of the familiar characteristics of traditional legal scholarship: a certain incrementalism, a certain conservative respect for the independent value of law, a certain sense of holding at bay fundamental questions and working instead within a field of political purposes that are already more or less given.

The contrast with utopian scholarship, while a matter of degree, is nevertheless palpable. As an heir of legal realism, utopian scholarship understands the basic function of law to be the reflection and accomplishment of political purposes. It thus demands of its adherents engagement precisely with these purposes, and yet it also offers no justification for claiming scholarly expertise with respect to the ascertainment and advocacy of these purposes. The upshot is that a misfortune like that which befell Lani Guinier was simply waiting to happen.

Guinier came to Washington bearing her truths about the nature of race relations in America and presenting those truths under the sign of academic expertise. On closer inspection, how-

ever, that expertise ultimately proved to rest on the kind of political perspective appropriate to the citizen, and so the prerogatives of the expertise were abruptly dismissed. The resulting shock that ran through the community of legal scholarship could only have been due to our failure adequately to distinguish between our quest for the truth of legal institutions and our quest for the truth of political ordering. We had not quite understood how different was the footing along each of these paths.

The peremptory dismissal of the substance of Guinier's truths was also a difficult lesson for the profession. Ensconced in the narrow world of law reviews, we are apt to forget Arendt's harsh warning of the tension between truth and politics. We are apt to confuse our truth with power. We were therefore both unprepared for and galled by the reminder that in Washington truth rightly does not command political opinion, even truth about politics.

Now, in the sober and chastened light of hindsight, we may perhaps begin to think once again about these and other aspects of our collective vocation.