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**BATTLING BIASES: HOW CAN DIVERSE STUDENTS OVERCOME TEST
BIAS ON THE MULTISTATE BAR EXAMINATION**

Christina Shu Jien Chong*

INTRODUCTION

Drafters of standardized tests, such as the Law School Admissions Test (LSAT) and Multistate Bar Examination (MBE), strive to eliminate biases in multiple-choice questions by assembling representatives of diverse backgrounds to screen and discard prejudicial questions. But in reality, intelligence tests will always contain some aspect of bias because a committee of test administrators can never represent the views of every person. Nevertheless, the bar exam incorrectly assumes that all applicants learned the same information throughout their academic careers and possess similar cultural experiences and opinions. The bar exam has not fully recognized that questions can be interpreted differently.

Scholars advocate to abandon intelligence tests as a measure of a person's future success, but this is unlikely to happen anytime soon because intelligence tests have been used since the early 1900s.¹ Thus, in the meantime, professors must teach students how to identify and eliminate personal biases to increase the students' chances of selecting the *best* answer. We must acknowledge that biases will never fully disappear and figure out how to properly support students who experience biases. This article does not promote conforming to social norms, changing our students core beliefs, or decreasing diversity. This article addresses the reality of the bar exam and provides students with a chameleon-like skill that they can use to ensure they are triumphant on the MBEs.

Part I provides background information on the components of the bar exam and disparity in performance results between Whites and

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¹ Paulina Alcocer, *History of Standardized Testing in the United States*, NAT'L EDUC. ASS'N., <https://www.nea.org/home/66139.htm> (last visited Feb. 14, 2018); *see also* William P. LaPiana, Professor, N.Y. Law Sch., Keynote Address at LSAC Annual Meeting: A History of the Law School Admission Council and the LSAT (May 28, 1998) (discussing that the LSAT has been used for over fifty years, thereby suggesting it is a part of our culture and likely difficult to eliminate).

people of color.² It defines test validity and explores test biases as a possible reason for the lower passage of minorities, such as language barriers, the equal experience assumption, promotion of dominant values, and bias in item selection.³ Part II discusses test biases on the MBE portion of the bar by exploring the National Conference of Bar Examiners' (NCBE) five myths and breaking down specific multiple-choice questions from NCBE's Online Practice Exam #4.⁴ Part III shares how academics can (a) reframe stereotype threat to help students overcome test anxiety and (b) reframe the speediness and memorization requirements of the bar exam to requirements of grit and determination to join the profession.⁵ Finally, Part IV acknowledges that test biases are unlikely to disappear and provides a step-by-step solution to help students be successful on the MBEs. The step-by-step approach is supported by statistics from the Logic for Lawyers class at the University of San Francisco School of Law, a multiple-choice skills-based test that employs the step-by-step method.⁶

I. THE MULTISTATE BAR EXAMINATION (MBE) AND STANDARDIZED TESTING DEBATE

The American Bar Association (ABA) claims the bar exam is a valid licensure test because it uses an objective standard to evaluate students⁷ and requires a comprehensive review of the law that motivates students to work hard in law school to obtain the skills and information necessary to pass the exam.⁸ The bar exam also encourages law schools to provide quality education⁹ because third parties, who do not have relationships or financial interests in the results and not the examinee's professors or employers, will judge the examinee's competency levels.¹⁰

Despite the positives promoted by the ABA, several people question whether the bar exam validly predicts a person's ability to practice

² See *infra* Part I.

³ See *infra* Part I.

⁴ See *infra* Part II.

⁵ See *infra* Part III.

⁶ See *infra* Part IV.

⁷ Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 275 (2007).

⁸ *Id.* at 274.

⁹ *Id.*

¹⁰ *Id.*

law.¹¹ Before discussing the debate surrounding test biases and the bar exam, this section will provide background information on the (a) components of the bar examination, (b) disparity in passage rates between Whites and minorities, and (c) types of test biases and validity issues that commonly appear in standardized testing.

A. *What are the Components of the Bar Examination?*

The bar exam is “a test for minimum competence that students need to take and pass in order to get licensed to practice law.”¹² Most exams contain the following components:

(1) the Multistate Bar Exam (MBE), a 200-question, multiple-choice exam; (2) the Multistate Essay Exam (MEE), comprised of thirty-minute essay questions; (3) the Multistate Performance Exam (MPT), a closed-universe problem with a client “File” and “Library” requiring students to perform a fundamental lawyering task; and (4) the Multistate Professional Responsibility Exam (MPRE), a sixty-question multiple-choice exam.¹³

The exact configurations of bar exams vary, but most states combine the four NCBE exams above with state-created portions.¹⁴ For example, in California, there is a two-day exam with five one-hour essay questions, a California performance test, and the 200 NCBE

¹¹ Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 478 (2003); see also Daniel R. Hansen, *Do We Need the Bar Examination: A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1204–22 (1995); Edward F. Bell, *Do Bar Examinations Serve a Useful Purpose*, 57 A.B.A. J. 1215, 1216–18 (1971).

¹² Riebe, *supra* note 7, at 302; See also NAT’L CONF. OF BAR EXAM’RS & A.B.A., SECTION ON LEGAL EDUC. AND ADMISS. TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS ix (2018), <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html>.

¹³ Riebe, *supra* note 7, at 303–04; See also NCBE Exams, NAT’L CONF. OF BAR EXAM’RS., <http://www.ncbex.org/exams/> (last visited Feb. 15, 2018).

¹⁴ Riebe, *supra* note 7, at 303–04; see also NAT’L CONF. OF BAR EXAM’RS. & A.B.A., SECTION ON LEGAL EDUC. AND ADMISS. TO THE BAR, *supra* note 12, at chart 8:29.

multiple-choice questions.¹⁵ In North Carolina, there is a two-day exam with twelve state-created essay questions and the MBE.¹⁶ New York has adopted the UBE, which is a two-day exam with the MBE, MPT, and six Multistate Essay Exam questions.¹⁷ All three states also require the MPRE in order to obtain a license.¹⁸

Historically, the 200 MBE questions have covered seven subject areas that test the majority view of the legal principles and not the law of the administering state: contracts, torts, property, criminal law, evidence, and constitutional law.¹⁹ “Effective for the February 2015 bar exam, the NCBE added civil procedure to this list.”²⁰ Examinees have six hours to answer the questions, which averages 1.8 minutes per a question.²¹ The time constraints require applicants to “ignore refinements and [quickly] pick the proper response by drawing upon that assemblage of ‘majority’ rules, ‘traditional’ rules and ‘trends’ which [she] presumably carries in [her] head.”²² In some cases, out of the four answer choices, there is no right answer, but “only the least wrong answer.”²³ The “select the most correct answer” requirement is where the testing structure of the bar exam begins to lose its legitimacy²⁴ because reasonable minds can differ on how to handle certain scenarios presented in the multiple-choice fact patterns. This article argues that

¹⁵ *Changes to the California Bar Exam*, ST. BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Changes-to-Bar-Exam> (last visited Feb. 14, 2018).

¹⁶ Riebe, *supra* note 7, at 304; *see also Jurisdictional Information: North Carolina*, NAT’L CONF. OF BAR EXAM’RS., <http://www.ncbex.org/jurisdiction-information/jurisdiction/nc> (last visited Feb. 15, 2018) (describing the current components for the bar exam in North Carolina but, also including that it will adopt the Universal Bar Exam in February 2019).

¹⁷ N.Y. ST. BOARD OF L. EXAM’RS., N.Y. ST. BAR EXAM INFORMATION GUIDE (2018), <https://www.nybarexam.org/TheBar/NYBarExamInformationGuide.pdf>.

¹⁸ Riebe, *supra* note 7, at 304; *Admission Requirements*, ST. BAR OF CAL., <http://www.calbar.ca.gov/Admissions/Requirements> (last visited Feb. 15, 2018).

¹⁹ *Preparing for the MBE*, NAT’L CONF. OF BAR EXAM’RS., <http://www.ncbex.org/exams/mbe/preparing/> (last visited Mar. 14, 2018).

²⁰ Carol Goforth, *Why the Bar Examination Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 54 (2015).

²¹ Glen, *supra* note 11, at 366.

²² *Id.*

²³ *Id.* (quoting Comm. on Legal Educ. and Admission to the Bar, Ass’n of the Bar of the City of New York, *Report on Admission to the Bar in New York in the Twenty First Century - A Blueprint for Reform*, 47 THE RECORD 472, 483 (1992)).

²⁴ *Id.*

individuals who score higher on the MBEs are often examinees who possess comparable opinions as the drafter of the multiple-choice question, which, similar to the LSAT, leaves applicants with minority viewpoints at a disadvantage before the exam even begins.²⁵

Unlike the MBEs, the essays and performance tests (PTs) require the examinee to “communicate effectively in writing.”²⁶ The purpose of the essays

is to test the examinee’s ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation.²⁷

Similarly, the PT requires applicants to

(1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client’s problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.²⁸

Both test an examinee’s legal analysis, organization, issue-spotting, and understanding of the legal principles.

For most students, studying for the bar exam is more work than a full-time job.²⁹ Students spend at least eight to ten hours a day, six days a week, studying around twenty substantive law subjects,

²⁵ Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER, SOC. POL’Y & L. 121, 129–31 (1993).

²⁶ Goforth, *supra* note 20, at 54 (quoting *Jurisdictions Administering the MBE*, NCBE, <http://www.ncbex.org/exams/mee/> (last visited Feb. 14, 2018)).

²⁷ *Id.*

²⁸ *Id.* at 55; (quoting *Preparing for the MPT*, NCBE, <https://www.ncbex.org/exams/mpt/preparing/> (last visited Feb. 14, 2018)).

²⁹ Riebe, *supra* note 7, at 307.

including subjects they did not study in law school.³⁰ Students attend dozens of lectures, memorize thousands of laws, complete at least 2000 practice multiple-choice questions, and simulate dozens of practice essay questions.³¹ The intensity of the study period makes it difficult for students to get sufficient sleep, exercise, and nutrition and often presents challenges of managing stress and time,³² especially for students who are working due to financial constraints.³³ If students are unable to properly navigate their lives and study schedule during the bar preparation season, then they often see an interference with their performance on test day. To sum it up, the bar exam is a tough test and examinees do not need additional obstacles to obtaining their license. However, the bar still contains several biased questions that can negatively impact an examinee's performance and preparation period. This article examines the multiple-choice section of the bar exam, its impact on minorities, and how to help students overcome test biases that appear on the MBEs.

B. What are the Performance Statistics for the Bar Examination?

Several statistical studies on bar passage have proven that minorities underperform on the bar examination compared to the majority. In *Why is Psychometric Research on Bias in Mental Testing So Often Ignored*, Cecil R. Reynolds states there are four common explanations for the differences between Whites, Blacks, Hispanics, Asians, and other groups:

(a) the differences have a primarily genetic basis; (b) the differences have an environmental basis (related to economic, social, and educational deprivation); (c) the differences are due to the interactive effect of genes and environment; and (d) the tests are faulty in such a way that minorities' true knowledge, skills, or aptitudes are systematically underestimated."³⁴

This article argues that (b) and (d) are likely causes for the disparate

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Glen, *supra* note 11, at 495.

³⁴ Cecil R. Reynolds, *Why Is Psychometric Research on Bias in Mental Testing So Often Ignored?*, 6 PSYCHOL. PUB. POL'Y & L. 144, 144 (2000).

impact on minorities. However, before discussing the cause of the problem, this section will provide statistics explaining the disparities.

In 1991, the Law School Admission Council (LSAC) explored the allegations that the bar exam was “infected with racial, ethnic, cultural, gender, and/or economic bias [that was] unrelated to the . . . practice of law” by conducting a six-year study.³⁵ “The class scheduled to enter ABA-approved law schools in Fall 1991 was selected as the study group and the bar pass rate of its members was studied over approximately six years.”³⁶ The LSAC Report was released in 1998 and revealed that the bar exam disproportionately delayed the entry of minorities into the practice of law;³⁷ the first-time passage rates were disproportionate among subgroups: 92% for Whites; 81% for Asian Americans; 75% for Hispanics; 66% for Native Americans; and 61% for African Americans.³⁸

In 1992, the New York Court of Appeals commissioned a study of the New York bar exam during the July 1992 administration of the test.³⁹ The study included questionnaires placed on all applicants sitting for the July administration.⁴⁰ The study asked graduates from both in-state and out-of-state law schools about their “gender, race/ethnicity, and whether English was the applicant’s native language.”⁴¹ The passage rates mirrored the LSAC study: 53% for Asian Americans, 37.4% for African Americans, 48.6% for Hispanics, and 81.6% for Whites.⁴² The findings also revealed that native English speakers scored thirty-five points higher than English as a Second Language takers, “holding other questionnaire variables constant,” likely due to the speediness required on the exam.⁴³ “[E]arlier data on the 1985–1988 July pass rates of graduates from New York law schools also indicated wide disparities: 73.1% for Whites, 62.9% for Asian Americans, 40.9%

³⁵ LINDA F. WIGHTMAN, LSAC NAT’L LONGITUDINAL BAR PASSAGE STUDY 27 (1998) (researching why the educational pipeline has been significantly cut off for many people of color).

³⁶ Glen, *supra* note 11, at 385.

³⁷ WIGHTMAN, *supra* note 35, at 27.

³⁸ *Id.*

³⁹ Glen, *supra* note 11, at 503.

⁴⁰ *Id.* at 508.

⁴¹ *Id.* at 508–09.

⁴² *Id.* at 509.

⁴³ *Id.* at 509.

for Latinos, 33.3% for American Indians, and 31% for African Americans.”⁴⁴

In 2001, the Florida Supreme Court ordered the Board of Bar Examiners to release racial data on the February 2000 and July 2000 Florida bar exams.⁴⁵ The results revealed that 68.5% of Whites passed compared to 53.2% of minorities with a 136 cutoff score and 79.7% of Whites would pass compared to 65.6% of minorities with a 131 cutoff score.⁴⁶ Although the gap is closing, minorities are still underperforming compared to the majority. The Florida Supreme Court’s Racial and Ethnic Bias Commission obtained data that revealed a possible explanation.⁴⁷ The expert panel in Florida that examined the questions showed that “most items on which minority students scored significantly lower than non-minorities contained culturally stereotypic language or situations, or structural components, which may have disadvantaged minority candidates.”⁴⁸ For example, a review of the entire MBE exam showed questions had “technical, language and/or structural problems which, while possibly affecting the performance of all candidates, may carry a greater impact for minority candidates.”⁴⁹ One reoccurring problem was the use of super-standard English that contained “vocabulary or sentence structure which is unnecessarily convoluted, complex, or tricky.”⁵⁰ The complexity of the language can cause outsider candidates, especially those who are bilingual, to take longer than the majority to answer the questions.⁵¹ “Robert Feinberg [], the founder and national director of PMBR . . . estimates . . . as many as twenty questions that could go either way,” which makes some questions quite subjective.⁵²

⁴⁴ William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 570 (2004) [hereinafter Kidder, *Dream Deferred*].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Milo Colton, “What Is Wrong with the Texas Bar Exam?” *A Minority Report*, 28 T. MARSHALL L. REV. 53, 60 (2002); see also Deborah Hardin Wagner, *Where the Injured Fly for Justice: Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida*, FLA. SUPREME COURT 5-9 (1990), http://www.floridasupremecourt.org/pub_info/documents/racial.pdf.

⁴⁸ Colton, *supra* note 47, at 6.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

One of the more recent studies was conducted by the California Bar Examination in 2017.⁵³ Although this study was done fifteen years after the Florida study, the results for minorities have remained similar, which suggests a problem with the examination itself. The table below includes data from Table 6 in Roger Bolus's final report to the California Bar Exam on the July passage rates in 2008, 2012, and 2016.⁵⁴

July California Bar Exam Passage Rates			
	2008	2012	2016
Asian	56%	51%	38%
Hispanic	49%	42%	34%
Black	34%	28%	21%
White	69%	64%	52%

California illustrates how non-majority applicants consistently pass the bar at a lower rate than majority students, which suggests the bar exam itself is biased. But proponents of the bar exam claim the test is valid because, on average, the results of the bar exam mirror the results of the applicant's performance on the LSAT.⁵⁵ However, studies have shown that the LSAT is plagued with similar disparate results that suggest minorities are disadvantaged.⁵⁶ The next section explains common theories of test biases that infect the LSAT and bar exam.

⁵³ News Release, State Bar of California, State Bar releases study of California Bar Exam passing score (July 31, 2017), <http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-releases-study-of-california-bar-exam-passing-score>.

⁵⁴ See ROGER BOLUS, RECENT PERFORMANCE CHANGES ON THE CALIFORNIA BAR EXAMINATION (CBE): INSIGHTS FROM CBE ELECTRONIC DATABASES 1, 16 (Feb. 19, 2017), http://www.calbarjournal.com/Portals/0/documents/communications/2017_PR-01-17_R.pdf; see also CHAD W. BUCKENDAHL, CONDUCTING A STANDARD SETTING STUDY FOR THE CALIFORNIA BAR EXAM: FINAL REPORT (July 28, 2017), <https://www.almcms.com/contrib/content/uploads/sites/292/2017/07/agendaitem100001929.pdf> (providing more information on the California Cut Score).

⁵⁵ BOLUS, *supra* note 54, at 4–5.

⁵⁶ BOLUS, *supra* note 54, at 15–16.

C. What Causes the Disparate Results on the Bar Exam and Standardized Testing?

People commonly confuse *test validity* with *test biases*.⁵⁷ Psychometricians broadly define *biases* as “technical flaws in an examination that lead to incorrect measurements for one or another subgroup of test takers.”⁵⁸ “‘Validity’ is the extent to which a test accurately measures what it is used to measure . . .”⁵⁹ A test is biased if it fails to accurately measure the abilities of all test-takers (irrespective of race, ethnicity, sex, etc.).⁶⁰ A test that is invalid for one purpose might be valid for another purpose; it depends on how the test is used by the administrators.⁶¹ For example, a vocabulary test used to measure a person’s knowledge of the English language would be valid, but if that same vocabulary test was used to measure a person’s success as a future businessperson, it might be invalid. A biased test is always an invalid test,⁶² but an invalid test is not always biased.⁶³ Validity differs from test bias because test bias refers to the exam’s failure to properly assess the abilities of a particular demographic group, where validity is generally applicable.⁶⁴ This section defines the three validity tests and explores how various types of test biases cause disproportionate performances on standardized examinations.

1. Test Validity

For many years, society has debated over the validity of the bar examination.⁶⁵ Advocates for the bar examination believe the bar accurately measures minimum competency to practice law because the MBE tests general knowledge of legal principles that lawyers may

⁵⁷ Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. 1111, 1173 (2002).

⁵⁸ *Id.* at 1171.

⁵⁹ Ellen Smith, *Test Validation in the Schools*, 58 TEX. L. REV. 1123, 1136 (1980).

⁶⁰ Braceras, *supra* note 57, at 1171.

⁶¹ Smith, *supra* note 59, at 1136.

⁶² Braceras, *supra* note 57, at 1173.

⁶³ *Id.*

⁶⁴ *Id.* at 1171, 1173 (“[T]est bias refers to the failure of a test to assess accurately the abilities of examinees of a particular demographic group . . . [while] [t]est ‘invalidity’ refers to the inaccuracy of an exam across subgroups.”).

⁶⁵ Andrea A. Curcio et al., *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS. L. REV. 206, 222 (2014); see Riebe, *supra* note 7, at 278.

encounter in their professional careers, and the written portion measures critical skills such as legal analysis, issue recognition, legal research, and legal writing.⁶⁶ They also believe the exam provides a reliable, standardized method to evaluate a massive number of applicants and passes all validity tests because passage rates correlate to LSAT scores and law school grade point averages (GPAs).⁶⁷ Opponents of the bar examination argue the test is invalid because it fails to consider important skills, such as client interaction and negotiations, and is an artificial simulation because it requires memorization and imposes unrealistic time constraints.⁶⁸ In practice, lawyers are rarely expected to recall thousands of laws and apply them to fact patterns within minutes.⁶⁹

In Ellen Smith's article, *Test Validation in the Schools*, she explains that the validity of a test is measured in three different ways: (1) content validation, (2) criterion validation, and (3) construct validation.⁷⁰ Federal courts evaluating the legality of tests determined the following reasons made a test discriminatory:

when the test is used for a purpose for which it was not designated or validated; when a test score is the sole criterion for the educational decision; when there is no educational basis for establishing a passing or cutoff score; and when the test predicts differently for different groups—such as overestimating the future performance of one group while underestimating the future performance of another group—or contains possible cultural biases.⁷¹

⁶⁶ Riebe, *supra* note 7, at 279.

⁶⁷ *Id.* at 283–84.

⁶⁸ Curcio et al., *supra* note 65, at 233–35.

⁶⁹ *Id.* at 233–34.

⁷⁰ Smith, *supra* note 59, at 1137–38.

⁷¹ Adele P. Kimmel, *Standardized Tests: Low Marks for Fairness*, 2 TRIAL 41, 41 (2001). “In *Sharif v. New York State Education Department*, female applicants for New York State merit scholarships alleged discrimination against women in violation of Title IX and the Equal Protection Clause where the state awarded the scholarships based solely on scores on the Scholastic Aptitude Test (SAT). The federal district court preliminarily enjoined this use of SAT scores because the test had been designed to predict college success and was not designed or validated to measure high school achievement. The court also ruled that the plaintiffs were likely to succeed on their discrimination claims because of evidence that the SAT predicts differently for females and males—that is, it underpredicts performance for female

i. Content Validation

If a test is administered to evaluate a person's knowledge of a specific skill or knowledge about the information contained within the exam, then the exam's content is valid if the exam is used to measure that specific knowledge.⁷² Content validation judges will test "whether the test items are a satisfactory sample of the tested ability."⁷³ For example, if a test was designed to evaluate a person's mathematical abilities, but purposefully used complex language that makes it difficult to solve the math problem, then the content on the exam might not be valid.

ii. Criterion Validation

Criterion validation is slightly different because it measures a person's inferred ability and predicts future performance.⁷⁴ Unlike content validation, the test scores must be correlated to some objective measure of inferred ability (the criterion) to forecast future success.⁷⁵ If a statistical correlation exists between test scores and the projected performance, then the test is valid because it equates the tested ability with the objective criterion that predicts success rates.⁷⁶ If no correlation exists, then the test is invalid because the test items are likely an inaccurate measure of the examinee's future abilities.⁷⁷ The LSAT is a great example because scholars cannot agree on whether an examinee's LSAT score predicts future success in law school and the bar

college freshmen as compared with males . . . [i]n *Groves v. Alabama State Board of Education*, a federal district court struck down the state's use of a cutoff score on the American College Test (ACT) as a requirement for admission to an undergraduate teacher training program. The court held that the score had a disparate impact on African American students and was not educationally justified because the state failed to show that it was a valid measure of the minimal ability necessary to become a teacher." *Id.* at 42.

⁷² Smith, *supra* note 59, at 1136.

⁷³ *Id.* at 1137.

⁷⁴ *Id.* at 1136–37.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Smith, *supra* note 59, at 1136–37 ("The salient feature of criterion validation is its correlation of one measurable (test scores) with another measurable (the criterion equated with the tested ability).").

examination.⁷⁸ For example, Eulius Simien's article *The Law School Admission Test As a Barrier to Almost Twenty Years of Affirmative Action* discusses how heavy reliance on the LSAT is the reason African Americans are underrepresented in law schools and might not be the best predictor of success because there are other factors that should be considered when predicting academic success.⁷⁹ However, in *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, Gail Heriot and Christopher Wonnell discuss how "standardized test bashing [is] popular these days. . . . [H]owever the solutions offered would actually lead to even greater inaccuracies."⁸⁰ They also argue that the LSAT is a predictor of performance in law school.⁸¹

iii. Construct Validation

Finally, "construct validation" examines whether the test appropriately measures what it claims to be measuring.⁸² This technique analyzes the overall validity of a test by determining if the test results appropriately measure the ability being tested.⁸³ For example, whether IQ tests validly measure a person's human intelligence has always been

⁷⁸ See Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 390 (1987) ("The LSAC and ABA both caution law schools against excessive reliance on the LSAT in admission decisions."). *But see* Curcio et al., *supra* note 65, at 222 ("Professor Subotnik clearly believes that the LSAT and the bar exam are appropriate gateways to law school, to licensing, and to law practice."); Riebe, *supra* note 7, at 283–84 ("There is a strong correlation between undergraduate GPAs, LSAT scores, and bar passage.").

⁷⁹ Simien, *supra* note 78, at 389–90.

⁸⁰ Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. L. & POL. 467, 483 (2003).

⁸¹ *Id.*

⁸² Smith, *supra* note 59, at 1137–38; see Milton E. Strauss & Gregory T. Smith, *Construct Validity: Advances in Theory and Methodology*, 5 ANN. REV. OF CLINICAL PSYCHOL., 1, 6 (2009) ("Imagine, for example, that you created an instrument to measure the extent to which an individual is a 'nerd.' To demonstrate construct validity, you would need a clear initial definition of what a nerd is to show that the instrument in fact measures 'nerdiness.' Furthermore, without a precise definition of nerd, you would have no way of distinguishing your measure of the nerdiness construct from measures of shyness, introversion or nonconformity.").

⁸³ Smith, *supra* note 59, at 1138; see Strauss & Smith, *supra* note 82, at 6–7.

debated because someone's intelligence is a somewhat abstract variable to measure and difficult to capture within one examination.⁸⁴

Although this article does not deeply explore the validity debate, this article does discuss how test biases appear in standardized testing and how those biases apply to the MBE portion of the bar examination.⁸⁵ The brief explanation of test validity above was included to provide readers with context and ensure validity and biases are not used interchangeably or confused.

2. Test Biases

A type of test bias is cultural bias, which occurs when a test includes "items [that] disadvantage[] one culture in a way unrelated to the tested ability."⁸⁶ Culturally biased tests are invalid because the test is "invalid for one cultural group or less valid for one group than another (differentially valid)."⁸⁷ If cultural bias exists to a small degree, then the existence is likely harmless.⁸⁸ However, minorities underperform at disproportionate levels when compared to the majority.⁸⁹ This article argues that test bias appears in many shapes and forms, but common cultural biases include: (1) language barriers and interpretations, (2) the equal experience assumption, (3) promotion of dominate values, and (4) subjective or flawed item selection. Cultural biases often appear as item biases, which means individual questions on the exam pose different burdens for test takers based on their backgrounds.⁹⁰

This article uses the words minorities and outsiders interchangeably. Other scholars define minorities and outsiders as "women, minorities, [individuals] from modest socioeconomic

⁸⁴ See Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and Atkins*, 65 AM. U. L. REV. 87, 104 (2015) ("IQ test scores are not precise and, even if relatively well-controlled, not clinically conclusive."); Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 887 (2012) ("IQ tests are not exact and precise measurements of global intelligence but are instead estimations of intelligence focused upon a particular range of abilities.").

⁸⁵ See *infra* Part II.

⁸⁶ Smith, *supra* note 59, at 1141.

⁸⁷ *Id.* at 1140.

⁸⁸ *Id.* at 1147.

⁸⁹ *Id.* at 1146–47; BOLUS, *supra* note 54, at 16.

⁹⁰ Smith, *supra* note 59, at 1141, 1148–49.

backgrounds, friendly [personalities], and [individuals] dedicated to public interest work. . . .”⁹¹ For example, *The Rise of the Testocracy* states the insider group excludes anyone who does not “conform, in physical characteristics, personality type, or ideology, to its cherished ideal of the upper-middle class, White, male, conservative, on-the-fast-track-to-a-big-firm applicant.”⁹² *Painting Beyond the Numbers* defines underrepresented groups as persons with diverse ethnic and racial compositions, socioeconomic disadvantages, first-generation college graduates or immigrants, international citizenship, physical or learning disabilities, and non-traditional backgrounds, and those who have experienced discrimination.⁹³ This article agrees with previous scholars’ definitions, but expands outsiders to include anyone who does not think like the normal, average, American person.

i. Language Barriers and Interpretations

The first type of cultural biases relates to the difference between an insider’s and outsider’s foundational language skills and interpretation of English words.⁹⁴ In most cases, minorities have varying levels of education that can impact their vocabulary and knowledge of complex English words.⁹⁵ The language barrier creates cultural bias if the tests are used to measure skills other than measuring English proficiency.⁹⁶ For example, if an exam tests an examinee’s vocabulary to determine how many words the examinee can define, then the test is not culturally biased, even if the examinee’s lower scores are

⁹¹ William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CAL. L. REV. 1055, 1105 (2001). [hereinafter Kidder, *Mirror or Magnify*].

⁹² William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 173 (2000). [hereinafter Kidder, *Testocracy*].

⁹³ Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71, 78–79 (2012).

⁹⁴ Braceras, *supra* note 57, at 1171 (“[L]anguage barriers prevent one or more groups of test-takers from understanding the questions asked by a test.”); Smith, *supra* note 59, at 1141 (“[S]ince blacks are exposed less frequently than whites to standard English outside the school, the blacks as a group may score lower than the whites on the test.”).

⁹⁵ *Id.*

⁹⁶ *Id.*

caused by the lack of exposure to the standard English language outside of school.⁹⁷

However, if a minority group scores lower on a math test that includes test items with stories that utilize complicated English, then the test might be culturally biased⁹⁸ because it will inevitably underestimate the abilities of non-speaking children who are unable to demonstrate their mathematical skills due to their limited familiarity with English.⁹⁹

Another type of language barrier relates to how an examinee interprets English words. A test's emphasis on standard English can sometimes conflict with different cultures' use of English.¹⁰⁰ For example, people can interpret the word "home" differently.¹⁰¹ Clifford Hill and Eric Larsen's study revealed that "African-American third-graders systematically misinterpret test questions due to differences in use between the races regarding semantic and syntactic cues contained in the formulation of many test questions."¹⁰² Hill and Larsen stated that "'home' has a broader meaning among African-Americans due to the fact that the African-American community involves an 'extended family' structure" where most "White Americans no longer have an extended family structure" and home could have a different meaning.¹⁰³ The study revealed that "the African-American children knew what the question and its associated reading passage meant. But, nonetheless, the test makers were unwittingly punishing them for belonging to a community with a different social structure."¹⁰⁴ The White children were not similarly punished."¹⁰⁵ This cultural difference can impact scores on standardized testing because when asked the meaning of home minorities would answer incorrectly because their definition was different.¹⁰⁶

⁹⁷ Smith, *supra* note 59, at 1141.

⁹⁸ Smith, *supra* note 59, at 1140–41.

⁹⁹ *Id.*

¹⁰⁰ Smith, *supra* note 59, at 1148.

¹⁰¹ Roy Freedle, *How and Why Standardized Test Systematically Underestimate African Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 188 (2006).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Freedle, *supra* note 101, at 188.

¹⁰⁶ *Id.*

ii. Equal Experience Assumption

The second type of cultural bias exists when tests assume that everyone shares the same life experiences. The exam is biased if it is used to measure constructs, inherent ability of examinees, but “the underlying theory of the test is significantly less true for one cultural group than it is for others.”¹⁰⁷ For example, IQ tests assume that everyone is exposed to the same scenarios.¹⁰⁸ This assumption creates an equal exposure issue because different cultural groups have different experiences in society due to socioeconomic status, racial discrimination, political views, demographics, oppression, and a variety of other reasons.¹⁰⁹ Thus, some scholars believe that “no test based on [the equal exposure assumption] can validly measure the intelligence of multiple groups,” especially when most standardization scales were developed by white populations where the underlying theory of the tests were based on the white, affluent, conservative, male experience.¹¹⁰ Courts have “cited expert testimony that black children raised in a cultural environment closer to the white middle class mainstream tend to perform better on the test,”¹¹¹ which reaffirms the idea that individuals with similar experiences to the majority are likely to score higher on standardized test. For example, an examinee who grew up in an urban city might interpret factual scenarios about agricultural practices differently than an examinee who grew up on a farm in rural America because the lifestyles and daily events that occur in the two environments are extremely different. Another example is the definition of a domestic animal versus a wild animal. Elephants and horses are considered domesticated in some cultures whereas other cultures only refer to dogs and cats as domesticated. Petting zoos in America contain farm animals whereas petting zoos in Australia have kangaroos. An individual’s interpretation of a question will vary depending on the individual’s upbringing. Test creators should recognize people are different and not assume that everyone experienced the same events throughout their lifetime.

iii. Promotion of Dominate Values

¹⁰⁷ Smith, *supra* note 59, at 1140–42.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1148.

¹¹¹ *Id.*

The third type of cultural bias is value bias, which appears when tests administrators fail to recognize that examinees possess different opinions and viewpoints about the scenarios included in the exam. “Critical race theorist Richard Delgado has criticized standardized tests for their ‘epistemological fascism’ because of the ways such tests reward particular thinking styles and punish other styles.”¹¹² Delgado’s main critique is that “traditional psychometric methods will not allow the ‘right’ people to get the answer wrong and the ‘wrong’ people to get the answer right, even if this is what happened in fact.”¹¹³ Most verbal sections of standardized tests involve stories that assess reading comprehension, logical reasoning, and vocabulary through narratives from mainstream society’s point of view.¹¹⁴ For example, a question might ask “what a child should do if struck by a smaller child of the same sex. The ‘correct’ answer is that striking the child back is wrong.”¹¹⁵ This assumes everyone believes turning the other cheek is the appropriate reaction to physical assault and requires a judgment of what is right versus wrong. It also suggests that the answer might be different if the children were two different sexes.

Value bias exists because drafters often draw on their own life experiences, which tend to mirror the majority point of view, which is white males from the middle class.¹¹⁶ Another example from the LSAT is below. This question requires examinees to determine if affirmative action is reverse racism.¹¹⁷

Question:

The universities should not yield to the illiberal directives of the Office of Civil Rights [sic] that mandate

¹¹² William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In-Headwinds”*: An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131, 160 (2002).

¹¹³ *Id.*

¹¹⁴ Smith, *supra* note 59, at 1148.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1148–49.

¹¹⁷ William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 32–34 (2000) [hereinafter Kidder, *Portia Denied*].

affirmative action in hiring faculties. The effect of the directives to hire minorities and women under threat of losing crucial financial support is to compel universities to hire unqualified minorities and women and to discriminate against qualified non-minorities and men. This is just as much a manifestation of racism, even if originally unintended, as the racism the original presidential directive was designed to correct. The consequences of imposing any criterion other than that of qualified talent on our educational establishments are sure to be disastrous in the quest for new knowledge and truth, as well as subversive of our democratic values.

Which of the following [sic], if true, would considerably weaken the argument above?

- I. The directive requires universities to hire minorities and women when no other applicant is better qualified.
- II. The directive requires universities to hire minorities and women only up to the point that these groups are represented on faculties in proportion to their representation in the population at large.
- III. Most university employees are strongly in favor of the directive.

- (A) I only
- (B) II only
- (C) III only
- (D) I and II only
- (E) II and III only¹¹⁸

Examinees can make one of two assumptions about answer choice (C): (1) women and minorities possess equal talent to the majority and affirmative action creates opportunity in academia or (2) hiring through affirmative action promotes unqualified women and minorities.¹¹⁹ The correct answer choice was (A), which requires the assumption that affirmative action creates opportunities for unqualified

¹¹⁸ *Id.*

¹¹⁹ *Id.*

women and minorities.¹²⁰ This passage can disadvantage outsiders because they might possess a dissimilar opinion about women and minorities in the workplace and includes sensitive content that may have no impact on the insider group.¹²¹ In addition, the question uses words beyond standard English, such as directives, which means orders, instructions, or commands.¹²²

In today's standardized tests, the narrative bias is less blatant, but appears in a subtle manner, such as biased stories about mannerisms, sensitivities, paradigms, political views, culture, or atmosphere.¹²³ Another LSAT example from Leslie G. Espinoza's article, *The LSAT: Narratives and Bias*, reveals implicit bias (unconscious bias) against women who have children and are working mothers.¹²⁴

The problem with expanding work opportunities for women is that it results in a dangerous situation for our country; fewer children will be born and those children will be less well prepared to perform well in school and in society.

Which of the following presuppositions is (are) necessary to the argument above?

- I. The more education a woman has, the more likely she is to choose to work outside her home.
- II. Women who choose to work are better mothers than those who choose to be homemakers.
- III. Working women have fewer children than women who do not join the work force.

- (A) II only
- (B) III only

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Directive*, MERRIMAN-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/directive?src=search-dict-box> (last visited Jan. 9, 2018).

¹²³ Espinoza, *supra* note 25, at 129–31.

¹²⁴ *Id.* at 131–32.

- (C) I and II only
- (D) II and III only
- (E) I, II and III

As Espinoza explains in her article, for women, answering this question requires a very difficult, personal choice that must be reflected upon in the middle of the examination.¹²⁵ This gender-biased question can take women examinees off-track because it makes the test personal; the conflict between family and career is a real for many women.¹²⁶ Controversial issues distract many outsiders who read the question and are upset by the narrative to the point where they are unable to focus on the arguments and objectively answer the question.¹²⁷ This distracting, emotional narrative should be replaced by a neutral story that tests an examinee's logical reasoning without disadvantaging outsiders.¹²⁸

Neutral subjects, such as the sample LSAT question in Anthony Peirson Xavier Bothwell's article, *The Law School Admission Test Scandal: Problems of Biases and Conflicts of Interest*, are a good alternative.¹²⁹ The question asks the examinee to follow a number of criteria to determine which printer was purchased in 1989.¹³⁰ The question does not involve political issues related to affirmative action or working women, but is an objective narrative.¹³¹

A small software firm has four offices, numbered 1, 2, 3, and 4. Each of its offices has exactly one computer and exactly one printer. Each of these eight machines was bought in either 1987, 1988, or 1989. The eight machines were bought in a manner consistent with the following conditions:

¹²⁵ *Id.* at 132.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Espinoza, *supra* note 25, at 132.

¹²⁹ Anthony Peirson Xavier Bothwell, *The Law School Admission Test Scandal: Problems of Bias and Conflicts of Interest*, 27 T. MARSHALL L. REV.1, 9–10 (2001) (noting that while Bothwell critiques this question because it is irrelevant to test “legal scholarship or advocacy,” this article will not discuss the effectiveness of the LSAT with regards to law school admissions).

¹³⁰ *Id.*

¹³¹ *Id.* (providing an example of a question that does not disadvantage outsiders but has no “relevance to legal scholarship or advocacy” and should not be used on that basis).

The computer in each office was bought either in an earlier year than or the same year as the printer in that office.

The computer in office 2 and the printer in office 1 were bought in the same year.

The computer in office 3 and the printer in office 4 were bought in the same year.

The computer in office 2 and the computer in office 3 were bought in different years.

The computer in office 1 and the printer in office 3 were bought in 1988.

Suppose the computer in office 2 and the computer in office 3 had been bought in the same year as each other. If all the other conditions remained the same, then which one of the following machines would have been bought in 1989?

- (A) the printer in office 1
- (B) the computer in office 2
- (C) the printer in office 2
- (D) the computer in office 4
- (E) the printer in office 4¹³²

Bothwell, like many other scholars, explains that biased questions on the LSAT “cuts off the chance for many promising women and men...from lower and middle income groups” from entering law school because it injures those who are “from less privileged groups, whose backgrounds caused them to be unfamiliar with concepts used on the test.”¹³³ The examples from the LSAT are plentiful and available further review in Appendix A.

iv. Subjective Item Selection

¹³² *Id.*

¹³³ *Id.* at 12.

The final type of cultural bias relates to how the test items are selected for the examination. Most standardized tests, including the MBE and LSAT, undergo a statistical and sensitivity review process.¹³⁴ During this process, the researchers test the questions and assume that “if an individual question creates racial or gender disparities [that are] similar to disparities in overall test scores, then that items must not be biased.”¹³⁵ This a statistical technique is called differential item functioning (DIF).¹³⁶

DIF compares the results of individuals with the same overall test score because it indicates whether those individuals, regardless of race or gender, possess equal knowledge and skill.¹³⁷ Using that group of individuals, test administrators examine the average item scores to see if a particular item is measuring the same across the subgroups.¹³⁸ If the scores of individuals from the same test group are disproportionately different, then the test item is excluded because it is deemed difficult for members of a certain group.¹³⁹

Many scholars believe DIF is flawed because it does not acknowledge that biased questions could subsequently impact the examinee’s motivation and attention to later test questions or that other factors could influence the person’s overall score.¹⁴⁰ Thus, DIF fails to reveal biases on specific items due to other items compensating for the test-taker’s overall test score.¹⁴¹ This means biased questions are balanced out by questions in favor of that group.¹⁴² As a result, the total score is skewed.¹⁴³ Moreover, DIF has no external standard for judging what is considered fair or not fair on the exam.¹⁴⁴ DIF uses the test itself as the control to determine if specific items within that test are biased.¹⁴⁵

¹³⁴ Kidder, *Portia Denied*, *supra* note 117, at 34.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Kidder, *Portia Denied*, *supra* note 117, at 34.

¹⁴⁰ *Id.* at 35.

¹⁴¹ *Id.* at 34–35.

¹⁴² Kidder, *Mirror or Magnify*, *supra* note 91, at 1107.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Instead, the external measure should be an outside factor, such as college GPA, to increase fairness.¹⁴⁶

Other techniques to eliminate selection bias include: (a) the Golden Rule technique,¹⁴⁷ which eliminates items with largest gaps between groups by categorizing questions based on the magnitude of subgroup differences¹⁴⁸ and (b) hiring a diverse group of members to screen the test items for biases. However, both methods are faulty because they focus on an individual's perceived fairness and appropriateness of the questions, which varies.

Researchers studied if individuals could identify culturally biased items and discovered that "minority review panels" helped identify offensive items but did not help identify biased items.¹⁴⁹ The Golden Rule received similar criticism. The Golden Rule emerged from a 1984 settlement brought by the Golden Rule Insurance Company against ETS over alleged racial biases on the Illinois Insurance Exam.¹⁵⁰ The Golden Rule requires administrators to classify questions as either Type I or Type II after pre-testing the items and select Type I items that had less racial disparities over Type II items that had large racial disparities.¹⁵¹ Some psychologists and lawyers disagree with this approach because it interferes with the content of the exam by using classifications based on racial disparities.¹⁵² However, this is easily fixed by using the Golden Rule on each individual portion of the exam rather than the exam as a whole and would preserve the content differentials. Research has proven that several test biases exist on standardized testing, but these studies are ignored by test administrators, such as the NCBE, which is explored in the next section.

II. BIASES PLAY A ROLE ON THE MULTISTATE BAR EXAMINATION

Although research discussing test validity and test biases is common, most of the articles use the LSAT or SAT to exemplify the theories and not the MBE. This section focuses on identifying test biases that appear on the bar examination's multiple-choice questions, how the

¹⁴⁶ Kidder & Rosner, *supra* note 112, at 157.

¹⁴⁷ Kidder, *Mirror or Magnify*, *supra* note 91, at 1107.

¹⁴⁸ *Id.* at 1107–08.

¹⁴⁹ Reynolds, *supra* note 34, at 146.

¹⁵⁰ Kidder & Rosner, *supra* note 112, at 164.

¹⁵¹ *Id.* at 164–65.

¹⁵² *Id.* at 165–66.

NCBE has responded to concerns related to test biases, and the validity of the NCBE's response to these concerns, or "myths," about the unfairness of the examination.

A. Did the National Conference of Bar Examiners Bust the Myths Related to Test Biases on the MBEs?

In Spring 2016, the NCBE's website included five myths that examinees often heard about the MBE and proceeded to dispel those myths with factual evidence to validate the exam.¹⁵³ As of Fall 2017, that information is no longer on the website, but the original language is provided in Appendix B.

One might assume that the five myths were proven to be true rather than false, which is why the information was removed from the website. It is also possible that the myths raised more questions than they resolved. But why the myth buster language was removed from the NCBE's website is less significant than the NCBE's response and how test bias likely contributed to NCBE's belief that the five myths were not truths.

- (1) MYTH #1: The MBE is a test of memory and test-taking ability, not of legal knowledge or analytical skill.

The NCBE justifies the bar exam because:

[r]esearch indicates that MBE scores are highly correlated with other measures of legal skills and knowledge, . . . [the] novices and graduates had virtually identical mean LSAT scores, so if the ability to take multiple-choice tests were the major factor influencing MBE scores, both groups should have had very similar MBE scores.¹⁵⁴

However, as discussed above, the LSAT and other standardized tests are plagued with similar biases.¹⁵⁵ Thus, using a biased test to argue the bar examination contains no test biases is flawed.

¹⁵³ See *infra* Appendix B.

¹⁵⁴ See *infra* Appendix B.

¹⁵⁵ Simien, *supra* note 78, at 359.

- (2) MYTH #2: MBE questions are needlessly difficult, arcane, and tricky.

The NCBE believes the MBE is a “fair index of whether an examinee has the ability to practice law” because “every MBE question is reviewed at several levels: at least twice as it is edited by the drafting committee, by psychometric experts to ensure that it is fair and unbiased, and by the practitioner members of the MBE Policy Committee and their academic consultants.”¹⁵⁶

As discussed above, the item-selection process used for most standardized tests fails to use objective measure to eliminate questions that might unfairly bias one group of individuals and does not account for questions in favor of the group that might balance out the score.¹⁵⁷ The NCBE assured examinees that “[s]hould an error be detected even after this thorough scrutiny, two or more answers may be deemed correct in order to ensure that no examinee is disadvantaged by having a particular question appear on the form of the MBE he or she took.”¹⁵⁸ The NCBE’s response acknowledging that the process used to eliminate bias may not be perfect and the NCBE’s willingness to correct any errors are steps in the correct direction. However, there are several unsolved questions, such as: who determines what questions disadvantage certain groups of thinkers, what is considered an error, and how will these errors be determined? The current process seems arbitrary and does not account for biases that might exist among those who evaluate the validity of the test answers.

- (3) MYTH #3: Not enough time is allotted to answer MBE questions.

Most students complain they don’t have enough time to answer MBE questions. According to the NCBE,

[r]esearch shows that the time allotted to take the MBE is sufficient for 99 percent of examinees . . . [t]he rate of correct responses at the end of a three-hour session is not significantly different from the rate of correct answers at other, earlier points in the test...and

¹⁵⁶ See *infra* Appendix B.

¹⁵⁷ Kidder, *Mirror or Magnify*, *supra* note 91, at 1106–07.

¹⁵⁸ See *infra* Appendix B.

unlimited time to answer the MBE resulted in an average increase in score of about six raw (unscaled) points.¹⁵⁹

This response lacks several important data points, such as who were the individuals in the test group? Does six raw points make a difference? For some people, six points could make the difference between passing and not passing. As discussed above, test biases can sometimes slow down the outside examinee because of the additional mental struggle to overcome questions raising personal issues or requiring difficult value choices.¹⁶⁰ A study examining how many questions were right or wrong in the beginning or end of the test does not measure the impact on the speed of outsiders who are likely reacting to biased questions through entire examination.¹⁶¹

- (4) MYTH #4: Essay examinations and performance tests are better ways to measure minimum competency to practice law.

The issue with this myth relates to the NCBE's second reason, which is that "multiple-choice questions can be scored objectively, and scores can be scaled to adjust for changes in difficulty from one test to the next."¹⁶² Although the scores are objective, the questions themselves are not, which makes the MBE similarly subject to essay examinations and performance tests. All three parts of the bar examination are written through narratives that will always poses a risk of test bias, especially related to language interpretation and equal experience assumption biases.

- (5) MYTH #5: The MBE discriminates against minority examinees.

Finally, the NCBE directly addressed the claims that its examination discriminated against minorities. Relevant parts of the NCBE's response is below.

The MBE neither widens nor narrows the gap in performance levels between minority and majority examinees. Research indicates that differences in

¹⁵⁹ See *infra* Appendix B.

¹⁶⁰ See *supra* Section I.C.2.iii. See also Espinoza, *supra* note 25, at 132.

¹⁶¹ See *supra* Section I.C.2.iii. See also Espinoza, *supra* note 25, at 132.

¹⁶² See *infra* Appendix B.

mean scores between racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores and performance test scores. . . . The National Conference of Bar Examiners is committed to gender and ethnic diversity on all its drafting and policy committees. Each drafting committee is composed of members of both sexes, and members of ethnic minority groups participate in the preparation and review of items both at the drafting committee level and at the MBE policy committee level.¹⁶³

Admittedly, after a thorough review of NCBE's Fourth Online Practice Examination, there were few gender- and racially-biased questions, which suggests the bar examination has improved its drafting. However, the NCBE fails to realize that test biases are deeper than ethnic-based names and female stereotypes.¹⁶⁴ Today's test biases are implicit and often appear in the form of language interpretation, equal experience assumptions, and dominate value biases.¹⁶⁵ None of these biases are obviously linked to one race, but instead spread across the racial and socio-economic groups.¹⁶⁶ Moreover, one drafting committee that includes some women and members of various ethnic groups cannot represent the thoughts of every individual from that particular group.¹⁶⁷ All people are not created the same, which makes it difficult for any testing administration to full eliminate the test biases.

B. Are there Specific Examples of Test Biases on the MBEs?

Although race and socioeconomic status influence how an examinee interprets a question, which can negatively impact the examinee's performance, this article shifts the focus from the test takers to the test creators. This section argues that drafters of the multiple-choice questions likely play a large role in the creation of test biases on

¹⁶³ See *infra* Appendix B.

¹⁶⁴ See *infra* Appendix B.

¹⁶⁵ See *supra* Part I.

¹⁶⁶ See *supra* Part I.

¹⁶⁷ Goforth, *supra* note 20, at 78–79.

the MBEs and analyzes the test biases that appear in a couple of questions from the NCBE's Online Practice Exam #4 (OPE #4) in the *Strategies & Tactics for the MBE*.

Drafting committees of experts in the particular subjects are responsible for writing the NCBE's multiple-choice questions.¹⁶⁸ These committees include senior academics who are tenured, experienced, and well-regarded in their fields of expertise; and federal judges and experienced practitioners who are nationally recognized.¹⁶⁹ However, no precise eligibility standards have been written for the NCBE's questions and the authorship qualification for various NCBE questions remains unclear.¹⁷⁰ Drafters root their analysis in law and facts, but it is likely that most drafters must also determine what assumptions are right or wrong. As a result, drafters make assumptions based on their own opinions and experiences and might not realize that reasonable minds may differ on what is considered the best answer. This arbitrary drafting generates exam questions that often require detailed knowledge beyond the prima facie case and general legal theories and creates test biases issues. Two examples are discussed below.

Question # 59 - Constitutional Law

In order to foster an environment conducive to learning, a school board enacted a dress code that prohibited all public high school students from wearing in school shorts cut above the knee. Because female students at the school considered it unfashionable to wear shorts cut at or below the knee, they no longer wore shorts to school. On the other hand, male students at the school regularly wore shorts cut at or below the knee because they considered such shorts to be fashionable.

Female students sued to challenge the constitutionality of the dress code on the ground that it denied them the equal protection of the laws.

Should the court uphold the dress code?

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 79.

¹⁷⁰ *Id.* at 78.

- (A) No, because the dress code is not necessary to further a compelling state interest.
- (B) No, because the dress code is not substantially related to an important state interest.
- (C) Yes, because the dress code is narrowly tailored to further an important state interest.
- (D) Yes, because the dress code is rationally related to a legitimate state interest.¹⁷¹

The correct answer is (D). The court should uphold the dress code because the code is rationally related to the state's legitimate interest in fostering a proper educational environment. The dress code should not trigger heightened judicial scrutiny because there are no facts to suggest that the purpose of the code is to discriminate against female students.¹⁷²

First, individuals from various backgrounds could differ in their opinion of whether students wearing shorts that are short in length are distracting enough to detract from a proper educational environment. Some individuals might believe that the prohibition against shorts cut above the knee is not rationally related to legitimate state interest because the short shorts are not distracting whereas others might believe a dress code is necessary to ensure students are focused on academics. Second, this question requires examinees to assume that a prohibition against wearing shorts above the knees did not implicate gender bias. In American culture, it is more likely that female students would wear shorts above the knees than male students because popular fashion trends advertise women in short shorts. Thus, if a person believed this prohibition was created to discriminate against women, then they are more likely to select answer choice (B) over (D). The question requires examinees to make an evaluation related to reasonableness and the correct answer is based on the drafter's viewpoint.

Question # 17 – Evidence

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

¹⁷¹ *Id.*

¹⁷² Goforth, *supra* note 20, at 78.

At trial, the plaintiff calls an emergency room physician to testify that when the physician asked the plaintiff's husband if he knew what had happened, the husband, who was upset, replied, "I saw my wife get run over two hours ago by a driver who went right through the intersection without looking."

Is the physician's testimony about the husband's statement admissible?

- (A) No, because it relates an opinion.
- (B) No, because it is hearsay not within any exception.
- (C) Yes, as a statement made for purposes of diagnosis or treatment.
- (D) Yes, as an excited utterance.¹⁷³

The correct answer is (B) because the husband would no longer be under the stress of the accident two hours later.¹⁷⁴ The outsider group includes individuals who believe that someone whose significant other was hit by a speeding car might be emotional or negatively impacted for more than two hours. The fact pattern is ambiguous about whether the husband actually saw his wife hit by the car, but does suggest he was in the ambulance with her. Regardless of where the husband was during the accident, the outsider group is likely to choose answer choice (D) because this could be interpreted as a traumatic experience for the wife and the husband.

By making answer choice (B) the "best" answer, the drafters are leaning towards a less sensitive viewpoint and lack of understanding PTSD could result from this type of accident, even for bystanders, and cause the impact to last for more than two hours. Stating that "the husband [] was upset" and placing the discussion between the physician and the husband in the emergency room could trigger the interpretation that the husband was still under the stress of the incident. If the husband was under the stress from the incident when he made the statement, then it would allow his statement to fall under a hearsay exception and answer choice (D) would be the best answer. This question is a perfect example of a value bias or opinion bias that appears on the MBEs and requires a subjective judgment of the facts and situation to select the "best" response.

¹⁷³ *Id.* at 750–51.

¹⁷⁴ *Id.*

More examples of questions with test biases from the NCBE's Online Practice Exam #4 in the *Strategies & Tactics for the MBE* are discussed in Appendix C, which also includes explanations of why the question could be distracting to outsider examinees.

III. RAISING CULTURAL AWARENESS TO PROMOTE SUCCESS BY REFRAMING EXISTING THEORIES

Fairness means that “everyone should be given an equal opportunity to achieve all that their abilities allow,”¹⁷⁵ but standardized tests will always contain some form of cultural or value bias. The reality of a diverse society is that no one will ever think exactly the same. Eliminating bias is an unreasonable request because implicit bias is difficult to reduce, especially when most people do not realize that the implicit bias even exists.¹⁷⁶ Thus, educators and advocates should promote that test administrators in the U.S. reduce bias and raise awareness among examinees to help them battle the test biases that will appear and could impact their scores. Unfortunately, changing standardized testing is glacial.¹⁷⁷ In the meantime, as educators, we should focus some of our energy on helping students by encouraging self-awareness of possible cultural, personal experience, and value biases and promoting techniques that can help reduce those biases on test day. This section draws on William Kidder's theories and takes his viewpoints one step further by offering a solution because the biased narratives offered in tests are unlikely to change.

A. Reframing Stereotype Threat as Test Anxiety

Stereotype threat is a type of bias that does not appear within the test itself, but is a psychological atmosphere associated with standardized testing.¹⁷⁸ The phenomenon arises when students “must deal with the possibility of being judged or treated stereotypically, or of doing something that would conform to the stereotype,” either to others

¹⁷⁵ Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Deal*, 84 CAL. L. REV. 953, 982 (1996).

¹⁷⁶ Christina Shu Jien Chong, *Where Are the Asians in Hollywood? Can S1981, Title VII, Colorblind Pitches, and Understanding Biases Break the Bamboo Ceiling?*, 21 ASIAN PAC. AM. L.J. 29, 31, 58 (2016).

¹⁷⁷ Kidder, *Mirror Magnify*, *supra* note 91, at 1107.

¹⁷⁸ Kidder, *Portia Denied*, *supra* note 117, at 24.

or to themselves.¹⁷⁹ This phenomenon adversely affects the performance of traditionally strong, academically oriented students on high-stakes tests¹⁸⁰ because once the student see the test as hinging on one of the qualities that are related to the stereotype, the “students for whom the stereotype has been triggered perform significantly less well than those who do not fall within the same group.”¹⁸¹

Stereotype threat acknowledges that different groups can experience the same test in different ways because historically marginalized groups may face the added pressure and anxiety that disproportionately depresses their performance.¹⁸² On the bar exam, minorities must battle the expectation of failure that is exacerbated by the knowledge of lower first-time bar pass rates of graduates with a similar race or backgrounds.¹⁸³ For example, the false stereotype that African Americans cannot pass the bar exam will “negatively affect the ability of African American applicants to answer questions on the bar exam and artificially depressing their scores, potentially below the pass/fail cutoff.”¹⁸⁴ Studies have proven that mere self-awareness of the possibility that one might score poorly on an exam due to stereotypes associated with a group the person identifies as a member could actually led to a lower score due to the negative suspicion about one’s own intellectual ability.¹⁸⁵ Thus, the use of the same content, does not necessarily make the test unbiased.¹⁸⁶

A common study cited by scholars to support stereotype is Claude Steele and Joshua Aronson’s administration of a test that provided Graduate Record Examination (GRE) questions to Black and White college students who were matched on SAT scores.¹⁸⁷ All students were provided the same test, but Blacks who were told the exam was not indicative of ability performed equal to Whites.¹⁸⁸ When Blacks were told the exam was indicative of ability, they scored lower

¹⁷⁹ Glen, *supra* note 11, at 391.

¹⁸⁰ *Id.* at 392.

¹⁸¹ *Id.* at 391.

¹⁸² Kidder, *Mirror or Magnify*, *supra* note 91, at 1085–86.

¹⁸³ Glen, *supra* note 11, at 391.

¹⁸⁴ *Id.* at 392.

¹⁸⁵ Kidder, *Portia Denied*, *supra* note 117, at 25.

¹⁸⁶ Kidder, *Mirror or Magnify*, *supra* note 91, at 1085–86.

¹⁸⁷ *Id.* at 1086.

¹⁸⁸ *Id.*

than Whites because they were under the spotlight to overcome the stereotype that Blacks do worse on standardized tests.¹⁸⁹ Similar studies were conducted with women and math and Latinos and English.¹⁹⁰ The test group was provided with the societal stereotype about the performance of the group, Latinos struggle with English and women are bad at math.¹⁹¹ Individuals in the group primed with this stereotype did statistically worse than those who were not told about the stereotype.¹⁹²

However, the phenomenon of stereotype threat wouldn't have such impact if the stereotype itself did not bare some level of truth to cause anxiety among our test takers. As Jennifer Braceras mentions in her article *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, minorities tend to lag behind their peers at various education levels, such as grade point averages, graduation rates, and class rankings, which would be consistent with the results on standardized tests.¹⁹³ However, Kidder claims that this difference is exaggerated by the standardized testing, which is the reason the test itself becomes biased.¹⁹⁴ Many scholars have explored the impact of stereotype threat and landed on different sides on the standardized testing debate, but this article does not aim to support one side of the other.¹⁹⁵ Instead, this article focuses on the solution.

¹⁸⁹ *Id.* at 1086–87.

¹⁹⁰ *Id.*

¹⁹¹ Kidder, *Mirror or Magnify*, *supra* note 91, at 1086–87.

¹⁹² *Id.*

¹⁹³ Braceras, *supra* note 57, at 1175–76.

¹⁹⁴ Kidder, *Mirror or Magnify*, *supra* note 91, at 1081–82.

¹⁹⁵ See, e.g., Jonathan Feingold, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 231, 231 (2011) (“Stereotype threat may be a possible source of bias in standardized tests, a bias that arises not from item content but from group differences in the threat that societal stereotypes attach to test performance.”); see also Asmara G. Carbado, *Reaction to: Color-Blindness and Stereotyping*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 275, 275 (2011) (“Feingold explains, ‘When exposed to stereotype threat, vulnerable Black and Latino/a LSAT takers suffer from a race-dependent measurement bias.’ To put this point another way, but for stereotype threat, Black and Latino test-takers would score approximately four points higher.”); Maheen Kaleem, *Reaction to: Color-Blindness and Stereotyping*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 269, 270 (2011) (“Perhaps the most dangerous consequence of adopting Feingold’s policy is his claim that increasing a critical mass of students of color in law school settings will somehow move us towards a

Stereotype threat may manifest itself as test anxiety but should not be written off as test anxiety alone. Stereotype threat studies acknowledge that anxiety levels and blood pressure may be raised when the person battling the negative stereotype takes an exam.¹⁹⁶ For example, “[n]umerous studies reporting that female college students report greater levels of anxiety when taking standardized tests compared to male college students”¹⁹⁷ and it is no secret that law schools are “hostile learning environments for minorities, which cause them to feel alienated and have a negative impact on their ability to learn and perform.”¹⁹⁸ When minorities are expected to produce lower performance, the lower expectations become self-fulfilling.¹⁹⁹ Individuals fear conforming to the negative stereotype, which causes anxiety due to self-doubt, which lowers their test performance due to internalization of the stereotype.²⁰⁰

To start to overcome the effects of stereotype threat students must have certainty and confidence in their own abilities.²⁰¹ To help outsider students gain this confidence, some law school programs raise awareness of stereotype threat during the students’ upper-division years in their academic support and bar prep programs.²⁰² However, this article argues that awareness of the stereotype generates more test anxiety and could cause students to underperform. Stereotype threat programming is equivalent to the priming action in Steele and

more ‘color-blind’ classroom. It is the constant push for ‘color-blindness,’ synonymous with ‘whiteness,’ that marginalizes the experiences of students of color in the law school environment and legal profession. To assume that representation is the only issue perpetuating racism in the classroom is to deny the inherent racism in the internal logic of the law. Although some law schools now offer critical race studies classes, or hire critical legal scholars onto their faculty, the majority of law schools do not teach students to critique the underlying biases with which the law is often written.”).

¹⁹⁶ Kidder, *Mirror or Magnify*, *supra* note 91, at 1087.

¹⁹⁷ Kidder, *Portia Denied*, *supra* note 117, at 28.

¹⁹⁸ Riebe, *supra* note 7, at 276–77.

¹⁹⁹ *Id.* at 277.

²⁰⁰ Kidder, *Mirror or Magnify*, *supra* note 91, at 1087.

²⁰¹ Lustbader, *supra* note 93, at 99.

²⁰² See, e.g., *Academic and Bar Exam Success: Bar Exam Services*, U. OF SAN FRANCISCO SCH. OF L., <https://www.usfca.edu/law/academics/academic-services/academic-and-bar-exam-success> (last visited Mar. 24, 2018) (providing an example of academic and bar exam success services provided to struggling students).

Aronson's study where minorities are informed about the negative stereotype.²⁰³ The only difference with stereotype threat programming is that universities expect students to perform better after obtaining knowledge of the stereotype, whereas Steele and Aronson expect students to perform worse.²⁰⁴

Thus, instead of reminding students about negative stereotypes during their third year, schools should put stereotype threat programming in the first-year curriculum and provide proper support throughout the second and third years to help students disprove these stereotypes. Any programming related to stereotype threat in the final year of law school risks causing more problems than solutions if students are not in the right mindset. Thus, if 3L programming is necessary, it is likely better to reframe the stereotype threat programs to focus on overcoming test anxiety to avoid triggering the stereotype threat effect.

B. Promoting Speediness and Memorization as a Test of Grit

Many scholars believe the bar exam is not valid because it requires an aspect of memorization and speed to pass the exam.²⁰⁵ Many schools even offer programming that tells students the bar exam is not an accurate measure of their ability to practice law because no studies show a correlation between the bar exam and competence or actual achievements as a lawyer.²⁰⁶ While it is true that the bar exam does not fully measure a person's ability to be a successful attorney, this article argues that offering programs discrediting the bar exam causes students to adopt a mindset of apathy for the bar exam and the bar prep season. As a result, the students are likely to dread the bar because they question the process and are unable to understand the reasoning behind the bar as a license barrier. If students do not understand the reasoning behind the exam's existence, then it is harder to obtain buy-in from them to achieve the goal of passing the exam. Thus, we must change our students' mindset to help them understand that the bar exam is necessary to test applicant's grit.

²⁰³ Kidder, *Mirror or Magnify*, *supra* note 91, at 1086–87.

²⁰⁴ *Id.*

²⁰⁵ Curcio et al., *supra* note 65, at 232–35.

²⁰⁶ Riebe, *supra* note 7, at 278.

Grit is a personality trait possessed by individuals who demonstrate passion and perseverance to achieve goals over an extended period of time despite being confronted by significant obstacles and distractions.²⁰⁷ Grit is an essential trait possessed by many successful individuals²⁰⁸ and is something the legal profession desires from its admits.²⁰⁹ Students must understand that the bar prep season, which is merely three months and 0.003% of their entire lifetime if they live to eighty years old,²¹⁰ is testing their determination and ability to triumph in stressful and tough situations. In practice, the work will not always be easy, and the bar exam ensures the attorneys admitted have the ability to persevere through the difficult times and properly represent their clients.

As for speediness, a student's ability to complete the test within the given time constraints is always a struggle,²¹¹ especially for outsiders who must change their thinking to match the thoughts of mainstream society.²¹² Stereotype threat and language barriers are likely causes of the reduced speed because the examinee might second guess his or her answers and delay proceeding to the next question.²¹³ In addition, the fear of selecting the wrong answer due to test anxiety could preclude the test taker from guessing.²¹⁴ Studies show that women have a higher rate of omitting items than men on the LSAT and GRE and Black, Puerto Rican, and Hispanic test takers have been found to produce "particularly dramatic" speediness differences compared to

²⁰⁷ Angela Lee Duckworth, *Grit: The Power of Passion and Perseverance*, TED TALKS (Apr. 2013), at 3:01–3:26, https://www.ted.com/talks/angela_lee_duckworth_grit_the_power_of_passion_and_perseverance.

²⁰⁸ *Id.*

²⁰⁹ See, e.g., Katherine M. Larkin-Wong, *Grit, Growth Mindset & Being A Great Trial Lawyer*, AM. BAR. ASS'N., (Mar. 9, 2015), <http://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2015-0315-grit-growth-mindset.html> (indicating that the legal profession has recognized the importance of grit in a successful career as a lawyer with the creation of the "Grit Project").

²¹⁰ There are 365 days in a year. 80 years* 365 days = 29,200 days. Bar prep lasts for 3 months (May, June, and July), which is a total of 92 days (31 + 30 + 31). $92/29,200 = 0.003151\%$.

²¹¹ Kidder, *Portia Denied*, *supra* note 117, at 24.

²¹² Kidder, *Testocracy*, *supra* note 92, at 171.

²¹³ Kidder, *Portia Denied*, *supra* note 117, at 29.

²¹⁴ *Id.*

White students.²¹⁵ However, practicing the step-by-step method described in Part IV can increase an outsider's speed because it familiarizes the outsider with the content being tested. The bar exam is directly testing speediness, but indirectly testing an applicants' grit, focus, discipline, and determination during the preparation process to reach a level of competency.

Thus, programming and classes in law school should shift towards teaching students how to control what they can control rather than wasting energy debating the validity of the bar exam itself. Instead of discrediting the bar, we should teach our students that the bar gives artificial time constraints because “[Lawyers] must be able to work quickly because the demands of law practice and clients require maximum . . . efficiency. Lawyers must [be able] to focus hard and [produce] competent work . . . quickly. . . .”²¹⁶ Explaining the reasoning behind the test might help motivate students to study and avoids giving students an additional timing excuse to justify their decisions not to study. Law schools must remind students that being a lawyer is not an easy job. Mental toughness, grit, work ethic, and perseverance are all necessary traits to be a successful attorney and the bar exam tests soft skills as well as a person's ability to solve analytical problems and write competently. Not everyone is suited to be a lawyer and the bar exam has determined that individuals who lack the grit necessary to reach minimum competency are not suited for the profession.

IV. A STEP-BY-STEP PROCESS TO LEVEL THE PLAYING FIELD

Section III suggested solutions to non-cognitive factors that impact an examinee's ability to pass the bar examination, such as an examinee's lack of confidence and improper presentation of sensitive theories in academic support and bar preparation programs. But changing a person's mindset or a school's curriculum and culture is difficult and time consuming. Thus, this article offers a concrete, mechanical step-by-step solution that students can easily and immediately implement to battle test biases.

Overcoming test biases includes four steps: (1) recognize you might possess a differing opinion, (2) search for words or phrases in the

²¹⁵ *Id.*

²¹⁶ Riebe, *supra* note 7, at 278.

question that eliminate ambiguity and biases, (3) use objective logic, such as the law and IRAC,²¹⁷ to find the best answer, and (4) only make common sense inferences that are from a stereotypical “normal, average, American” person. But before discussing the theories, this section will explain the research study that collected data on the step-by-step method’s impact on law school students.

A. The Logic for Lawyers Statistical Study

The four-step process was implemented in the University of San Francisco School of Law’s (USF) third-year curriculum starting Spring 2016 in a class titled Logic for Lawyers.²¹⁸ During the first week, students took a diagnostic test that evaluated their multiple-choice, test-taking abilities. The exam was a one-hour exam that contained twenty-four questions. To isolate their skill abilities from their substantive understanding, the students were provided with all the law necessary to answer the questions during the exam. The diagnostic was essentially an open-book exam and included MBE subjects they already took in their first-year (Civil Procedure, Contracts, Criminal Law, and Torts) and likely took during their second year (Evidence, Criminal Procedure, Constitutional Law, and Real Property). During week thirteen, after a semester of learning multiple-choice skills, including the four-step process to eliminate test biases, the students completed an exit exam that mirrored the same format and subjects as the diagnostic to see if their skills improved; but the exit exam used different MBE questions. The results and sample size of the study are below.

²¹⁷ A detailed discussion of IRAC is provided below.

²¹⁸ Logic for Lawyers is a class developed by Professor Christina Chong, author of this article, to increase the multiple-choice test-taking skills of third-year law students. The data presented in this article was collected and analyzed by Professor Chong over a two-year period.

Semester	# of Students	Average Diagnostic Score	Average Exit Score	Average Increase	High and Lows for Increases
Fall 2017	25	48.0%	66.1%	+16.1%	High: +55% Low: +4%
Spring 2017	20	60.4%	80.5%	+20.1%	High: +45% Low: +8%
Fall 2016	20	50.4%	62.7%	+15.4%	High: +42% Low: +5%
Spring 2016	25	60.0%	81.2%	+21.2%	High: +46% Low: 0.5%

The four-step method was only a portion of the Logic for Lawyers curriculum, but the method was reinforced throughout the semester and students were required to practice the four-step skill to increase their chances of passing the bar exam. Other skills taught throughout the semester included how to approach an MBE question, speed reading, timing techniques, how to improve reading comprehension, how to identify incorrect answers, how to IRAC a multiple-choice question, how to create attack plans, and how to properly mark-up an MBE fact pattern.

A logical and linear regression analysis using R Project²¹⁹ revealed that 78% of the students (fourteen out of eighteen) who took

²¹⁹ Logistic regression is a statistical technique for estimating the change in the dependent variable due to the change in one or more independent variables. The dependent variable in this study was bar passage (fail or pass) and the independent variable was enrollment in Logic for Lawyers. Logistic regression provides a coefficient estimate that allows us to make future projections based on the average mathematical relationship between the two variables. The estimate is a numerical

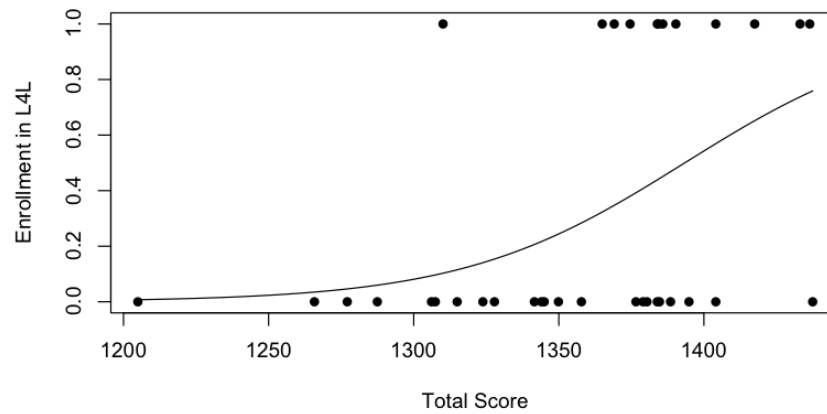
Logic for Lawyers outperformed their LSAT predictors on the MBE portion of the bar exam; data for seven students is still missing due to California's decision to not release the passage lists to law schools. Linear regression analysis on R Project also revealed that a student enrolled in Logic for Lawyers, compared to the rest that students graduating class, was more likely to have a higher total score on their first-attempt to pass the California Bar Examination by 45.11 points (p value = 0.0116).²²⁰ When a student fails the bar exam, the state bar sends a breakdown of their total scaled score (0 to 2000 points).²²¹ A student needs a total scaled score of 1440 to pass the bar exam. When measured collectively with other bar prep courses offered at USF, such as classes focused on improving essay and PT skills, Logic for Lawyers had an even higher positive impact of 66.33 points and increased statistical significance (p value = 0.00361).

The graph illustrates the positive impact of Logic for Lawyers on a student's total scaled score.

value that describes how the independent variable is related to the dependent variable; the estimate indicates the impact of a unit change in the known, predictor variable (the independent factor) on the unknown, estimated variable (the dependent variable; bar passage). *What is Logistic Regression*, STATISTICS SOLUTIONS, <http://www.statisticssolutions.com/what-is-logistic-regression/> (last visited Jan. 9, 2018). Linear regression is a correlation study that analyzes the co-relationship between two variables through a correlation coefficient. Similar to logistical regression, linear regression uses a scale that measures the change in the dependent variable based on independent variables. The major difference between the two-regression analysis is the dependent variable in linear regression is on a numerical scale rather than a limited "pass-fail scale." *Id.*

²²⁰ *Id.* The lower the p value, the more significant the results. P values below 0.05 (p < 0.05) are significant while p values above 0.1 are not significant (p > 0.1). P values between 0.05 and 0.1 are marginally significant.

²²¹ *California Bar Exam Grading*, THE ST. BAR OF CALIF., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Exam/Description-and-Grading-of-the-California-Bar-Exam> (last visited Feb. 19, 2018) (explaining that in California the MBE scores are reported on a scale of 0 to 2000).



To further verify that that Logic for Lawyers was positively influencing a student's ability to pass the bar exam, the study analyzed the impact of Logic for Lawyers by quintile. The study created five different sub-set sample groups where the students law school GPAs were similar. The results revealed that Logic for Lawyers increased a student's total score in the second quintile by 77.70 points (p value = 0.02) and third quintile by 61.05 points (p value = 0.0563). A chart illustrating the results is below.

Rank 1	Rank 2	Rank 3	Rank 4	Rank 5
Not significant	+77.70 points	+61.05 points	Not significant	Not significant

Thus, the class had a positive statistically significant impact on a student's total scaled score on the California Bar Examination. Although the four-step method cannot be fully credited for this increase in the students' test-taking abilities, it did play a role and can be used in the classroom, during workshops, or for one-on-one counseling to help students overcome the challenges of the MBE. A detailed breakdown of the four-step process is below.

B. Step #1: Identify Possible Conflicts of Opinion or Differing Viewpoints

First, examinees must understand that the exam is likely going to be from a particular viewpoint that disadvantages people with different opinions. Examinees must realize that if the examiners

determine there is “only one answer – their answer.” Even if the examinee believes the answer is incorrect, it does not matter.²²² The goal is not to fight the test. The goal is to solve the problem presented from the test administrator’s point of view.²²³ Step #1 can be a grueling process because many students do not realize their opinions or personal feelings could be influencing their answers. Many students are unsure why they answered the question incorrectly, even after reviewing the answer explanations, and default to the assumption that a lack of knowledge or understanding of the law caused them to select the wrong answer choice. They fail to realize that they might know the law but interpret it in a different manner. The student could be reacting to their gut instinct, which can be very dangerous because not everyone has the same instinct. This step is difficult because it requires awareness of cultural, personality, and all other types of background issues that might get in the way of answering a question. However, with enough reflection, this step can be fairly easy for students to accomplish.

When Professor Rachel Moran conducted a study on the reaction of Berkeley Law’s student body, she concluded that:

[S]tudents perceive[d] the first-year classroom as a hierarchical environment in which their contributions must fit within the professor's agenda. Although students may arrive with diverse experiences and viewpoints, they all must learn to “toe the party line,” a process that some find “intellectually stunting.” Those students of color who take seriously the notion that their perspectives should be included see themselves in an uphill fight to challenge the status quo. Some believe that they must struggle not only against the professor's unquestioned authority, but also against their classmates' discomfort and anxiety in addressing racial issue.²²⁴

Moran’s study revealed that there is a body of student who are experiencing the pressure to conform or think a certain way that matches mainstream society.²²⁵ During law school and throughout their

²²² Bothwell, *supra* note 129, at 12.

²²³ *Id.*

²²⁴ Kidder, *Mirror or Magnify*, *supra* note 91, at 1105.

²²⁵ *Id.*

professional career, battling the status quo is always an act that should be encouraged. However, Step #1 encourages students to understand that battling that status on the bar exam is setting yourself up for failure. It is the wrong time, place, and space to fight the validity of the question, facts, outcome, or theories. Instead, the bar exam is a time to show your understanding of the current state of law and legal thinking. The ability to change law is a great strength, but it requires the understanding of the current state of the law and how those in power view that particular legal theory's application to factual scenarios. That is the skill students must learn to master to battle the biases.

If a student realizes that he or she does not possess the same "common sense" thinking as the drafter, then the goal is to switch that thinking when a similar question arises. The student does not need to change their personality or viewpoints, the student needs to recognize where he or she might be different to appropriately implement the four-step method.

C. Step #2: Increase Reading Comprehension to Eliminate Biases

Step #2 is a less challenging fix than completely changing an individual's mindset because it requires students to slow down and make purposeful markings throughout the fact pattern to ensure they don't miss words that could eliminate possible biases. A couple of examples are below.

Question # 13 – Contracts

A seller sent an email to a potential buyer, offering to sell his house to her for \$150,000. The buyer immediately responded via email, asking whether the offer included the house's front porch swing. The seller emailed back: "No, it doesn't." The buyer then ordered a front porch swing and emailed back to the seller: "I accept your offer." The seller refused to sell the house to the buyer, claiming that the offer was no longer open.

Is there a contract for the sale of the house?

(A) No, because the buyer's initial email was a counteroffer.

- (B) No, because the offer lapsed before the buyer accepted.
(C) Yes, because the buyer relied on the offer by ordering the swing.
(D) Yes, because the buyer's initial email merely asked for information.²²⁶

In this question, answer choice (D) is correct. But the issue relates to why answer choice (B) is incorrect. In this fact pattern, the outsider group includes individuals who might not respond quickly to email or do not equate email to an instant message system. The drafter incorrectly assumes that everyone will believe the buyer's second email response was immediate, which causes individuals who assumed the buyer took time to send the acceptance email to select answer choice (B). Examinees who read the facts closely will circle that the buyer "immediately" responded to seller's first email with an inquiry. This is the drafter's attempt to eliminate any bias by telling examinees that this conversation occurred within a short period of time. Although the question never stated the buyer's acceptance email was also an immediate response, when debating between (B) and (D), the examinee should realize that (D) might be a better choice based on the words used in the fact pattern.

Question # 67 - Constitutional Law

A number of psychotherapists routinely send mailings to victims of car accidents informing the victims of the possibility of developing post-traumatic stress disorder (PTSD) as the result of the accidents, and offering psychotherapy services. Although PTSD is a possible result of a car accident, it is not common.

Many accident victims in a particular state who received the mailings complained that the mailings were disturbing and were an invasion of their privacy. These victims also reported that as a result of the mailings, their regard for psychotherapists and for psychotherapy as a form of treatment had diminished. In response, the state enacted a law prohibiting any licensed psychotherapist from sending mailings that raised the concern of PTSD to any car

²²⁶ STEVEN L EMANUEL, STRATEGIES AND TACTICS FOR THE MBE (MULTISTATE BAR EXAM) 748–49 (6th ed. 2016).

accident victim in the state until 30 days after the accident. The state justified the law as an effort to address the victims' complaints as well as to protect the reputation of psychotherapy as a form of treatment.

Is this law constitutional?

(A) No, because the law singles out one type of message for prohibition while allowing others.

(B) No, because the mailings provide information to consumers.

(C) Yes, because mailings suggesting the possibility of developing PTSD as the result of an accident are misleading.

(D) Yes, because the law protects the privacy of accident victims and the public regard for psychotherapy without being substantially more restrictive than necessary.²²⁷

The correct answer is (D). Examinees who believe society should raise awareness about PTSD might select answer choice (B) because the mailing provides consumers with immediate information. This examinee might believe the mailings could timely help victims of car accidents who did not realize they were suffering from PTSD; waiting thirty days might seem neglectful to these individuals. Other examinees might believe privacy is more important and select answer choice (C). Individuals who believe in the freedom of speech might pick answer choice (A). In this fact pattern, there are so many different opinions floating around.

However, close reading comprehension help examinees select answer choice (D). The facts state that “[a]lthough PTSD is a possible result of a car accident, it is not common” and “[t]he state justified the law as an effort to address the victims' complaints as well as to protect the reputation of psychotherapy as a form of treatment.” These two sentences attempt to eliminate the constitutional debate above and lead the examinees to the realization that thirty days is not forever, but a “reasonable” time period, especially if PTSD is not common. Individuals who believed PTSD is an issue in society must pay close attention to the fact that the drafters are trying to eliminate bias by explicitly stating PTSD was not common, which means it wasn't a

²²⁷ *Id.*

compelling issue. Individuals leaning towards (A) and (C) must realize that the government tends to balance interests rather than choose sides. Thus, (A) and (C) were purposefully added as distractors to stimulate people's personal reactions to the issue. Those individuals must pay close attention to the state's justification.

D. Step #3: Use IRAC to Objectively Analyze the Facts

The second example for Step #2 exemplifies how students who lack an understanding of the law fall prey to their own values and opinions. This often happens because Step #3 is a difficult step to master. Logic for Lawyers teaches students the following techniques to help them accomplish Step #3: (i) read the specific inquiry before the fact pattern, (ii) how to effectively transfer the IRAC skill used to attack essay questions to multiple-choice questions, and (iii) how to use markings to quickly IRAC the fact pattern. An example of the techniques is discussed using the torts multiple-choice question on invasion of privacy.

A well-known movie star was drinking wine at a nightclub. A bottle of the wine, with its label plainly showing, was on the table in front of the movie star. An amateur photographer asked the movie star if he could take his picture and the movie star said, "Yes." Subsequently, the photographer sold the photo to the wine company, whose wine was pictured in the photo. The wine company, without the movie star's consent, used the photo in a wine advertisement in a nationally circulated magazine. The caption below the photo stated, "This movie star enjoys our wine."

If the movie star sues the wine company to recover damages as a result of the wine company's use of the photograph, will the movie star prevail?

- (A) No, because the movie star consented to being photographed.
- (B) No, because the movie star is a public figure.
- (C) Yes, because the wine company made commercial use of the photograph.

(D) Yes, unless the movie star did, in fact, enjoy that specific wine.²²⁸

1. Read the Specific Inquiry

Students should read the specific inquiry, which is also known as the prompt, before reading the facts. This technique eliminates subjective thoughts in the beginning because it provides students with the central issue of the multiple-choice question and leaves less room for their personal interpretations of what might be important within the facts. For example, “if the movie star sues the wine company to recover damages as a result of the wine company’s use of the photograph, will the movie star prevail?” indicates the multiple-choice question will be about torts, invasion of privacy, and specifically the use of a movie star’s photography by a wine company. Students will know the question is not about negligence or criminal law before read the fact pattern.

Some students take this technique a step further and scan the answer choices to see if there are other sub-issues that might be important to answering the specific inquiry. In this example, a quick scan of the answer choices would alert the reader that consent, whether the movie star is a public figure, and commercial use might be important issues to analyze.

Beginning with the specific inquiry and answer choices gives students a better understanding of the problem that needs to be solved before they dive into the fact pattern. Students who opt to start with the facts are often forced to reread the facts before selecting the best answer because their initial read was done without any context of the issues raised by the prompt. If students read the inquiry first, then the students know the issues raised by the facts in advance and students can actively begin solving the problem and IRACing the facts when they read the first sentence of the fact pattern.

2. IRAC the Multiple-Choice Question

IRAC is an acronym for Issue, Rule, Analysis, and Conclusion. IRAC is an analytical and organizational tool that attorneys use to solve problems. First, the attorney must identify the issue presented by the facts. Second, the attorney must identify and state the controlling law

²²⁸ *Id.*

related to that issue. Third, the attorney must use the facts to analyze whether the rule is met or not met and explain why the facts support his or her arguments. Fourth, the attorney must make a final conclusion on the issue based on the current law and analysis of the facts.

Students use the IRAC structure to create formal work product, such as motions, and to complete law school essay exams. However, students rarely use IRAC to solve multiple-choice questions. Students struggle to understand that the IRAC skill used for essays exams is the same IRAC skill used for MBEs. The only major difference is essay exams require students to “show their work” by explaining the arguments in written prose whereas MBEs require no explanation and test the student’s ability to quickly analyze the problem and select an answer. If students can understand that a multiple-choice question is essentially an essay question and learn to transfer the IRAC skill from essays to MBEs, then students are more likely to select the best answer choice.

Logic for Lawyers removes the four answer choices, which transforms the MBE questions into essay questions, and instructs students to IRAC the questions before looking at the answer choices. An example of the exercise is below.

A well-known movie star was drinking wine at a nightclub. A bottle of the wine, with its label plainly showing, was on the table in front of the movie star. An amateur photographer asked the movie star if he could take his picture and the movie star said, “Yes.” Subsequently, the photographer sold the photo to the wine company, whose wine was pictured in the photo. The wine company, without the movie star’s consent, used the photo in a wine advertisement in a nationally circulated magazine. The caption below the photo stated, “This movie star enjoys our wine.” If the movie star sues the wine company to recover damages as a result of the wine company’s use of the photograph, will the movie star prevail?

I: What are the issues raised by the facts and/or prompt?

Defamation, Constitutional Limits, Consent,
Misappropriation of Right to Publicity

**R: What rules will help us answer the issue statement?
State the rules.**

Invasion of Privacy by Misappropriation: (a) Unauthorized use (b) of P's name, photo, signature, voice, or likeness (c) for commercial advantage. Consent is a defense.

A: How do the rules apply to the relevant facts? Explain why and argue both sides.

- (a) Unauthorized use is met because the wine company's use of the photo was outside the scope of P's consent. P consented to the photo being taken, but not the wine company's ad.
- (b) P's photo was used in the wine advertisement and people would recognize P in the photo because P is famous.
- (c) The wine company used the photo for commercial advantage because the company included the photo in a nationally circulated magazine with the caption "This movie star enjoys our wine!" The wine company wanted to use the movie star's fame to increase its customers and sales.

**C: What is the best answer to the specific inquiry?
Conclude.**

Yes, the movie star will prevail because the elements are met and no defenses apply.

After the students fully analyze the essay question using IRAC, the question is transformed into a multiple-choice question by revealing the four possible answers choices.

- (A) No, because the movie star consented to being photographed.

- (B) No, because the movie star is a public figure.
- (C) Yes, because the wine company made commercial use of the photograph.
- (D) Yes, unless the movie star did, in fact, enjoy that specific wine.

Students are instructed to select the best answer. Most students immediately select (C), which is the correct answer, and admit that doing a full IRAC analysis of the fact pattern helped them quickly identify the answer choices that were incorrect.

This IRAC technique gives students a methodical way to attack multiple-choice questions that does not rely on subjective opinions. IRAC focuses the students' mental energy on objectively analyzing the fact pattern using the law to find the best answer versus analyzing how they feel about the facts. IRACing often speeds up the selection process when students get to selecting one of the four answer choices, but students fear that IRACing an MBE will take too much time. As a result, students revert back to rushing through the analytical process and relying on their gut feelings and opinions. To help combat the anxiety related to timing, students must use markings on an MBE question to speed up the IRAC process.

3. Use Markings to Quickly IRAC the Fact Pattern

Most students circle and underline words in a multiple-choice question without any formal system; the markings have no meaning. As a result, the students have to reread the fact pattern multiple times to complete a proper IRAC, which slows them down; or the students will complete an IRAC, but miss important facts that were not underlined or focus on irrelevant facts that were incorrectly underlined.

For IRAC to work, students should enter the exam with a formal markings technique, such as "I will circle all the parties and pieces of property; I will put a square around dates; I will double underline important facts, write the issue that facts addressed in the margin, and write a quick note of whether the rule was met or not met based on those facts; and I will underline facts that feel important, but I'm unsure if the facts relate to the central issue." There is no perfect technique, but this example markings technique above forces students to underline and circle with a purpose, which identify the issues and rules raised by the

facts. The quick notes in the margin push students to quickly analyze the facts and make a conclusion because they must write a note in the margin about why those facts were important. This quick note technique also prevents the students from writing full sentences that are appropriate for essays but not for time-sensitive multiple-choice questions. An example of this technique is shown in Appendix D.

To accomplish Step #3, students must understand and memorize the nuances of the law to objectively apply the law to the fact pattern. If the student does not know or understand the law, then the student cannot properly and methodically IRAC the multiple-choice question under exam conditions. However, knowing all the law tested on the bar exam is a difficult task for several students due to the time constraints of the study period and the mass amount of information. The MBEs test seven different subjects that cover detailed rules, such as exceptions and exceptions to the exceptions. Step #4 attempts to push students in the right direction when they start relying on their gut feelings because they are unable to recall the law to IRAC a multiple-choice question.

E. Step #4: Think Like the “Normal, Average, American” Person

Step #4 requires students to understand what the drafters believe is considered a “normal, average, American” person’s opinion. The technique appears to be simple; if a student is in doubt, then the student should select the answer that mirrors the opinions of the person who wrote the question. In reality, the technique is complicated because no one actually knows who drafted the question.

To resolve the issue, students are advised to view the question from the lens of a normal, average, and American person. But what is normal, average, and American? Honestly, addressing that debate is an entirely separate article on its own because America is a melting pot of cultures and personalities and the individuals who draft the MBE questions are from a variety of backgrounds. Thus, the only way for a student to learn what is considered normal, average, and American on the MBEs is to complete more multiple-choice questions with Step #1 in mind.

Students must answer 1500-2000 multiple-choice questions within the bar prep season with the goal of understanding where their

personal viewpoints differ from the drafters and keep a written journal of these differences to review before exam day. If an examinee can achieve high self-awareness and develop an understanding of how MBE drafters view the world, then the examinee can IRAC and interpret the facts similar to the drafter, which will increase his or her chances of selecting the best answer.

CONCLUSION

Standardized testing has come a long way from its explicitly biased questions that often were insensitive to the experiences of minority groups. Earlier tests focused on the white, male experience, but today's tests now include a diversity of narratives related to women and other cultures. However, this increase of diversity also comes with responsibility. Test administrators must be careful of "what they say and how they say it" to ensure they are displaying sensitivity to the whole test-taking audience, which includes groups that were historically marginalized and could be impacted by insensitive narratives. But until society changes its drafting for the bar examination and other standardized exams, the reframing of non-cognitive factors that impact bar passage and teaching students the four-step method to overcoming test biases will hopefully give outsiders a higher chance of passing the bar examine on the first attempt.

APPENDIX A

Below are sample questions from the LSAT from William C. Kidder's article, *Portia Denied: Unmasking Gender Bias on the Lsat and Its*

Relationship to Racial Diversity in Legal Education, 12 YALE J.L. & FEMINISM 1, 38–42 (2000) (internal citations omitted).

Women

The bias and stereotyping in the following question is sufficiently obvious that commentary is not really necessary:

Fred is tall, dark, and handsome, but not smart.
People who are tall and handsome are popular.
Joan would like to meet anyone with money.

If the statements above are true, which of the following statements must also be true?

- I. Fred is popular
- II. Fred has money.
- III. Fred is someone Joan would like to meet.

African Americans

Often questions have subtle biases when certain wrong answers are differentially distracting based on cultural background. For example, a Reading Comprehension passage about Zora Neale Hurston's *Their Eyes Were Watching God* mentions how feminist criticism and Afrocentric standards of evaluation were important to the rediscovery of this work.

However, “Afrocentric” or “Feminist” appear in four of the incorrect answer choices but none of the correct ones. Espinoza notes that “the discourse of the test does not challenge the emotional steadiness of White males. The distractor questions are discriminatory because they effect only the outsider test taker.”

Latinos

In a certain mythical community where there are only two social classes, people from the upper class are all highly educated, and people from the lower class are all honest. Maria is poor. If one infers that Maria is honest and uneducated, one presupposes that class status in the mythical society depends upon . . . (answer choices omitted).

Espinoza comments on this question: “Why Maria? Is Maria by any chance Hispanic? This is one of a handful of questions using non-Anglo names. The question creates a vision of insiders and outsiders based on ethnicity and class.”

Asian Americans

Asian Americans are sometimes portrayed in LSAT questions as hard working and industrious, which at first blush appears to be a positive thing. However, test takers who are concerned with how the Asians-as-hardworking stereotype contributes to a “model minority myth” injurious to both the Asian Americans and to other minorities may resist picking answers with this stereotype. One fairly recent passage about the success of Chinese and Japanese immigrants asked:

Which one of the following can best be described as a supply-side element in the labor market, as such elements are explained in the passage?

- A) concentration of small businesses in a given geographical area
- B) need for workers with varying degrees of skill
- C) high value placed by immigrants on work (correct answer)
- D) expansion of the primary labor market
- E) development of an advanced capitalist economy

The above recent passage echoes a stereotyped notion of Asians which has been repeated in earlier versions of the LSAT.

Myths and Facts about the MBE²²⁹

Examinees often hear myths relating to the MBE, one of the important parts of the test of minimum competence for licensure to practice law. Over the years, significant research has been conducted that dispels these myths.

Myth 1: The MBE is a test of memory and test-taking ability, not of legal knowledge or analytical skill.

Fact: Research indicates that MBE scores are highly correlated with other measures of legal skills and knowledge, such as law school grades and scores on essay examinations. These correlations provide empirical evidence that the MBE is testing legal ability rather than general test-taking ability. More recent research conducted in 2004 examined the cognitive processes used by examinees to answer MBE questions and found that the cognitive process of applying legal principles was most closely correlated with high performance, while irrelevant cognitive processes, such as test-taking strategies, had little impact on performance. In research conducted in July 1986, incoming law students took the morning session of the MBE, and their scores were compared to the scores of graduates of the same law schools who had taken the same examination. The novices and graduates had virtually identical mean LSAT scores, so if the ability to take multiple-choice tests were the major factor influencing MBE scores, both groups should have had very similar MBE scores. In fact, the highest MBE score earned by the novices was lower than the lowest score earned by any of the graduates.

Myth 2: MBE questions are needlessly difficult, arcane, and tricky.

Fact: MBE questions are designed to be a fair index of whether an examinee has the ability to practice law. MBE questions are written by drafting committees composed of law teachers and practitioners. Before it is administered, every MBE question is reviewed at several levels: at least twice as it is edited by the drafting committee, by psychometric experts to ensure that it is fair and unbiased, and by the practitioner members of the MBE Policy Committee and their academic consultants. After a form of the MBE is administered, any question that performs in

²²⁹ *Myths*, NAT'L. CONF. OF BAR EXAM'RS., <http://www.ncbex.org/exams/mbe/preparing/> (last visited Spring 2016).

an unanticipated manner—is very difficult or is missed by examinees who did well on the rest of the test—is flagged by psychometric experts and reviewed again by content experts on the drafting committees to ensure that no ambiguity exists in the question and that the key (the correct answer) is unequivocally correct. Should an error be detected even after this thorough scrutiny, two or more answers may be deemed correct in order to ensure that no examinee is disadvantaged by having a particular question appear on the form of the MBE he or she took.

Myth 3: Not enough time is allotted to answer MBE questions.

Fact: Research shows that the time allotted to take the MBE is sufficient for 99 percent of examinees. The MBE is designed to be answered by a reasonably competent examinee in the amount of time available. The rate of correct responses at the end of a three-hour session is not significantly different from the rate of correct answers at other, earlier points in the test. A research project in which examinees were given virtually unlimited time to answer the MBE resulted in an average increase in score of about six raw (unscaled) points. Since all groups benefit from an increase in time to the same degree, and since the test is scaled to account for differences in difficulty, an increase in the average score would be offset in the scaling process and additional time would not be expected to increase examinees' scaled scores.

Myth 4: Essay examinations and performance tests are better ways to measure minimum competence to practice law.

Fact: While essay examinations and performance tests provide important information about examinees, there are several significant advantages to including multiple-choice tests on a bar examination. First, multiple-choice testing offers the opportunity for a breadth of coverage of subject areas which cannot be duplicated using only essay questions or performance tests. Second, multiple-choice questions can be scored objectively, and scores can be scaled to adjust for changes in difficulty from one test to the next. There are two sources of variation in difficulty in essay examinations and performance tests: variations in the difficulty of the test items themselves, and variations in how strict or lenient graders are. In contrast, scores on the MBE are equated through a process that ensures that a new form of the MBE is no more nor less difficult than a previous form. By comparing the performance of examinees on a common set of items, raw scores on the test can be

converted to adjusted, “scaled” scores that are directly comparable to one another. Because scores are equated, the MBE provides an anchor for other, more subjective test scores; the National Conference of Bar Examiners recommends that scores on essay examinations and performance tests be scaled to the MBE. And finally, this scaling of MBE scores allows direct comparisons of performance between tests. An examinee taking a current examination is on a level playing field with other examinees taking tests at other times.

Myth 5: The MBE discriminates against minority examinees.

Fact: The MBE neither widens nor narrows the gap in performance levels between minority and majority examinees. Research indicates that differences in mean scores between racial and ethnic groups correspond closely to differences in those groups' mean LSAT scores, law school grade point averages, and scores on other measures of ability to practice law, such as bar examination essay scores and performance test scores. Individual items on the MBE that are relatively difficult for one group are relatively difficult for all groups; the relative difficulty of the items within a subtest (e.g., the Constitutional Law items versus the Torts items) does not differ from group to group. Finally, total MBE scores are not higher or lower from group to group than they are on other test formats. All items on the MBE are reviewed for potential bias. The National Conference of Bar Examiners is committed to gender and ethnic diversity on all its drafting and policy committees. Each drafting committee is composed of members of both sexes, and members of ethnic minority groups participate in the preparation and review of items both at the drafting committee level and at the MBE policy committee level.

APPENDIX C

Below are examples of questions that might contain test biases from the NCBE's Online Practice Exam #4 from the Strategies & Tactics for the MBE.²³⁰

²³⁰ EMANUEL, *supra* note 226.

Question #13 – Contracts

A seller sent an email to a potential buyer, offering to sell his house to her for \$150,000. The buyer immediately responded via email, asking whether the offer included the house's front porch swing. The seller emailed back: "No, it doesn't." The buyer then ordered a front porch swing and emailed back to the seller: "I accept your offer." The seller refused to sell the house to the buyer, claiming that the offer was no longer open.

Is there a contract for the sale of the house?

- (A) No, because the buyer's initial email was a counteroffer.
- (B) No, because the offer lapsed before the buyer accepted.
- (C) Yes, because the buyer relied on the offer by ordering the swing.
- (D) Yes, because the buyer's initial email merely asked for information.

In question #13, answer choice (D) is correct. But the issue relates to why answer choice (B) is incorrect. The drafter assumes that everyone responds to email quickly. The facts state the buyer "immediately" responded to seller's first email with an inquiry, but never stated the buyer's acceptance email was also an immediate response. The facts are ambiguous and require an assumption. The outsider group includes individuals who might be slower in their responses through email and do not view email similar to an instant message system. Individuals who assume the buyer took time to send the acceptance email might select answer choice (B). However, if students use the step-by-step method described in the article and looked for signals within the fact pattern to resolve the ambiguity, the student would realize that the word "immediately" suggests the correspondence was more likely quick than elongated. Thus, when debating between (B) and (D), the student should lean towards selecting (B).

Question #14 – Criminal Law and Procedure

A valid warrant was issued for a woman's arrest. The police learned that a person with the woman's name and physical description lived at a particular address. When police officers went to that address, the house appeared to be unoccupied: the windows and doors were boarded up with plywood, and the lawn had not been mowed for a long time. A neighbor confirmed that the house belonged to the woman but said that the woman had not been there for several months.

The officers knocked repeatedly on the front door and shouted, "Police! Open up!" Receiving no response, they tore the plywood off the door, smashed through the door with a sledgehammer, and entered the house. They found no one inside, but they did find an illegal sawed-off shotgun. Upon her return to the house a few weeks later, the woman was charged with unlawful possession of the shotgun.

The woman has moved to suppress the use of the shotgun as evidence at her trial. Should the court grant the motion?

- (A) No, because the officers acted in good faith under the authority of a valid warrant.
- (B) No, because the officers did not violate any legitimate expectation of privacy in the house since the woman had abandoned it.
- (C) Yes, because the officers entered the house by means of excessive force
- (D) Yes, because the officers had no reason to believe that the woman was in the house.

In question #14, answer choice (D) is correct. However, readers must assume that the neighbor is not lying. No information is provided about the neighbor's credibility and outsiders with backgrounds where their neighbors are less trustworthy might be distracted by the facts. If students used the step-by-step method, they would realize that the drafters attempted to reduce any bias by stating "A neighbor *confirmed* that the house belonged to the woman but said that the woman had not

been there for several months.” The word *confirmed* is stronger than *stated* or *said* because it suggests the neighbor’s statement was true.

Question #28 – Criminal Law and Procedure

A defendant was validly arrested for the murder of a store clerk and was taken to a police station where he was given Miranda warnings. When an interrogator asked the defendant, “Do you understand your Miranda rights, and are you willing to give up those rights and talk to us?” the defendant replied, “Yes.” When asked, “Did you kill the clerk?” the defendant replied, “No.” When asked, “Where were you on the day the clerk was killed?” the defendant replied, “Maybe I should talk to a lawyer.” The interrogator asked, “Are you sure?” and the defendant replied, “I’m not sure.” The interrogator then asked, “Why would you want to talk with a lawyer?” and the defendant replied, “Because I killed the clerk. It was an accident, and I think I need a lawyer to defend me.” At that point all interrogation ceased. Later, the defendant was formally charged with murdering the clerk.

The defendant has moved to suppress evidence of his statement “I killed the clerk” on the ground that this statement was elicited in violation of his Miranda rights.

Should the defendant's motion be granted?

- (A) No, because although the defendant effectively asserted the right to counsel, the question “Why would you want to talk with a lawyer?” did not constitute custodial interrogation.
- (B) No, because the defendant did not effectively assert the right to counsel, and his conduct prior to making the statement constituted a valid waiver of his Miranda rights.
- (C) Yes, because although the defendant did not effectively assert the right to counsel, his conduct prior

to making the statement did not constitute a valid waiver of his Miranda rights.

(D) Yes, because the defendant effectively asserted the right to counsel, and the question “Why would you want to talk with a lawyer?” constituted custodial interrogation.

In question #28, answer choice (B) is correct. The issue with this question surrounds the defendant’s reply, “Maybe I should talk to a lawyer.” This question often tricks students with public defender minds. A student would select (D) if the student believed the defendant’s statement was clear enough to signal to the interrogator that the defendant wanted an attorney and the interrogator decided to ignore the defendant’s request by continuing questioning. If the student used the step-by-step method and searched for words or phrases that would eliminate the ambiguity, the student would realize the defendant stated, “I’m not sure,” when asked if he wanted an attorney, which suggests the defendant needed to be clearer about his assertion for counsel to the interrogator. However, outsider students still need to take that additional step to draw the inference.

Question #88 – Constitutional Law

A fatal virus recently infected poultry in several nations. Some scientific evidence indicates that the virus can be transmitted from poultry to humans. Poultry farming is a major industry in several U.S. states. In one such state, the legislature has enacted a law imposing a fee of two cents per bird on all poultry farming and processing operations in the state. The purpose of the fee is to pay for a state inspection system to ensure that no poultry raised or processed in the state is infected with the virus.

A company that has poultry processing plants both in the state and in other states has sued to challenge the fee. Is the fee constitutional?

- (A) No, because although it attaches only to intrastate activity, in the aggregate, the fee substantially affects interstate commerce.
- (B) No, because it places an undue burden on interstate commerce in violation of the negative implications of the commerce clause.
- (C) Yes, because it applies only to activities that take place wholly within the state, and it does not unduly burden interstate commerce.
- (D) Yes, because it was enacted pursuant to the state's police power, which takes precedence over the negative implications of the commerce clause.

In question #88, answer choice (C) is correct. Some readers, especially those who are pro-health or support the free market, might select answer choice (A) because they believe this law might cause companies to move their poultry business elsewhere to avoid the fee and continuing practices that transmit the virus to humans. Whether the fee, in the aggregate, substantially impacts interstate commerce is debatable. If students use the step-by-step method, they might be able to eliminate some biases by identifying that the facts stated “two cents per bird,” which is a very low threshold; companies with 200 birds would only pay \$4.00. However, without more information from the drafters, students are left with several unanswered questions about the number of companies in the industry, how many birds each company might be farming, and how many states have a large poultry business. These questions must be answered to determine if the law impacted interstate commerce in the aggregate.

Question #73 – Torts

A 14-year-old teenager of low intelligence received her parents' permission to drive their car. She had had very little experience driving a car and did not have a driver's license. Although she did the best she could, she lost control of the car and hit a pedestrian. The pedestrian has brought a negligence action against the teenager. Is the pedestrian likely to prevail?

- (A) No, because only the teenager's parents are subject to liability.
- (B) No, because the teenager was acting reasonably for a 14-year-old of low intelligence and little driving experience.
- (C) Yes, because the teenager was engaging in an adult activity.
- (D) Yes, because the teenager was not old enough to obtain a driver's license.

In question #73, answer choice (C) is correct. Most people would agree that driving is an adult activity. However, some outsiders might select (B) because teenagers can legally obtain their driver's license at the age of sixteen years old. In the U.S., teenagers do not become adults until they turn eighteen years old. Thus, whether driving is an adult activity is debatable because humans are not classified as adults until they are eighteen but allowed to drive when they are underage kids at sixteen years old. In this particular question, there isn't much the drafters could do to remove the ambiguity because the issues are rooted to the reality of our current laws. Instead, drafters should likely eliminate this question rather than add words or phrases to help the readers make the right assumptions.

Question #98 – Criminal Law and Procedure

A defendant is charged with an offense under a statute that provides as follows: "Any person who, while intoxicated, appears in any public place and manifests a drunken condition by obstreperous or indecent conduct is guilty of a misdemeanor."

At trial, the evidence shows that the defendant was intoxicated when police officers burst into his house and arrested him pursuant to a valid warrant. It was a cold night, and the officers hustled the defendant out of his house without giving him time to get his coat. The defendant became angry and obstreperous when the officers refused to let him go back into the house to retrieve his coat. The officers left him handcuffed outside in the street, waiting for a special

squad car to arrive. The arrest warrant was later vacated.

Can the defendant properly be convicted of violating the statute?

- (A) No, because the defendant's claim of mistreatment is valid.
- (B) No, because the statute requires proof of a voluntary appearance in a public place.
- (C) Yes, because the defendant voluntarily became intoxicated.
- (D) Yes, because the defendant voluntarily behaved in an obstreperous manner.

In question #98, answer choice (B) is correct. Outsiders who strongly believe drinking is a negative activity might determine the voluntary act of becoming intoxicated is enough to satisfy the statute. If the defendant never drank, then the defendant would have never violated the statute when the police arrested him and answer (C) would be correct. However, drafters determined the voluntary act of walking outside was required to be guilty of this statute and made answer choice (B) the best answer. This question raises several competing viewpoints and the step-by-step method only helps slightly. The facts state the “officer refused to let him go back into the house to retrieve his coat,” which suggests the defendant did not want to be indecent outside his home. But the facts also state that the “defendant became angry and obstreperous,” which is enough to be guilty of the statute. The statute says “obstreperous or indecent conduct.” The word “or” suggests both are not required to be guilty. Thus, whether the reader selects choice (B) or (C) will depend on where the reader focuses their reading comprehension energy.

Question #89 – Criminal Law and Procedure

A state statute provides as follows: “The maintenance of any ongoing enterprise in the nature of a betting parlor or

bookmaking organization is a felony.” A prosecutor has evidence that a woman has been renting an office to a man, that the man has been using the office as a betting parlor within the meaning of the statute, and that the woman is aware of this use.

Which of the following additional pieces of evidence would be most useful to the prosecutor's effort to convict the woman as an accomplice to the man's violation of the statute?

- (A) The woman was previously convicted of running a betting parlor herself on the same premises.
- (B) The woman charges the man considerably more in rent than she charged the preceding tenant, who used the office for legitimate activities.
- (C) The woman has personally placed bets with the man at the office location.
- (D) The man has paid the woman the rent in bills that are traceable as the proceeds of gambling activity.

In question #89, answer choice (B) is correct. The issue with this question is not with the interpretation of the facts or answer choices. The issue relates to the word “parlor.” Instead of using the phrase “betting business,” the drafters decide to complicate the language of the question with the words “bettering parlor,” which means a shop or business providing bettering services or a sitting room in a private house. To eliminate the language barriers that might arise with outsiders, drafters could easily simplify the language and still test the same understanding of the law.

Example #1

private fig
 Dock was the unsuccessful suitor of Mary, who recently announced her engagement to Paul. Angered by her engagement, Dock sent Mary the following letter: "I hope you know what you are doing. The man you think you love wears women's clothes when at home. A Friend."

def. stmt.

The receipt of this letter caused Mary great emotional distress. She hysterically telephoned Paul, read him the letter, and told him that she was breaking their engagement. The contents of the letter were not revealed to others. Paul, who was a young attorney in the state attorney's office suffered serious humiliation and emotional distress as a result of the broken engagement.

of it

pub?

RD
 If Paul asserts a claim against Dock based on defamation and it is proved that Dock's statement was true, such proof will be

- (A) a defense by itself.
- (B) a defense only if Dock was not actuated by malice.
- (C) a defense only if Dock reasonably believed it to be true.
- (D) no defense by itself.

Example #2

private figs
 Jones and Smith, who were professional rivals, were attending a computer industry dinner where each was to receive an award for achievement in the field of data processing. Smith engaged Jones in conversation and expressed the opinion that if they joined forces, they could do even better. Jones replied that she would not consider Smith as a business partner and when Smith demanded to know why, told him that he, Smith, was incompetent.

slander perse

The exchange was overheard by Brown, who attended the dinner. Smith suffered emotional distress, but no pecuniary loss.

def. v stmt.

pub?

special damages

If Smith asserts a claim against Jones based on defamation, will Smith prevail? *Sv. J*

- (A) No, because Smith suffered no pecuniary loss.
- (B) No, because Jones statement was made to Smith and not to Brown. *-pub?*
- (C) No, unless Jones should have foreseen that her statement would be overheard by another person.
- (D) No, unless Jones intended to cause Smith emotional distress.