

# THE LSAT: NARRATIVES AND BIAS

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Fred is tall, dark, and handsome, but not smart.  
People who are tall and handsome are popular.  
Popular people either have money or are smart.  
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.
- (A) I only
  - (B) II only
  - (C) III only
  - (D) I and II only
  - (E) I, II, and III<sup>1</sup>

This question is from a recent Law School Admission Test (LSAT) examination.<sup>2</sup> The LSAT is the gatekeeper to the legal profession. The test is used by law schools in combination with undergraduate grade point average as the main criteria for admission to the profession.<sup>3</sup> The test can keep you out of law school, it can determine which law school you attend, and it can greatly affect the way you feel about yourself and your potential for success while in law school.<sup>4</sup>

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1. LSAT, Logical Reasoning, Question 14, June 1988 (all LSAT questions on file with author).

2. The LSAT is an admissions test administered by the Law School Admission Council (LSAC). The Law School Admission Services (LSAS) administers the LSAC's programs and provides other services to American and Canadian law schools. LAW SCHOOL ADMISSION SERVICES, LSAT 1992-93 INFORMATION BOOK (1992) [hereinafter LSAT INFO. BOOK 92-93].

3. *Id.* at 6 ("Almost all ABA-approved law schools require both the LSAT and the Law School Data Assembly Service (LSDAS), including undergraduate academic record.").

4. Despite the obvious limits of a three or four-hour standardized test, research indicates that test takers' self-image is greatly affected by their scores. Studies analyzing the Scholastic Aptitude Test (SAT) indicate internalization of test measures. See PHYLLIS ROSSER, CENTER FOR WOMEN POLICY STUDIES, THE SAT GENDER GAP: IDENTIFYING THE CAUSES 22 (1989) ("Unfairly low test scores . . . become a self-fulfilling prophecy for many girls and

Prior to 1979, the LSAT and other standardized tests used for educational admission purposes were shrouded in secrecy.<sup>5</sup> Testing agencies refused to grant access to the tests to test takers, researchers, or state governments.<sup>6</sup> Thus, there was no way to analyze the appropriateness of questions, the correctness of answers, or even the accuracy of scoring of individual examinations.<sup>7</sup> What was known was that women and minorities had substantially lower scores than white males.<sup>8</sup> Additionally, anecdotal tales of biased,

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young women; lower scores inspire lower expectations and encourage women to apply to less competitive colleges and universities than their grades would otherwise warrant.”); *see also id.* at 41 (“Students’ overall perceptions are closer to test feedback than to grade feedback, which is beneficial for boys’ self image but damaging to girls’.”). Despite superior academic records, girls average 19 to 60 points lower on the SAT than boys. Thus, girls judge themselves to be less able than their grades would indicate, and less able than boys. *Id.* at 41-42, 71. *See Sharif v. New York State Educ. Dep’t*, 709 F. Supp. 345, 355, 362 (S.D.N.Y. 1989) (finding that the state’s sole reliance on SAT scores to award state scholarships is discriminatory because it disparately impacts young women and concluding that the consistent disparity between males’ and females’ scores cannot be explained through “neutral” variables); William Glaberson, *U.S. Court Says Awards Based on SAT’s Are Unfair to Girls*, N.Y. TIMES, Feb. 4, 1989, § 1, at 50 (outlining the ruling in *Sharif*, which was the first in the nation to link standardized tests and discrimination against a certain group).

5. *See* Dario F. Robertson, *Examining the Examiners: The Trend Toward Truth in Testing*, 9 J.L. & Educ. 167, 170-79 (1980) (examining the legislative response to test secrecy in general and discussing the impotence of test takers when attempting to address grievances against the testing services prior to Truth in Testing laws). Robertson claimed that test takers were “defenseless in both the marketplace and the courtroom . . .” because of the secrecy, and that test subjects “ha[d] no cognizable right to receive more information than the test agencies deem[ed] appropriate to provide.” (citation omitted) *Id.* Although much of the testing material was kept secret, researchers were able to examine some test questions and forms in order to critique them. *See* David M. White, *An Investigation Into the Validity and Cultural Bias of the Law School Admission Test*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 66, 132-33 (David M. White ed., 1981) [hereinafter White, *Investigation Into Validity and Bias*] (using samples from the LAW SCHOOL ADMISSION BULLETIN and LSAT preparation material to demonstrate existence of bias in the actual test by inferring that the same biases in the samples will, necessarily, show up in the actual test).

6. Robertson, *supra* note 5, at 167, 174-79 (discussing the difficulty third parties had in obtaining internal studies, financial statements, statistics, or actual questions from the testing services, and other information which was “vital for public review . . .” of the statistical methods used to score exams prior to the Truth in Testing laws).

7. *See* Jocelyn Samuels, Note, *Testing Truth-in-Testing Laws: Copyright and Constitutional Claims*, 81 COLUM. L. REV. 179, 190 (1981) (elucidating some of the purposes behind Truth in Testing laws, which include assuring and encouraging the validity and objectivity of the test, and the accuracy of the scoring and calculating process); *see also* Robertson, *supra* note 5, at 167, 178-79 (discussing the test taker’s lack of recourse against the testing companies prior to the Truth in Testing laws when test scores were reported in error, late, or completely lost).

8. *See* Lloyd Bond, *Bias in Mental Tests*, in ISSUES IN TESTING: COACHING, DISCLOSURE, AND ETHNIC BIAS 55, 56 (Bert F. Green ed., 1981) (citing the general fact that white students, on average, receive higher scores on standardized tests than non-whites, and that males, as a group, outperform females); DAVID M. WHITE, NATIONAL CONFERENCE OF BLACK LAWYERS, THE EFFECTS OF COACHING, DEFECTIVE QUESTIONS, AND CULTURAL BIAS ON THE VALIDITY OF THE LAW SCHOOL ADMISSION TEST 73 (1984) [hereinafter WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS] (discussing lower minority scores on the LSAT); Cecil R. Reynolds & Robert T. Brown, *Bias in Mental Testing: An Introduction to the Issues*, in PERSPECTIVES ON BIAS IN MENTAL TESTING 4 (Cecil R. Reynolds & Robert T. Brown eds., 1984) (introducing the general controversy that surrounds standardized mental tests and the systematic group performance differences on standardized intelligence and aptitude tests); David M. White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89,

disturbing questions and actual evidence of bias in the sample questions published in the LSAT Information Book began to be documented.<sup>9</sup>

In 1979, New York State passed a "Truth in Testing" law.<sup>10</sup> It required testing agencies to disclose test questions and answers to the state.<sup>11</sup> The law allowed test takers to request a copy of the test they had taken, the correct answers, and their own score sheets.<sup>12</sup> The law also required test agencies to gather statistical information on the differential performance of women and minorities.<sup>13</sup> The New York law was promptly challenged by the Association of American Medical Colleges (AAMC), the organization which administers the Medical Colleges Admissions Test (MCAT).<sup>14</sup> In 1980, Federal District Court Judge McCurn preliminarily enjoined enforcement of the Truth in Testing law as to the MCAT.<sup>15</sup> However, until 1991, administrators of the other major admissions tests, including the Scholastic Aptitude Test (SAT), the LSAT, and the Graduate Record Examination (GRE), complied with the law during the pendency of the litigation.<sup>16</sup>

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114-20 (1979) [hereinafter *Culturally Biased Testing*] (examining the test score gap between non-whites as compared to whites and charting the test score gaps on the LSAT as compared to GPAs of whites and non-whites); David M. White, *Pride, Prejudice and Prediction: From Brown to Bakke and Beyond*, 22 How. L.J. 375, 377, 391-92 (1979) [hereinafter *Pride, Prejudice and Prediction*] (analyzing the implementation of differential admissions programs, instituted because minorities, generally, have lower average LSAT scores and lower average GPAs); see also Wade J. Henderson & Linda Fores, *Implications for Affirmative Admissions After Bakke*, in TOWARDS A DIVERSIFIED LEGAL PROFESSION 13, 25-26, 36-41 (David M. White ed., 1981) (discussing the lower LSAT scores of Council on Legal Education Opportunity fellows, all of whom are educationally and economically disadvantaged, and most of whom are minorities); Edward Bronson, *Trial by Numbers: The LSAT and Cultural Bias*, 34 GUILD PRAC. 33 (1977) (charging that cultural and gender bias in the LSAT generally exists because its form is conducive to bias).

9. See White, *Investigation Into Validity and Bias*, *supra* note 5, at 66, 155-56 (discussing reactions of some individuals when they were read a sample question from the *Law School Admission Bulletin* that used a servant as the subject); WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS, *supra* note 8, at 35-43 (discussing the results of a National Conference of Black Lawyers' study and the responses of people who were shown various LSAT questions and using anecdotal reactions to questions to explain and reveal forms of bias in testing).

10. New York Standardized Testing Act, N.Y. EDUC. LAW §§ 341-48 (McKinney 1988 & Supp. 1993).

11. *Id.* § 342 (McKinney 1988).

12. *Id.* § 342(2) (McKinney 1988).

13. *Id.* § 341-a (McKinney 1988).

14. Association of Am. Medical Colleges v. Carey, 482 F. Supp. 1358 (N.D.N.Y. 1980) [hereinafter AAMC I], summary judgment granted, 728 F. Supp. 873 (N.D.N.Y. 1990) [hereinafter AAMC II], *rev'd sub nom., vacated*, Association of Am. Medical Colleges v. Cuomo, 928 F.2d 519 (2d. Cir. 1991) [hereinafter AAMC III], *cert. denied*, 112 S. Ct. 184 (1991).

15. AAMC I, *supra* note 14.

16. See *infra* notes 224-243 and accompanying text (discussing the testing agencies' compliance with Truth in Testing laws and explaining the subsequent stipulation agreements entered into by the agencies regarding test disclosure pending the AAMC litigation); Kevin Sack, *Appellate Panel Grants Reprieve to Law on Tests*, N.Y. TIMES, March 14, 1991, at B3 (examining the Educational Testing Service's national and voluntary policy to disclose test answers).

Between 1979 and 1991, the content of most standardized admission tests was disclosed.<sup>17</sup> Nevertheless, the administrators of the MCAT continued to refuse to disclose, and the preliminary injunction remained in place.<sup>18</sup> The State of New York continued to try to negotiate compliance with all other standardized testing organizations.<sup>19</sup> In 1988, the AAMC moved for summary judgment.<sup>20</sup> It alleged that the Truth in Testing law violated its copyright interest in the MCAT.<sup>21</sup> The district court granted summary judgment in 1990.<sup>22</sup> On appeal, the Second Circuit removed the injunction and remanded the case for trial on the facts.<sup>23</sup>

While the AAMC claimed that disclosure of the MCAT would harm its copyright interest,<sup>24</sup> there is a well established exception to copyright protection known as the Fair Use Doctrine.<sup>25</sup> The applicability of the Fair Use Doctrine is determined by balancing the pub-

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17. AAMC II, *supra* note 14, at 874, 878 (mentioning specifically the disclosure of the SAT and the LSAT in compliance with the New York Truth in Testing law over the previous ten years).

18. AAMC II, *supra* note 14, at 874. The temporary restraining order that had been issued almost a decade earlier was replaced by a permanent injunction by the district court. AAMC II, *supra* note 14, at 889.

19. *See infra* notes 224-243 and accompanying text (explaining the temporary resolution of the disclosure issue pursuant to stipulation agreements between the agencies and the State of New York).

20. AAMC III, *supra* note 14, at 521.

21. AAMC I, *supra* note 14, at 1361; AAMC II, *supra* note 14, at 874-75; AAMC III, *supra* note 14, at 521-22.

22. AAMC II, *supra* note 14, at 878-79, 889.

23. AAMC III, *supra* note 14, at 521.

24. AAMC I, *supra* note 14, at 1361; AAMC II, *supra* note 14, at 874-75; AAMC III, *supra* note 14, at 521-22.

25. The Fair Use Doctrine establishes that there are certain uses of copyrighted material that are considered non-infringing, "fair" uses. Although it was originally only recognized at common law, the Doctrine has been codified in the Copyright Act of 1976. *See* 17 U.S.C. § 107 (1988 & Supp. II 1990) (setting forth the four factors to be considered in determining whether a use of a work will be an acceptable Fair Use). Section 107 lists examples of uses that might be found fair, including: uses "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." *Id.* However, this list is not exhaustive. The Fair Use Doctrine and the four factors in the Copyright Act, which shape the use of the defense, have been developed and interpreted through case law. *See, e.g.,* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (discussing the Fair Use Doctrine and making a distinction between commercial and noncommercial uses of copyrighted works). The Supreme Court has stated:

The factors enumerated in [section 107] are not meant to be exclusive: '[s]ince the doctrine [of fair use] is an equitable rule of reason, no generally applicable definition is possible and each case raising the question must be decided on its own facts.'

*Id.* (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S.C.A.N. 5659, 5657).

There has been much commentary regarding the history and development of this exception to copyright protection. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (1982) (describing the Fair Use Doctrine and the elements used by courts to determine whether the use of a work is infringing or fair); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 110 (1990) (explaining the development of the Fair Use Doctrine and the general landscape of copyright law in which it is applied); Lloyd L. Weinreb, *A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990) (exploring the analytical confusion

lic interest in the free flow of information and the private interest of the copyright holder in controlling and being rewarded for her or his work.<sup>26</sup>

The significant public interest in the disclosure of actual test questions was recognized by both the district court and the Second Circuit in reviewing the Truth in Testing law. However, the courts gave significantly more weight to the perceived negative economic impact that disclosure might have, although the circuit court was unclear about the harm in requiring a rehearing.<sup>27</sup>

Despite the concerns raised by the courts, disclosure is the only effective way to monitor the bias of the testing process.<sup>28</sup> It is not enough for the AAMC and other test agencies, such as the Law School Admission Council (LSAC), which administers the LSAT, to disclose statistical and descriptive information about their tests. There is a narrative content to each test question that affects the test taker's ability to analyze that question.<sup>29</sup> More importantly, the narrative content of individual questions creates a discourse, a thematic

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over the application of the Fair Use Doctrine by a number of courts, despite congressional enactment and interpretation by the Supreme Court).

26. *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 27-28 (2d Cir. 1982).

27. The district court recognized and discussed the public interest involved in test disclosure. However, the court found that the other factors to be considered under the Fair Use Doctrine, such as economic injury, strongly supported the plaintiffs (AAMC) in this case. Thus, the court found in favor of the AAMC. *AAMC II*, *supra* note 14, at 885, 887-88. Perhaps the court did not recognize the full extent of the public interest being served by requiring disclosure of standardized exams and therefore improperly allowed the other factors to overshadow it.

The circuit court also recognized the public interest that is served by the Truth in Testing law. However in support of its holding, it cited *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) which elevated the economic interest of the copyright holder above all other Fair Use factors and recognized Fair Use as a privilege. The court could not rule on the issue of injury to the AAMC and therefore could not adequately complete the balancing test between the public interest and the harm. The *AAMC* court stated, "a balance must be struck between the benefit to the public and personal gain the copyright owner will receive if the use is denied." *AAMC III*, *supra* note 14, at 526 (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)). The case was remanded to the circuit court for further consideration on this issue. *AAMC III*, *supra* note 14, at 524-26.

28. The importance of disclosure was recognized by the circuit court at one point: "It is clear that the goal of the State Act [Truth in Testing,] is to subject the MCAT to non-commercial comment and criticism." *AAMC II*, *supra* note 14, at 884. It could be asserted, however, that although the court recognized the importance of disclosure, it did not fully appreciate its importance, especially with regard to the issue of bias.

29. In order to effectively uncover this narrative content it is important for researchers to have access to various components of standardized tests. See *WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS*, *supra* note 8, at 73-84 (exploring the importance of using the actual text in analyzing test bias and score discrepancies among groups and discussing the obstacles that exist when one is unable to have access to this information); see also Lorrie A. Shepard, *Identifying Bias in Test Items, in ISSUES IN TESTING: COACHING, DISCLOSURE, AND ETHNIC BIAS* 79, 81 (Bert F. Green ed., 1981) (explaining that focus on the internal properties of a test is important when ascertaining bias, because testers' development of guidelines aimed at reducing bias are done using the full text of the questions, not just statistical evidence of the results).

content, for the whole test.<sup>30</sup> That discourse has been one that favors the dominant social force in our society, white men.<sup>31</sup> Only through disclosure of actual questions can we begin to understand the relationship between test narratives and bias.

Part one of my article will examine test bias through a narrative analysis of actual LSAT questions. Part two will describe the legal action by test agencies to eliminate mandated disclosure and thus the public's ability to do narrative test analysis. Part three will analyze the need for continuing narrative analysis. The article concludes that it is only through the exposure and disclosure of standardized tests that true eradication of bias can occur. Researchers must be free to examine questions appearing on actual tests in order to expose bias. Additionally, test disclosure highlights the questionable premise of prediction of a student's future academic performance upon which the use of the LSAT and other standardized tests for admission purposes is based.<sup>32</sup> The LSAT only predicts a general correlation between ranges of test scores and first-year law school grades.<sup>33</sup> Should admission decisions be based

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30. Discourse is the unspoken, assumed viewpoint of the test. Cf. Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (analyzing the Supreme Court's approach to racial and cultural differences and noting that differences are created and highlighted through comparisons to what is considered "the norm"; explaining that the Court's attempted use of simple and clear solutions to legal problems exacerbates differences); Leslie G. Espinoza, *Masks and Other Disguises: Exploring Legal Academia*, 103 HARV. L. REV. 1878, 1885 (1990) (exploring the role of Critical Race Theory in identifying and legitimizing the minority experience and explaining that most minorities, especially those in legal academia, face a common social situation that degrades them); Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1874-77 (1990) (discussing the use of metaphors as a standard by which to analyze and measure the law). Delgado states, "One way in which we make sense of the world around us is by means of narrative structures, stories, and metaphors." *Id.* at 1874.

31. Nancee L. Lyons, *FAIRTEST: Nation's Leading Watchdog Over Standardized Tests On a Mission of Fairness*, BLACK ISSUES IN HIGHER EDUC. at 8 (Oct. 12, 1989). Bob Schaeffer, FairTest's Public Education Director, states that, "[t]he very nature of the test itself may be biased because it is a fast-paced, multiple-choice exam with a premium on guessing and being superficial . . . [i]t is . . . a brash white boy's game." *Id.* at 8. Furthermore, FairTest asserts that an important factor in lowering women's scores is that the "reading comprehension passages and other questions feature men and male-oriented sports . . ." *Id.*

32. See Katherine Conner & Ellen J. Vargyas, *The Legal Implication of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN'S L.J. 13 (1992) (revealing tenuous links between performance on the SAT and actual college performance and stating that the implications and data from one type of standardized test are instructive with regard to other standardized tests, such as the LSAT). Additionally, there is little research focusing on the predictive validity of post-secondary admissions tests for minority females. Conner and Vargyas note, "Differences in the predictive value of test scores also present serious problems for minority students . . ." *Id.* at 30-31.

33. LSAT INFO. BOOK 92-93, *supra* note 2, at 125. The information book states: Correlation is stated as a coefficient for which 1.00 indicates an exact correspondence between candidates' test scores and subsequent law school performance. A coefficient of zero would indicate nothing more than a coincidental relationship between test scores and subsequent performance . . . The correlation between LSAT scores and first-year law school grades varies from one law school to another . . .

on first year performance? Should expected first year performance be the primary criterion for predicting who is worthy of admission to the profession, who will be a "good lawyer"?

### I. THE NARRATIVE OF LSAT QUESTIONS

The LSAT is promoted as an essentially objective test.<sup>34</sup> It is lauded as being able to predict which applicant will be a good law student.<sup>35</sup> Recall the LSAT question about Fred and Joan reprinted at the beginning of this article. What did it make you think about? What associations came to mind? The question is from the "Logical Reasoning" section of the test.<sup>36</sup> Did the story which comprises the question have any effect on your ability to discern the objective steps of logic?

The narrative bias of test questions is the atmospheric, sometimes subtle, sometimes blatant, often pervasive bias of stories, manners, sensitivities, and paradigms.<sup>37</sup> It is the same bias confronted in law

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Correlations between LSAT scores and first-year law school grades ranged from .11 to .64 (median is .41).

LSAT INFO. BOOK 92-93, *supra* note 2, at 125.

34. While the LSAC never actually uses the word "objective," nor claims to be completely infallible, it portrays the exam as broadly applicable and useful. No specific words of caution are issued with regard to certain groups, such as women and minorities, who traditionally score lower on their exams.

When discussing the exam revision process that occurred in the late 1980s, the LSAC states, "We also examined the performance characteristics of various subgroups of LSAT takers to determine whether the test optimally met the measurement requirements of the diverse population of LSAT takers and law school applicants." LAW SCHOOL ADMISSIONS SERVICES, THE LAW SCHOOL ADMISSIONS TEST: SOURCES, CONTENTS, USES 5 (September 1991) [hereinafter LSAT: SOURCES, CONTENTS, USES]. Although it is not stated, the assumption is that they were able to accomplish this task when incorporating changes into the June 1991 version of the LSAT. The LSAC goes on to state that the concern of the Council is that the LSAT be "fair, valid, [and] reliable . . ." *Id.* Later the LSAC states that the new version of the LSAT, instituted in June 1991, functions as well, or better than, the old version in "predicting academic success in the first year of law school." *Id.*

The bulletin further states, in its *Cautionary Policies* section, that "[b]ecause the LSAT is administered to all applicants under standard conditions and each test form requires the same or equivalent tasks of everyone, LSAT scores provide a standard measure of abilities." *Id.* at 26. There is no acknowledgement of any limitations or possible bias within the test or the testing process. The obvious inference is that the LSAT is essentially an objective measure of an individual's aptitude for law school, regardless of the race or sex of the test taker.

35. *Id.* at 5 ("[The] LSAT is designed to perform . . . the task of predicting academic success in the first year of law school.").

36. See LSAT INFO. BOOK 1992-93, *supra* note 2, at 52 (describing the Logical Reasoning section and the purpose behind it); see also White, *Investigation Into Validity and Bias*, *supra* note 5, at 137-38 (analyzing and discussing the section in the LSAT BULLETIN 1979-80 that describes the purpose of the Logical Reasoning section).

37. Narrative analysis is increasingly employed by legal scholars to bring new perspective to law in order to reveal hidden bias. See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 COLO. L. REV. 683, 695-96 (1992) (remarking that outsider scholarship "seeks . . . to cross the boundaries that define [the] community by speaking to the dominant community, but in a different voice . . ." and arguing that the voice often expresses itself through narratives and stories that expose oppression which is overlooked and ignored in mainstream legal

school examinations,<sup>38</sup> moot court questions,<sup>39</sup> casebooks,<sup>40</sup> placement interviews,<sup>41</sup> court procedures, judicial language, and evidentiary conventions.<sup>42</sup>

discourse) (citation omitted); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (analyzing and discussing the use of narrative in feminist legal scholarship); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (examining the use of narratives in legal discourse to challenge the status quo that is perpetuated and protected by dehumanizing mainstream legal discourse).

38. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 80-95 (1991) (discussing the author's experience with law school faculty and biases after bringing a student complaint of race and gender bias in an exam to their attention).

39. There was a recent controversy at New York University School of Law regarding a moot court question drafted to require an argument about a fictional mother's custody rights. The main issue in the problem was the mother's sexual orientation. New York University School of Law, Moot Court Board, *Subject: Child Custody, Mike Brody v. Carol Brody* (case No. 14-09) in 14 MOOT CT. CASEBOOK 381-460 (1990); see Jerry Adler, *Taking Offense*, NEWSWEEK, Dec. 24, 1990, at 48 (mentioning, in a general discussion of "political correctness," the controversy surrounding New York University Law School's moot court topic based on the custody rights of a lesbian mother).

40. Traditional law school case books and courses have been criticized as not taking varied perspectives into consideration in their approach to teaching law. See Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 104-05, 112-16 (1988) (analyzing the contents of classes, class offerings, and casebooks; finding generally widespread bias in law school classes and materials); Mary I. Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988) (condemning the sexism of a particular criminal law textbook and integrating the use of narrative to illustrate the analysis and conclusion of the article). However, attempts have been made to eradicate bias by taking a unique approach to the discussion of traditional legal concepts. See, e.g., Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985) (taking a feminist approach to the analysis of a contracts casebook, finding that readers' views about gender affect their understanding of a law casebook, the law, and themselves).

41. See Lisa G. Markoff, *Dean Suspends Baker and McKenzie From 1989-'90 Campus Interviews*, NAT'L L.J., Feb. 13, 1989, at 4 (relating an incident where a law firm recruiter asked a law student racist questions and the Dean of the University of Chicago Law School responded by suspending the firm from interviewing on campus); see also Chris Downey, *Firms Try to Heighten Recruiters' Sensitivity*, N.Y.L.J., March 4, 1991, at 1 (reviewing the many steps that are being taken to help reduce the incidence of discriminatory and improper questions during interviews); Jane Cooperman, *Law Office Management; Recruitment*, NAT'L L.J., July 31, 1989, at 20 (discussing the importance of training law firm recruiters in non-discriminatory interviewing techniques and listing interview "don'ts" to avoid discriminatory interviews); Paula S. Linden, Gail G. Peshel & Jamiene S. Studley, *Recruitment; The Jobs Graduates Grabbed*, NAT'L L.J., March 27, 1989, at 16 (discussing the fact that discrimination against women and minorities in legal employment still exists and may be evidenced in the form of offensive interview questions).

Discrimination in attorney hiring and promotion is also a continuing problem. A 1988 National Law Journal survey found that while 40% of new associates hired were women, only 23% of all lawyers at firms were women and "since 1982, women have increased their share of partnerships by only one percent per year." Indeed, in 1987, only eight percent of partners overall were women. The numbers were far worse for minorities. Doreen Weisenhaus, *White Males Dominate Firms: Still a Long Way to Go for Women, Minorities*, NAT'L L.J., Feb. 8, 1988, at 1. The National Law Journal's 1990 survey confirms that little has changed in the legal profession in recent years. See Rita Henley Jensen, *Minorities Didn't Share in Firm Growth*, NAT'L L.J., Feb. 19, 1990, at 1 (listing a breakdown of the number of women and minorities in many of the nation's largest law firms).

42. See Elizabeth M. Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87, 87-88, 92, 95 (1988) (connecting biases in the courts to law schools and addressing the need for changes in legal education because of its critical role in affecting and reforming the legal environment); COMMONWEALTH OF MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989), partially reprinted in



Bias delegitimizes the whole of the admission test enterprise. Over the years, I collected LSAT questions that I found to be offensive.<sup>43</sup> I have shared these questions with law students for their free associational responses.<sup>44</sup> Their perspective reveals the relationship between narrative test bias and disempowerment.

### A. *LSAT Images of Who You Should Be*

Remember Fred: "tall, dark, handsome, but not smart. People who are tall and handsome are popular. Popular people either have money or are smart."<sup>45</sup> Next enters the rapacious Joan who would like to meet anyone with money.<sup>46</sup> One student commented, "This question clearly puts down women, making it seem they pursue men with money (any man with money). It also puts down men, making it seem that men who are tall, dark and handsome are not smart."<sup>47</sup> Another student commented that the question reminded her of her mother's puzzlement that she wanted to go to law school, when she could just marry a lawyer.<sup>48</sup>

Test questions are stories. They can also be a form of subtle, unconscious psychological warfare.<sup>49</sup> This tactic is the way that the

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MARY JOE FRUG, *WOMEN AND THE LAW 2-16* (1992) (examining gender bias in the judiciary and making recommendations regarding reforms to ensure equal treatment of men and women in the court system); SENATE COMM. ON THE JUDICIARY, *THE VIOLENCE AGAINST WOMEN ACT OF 1991*, S. REP. NO. 197, 102D CONG., 1ST SESS. 43-44 & nn.40, 41 (1991) (stating that women often face discrimination and gender bias in the court system, and citing many studies that have been commissioned by the states documenting this pervasive problem).

43. Since 1980, I have collected approximately 100 questions that register from outrageously to highly offensive on my personal meter. The question gathering endeavor was both inspired and assisted by my friend since law school, David White. David White, head of Testing for the Public, is a long-time critic of standardized testing. See generally WHITE, *THE EFFECTS OF COACHING, QUESTIONS, AND BIAS*, *supra* note 8, at 27-73 (criticizing the LSAT generally and specifically addressing bias in testing).

44. Questions were shared with students on an individual basis and in small group settings. Responses to questions have been gathered informally. Students were asked to give voluntary, anecdotal responses to LSAT questions presented both in and out of the classroom setting. Many of the students who participated in these discussions were women and minorities. Student reactions were gathered from 1989 to 1992. Law students in Women and the Law classes, research seminars, and a Law and Literature group from both the University of Arizona College of Law and from Boston College Law School were included. (Results on file with the author).

45. See *supra* note 1.

46. See *supra* note 1.

47. See *supra* note 44.

48. See *supra* note 44.

49. Studies indicate that women do better on test questions that are related to human relationships and humanities rather than the world of practical affairs, especially regarding math questions. Connor & Vargyas, *supra* note 32, at 26 n.67. See ROSSER, *supra* note 4, at 43 (examining each question on a given SAT exam and comparing its ease or difficulty for the different sexes; finding that seventeen items were considerably easier for one sex than the other).

Furthermore, it is often overlooked that a defective or biased question will affect a test taker's performance on subsequent questions by interrupting his or her concentration. In this

test reminds "outsiders"<sup>50</sup> that they are indeed outsiders.<sup>51</sup> In a situation of stress and tension,<sup>52</sup> these questions bring out socialized self-doubt.<sup>53</sup> The outsider candidate is reminded of the formidable

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light, a biased question will negatively impact the test taker's score on more than one question. See Shepard, *supra* note 29, at 86 (citation omitted) (discussing the negative "carry-over" effects of an offensive question item to subsequent questions; explaining that this phenomenon affects the test taker's performance on later questions); WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS, *supra* note 8, at 75 (supporting the hypothesis that confusion and distraction may result from biased questions and affect the test taker's performance on subsequent questions; criticizing the commonly utilized "item-group" analysis that measures a test taker's reaction only to specific questions).

50. "Outsider" is a term adopted by Professor Mari Matsuda to designate persons of color, feminists, gays, lesbians, and other oppressed groups. Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 n.15 (1989). In support of this alternative terminology, Matsuda explains that the term "minority" is a misnomer because of the actual large numbers of persons in excluded groups. *Id.* Professor Matsuda also discusses the importance of recognizing outsider perspectives to various legal issues. See Mari Matsuda, *Affirmative Action and Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 2 (1988) (articulating the need to incorporate outsiders' visions to combat racist preconceptions).

51. Two additional examples from the LSAT illustrate the disempowered message of question/stories for women test takers. These passages remind women that examples of their status as outsiders can easily be seen in everyday life. See LSAT, Logical Reasoning, Question 22, October 1983:

Although there are more women working for wages today than ever before, the average wage earned by female workers is only about 59 percent of the average earned by male workers. This is a lower ratio than it was in 1955, when the average income of female workers was 63.9 percent of that earned by male workers. [Answer choices excluded];

see also LSAT, Logical Reasoning, Question 6, March 1984:

The principle of equal pay for equal work cannot, by itself, eliminate the discrepancy between the earnings of men and women. Women and men are not evenly distributed among occupations [sic] in our society; men tend to predominate in the higher-paying occupations. Therefore, even if the principle of equal pay for equal work were applied, — would result. [Answer choices omitted].

52. See generally Ray Hembree, *Correlates, Causes, Effects, and Treatment of Test Anxiety*, 58 REV. OF EDUC. RES. 47, 56-58, 60-62, 73 (1988) (compiling results of 562 studies related to test anxiety and finding that anxiety causes poor performance). Hembree shows that females have higher anxiety than males at all schooling levels, that African-Americans have higher anxiety than whites in elementary school, and that Hispanics have higher test anxiety than whites at all ages. *Id.* at 60-62. He concludes that self-esteem and test anxiety have a strong inverse relationship and that low self-esteem causes a high level of test anxiety and thus poorer performance. *Id.* at 73.

53. Standardized tests have a strong impact on an individual's self-evaluation of her or his skills and worth. See Connor & Vargyas, *supra* note 32, at 20 ("The evidence strongly suggests that students adjust their college expectations based on their SAT or ACT scores; Lower-scoring females apply to less competitive colleges and universities than their grades would warrant."); ROSSER, *supra* note 4, at 22, 41-42 (discussing findings which reveal that students adjust their expectations of the caliber of school that will accept them based on their scores on standardized tests, rather than grades or other criteria); cf. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982) ("The psychological responses to [racial slurs] consist of feelings of humiliation, isolation, and self-hatred . . . . Consequently, it is neither unusual nor abnormal for stigmatized individuals to feel ambivalent about their self-worth and identity.") (citation omitted); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 317-18 (1987) (showing that injury from racial inequality can be painful and severe regardless of the motives behind the action which caused the injury); Espinoza, *supra* note 30, at 1884 (discussing the self-doubts experienced by legal scholars in various situations).

barriers to breaking into the professions.<sup>54</sup>

Take, for example, the following LSAT question:

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.

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54. See, e.g., LSAT, Logical Reasoning, Question 14, October 1988:

In order to get good grades, a college student must either have a high IQ or resort to cheating. Unfortunately, a high IQ is something a person is born with; nothing you do in life can help you get a better one. Therefore, if a student who had a low IQ upon entering college ends up getting good grades, he —. . . (choices omitted).

This question reinforces the bias of a life-time of standardized tests. It is particularly troublesome because of the long-documented bias of the Stanford-Binet IQ exam and other intelligence tests. See STEVEN J. GOULD, *THE MISMEASURE OF MAN* 146-234 (1981) (tracing the development of the popular Stanford-Binet IQ test, and the uses and misuses of the test throughout the years). Although the Binet test was initially developed to identify children with learning disabilities, and not to rate the intelligence of all children, it was eventually developed into a mass-marketed exam by Dr. Lewis M. Terman, a professor at Stanford University (thus the name Stanford-Binet). Dr. Terman was the "primary architect of its [Stanford-Binet's] popularity." *Id.* at 174-75. The guidelines for narrow and controlled use of the Binet test were disregarded in the United States. *Id.* Furthermore, the widespread use of the Stanford-Binet IQ tests and those modeled after it, often developed out of racist theories of hereditary intelligence, as in the case of Terman. *Id.* at 175. Despite the broad use of IQ exams during the last fifty years, and the reliance upon them, there is no independent confirmation for the proposition that tests accurately measure intelligence. *Id.* at 177.

Researchers have questioned the legitimacy of intelligence tests. See Bond, *supra* note 8, at 63 (breaking down the issues of testing bias, analyzing tests and questioning whether bias exists in the internal structure and criteria of tests, in situational factors, and in the employment and use of tests). Bond discusses a study comparing the results of intelligence tests given to a group of African-American children who had been adopted by white parents to the results of tests given to white adoptee children in the same geographical area. Bond, *supra* note 8, at 64. This study was done to question the theory that intelligence is genetic and to challenge findings which attributed minorities' lower scores on tests to their genetic makeup. The study concluded that the African-American children tested had scores higher than the national white average, above the African-American average, and above other African-Americans reared in the same area. Thus, the results are inconsistent with genetic explanations for differing IQ performance between whites and African-Americans. Bond, *supra* note 8, at 65-66.

The issue of test bias is a complicated and controversial one. Most academics who have studied the issue have been unable to fully explain the reason for differing outcomes among groups. Bond, *supra* note 8, at 61-62. While many testing agencies have developed formal guidelines and review procedures for spotting and removing biased questions, the most difficult problem is that beyond blatantly biased questions, it is hard to predict ahead of time which questions will be the most difficult for which groups. See Shepard, *supra* note 29, at 79, 85-87, 99 (discussing the prediction and analysis of both subtle and statistical bias in test questions and recognizing the difficulty in attributing different meanings in test questions to bias or other "legitimate" reasons).

- (A) II only
- (B) III only
- (C) I and II only
- (D) II and III only
- (E) I, II and III<sup>55</sup>

Now imagine yourself a woman taking the LSAT. If you do not have children, but at least want to leave open the possibility of having children, the question forces you to think of this very difficult and personal choice. If you have children, and are now taking the big step of disrupting your whole life to go to law school, what is this question explicitly telling you? Your children will suffer because you insist on pursuing your own selfish dream of success.<sup>56</sup> In any event, the question makes the test taking personal. It takes the woman reader off-track.<sup>57</sup> The question is gender-related on its face. It is gender-biased in the devious way that it appears to be a neutral question about "logic." However, the question is instead a reminder that for women, the demands that go hand-in-hand with expanded opportunities can leave us with the choice that is no choice at all.<sup>58</sup>

55. LSAT, Logical Reasoning, Question 4, October 1982.

56. Women are also reminded that their education will probably be wasted in society's judgment. See LSAT, Logical Reasoning, Question 5, October 1980:

Mr. Jones argued that money spent on higher education is wasted. He supported his argument by referring to the case of a woman who, at great expense, completed a Ph.D. in English literature only to decide later to move to a remote area and devote her life to meditation, reading no books of any kind. [answer choices omitted]

Many of my women students strongly responded to this question. In their minds, meditation was a metaphor for having and raising children. See *supra* note 44; see also Leslie G. Espinoza, *Constructing a Professional Ethic*, 4 BERKELEY WOMEN'S L.J. 215, 226 (1989-90) ("Women students who choose to make quite reasonable compromises internalized their failure to emulate the model of lawyering constructed through the mythology of the institution. Indeed, much of the exclusion of women from the power centers of the law is based far more on their inability 'to maintain the appearance of total dedication to their careers.'") (citation omitted).

57. See Cathy L. W. Wendler & Sydel T. Carlton, *An Examination of SAT Verbal Items for Differential Performance by Women and Men: An Exploratory Study*, Paper for the American Educational Research Association Annual Meeting (April 1987) (on file with FairTest, National Center for Fair & Open Testing, Cambridge, Mass.) (discussing the possible reasons for women's lower SAT scores and explaining that one possible factor might be that women are more adversely affected than men "by negative, possibly upsetting, questions."); see also Shepard, *supra* note 29, at 79, 86 (referring to the negative "carry-over" effects of offensive questions to subsequent questions, implying that test takers are distracted from the intended purpose of the question by questions biased against them); WHITE, *EFFECTS OF COACHING, QUESTIONS, AND BIAS*, *supra* note 8, at 75 (supporting the hypothesis that confusion and distraction may result from biased questions, thus taking the test takers off-track and affecting their performance on subsequent questions as well).

58. See Espinoza, *supra* note 56, at 226 (discussing a woman's difficulty when she must choose between a career and a family or do both with heightened stress and guilt). See generally Susan Gore & Thomas W. Mangione, *Social Roles, Sex Roles and Psychological Distress: Additive and Interactive Models of Sex Differences*, 24 J. HEALTH & SOC. BEHAV. 300, 301 (Dec. 1983):

[T]he mental health of employed married women is still poorer than that of employed married men — and not markedly better than that of married homemakers . . . . From a sex-role perspective, these findings are not surprising. Whereas work is

Women test takers are not being hypersensitive. Nor are they grappling with imaginary hobgoblins. The conflict between career and family is a real one for women.<sup>59</sup> In her controversial "Mommy-track" article in the Harvard Business Review, Felice Schwartz sets forth the common wisdom and the actual facts regarding the work/family conflict:

Like many men, some women put their careers first. They are ready to make the same trade-offs traditionally made by the men who seek leadership positions. They make a career decision to put in extra hours, to make sacrifices in their personal lives, to make the most of every opportunity for professional development. For women, of course, this decision also requires that they remain single or at least childless or, if they do have children, that they be satisfied to have others raise them. Some 90 percent of executive men but only 35 percent of executive women have children by the age of 40.<sup>60</sup>

The social reality is that for women who are now forty, the decision to become professionals has different consequences and costs than it has for men. Efforts to equalize women's opportunities for career and family continue.<sup>61</sup> These efforts, however, are undermined by the LSAT's reiteration of the discriminatory stereotypes of the past, however much they are couched in the neutral language of Logical Reasoning.<sup>62</sup>

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compatible with the family-role expectations of men, it is less compatible with the family roles of most women, thus resulting in role stress and the poorer mental health of women (citations omitted).

59. See FRUG, *supra* note 42, at 81-133 (devoting an entire chapter of her casebook to the work/family conflict). Frug writes:

Workplace responsibilities often conflict with family duties in ways that produce significant stress and substantial barriers to women as they seek to assimilate and to advance in their labor force jobs.

*Id.* at 2; Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1992) (analyzing the pressure on women to take care of their children and parents at the expense of their careers); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988) (examining the barriers to women's career advancement that continue to exist because of the dual burdens women face with work and family responsibilities); Karen Czapskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (exploring the volunteer father/draftee mother conceptualization in family law and how a reallocation of childcare duties between parents would alleviate part of the conflict women feel in the workplace).

60. Felice N. Schwartz, *Management Women and the New Faces of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65, 69.

61. See Faye Fiore, *Women's Career - Family Juggling Act*, L.A. TIMES, Dec. 13, 1992, at D3 (discussing the approach taken by some employers to reduce the pressures of the work/family conflict on their female employees); *Work and Women*, BOSTON GLOBE, June 14, 1992, at 86 (reporting the results of a survey which found that women are still suffering from the pressures of the work/family conflict and concluding that more flexible hours are necessary to alleviate pressures).

62. This stereotyping that highlights historical discrimination is evident in one of the few LSAT questions addressing people with disabilities. See LSAT Logical Reasoning, Question 14, June 1982:

Lawyers are supposed to rise above the emotions of the problem. Perhaps it is logical that the LSAT should construct an emotional obstacle course. Maybe it should screen out all applicants who cannot objectively apply the rules of logic. However, this is not the intent of the law schools that use the test to make admission decisions. More importantly, 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.<sup>63</sup>

*B. The LSAT Vision of What the Law Should Be*

For many students, the LSAT is their first official contact with the study of law and the construction of legal professionalism. The questions within the test often present a social world view that excludes outsider test takers. Frequently the context of the question distorts the content or the meaning of the question for the test taker. For example, one question places us at a dinner party in a mythical land:

In Evalsland, where it is legal to hold slaves, the guests at a dinner party get into a debate.

One of the guests contends that slavery is a cruel institution. But the host contends that the slaves themselves like it. To prove his point, the host called in the household slaves, all of whom affirm that they do indeed find their condition not simply tolerable but extremely pleasant.

Which of the following would seriously weaken the host's argument in the passage above?

- I. Whenever slaves are offered their freedom they usually take it.
  - II. There have been numerous slave revolts in recent years.
  - III. All religions have forbidden one man to be a master over another.
  - IV. Slavery is an extremely inefficient institution because free labor is much more productive.
- (A) I and II only  
(B) I and IV only

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The demand for bus and subway systems accessible (sic) to and useable by handicapped people in wheelchairs actually discriminates against all but the most athletic of the handicapped, because most people in wheelchairs do not have the physical strength to wheel their chairs from their homes or offices to subway or bus platforms. [question and answer choices omitted].

63. Distractor questions are those questions that cause the reader to become distracted from the application of logic to find an answer. See *supra* note 50 (defining "outsider" as a term of art); see also WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS, *supra* note 8, at 88-91 (showing how word choices in LSAT questions have different associations for minority test takers).

- (C) II and III only
- (D) III and IV only
- (E) I, II, III and IV<sup>64</sup>

As one African-American student expressed, first the question reminds you that you are Black, then it forces you to try to divorce yourself from yourself, to pretend that you can look at the question without *you* looking at the question.<sup>65</sup> Furthermore, how can this be called Logical Reasoning when it would be useless to make any logical arguments to the host, who is obviously so blind that he will never see. Logic has no place in this situation at all.<sup>66</sup>

The question begins with the premise that it is legal to hold

64. LSAT, Logical Reasoning, Question 4, February 1986.

65. See *supra* note 44. The LSAC administers the LSAT and has chosen to allow this type of material to appear on tests without regard to its effect on the test taker. Indeed, the following sample LSAT question was highly criticized in the early 1980's:

A servant who was roasting a stork for his master was prevailed upon by his sweetheart to cut off one of its legs for her to eat. When the bird was brought to the table, the master asked what had become of the other leg. The man answered that storks never had more than one leg. The master, very angry but determined to render his servant speechless before he punished him, took the servant the next day to the fields where they saw storks each standing on one leg. The servant turned triumphantly to the master, but the master shouted and the birds put down their other legs and flew away. "Ah sir," said the servant, "you did not shout to the stork at dinner yesterday; if you had he too would have shown his other leg."

LAW SCHOOL ADMISSION SERVICES, LAW SCHOOL ADMISSION BULLETIN AND LSAT PREPARATION MATERIAL, Logical Reasoning, Questions 3-4 (1979-80); see White, *Investigation into Validity and Bias*, *supra* note 5 at, 154-55 (commenting that this LSAT question presented is "[p]erhaps the most startling and revealing passage encountered."). The question presents an offensive story which can be critiqued in different ways and can affect readers in varied ways. Cf. Robert Williams Jr., *Taking Rights Aggressively: The Perils and Promises of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103, 104-08 (1987) (using a parable about a Native-American "Grandfather" and an elevator to discuss the different positive and negative aspects of Critical Legal Theory for peoples of color).

66. Logic divorced from content is also evident in the following two LSAT passages:

By 1670, African slaves took the place of the vanished Native Americans brought to the Caribbean a century earlier from areas farther north. Since many of the Africans were already immune to malaria and yellow fever, relatively few of them died on the island plantations as a result of these diseases. But ultimately the differing immunities of the two slave groups did not matter, for the Africans succumbed to other gastrointestinal and infectious diseases. [answer section omitted].

LSAT, Logical Reasoning, Question 14, December 1984.

The question asks the reader to do a logical comparison of death and disease of oppressed people. It is an example of the same kind of mentality that viewed slavery as an economic calculus rather than a human tragedy. Expression of this viewpoint serves to further alienate outsider test takers. The second passage presents another comparison:

John Stuart Mill compared the position of married Englishwomen in the nineteenth century to that of slaves. Marital slavery was even worse, he said, because married women had fewer rights than slaves and more onerous duties and were expected to love their masters and their situation. How silly Mill's comparison is can be seen by turning the tables and thinking of husbands as slaves and wives as slaveholders. That makes equal sense, and the analogy collapses. [answer choices omitted].

LSAT, Logical Reasoning, Question 7, February 1989.

These two questions offer a new kind of competition between oppressed groups looking up from the bottom. It forces the test taker to separate logic from the actual content of the question.

slaves.<sup>67</sup> A vision of law is presented that directly contradicts currently held ideals. The law presented in the question validates the institution of slavery. Assessment of slavery now becomes a game of rationality and logic, not a recognition of oppression. This excising of value from the analysis of slavery, as required by the question, obscures the real content and legacy of slavery. The pretense of the question, the way the question pretends that normative judgment is not relevant, is the most relevant and biased aspect of the question.

The outsider test takers are reminded that they are clearly outside, excluded.<sup>68</sup> Not only are they outside, they are subjugated just like the slaves in the question. They have to pretend that the question and the whole test process is not only tolerable, but just and "logical."

In a quest for diversity within test questions, the LSAT only succeeds in objectifying outsiders, not including them. What the white people say is what is important. The outsider remains the object, the subject is the dominant society. This is exemplified in an LSAT question discussing diversity in the academy:

The universities should not yield to the illiberal directives of the Office of Civil Rights that mandate 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 nonminorities 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

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67. See *supra* note 64.

68. Examples of LSAT questions excluding outsider test takers also include questions regarding nationality, ethnicity, and stereotyping based on race. See, e.g., LSAT, Logical Reasoning, Question 7, October 1987:

Few United States high school students achieve fluency in languages other than their native English. Which of the following, if true, would best explain the causes of the situation described above? [answer choices omitted].

Of course, far from all high school students in the United States call English their "native" language. This assumption alienates those test takers who do not agree with the question's premise. See LSAT, Logical Reasoning, Question 12, February 1988:

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].

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.



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 only<sup>69</sup>

As one student commented, "Why base a question on such controversial racial issues. It is really disturbing."<sup>70</sup> Most of the outsider students who read the question were so upset by the imposing nature of the text that they were unable to focus on arguments that would weaken the statement.<sup>71</sup>

This is diversity askew. Many students commented that they find themselves constantly in the position of justifying affirmative action.<sup>72</sup> There is always the implicit, raised eyebrow, that no matter what they say, they cannot really be logical about the issue, because after all they are certainly the beneficiaries of the policy.<sup>73</sup>

The distracting nature of the question is certainly of concern. The question takes affirmative action and discusses it only from the perspective of white males.<sup>74</sup> Additionally, even the answer

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69. LSAT, Logical Reasoning, Question 22, October 1988.

70. See *supra* note 44.

71. See *supra* note 44.

72. See *supra* note 44.

73. For a discussion of the stigma associated with affirmative action see Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Students' Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REF. 281, 286-90 (1989) (discussing the stigmas involved as a result of using academic support programs for minority law students) and STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) (suggesting that affirmative action creates more stigma than help for African-Americans and other racial minorities).

74. LSAT questions continually force outsiders to place themselves in the perspective of white males. See e.g. LSAT, Reading Comprehension, Question —, December 1991, reproduced in THE OFFICIAL LSAT PREP TEST III, Dec. 1991, form 2LSS13 (discussing Native American diversity and analyzing Navajo weaving from the perspective of Anglo influence).

choices<sup>75</sup> focus on qualifications rather than past discrimination.<sup>76</sup> Rather than being inclusive, it is a diversity that increases exclusion. It requires test takers to justify their inclusion, regardless of qualifications. It increases the sense of "otherness."

## II. CHALLENGE TO TRUTH IN TESTING LAWS

Standardized tests now play an accepted and significant role in admissions for almost all educational levels in the United States.<sup>77</sup> In order to be considered for admission to college, most undergraduate schools require the SAT<sup>78</sup> or its companion test, the ACT. These tests are also required for admission to professional schools. Most medical schools require the MCAT, most business schools require the GMAT, and most law schools require the LSAT.

75. An analysis of questions from the LAW SERVICES INFORMATION BOOK, published after implementation of the LSAC's newest sensitivity review, reveals continued bias. Often this form of bias is more subtle and occurs in answer choices. Certain answer choices are disproportionately attractive to outsiders. For example, one reading comprehension passage analyzes the life and work of Phillis Wheatley, a former slave and early American poet. The first question following the passage asks for the best expression of the main idea in the passage. LSAT INFO. BOOK 92-93, *supra* note 2, at 58-59. Answer choices include: "(B) Although Phillis Wheatley had to overcome significant barriers in learning English, she mastered the literary conventions of eighteenth-century English as well as African aesthetic canons." and "(C) Phillis Wheatley's poetry did not fulfill the potential inherent in her experience but did represent a significant accomplishment." Answer (C) is the correct answer. LSAT INFO. BOOK 92-93, *supra* note 2, at 58-59. When I first read the question, I chose answer (B)—to me it was the main theme and story of the passage. Similarly, the first question following a reading passage on sex-related wage differentials in the 1991-92 Law Services Admission Book, asks for the best title to the passage. LAW SCHOOL ADMISSION SERVICES, LSAT 1991-92 INFORMATION BOOK 74-75 (1991)[hereinafter LSAT INFO. BOOK 91-92]. Choices include: "(B) Women in Low-Paying Occupations: Do They Have a Choice?; (C) Sex Discrimination in the Workplace; (D) The Roll of Social Prejudice in Women's Careers." *Id.* On my first read, I was certain that (C) or (D) were the correct answers. Wrong again. The correct choice impliedly places the subordinate economic status of women in their own hands.

76. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561-63 (1984) (commenting on the lack of minority scholarship on civil rights issues and explaining that this authorship by primarily white males ignores the past history of discrimination by creating a one-sided view of civil rights legal literature).

77. In 1926, the College Board, a nonprofit organization, introduced the Scholastic Aptitude Test (SAT). The SAT is now administered through the Educational Testing Service (ETS). ETS is the largest test maker in the country. It is a non-profit company which designs standardized tests for over 375 clients. Gil Sewall, *Tests: How Good? How Fair?*, NEWSWEEK, Feb. 18, 1980, at 99-100 (examining different types of standardized testing and criticism about them). ETS currently designs the LSAT. However, during the 1980's the LSAT was at times designed in-house by LSAC and at times by the test designer ACT. See LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 1-4 (giving the history and evolution of the LSAT).

78. Since its introduction in 1926, the College Board has always described the SAT as a supplementary measure to other admissions criteria. From its inception, the Board warned of a danger in placing too great an emphasis on the test scores. John Elson, *The Test That Everyone Feels*, TIME, Nov. 12, 1990, at 93 (discussing the problems that have arisen with the SAT and the resulting revisions of the test by the trustees of the College Board).

### A. Description of Truth in Testing Laws

#### 1. Political Backdrop to Regulation

By 1979, standardized tests, which had been used for decades as admission criteria, were severely criticized.<sup>79</sup> The criticism focused on the secrecy surrounding administration and evaluation of the tests.<sup>80</sup> Secrecy compounded the prevalence of race and gender bias.<sup>81</sup> During this time, Ralph Nader's consumer organization, Congress Watch Public Citizen, issued a study which condemned the Educational Testing Service (ETS), the creator and administrator of the SAT.<sup>82</sup> The six-year Nader study concluded that the SAT successfully predicted college performance in only one out of ten cases.<sup>83</sup> The study found that SAT score correlation to family income was much stronger than the correlation to college performance.<sup>84</sup> Based on new evidence of bias, the 1.8 million member National Education Association campaigned to abolish standardized testing in the public schools.<sup>85</sup> Additionally, studies indicated that the tests were "coachable," and that the results of the tests were not

79. Recent commentary has documented over a decade of criticism of standardized testing. See, e.g., Susan Campbell, *Opinions Differ on Suitability, Fairness of Standardized Tests: Standardized Tests Are: A. Needed B. Unfair C. Disputed*, HARTFORD COURANT, October 2, 1992, at B1 (finding, through interviews with high school teachers, that standardized test results do not reflect a logical pattern consistent with a student's achievement); Sean Piccoli, *Charges Persist SATs Biased Against Women and Minorities*, WASHINGTON TIMES, August 5, 1991, at G6 (discussing allegations that the SAT promotes cultural, racial, and gender bias).

80. See *Minutes of Proceedings, New York Joint Public Hearing of the Senate and Assembly Standing Committees on Higher Education 2-4* (May 9, 1979) [hereinafter *NY Joint Hearing*] (remarks of Sen. Kenneth P. Lavalle, Chairman, Senate Committee on Higher Education) (arguing against the secretive nature of standardized testing); see also Robertson, *supra* note 5, at 180-93 (1980) (discussing the legislative response to secrecy in standardized testing and Truth in Testing laws).

81. Because test makers were able to keep test questions secret, the biases in the questions went unchecked by third parties. Nevertheless, some researchers were able to gain access to test forms and sample questions and discovered the presence of bias. See Bronson, *supra* note 8, at 33 (1977) (charging that the form of standardized tests is the basis for producing racial bias in testing); White, *Culturally Biased Testing*, *supra* note 8, at 107 (1979) (showing cultural biases through statistics in LSAT testing); cf. David A. Weber, *Racial Bias and the LSAT: A New Approach To the Defense of Preferential Admissions*, 29 BUFF. L. REV. 439 (1975) (discussing the need to reexamine the LSAT to determine if it is unconstitutional based on its inherent racial bias); White, *Pride, Prejudice and Prediction*, *supra* note 8, at 375 (1979) (exploring the need to continue the legacy of *Brown v. Board of Education* with the integration of professional schools by eliminating the racial bias in LSAT testing).

82. Nader's organization published the results of its six-year study in *The Reign of ETS* (1979). This study was used by the media to expand on the criticism of ETS and standardized testing. See, e.g., Sewall, *supra* note 77, at 99, 100 (using quotes from Nader's ETS study to question the fairness of standardized testing).

83. See Sewall, *supra* note 77, at 101 (highlighting the results of the Nader study).

84. See Sewall, *supra* note 77, at 101 (discussing the Nader study's commentary on the weaknesses of the SAT).

85. See Sewall, *supra* note 77, at 101 (discussing the reaction of the National Education Association to the Nader study). ETS commented that the study was "deliberately fraudulent" in its finding that there was little or no correlation between scores in standardized testing and a student's subsequent grades in college. Sewall, *supra* note 77, at 101.

always an apt indicator of students' later performance.<sup>86</sup>

Legislative efforts to control admissions tests centered on "Truth in Testing," which would, at minimum, require test makers to release their examinations for inspection.<sup>87</sup> California passed a Truth in Testing law in 1979.<sup>88</sup> It was soon followed by a similar law in New York.<sup>89</sup> New York's law, passed after extensive legislative hearings, was a more comprehensive law, requiring disclosure of actual test questions.<sup>90</sup> It became the model for Truth in Testing proposed legislation.<sup>91</sup> In 1979, five other states had legislation pending.<sup>92</sup> By early 1980, fourteen states and the federal government were considering similar laws.<sup>93</sup> Indeed, such politically formidable organizations as the Parent Teacher Association (PTA) and the National Association for the Advancement of Colored People (NAACP) banded together to support the national legislation.<sup>94</sup>

## 2. *New York's Truth in Testing Law*

The New York Truth in Testing law, officially entitled the Standardized Testing Act, applies to "any test that is given . . . at the expense of the test subject and designed for use and used in the process of selection for post-secondary or professional school admissions."<sup>95</sup> Rather than taking on the whole world of standardized tests, the law only regulates tests used for college and professional school admissions.<sup>96</sup> The two main provisions of the New York law address the specific concerns enunciated in the Act's legislative

86. See White, *Pride, Prejudice and Prediction*, *supra* note 8, at 392-96 (noting that studies on LSAT results show that LSAT scores are better at distinguishing between the races of the test takers than they are at predicting a student's performance in law school).

87. See Sewall, *supra* note 77, at 104 (explaining the New York state legislature's support of test disclosure).

88. CAL. EDUC. CODE §§ 99150-99164 (Deering 1993).

89. N.Y. EDUC. LAW § 340-348 (McKinney 1988 & Supp. 1993).

90. *Id.* § 341(1) (McKinney 1988); see Samuels, *supra* note 7, at 179-81 (discussing New York's Truth in Testing law and the controversy surrounding its requirements of disclosure of test contents, test scores, and evaluative studies).

91. See Sewall, *supra* note 77, at 99 (discussing the reaction of other states to the passage of New York's Truth in Testing law).

92. See Joanne Omang, *Making the Grade: Standardized Tests Are Under Attack; Critics Drive for 'Truth in Testing'*, WASH. POST, Dec. 26, 1979 at A10 (noting that in 1979, California, Colorado, Florida, Maryland, Ohio, and Pennsylvania all had legislation pending to regulate standardized testing).

93. See Sewall, *supra* note 77, at 99 (noting that New York's Truth in Testing law inspired fourteen other states and the federal government to consider bills requiring test makers to disclose the content of their exams to the public).

94. See Sewall, *supra* note 77, at 104 (showing that the supporters of a national Truth in Testing law included influential groups).

95. N.Y. EDUC. LAW § 340 (1) (McKinney 1988).

96. N.Y. EDUC. LAW § 340(1) (McKinney 1988). *But see* Connor & Vargyas, *supra* note 32, at 13 (describing other uses of standardized tests such as employment and elementary school tracking, and detailing the gender bias inherent in this type of testing).

hearings.<sup>97</sup>

The first provision of the Act requires test agencies to file and make public their research information, studies, and evaluations of the tests.<sup>98</sup> This provision allows New York state officials, through the Commissioner of Education, to have a better basis to evaluate the tests.<sup>99</sup> Study disclosure provides more information upon which to examine the evaluations of the tests and claims made about them by the test agencies.<sup>100</sup> The provision also allows outside researchers, like the author of this article, to have access to basic, fundamental information regarding the test and its outcome correlations. It makes available to researchers the LSAC's and ETS's internal studies. In drafting this provision, legislators took into account the testimony, at the New York hearings, of a number of researchers regarding repeated requests to get even simple data from the test agencies which went unanswered or were refused.<sup>101</sup> Prior to the passage of the law, ETS had the ability to suppress internal studies that were critical of the tests, for example those which found bias,

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97. See generally *NY Joint Hearing*, *supra* note 80 (discussing the foundations of the Truth in Testing law in a state public hearing).

98. N.Y. EDUC. LAW § 341(1)-(2) (McKinney 1988) provides that:

Whenever any test agency prepares or causes to have prepared research which is used in any study, evaluation or statistical report pertaining to a test operational after January first, nineteen hundred eighty, such study, evaluation or report shall be filed with the commissioner [of Education].

99. *Id.* § 341(1) (McKinney 1988).

100. See ANDREW J. STRENIO, *THE TESTING TRAP* 274 (1981) (commenting on the pre-Truth in Testing world and the extreme importance placed upon the role of standardized testing results in achieving success). Strenio states:

The information available to permit an adequate assessment to be made of these secure tests is quite unsatisfactory . . . . I would like to repeat a statement which I made forty-two years ago; today it is practically impossible for a competent test technician or test consumer to make a thorough appraisal of the construction, validation, and use of most standardized tests being published because of the limited amount of trustworthy information supplied by test publishers and authors . . . . Unfortunately, although some progress has been made, my 1935 complaint is equally applicable today to the majority of existing tests, and especially so for secure tests.

*Id.*

101. See *NY Joint Hearings*, *supra* note 80, at 121-23 (testimony of Allan Nairn, speaker for Congress Watch Public Citizen on ETS study) (providing a factual basis to show the merits of the proposed Truth in Testing law). The testimony provides in relevant part: "[E]ntire categories of statistical information and numerous internal reports and critiques of great importance to scholars and the consuming public are now routinely withheld by the testing industry." *NY Joint Hearing*, *supra* note 80, at 121. In his testimony, Allan Nairn gave three examples of test agencies withholding important data and studies. One example was the refusal by ETS to release a study prepared by Dr. David Loye of the ETS staff. The report was prepared at the request of the president of ETS. The report, entitled "Cultural Bias in Testing: Challenge and Response," discussed the strengths and weaknesses of ETS tests in assessing the performance of minorities and poor people. *NY Joint Hearing*, *supra* note 80, at 123; see also *NY Joint Hearing*, *supra* note 80, at 35-36 (testimony of Steven Solomon, New York Public Interest Research Group) (recounting various personal experiences involving repeated requests made to testing agencies for information and reports which were subsequently ignored).

and to release only the studies that were favorable.<sup>102</sup>

The second provision of the law requires test agencies to file with the state a copy of the actual examination administered.<sup>103</sup> This type of test disclosure allows the state and outside watchdog groups to monitor the tests for accuracy and fairness. The law also requires test agencies to release, to test takers who so request, a copy of the test questions, the correct answers and the scoring rules for the tests.<sup>104</sup> In support of this provision, Senator Lavalley explained on the floor of the New York State legislature that disclosure legislation provides fundamental fairness to test takers.<sup>105</sup> He stated that prior to passage of the law, the test agencies refused to return answer sheets, reveal tests, provide raw scores, or tell students how they performed compared to other students.<sup>106</sup> The test agencies provided no method for a test taker to determine if her or his particular test was properly graded.<sup>107</sup> Additionally, there was substantial evidence of mistakes in administration of the tests.<sup>108</sup>

The New York law now also requires test agencies to prepare a statistical report for tests administered between July 1, 1988 and July 1, 1989.<sup>109</sup> The report will relate performance to test takers

102. See *NY Joint Hearing*, *supra* note 80, at 123 (testimony of Allan Nairn, Congress Watch Public Citizen) (explaining that a study of the use and predictive value of the LSAT was deemed "too sensitive" by the LSAC and was withheld from publication and general circulation upon completion).

103. N.Y. Educ. Law § 342 (1) (McKinney 1988) (stating in pertinent part that "[w]ithin thirty days after the results of any standardized tests are released, the test agency must file . . . a copy of all test questions . . . , the corresponding correct answers . . . and all rules for converting raw scores into those scores reported to the test subject together with an explanation of such rules").

104. N.Y. Educ. Law § 342(1) (McKinney 1988).

105. *Minutes of Proceedings, New York Joint Public Hearing of the Senate and Assembly Standing Committees on Higher Education*, Exhibit-E, at 5321-28 (June 14, 1976) (floor statement of Sen. Kenneth P. Lavalley).

106. *Id.* at 5326-27 (comparing the test agencies' refusal to reveal standardized tests with a hypothetical situation involving a college professor who refuses to return tests to his students in order for them to understand their mistakes).

107. *Id.* at 5327.

108. See *NY Joint Hearing*, *supra* note 80, at 37-38 (testimony of Steven Solomon, New York Public Interest Research Group) (discussing the imperfections in computer scoring techniques and positing that the notice provision of the law would notify test takers of computer errors so that they could contact law schools). Solomon stated that in the 1975-76 applicant year:

numerous law school applicants were erroneously designated as unacknowledged repeaters. Unacknowledged repeaters are test takers who have taken the law school admissions test more than once while denying that fact . . . [on] the information sheet filled out prior to taking the test. Law schools that received this information were being told that certain candidates were actually certified liars. No effort was made to inform those students who might have been denied admission because of this error that a mistake had been made.

*NY Joint Hearing*, *supra* note 80, at 38.

109. N.Y. Educ. Law § 341-a (McKinney 1988).

categorized by race, ethnicity, gender, and linguistic background.<sup>110</sup> Information contained in the report is to be filed with an advisory committee which will then report to the legislature.<sup>111</sup> This report is to provide information about race, gender, and/or ethnic performance differentials in the tests.

Finally, the documents filed under the law are now considered public records.<sup>112</sup> This public record designation assures that the material will be available to all researchers.

### B. *The MCAT Court Challenge*

One of the prime differences between the New York Truth in Testing law and its predecessor, the California law, is the requirement that actual test questions be disclosed.<sup>113</sup> This provision became the focus for a court challenge to the New York law.<sup>114</sup> In 1979, the Association of American Medical Colleges<sup>115</sup> sued the State of New York claiming that the Truth in Testing law abridged its copyright interest in the MCAT.<sup>116</sup> The AAMC sued in federal district court immediately after passage of the New York Act and prior to the administration of any tests. The Association sought a preliminary injunction in order to enjoin enforcement of the disclosure provisions as to the MCAT.<sup>117</sup> The AAMC informed the court that the MCAT would not be administered in New York if the injunction were not granted.<sup>118</sup>

This threat was not taken lightly. The district court, in granting the injunction, noted,

[T]he Commissioner of Education of New York has serious misgivings concerning the Testing Law. He has made clear that he questions whether the Law will serve the purposes for which it was enacted [specifically regarding cultural bias], that he fears that many testing agencies will stop giving the tests in New York State,

110. *Id.*

111. *Id.*

112. *Id.* §§ 341(3), 342(7) (McKinney 1988).

113. Compare N.Y. Educ. Law § 342 (McKinney 1988) (requiring disclosure of "all test questions" used in scoring an examination) with CAL. Educ. Law § 99162 (Deering 1993) (mandating disclosure of "operational test questions").

114. AAMC I, *supra* note 14, at 1358.

115. The Association of American Medical Colleges is a non-profit organization. At the time of initiation of the suit, its members included 125 medical schools, 418 teaching hospitals, 68 academic societies, and over 1,700 individuals. AAMC I, *supra* note 14, at 1359.

116. See AAMC I, *supra* note 14, at 1361 (alleging that sections 341 and 342 of the Truth in Testing law violated both the Federal Copyright Act and constitutional rights to due process and equal protection). See generally 17 U.S.C. § 106 (1988 & Supp. II 1990) (enumerating the exclusive rights in copyrighted works).

117. AAMC I, *supra* note 14, at 1361 n.7, 1368.

118. AAMC I, *supra* note 14, at 1361.

as threatened, or will decrease the number of test administrations per year, and he is concerned that the price for taking the tests will increase drastically, all to the detriment of the citizens of New York State.<sup>119</sup>

In 1980, when the district court issued the preliminary injunction, it was not unreasonable for Judge McCurn to be concerned about the effect of the law. However, eight years later, in 1988, when the AAMC moved for a permanent injunction, the situation was very different. During the previous eight years, the other test agencies had voluntarily complied with the law.<sup>120</sup> Research studies and disclosure of questions within this time period did affirmatively reveal bias in the tests.<sup>121</sup> The test agencies had changed their "sensitivity review" processes for catching bias.<sup>122</sup> Contrary to the predictions of the testing agencies in the early 1980s, the cost of the tests did not explode as a result of disclosure. Rather, the test agencies prospered financially.<sup>123</sup> The agencies were able to develop and research new questions for future tests. Through the use of "equating" questions, the tests from one year were found to be comparable to those of another.<sup>124</sup>

Nevertheless, in 1990, now Chief Judge McCurn found that the AAMC's copyright interest in the MCAT was greater than the public

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119. AAMC I, *supra* note 14, at 1367.

120. See Sewall, *supra* note 70, at 97 (explaining that while the other testing agencies vigorously opposed the New York law, they may have initially cooperated because they feared the passage of comprehensive federal legislation).

121. See generally WHITE, EFFECTS OF COACHING, QUESTIONS AND BIAS, *supra* note 8, at 27-70 (discussing the processes for identifying potential bias and examples of existing cultural bias in the LSAT). Researchers linked bias in the test to the enrollment of minorities in law schools. See, e.g., Eulius Simien, *The Law School Admission Test As a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359 (1987) (commenting on how the design of the LSAT contributed to the failure to increase enrollment of African-Americans in law schools).

122. See Letter from Lizabeth Moody, President, Law School Admission Services (LSAS), Executive Director, LSAC, to Professor Michael Burns, Editor, SALT EQUALIZER 2 (Apr. 1 1992) (on file with author) [hereinafter Moody letter] (explaining that since 1989 final assembled tests are subjected to a "sensitivity review" to ensure that they comply with *ETS Standards for Quality and Fairness* and are further reviewed for sensitivity by the LSAC test development staff).

123. See Edward B. Fiske, *College Testing is a Hard Habit to Break*, N.Y. TIMES, Jan. 15, 1989, § 4 at, 28 (stating that ETS ended its 1988 fiscal year having earned \$226 million).

124. Equating questions is the process by which test agencies examine and compare questions from previous years in order to develop future questions. This process ensures consistency and prevents the repetition of questions on standardized tests from year to year. See LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 4 (explaining the process of question equating in the context of the LSAT); Edward B. Fiske, *Truth-In-Testing - How's It Working*, N.Y. TIMES, Nov. 23, 1980, § 4 at, 9 (reporting that testing agencies' initial fears that problems in equating questions would destroy the validity of tests proved unfounded). The New York law directly affected the equating process. See N.Y. EDUC. LAW § 342 (McKinney 1988) (requiring disclosure of questions actually used in scoring the examination).



interest in the Truth in Testing law.<sup>125</sup> Chief Judge McCurn issued a permanent injunction.<sup>126</sup> The AAMC's primary argument was that disclosure made reuse of test questions impossible. If questions could not be reused, new questions would have to be developed.<sup>127</sup> The AAMC claimed that this would be expensive and that it might well be impossible.<sup>128</sup> The AAMC argued that there was a "finite pool" of possible science and math questions and question stimuli available that must be kept secure.<sup>129</sup> Thus, the AAMC argued that they would be hurt economically because they could not reuse questions and that depleting the pool of possible questions was against the public interest.<sup>130</sup>

On appeal to the Second Circuit, the case was remanded.<sup>131</sup> The Second Circuit found that summary judgment was inappropriate.<sup>132</sup> The effect of the Truth in Testing law on the market value of the AAMC's copyright was a material issue of fact.<sup>133</sup> The trier of fact needed to determine whether questions could be reused and calculate the expense of developing new questions before an injunction could be granted.<sup>134</sup>

### C. Copyright Analysis

The AAMC argued that the New York Truth in Testing law was preempted by the Federal Copyright Act, and thus was invalid.<sup>135</sup> Under the Supremacy Clause of Article VI of the United States Constitution, there are three ways in which state law can be preempted. First, Congress may expressly exclude state regulation.<sup>136</sup> Second,

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125. See AAMC II, *supra* note 14, at 889 (finding "that the 'disclosure provisions' of the New York State's Standardized Testing Act, N.Y. Educ. Law §§ 341, 341-a and 342 are preempted due to a direct conflict with Federal Copyright Law"); see also *supra* note 25 (explaining Fair Use in copyright law).

126. AAMC II, *supra* note 14, at 873.

127. AAMC II, *supra* note 14, at 878. However, it was unclear on the record the extent to which the MCAT reuses questions. The state submitted the affidavit of Professor Walter Haney, stating that after a period of years disclosed questions could be reused because the "pool" of those questions would be so large that access to them would not give a test taker an unfair advantage. AAMC II, *supra* note 14, at 878.

128. AAMC II, *supra* note 14, at 878.

129. AAMC II, *supra* note 14, at 878.

130. AAMC II, *supra* note 14, at 887.

131. AAMC III, *supra* note 14 (reversing the decision of the district court, vacating the permanent injunction and remanding the case).

132. AAMC III, *supra* note 14, at 526.

133. AAMC III, *supra* note 14, at 526.

134. AAMC III, *supra* note 14, at 525.

135. AAMC III, *supra* note 14, at 522.

136. U.S. CONST. art. VI, § 2, cl.1 (stating in pertinent part: "The Constitution and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under authority of the United States, shall be the supreme law of the land.").

Congress may so extensively regulate an area that federal regulation impliedly leaves no room for, or crowds out, state regulation.<sup>137</sup> Third, state law may be preempted if it actually conflicts with federal law.<sup>138</sup> The third kind of preemption is called "conflict preemption."<sup>139</sup> Conflict preemption occurs when compliance with both state and federal regulations would be impossible, or when the state law prohibits effectuating federal law policies.<sup>140</sup> Congress has neither expressly prohibited state regulation of standardized admissions tests nor comprehensively regulated the tests.<sup>141</sup> Therefore, the AAMC had to argue conflict preemption, the third type of preemption. The AAMC claimed that the Truth in Testing law prohibited accomplishing the policies of the Federal Copyright Act and prevented the copyright holder from receiving the benefits Congress intended.<sup>142</sup>

What then are the policies behind the copyright law? Copyrights are a protected property right.<sup>143</sup> The copyright interest protects intellectual property in order to encourage creativity.<sup>144</sup> Copyright protection is justified because it motivates people to continue to create, to think, to write, to publish, and to exchange information.

What benefits did Congress intend to confer through the copyright law? Authors who hold copyrights receive proper recognition and financial reward for their work.<sup>145</sup> Additionally, publishers can

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137. *Id.*

138. *See, e.g.* *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 985-86 (2d Cir. 1989) (finding that the Federal Petroleum Marketing Practices Act preempted a similar Connecticut statute because the two laws directly conflicted with each other).

139. U.S. CONST. art. VI, § 2, cl. 1; *see, e.g.*, *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (holding that a local unfair competition law conflicted with the power of the federal government to grant patents and would preclude implementation of federal policy).

140. *Stiffel*, 376 U.S. at 229.

141. AAMC III, *supra* note 14, at 527 (Mahoney, J., concurring in part and dissenting in part) (explaining that there is "no federal regulation of standardized testing that would displace New York's" Truth in Testing law).

142. AAMC III, *supra* note 14, at 523.

143. *See generally* 17 U.S.C. § 102 (1988 & Supp. II 1990) (enumerating categories of the general subject matter of copyright); NIMMER, *supra* note 25, at 1-44.15 § 103[A] (comparing copyright to the theory of private property).

144. *See* Maxtone-Graham v. Burtchaeil, 803 F.2d 1253, 1255 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) (holding that verbatim copying of a book was justified as Fair Use under the Copyright Act since the "purpose of fair use is to create a limited exception to the individual's property rights in his [or her] expression - rights conferred to encourage creativity."); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("the purpose of copyright is to create incentives for creative effort.").

145. *See generally* 17 U.S.C. § 106 (1988 & Supp. II 1990) (explaining authors' exclusive rights in copyrighted works); *see, e.g.*, *Mazer v. Stein* 347 U.S. 201, 219 (1954) (stating that copyright encourages individual creativity by extending financial personal gain); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 55 (1985) (explaining that one of the primary goals of the Copyright Act is to assure recognition to authors and reporters).

also profit.<sup>146</sup> Profit encourages publication and thus increases availability of information to the public. Without copyright, important ideas might never gain public attention.<sup>147</sup> The concept of copyright protection is founded upon encouraging creativity and enhancing public knowledge.

Copyright protection, however, has never been absolute. There is a tension between reward for creativity on the one hand and availability and public use of copyrighted material on the other. Copyright can be used to monopolize ideas and thus inhibit the exchange of information at a potentially great social cost.<sup>148</sup> In other words, copyright protection at times may be counterproductive to the policies justifying its existence.<sup>149</sup> Because of this potential conflict, exceptions to exclusive copyrights have existed for over 250 years.<sup>150</sup>

### 1. *The Fair Use Exception to Copyright Protection*

The most important of the exceptions to exclusive copyright is known as the Fair Use Doctrine.<sup>151</sup> At common law, the Fair Use Doctrine existed as an "equitable rule of reason."<sup>152</sup> The Doctrine allows use of copyrighted material without the copyright owner's consent in circumstances when the use is reasonable, and when the use "would tip the balance between the public interest in the free flow of information and the copyright holder's exclusive control over the work in favor of the public."<sup>153</sup>

This is not an easy balance to strike.<sup>154</sup> Justice Story explicated

146. See *Harper & Row*, 471 U.S. at 567 (describing the Copyright Act's focus on the importance of ensuring marketability of copyrighted work).

147. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that the "ultimate aim" of copyright law is "to stimulate artistic activity for the general public good.").

148. *Id.*

149. See *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., Inc.*, 621 F.2d 57, 60 (2d Cir. 1980) (stating that the "doctrine of fair use permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.").

150. See *Gyles v. Wilcox*, 2 Atk. 141 (1740) (No. 130) (defining abridgement of the right to use copyrighted material because of public considerations); see also Frank D. Prager, *History of Intellectual Property*, 26 J. PAT. [ & TRADEMARK ] OFF. SOC'Y 711 (1944) (recounting the history of copyright).

151. See *supra* note 25.

152. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659 (reporting on the legislative history of the Copyright Act).

153. *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 27 (2d Cir. 1982).

154. In 1939, a panel of the Second Circuit, including Judge Learned Hand, called the issue of Fair Use "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). It remains so today. See Weinreb, *supra* note 25, at 1144 (discussing the difficulty in ascertaining use as a public or private interest); Jay Dratler, *Distilling the Witches Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 250 (1988) (addressing the conflict between the public's right to know and privacy interests).

the operation of the doctrine in 1841: "We must often look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work."<sup>155</sup>

In 1976, Congress passed a comprehensive, new Copyright Act<sup>156</sup> that codified existing statutory copyright law and the substantial body of common law.<sup>157</sup> At the same time Congress formalized copyright protection, it also recognized the fundamental tension between monopoly and access in copyright law by codifying the Fair Use Doctrine in section 107 of the Copyright Act.<sup>158</sup> This section was intended to "restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way."<sup>159</sup>

Section 107 is basically a restatement of Justice Story's description of Fair Use. In its entirety it reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for the purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market or value of the copyrighted work.<sup>160</sup>

The criteria set out in section 107 should be applied on a case-by-case basis.<sup>161</sup> Although the contextual nature of the Fair Use Doc-

155. *Folsum v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4, 901).

156. Copyright Act, Pub. L. No. 94-533, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991)).

157. See Notes of Committee of the Judiciary House Report No. 94-1476, *Single Federal System, Historical Note*, 17 U.S.C.A. § 301 (West 1977) (explaining that the Copyright Act had changed what had been a "dual system of 'common law copyright' for unpublished works, . . . the system in effect in the United States since the first copyright statute in 1790 . . .").

158. 17 U.S.C. § 107 (1988 & Supp. II 1990).

159. H.R. Rep. No. 1476, *supra* note 152, at 66, *reprinted in* U.S.C.C.A.N. at 5679.

160. 17 U.S.C. § 107 (1988 & Supp. II 1990).

161. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("The factors enumerated in [section 107] are not meant to be exclusive: '[s]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising

trine has always been a challenge,<sup>162</sup> there is ambiguity in using specific case analysis. It is difficult to predict if the exception will apply in any given situation.<sup>163</sup> Nevertheless, case-by-case analysis is essential. The Doctrine arises in varied situations and there must be flexibility in its application. Rote application of the Fair Use criteria is too dangerous. However, regardless of the difficulty in applying the Fair Use Doctrine, its goal of resolving the conflict between the monopoly granted to the owner of the copyright and the free flow of information, serves to foster a creative and informed society. This goal is important in the arena of standardized testing.

*a.) The Purpose of the Use*

Section 107 lists "the purpose of the use" as the first criterion for claiming Fair Use exemption from copyright.<sup>164</sup> When applying this first prong of the Fair Use Doctrine the distinction between commercial use and non-profit use must be recognized. There is no doubt that Truth in Testing laws fall within the parameters of the exception for non-profit use. The disclosure provisions are aimed at teaching, scholarship, and research. Truth in Testing laws were passed because of the need for meaningful comment and criticism in this area with regard to standardized tests. The Truth in Testing law provides for the use of copyrighted material for non-profit, educational purposes only. It is not for commercial purposes, profit, or exploitation.<sup>165</sup>

*b.) The Nature of the Work*

The second criterion for determining Fair Use is the nature of the copyrighted work.<sup>166</sup> The AAMC, like most test agencies, regularly

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question must be decided on its own facts.' "); *see also* Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., Inc., 621 F.2d 57, 60 (2d Cir. 1980) ("[The] resolution of a fair use claim 'depends on an examination of the facts in each case'")(citation omitted).

162. *See generally* Weinreb, *supra* note 25, at 1137 (1990) (commenting on the "confused" Doctrine of Fair Use).

163. *See* Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986) (exemplifying the unpredictability of the Fair Use Doctrine where verbatim copying of interviews published in a pro-choice book by an author of an antiabortion book was justified).

164. 17 U.S.C. § 107(1) (1988 & Supp. II 1990).

165. *See* AAMC III, *supra* note 14, at 524 ("The State does not seek to exploit disclosed MCAT materials commercially . . . . This conclusion is essentially uncontested by the parties . . . ."). Though disclosure might result in commercial use of questions by test preparation services or test "coaching" businesses, this would be a commercial use also subject to copyright protection. Additionally, hypothetical infringing uses should not render the non-profit, Truth in Testing use a copyright infringement either. *See* Sony Corp. v. Universal Studios, Inc., 464 U.S. 417, 454-56 (1984) (stating that the possibility that VCRs are capable of infringing uses does not support a finding of copyright infringement because the VCRs are also capable of substantial non-infringing uses).

166. 17 U.S.C. § 107(2) (1988).

files for and receives copyrights for its tests.<sup>167</sup> The MCAT consists of science and math questions.<sup>168</sup> The factual nature of the MCAT material generally would afford it less copyright protection because a higher value is placed on copyrighted fiction than on nonfiction. As one court noted, "Factual works such as biographies, reviews, criticism and commentary are believed to have greater public value and, therefore, uses of them may be better tolerated by the copyright law."<sup>169</sup> Normally, "no author may copyright facts or ideas."<sup>170</sup> Yet, while the MCAT, like other admissions tests, is less than great literature, it is more than pure fact.<sup>171</sup> The test involves compilation and presentation of facts within the vehicle of the question stimulus or fact pattern. Questions are ordered by design. There is, therefore, a creative aspect to the test. This creative aspect must, however, be balanced with the public interest in disclosing the "objective" test questions and test agency factual, research reports.

Test agencies have successfully argued that their tests are protected by copyright because of the "secure" nature of the test material.<sup>172</sup> The AAMC in 1983, and ETS in 1986, sued for commercial infringement of their "secure" admissions tests.<sup>173</sup> However, both these law suits involved use of tests by commercial test "coaching"

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167. AAMC III, *supra* note 14, at 521.

168. See AAMC III, *supra* note 14, at 521 (explaining that the MCAT consists "of some 300 questions and is designed to measure a test-taker's knowledge in chemistry, biology, and physics, as well as his or her reading and quantitative skills.").

169. Basic Book, Inc. v. Kinko's Graphic Corp., 758 F. Supp. 1522, 1532-33 (S.D.N.Y. 1991) (holding that a duplication business had infringed publishers' copyrights by copying excerpts from books without permission and compiling them into university report packets).

170. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985). See American Geophysical Union v. Texaco Inc., 61 U.S.L.W. 2066, 2067 (S.D.N.Y. July 22, 1992) (stating that the factual nature of a work weighs in favor of Fair Use, but finding that the commercial nature of the user and harm to profits led to copyright infringement).

171. See *American Geophysical Union*, 61 U.S.L.W. at 2066 (explaining that less protection is afforded work that is non-fiction to the extent that non-fiction work does not require creativity, but finding even purely factual work may be creative and protected by copyright where the compilation and presentation are creative).

172. See National Conference of Bar Examiners v. Multistate Legal Studies, 692 F.2d 478, 484 n.6 (7th Cir. 1982) (interpreting Congress's intent in creating the Copyright Act to "afford protection to confidential creative material such as secure tests . . ."); see also 37 C.F.R. § 202.20(c)(2)(vi) (1991) (obviating the need for the Copyright Office to retain a copy of "secure" tests after the administration of the exam).

173. See *American Assoc. of Medical Colleges v. Mikaelian*, 571 F. Supp. 144, 155 (E.D. Pa. 1983) (commenting that the reuse of old secured test questions saves expense to AAMC and its member medical schools and granting a preliminary injunction to prevent a test preparation business from using AAMC questions in its materials), *aff'd without opinion*, 734 F.2d 3 (3d Cir. 1984); see also *Educational Testing Serv. v. Katzman*, 631 F. Supp. 550 (D.N.J. 1986) (holding that the court had jurisdiction over a review course corporation officer); *Educational Testing Serv. v. Katzman*, 793 F.2d 533 (3d Cir. 1986) (upholding an injunction against a test preparation course). The legal battles between Katzman and ETS date back to 1983, when ETS discovered that Katzman was registering for and taking several ETS examinations in order to become more familiar with them. *Id.* at 536.

groups. In *AAMC v. Mikaelian*,<sup>174</sup> the defendant's coaching classes used verbatim questions from MCAT tests that were thought to be secure.<sup>175</sup> The defendant had taken the MCAT on numerous occasions. His answer sheets for the tests were virtually empty. It appeared that he would sign up to take the test for the purpose of copying actual test questions and then would use them in his coaching classes.<sup>176</sup> The students in the defendant's coaching courses benefitted from an obvious advantage.<sup>177</sup> The court in *Mikaelian* refused to apply the Fair Use exception because of the commercial nature of the use and the unfairness to test takers who were not in the coaching course.<sup>178</sup>

Likewise, in *ETS v. Katzman*,<sup>179</sup> the test agency sued a commercial defendant who had somehow obtained a copy of various standardized tests before they were used for actual testing.<sup>180</sup> Again, the courts found that such a use was not a Fair Use at all, but rather against public policy.<sup>181</sup> It was unfair to students not in the course, and indeed distorted the whole testing process.<sup>182</sup>

Truth in Testing Fair Use is very different from selected exploitation of tests for commercial benefit by coaching services. The nature of the MCAT as a secure copyrighted work should be viewed in relationship to the Truth in Testing law. Certainly test agencies should be able to use copyright laws to protect themselves from use of tests such as that in *Katzman*. Copyright protection is needed to safeguard the tests as unpublished works prior to their administration.<sup>183</sup> The tests are more than raw facts. If a test taker knew exactly what questions would be asked and the order in which they would appear, answers could be memorized and the test would not be a test at all. On the other hand, disclosure after the test has been

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174. 571 F. Supp. 144 (E.D. Pa. 1983).

175. *Id.* at 148 ("Many of the Multiprep [Mikaelian's company] test questions are not only word-for-word reproductions of the MCAT test question, but also have the same typeface and graphic irregularities [e.g. an uneven line] found on the MCAT question.").

176. *Id.* at 147-48.

177. *Id.* at 153.

178. *Id.*

179. 631 F. Supp. 550 (D.N.J. 1986).

180. *See id.* at 551 (explaining that in 1982, Katzman obtained copies of the English and Math Achievement tests before the exams were administered and distributed them, causing ETS to cancel all students' scores and readminister the tests); *see also* Daniel S. Hinerfeld, *Cheating Time*, ROLLING STONE, Mar. 19, 1992 at 74 (postulating that Katzman and his cohorts would make use of time zone changes to transmit questions and answers from East Coast to West Coast test takers).

181. *Katzman*, 793 F.2d at 543.

182. *Id.*

183. *See Mikaelian*, 571 F. Supp. at 153 ("[T]he development, testing, and administration of the questions [are] performed under strict scrutiny. The very purpose of copyrighting the MCAT questions is to prevent their use as teaching aids . . .").

given has distinct fairness advantages. The primary disadvantage is that if questions are disclosed, there is a potential that the questions cannot be used in subsequent tests.<sup>184</sup> Yet, if the pool of previously used questions was large enough, it would be nearly impossible to memorize all the answers if the questions were disclosed.<sup>185</sup> The format and order of the questions could be changed in order to alter the test.<sup>186</sup> Additionally, new questions could be written and kept secure until their use.

*c.) The Extent of the Use*

The third factor of the Fair Use Exception, the amount of the protected material used, also has to be viewed within the context of the Truth in Testing law.<sup>187</sup> The Truth in Testing law requires that all test questions and answers actually used in scoring must be disclosed.<sup>188</sup> On the other hand, questions used for equating or development purposes do not have to be disclosed.<sup>189</sup> Likewise, the Truth in Testing law does not require disclosure of the test before it is given.<sup>190</sup> In this way, the law strikes a balance between strong public interest in monitoring this widely used type of test and the equally strong interest in fairly developing and administering admissions tests. In utilizing these balancing factors the law does not seek to ban the tests, but strives to make them better.

*d.) The Economic Effect of the Use*

The final factor in the analysis of Fair Use is the effect of the use on the potential market value of the copyrighted material.<sup>191</sup> This factor is viewed by courts as the most important in determining Fair Use.<sup>192</sup> A copyright holder can argue against Fair Use by showing

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184. AAMC III, *supra* note 14, at 525.

185. AAMC III, *supra* note 14, at 525 (discussing a study on disclosure of standardized testing questions finding that, over time, the effect of test disclosure on test scores becomes negligible).

186. AAMC III, *supra* note 14, at 525 (describing how mathematical adjustments in the value of test questions reduces any scoring deviations).

187. 17 U.S.C. § 107(3).

188. N.Y. EDUC. LAW § 342(1) (McKinney 1988).

189. N.Y. EDUC. LAW § 342(1)(a) (McKinney 1988). For the test taker, these questions might be as distracting and biased as questions used for scoring. Nevertheless, this exemption in the Truth in Testing law seems a reasonable balance with the interests of the agencies developing and administering standardized tests. This may also help the testing agencies to discern which types of questions, in fact, are distracting to the test taker if they are allowed to add non-scored experimental questions.

190. *Id.* §§ 340, 341(1) (McKinney 1988).

191. 17 U.S.C. § 107(4).

192. See *Harper & Row Publishers, Inc. v. Nation Enters.* 471 U.S. 539, 566 (1985) (doubting the impact on the potential market as "undoubtedly the single most important element of Fair Use."). There has also been a scholarly critique of the Court's emphasis on



that the excepted use would have a negative effect on the profitability of the copyrighted work.<sup>193</sup> However, negative effect alone is not enough. To prevent application of the Fair Use exception, any adverse effect on the value or profitability of the work must outweigh any benefit to the public if the Fair Use is permitted.<sup>194</sup>

Test agencies must demonstrate that the Fair Use would cause profit loss.<sup>195</sup> In evaluating the impact on profits of any Fair Use of copyrighted material the commercial/nonprofit distinction is again important.<sup>196</sup> The Supreme Court has stated, "If the intended use is for commercial gain, that likelihood [of economic harm] may be presumed. But if it is for a non-commercial purpose, the likelihood must be demonstrated."<sup>197</sup> It is not enough for test agencies to demonstrate profit loss under their current way of operating. In response to this assertion a court might hold that they would have to alter their business operations to mitigate the Fair Use harm.<sup>198</sup>

To challenge the Truth in Testing law, the AAMC brought forth several claims. They argued that Truth in Testing harmed the value of their copyright because questions could not be reused.<sup>199</sup> They also claimed that the cost of writing new questions would be excessive.<sup>200</sup> As a direct result of implementation of truth in testing procedures, they claimed that their profit would be effectively eroded.<sup>201</sup> The AAMC also asserted that disclosure might eliminate the ability to produce even a very expensive test because there is a

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economic factors to the exclusion of equity and policy issues. See Weinreb, *supra* note 25, at 137 (posing a broader, contextualized approach for Fair Use analysis and rejecting the limited utilitarian type of analysis); Leval, *supra* note 25, at 1105 (presenting a traditional utilitarian analysis of Fair Use concepts).

193. *Harper & Row*, 471 U.S. at 539. The Court provided an example of this type of Fair Use analysis where former President Ford claimed that a portion of his yet unpublished memoirs printed in *The Nation* Magazine violated the Copyright Act by reducing the potential market value of his memoirs. *Id.* at 548-55.

194. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

195. See AAMC III, *supra* note 14, at 525-26 (describing the court's reaction to the claim of loss of profits asserted by AAMC). The court stated, "Moreover, we reject the district court's conclusion that a copyright owner, such as AAMC, should not be 'required to change its operations when another individual or entity is interfering with its ownership rights under the Federal Copyright Act in order to make the fair use exception fit.'" AAMC III, *supra* note 14, at 525-26 (citation omitted). Additionally, courts have also held that a copyright owner may be required to take certain steps to avoid profit loss. AAMC III, *supra* note 14, at 525-26.

196. See AAMC III, *supra* note 14, at 523 (citing section 107 of the Copyright Act as requiring assessment of whether the use is for commercial or non-profit educational uses).

197. *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984).

198. See AAMC III, *supra* note 14, at 525-26 (describing situations where the copyright owner might be required to make accommodation for Fair Use).

199. AAMC III, *supra* note 14, at 522. *But see* AAMC III, *supra* note 14, at 525 (disputing the AAMC's claim that reuse of MCAT test questions was impossible).

200. See AAMC II, *supra* note 14, at 887 ("The plaintiff also maintains, and defendants do not dispute, that the development of effective questions costs a good deal of both time and money—an investment which would be lost with disclosure.").

201. AAMC II, *supra* note 14, at 887.

finite number of possible science and math questions that could be asked.<sup>202</sup> This would both hurt the public interest in having admissions tests and eliminate the market for their test.

The AAMC's assertion of economic harm is difficult to fathom. The AAMC and the other test agencies are monopolies. They can charge whatever they choose for the costs of administering admissions tests.<sup>203</sup> The market for medical school standardized admissions tests is absolutely captive. A person wishing to be admitted to medical school can go nowhere else to obtain this necessity. The AAMC, like the LSAC which administers the LSAT, gives itself a monopoly when acting for individual member schools. The same educational institutions which use the test information for admission purposes have banded together to form the AAMC and the LSAC.<sup>204</sup> Furthermore, the cost of question development and new test production for each series of administrations<sup>205</sup> may not be high.<sup>206</sup> Certainly the ten years of experience with disclosure would seem to indicate that new questions can be drafted without excessive cost.<sup>207</sup>

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202. AAMC II, *supra* note 14, at 878.

203. See David M. White, Brief of Testing for the Public, Puerto Rican Legal Defense and Education Fund, United States Students Association, and the Equality in Testing Project as Amici Curiae, U.S. Court of Appeals for the Second Circuit, at 18-20, AAMC v. Cuomo 928 F.2d 519 (2d Cir. 1991) (No. 90-7269) (stating that standardized test makers have a monopoly over this type of testing and thus have the ability to regulate prices at their discretion); see also, AAMC III, *supra* note 14, at 521 (noting that almost all medical schools in the United States require applicants to take and pass the MCAT which is produced by AAMC).

204. See AAMC I, *supra* note 14, at 1359 (explaining that the AAMC is comprised of over 125 medical schools, 418 teaching hospitals, 68 academic societies, and over 1700 individuals); see also LSAT INFO. BOOK 92-93, *supra* note 2 (describing the history and composition of standardized testing and explaining that virtually every ABA and AALS accredited and unaccredited law school in the United States is a member of the LSAC).

205. A new test would not have to be developed for each administration of the MCAT. See N.Y. EDUC. LAW § 342(1) (McKinney 1988) (explaining that admissions tests are usually administered in clusters over the calendar year in coordination with professional school application processes, and providing that substantial delay in reporting of scores after administration must be disclosed). The New York law established that disclosure of test questions by the test agency does not have to occur until 30 days after announcing test results. *Id.* This lag time allows for a number of administrations of the same test before it is disclosed.

206. See Fiske, *supra* note 124, § 4, at 9 (reporting that an ETS official indicated that the additional cost of disclosing the SAT nationwide could be kept to 30 cents per test given). Additionally, during the Joint Hearings on New York's Truth in Testing law, there was testimony that test questions generally cost between 21 cents and 42 cents per candidate to develop. See *NY Joint Hearing*, *supra* note 80, at 127-131 (testimony of Allan Nairn, Congress Watch Public Citizen) (noting that internal industry estimates for test development costs were inconsistent with the studies of cost disclosure done by ETS); AAMC I, *supra* note 14, joint app. at 15 (affidavit of Karen Mitchell, Director, MCAT Program) (on file with FairTest, National Center for Fair & Open Testing, Cambridge, Mass.) (explaining that each MCAT test forms costs \$215,000 to develop; each question on a test form costs \$705 for multiple choice and \$39,000 for essay questions).

207. Not only have test agencies been able to draft new questions at little expense, but they have also profited by the publication and sale of disclosed tests. See Mark J. Sherman, *The College Board Joins Publishers of S.A.T. "Cram" Books*, N.Y. TIMES, January 8, 1984, § 12 at 8

The policy behind copyright protection is encouragement of creativity and increased information.<sup>208</sup> The anomaly of the AAMC's claim for protection is that it is founded on a desire not to be creative. If questions are disclosed, the AAMC urges, they cannot be reused. They seek copyright protection to avoid any further creativity. The purpose of disclosure is to encourage the continued creation of better tests. The AAMC wants to have a static test, given without outside scrutiny.

Disclosure will not hurt the test agencies' profits or creativity. Additionally, it serves a significant public purpose. Disclosure leads to better tests, particularly in terms of confronting race, ethnic, and gender bias. For example, the LSAC has had a sensitivity review process for decades.<sup>209</sup> In 1989, after the exposure of offensive questions,<sup>210</sup> the LSAC instituted a new sensitivity review process.<sup>211</sup>

## 2. *Judicial Treatment of Fair Use in Truth in Testing*

The Fair Use Doctrine is to be applied contextually. The courts should examine the public interest in any individual case to the same extent that they examine potential harm to the copyright

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(revealing the College Board's reluctant admission that preparation for standardized testing can be beneficial to the test takers and discussing the Board's profitable sale of test preparation material). The financial hardness of the LSAC and the LSAT post-Truth in Testing is evident by the efforts made in the late 1980s by for-profit entrepreneurs to purchase and operate the LSAT. See Victor G. Rosenblum, *Complementary Concerns About Legal Education: No Buyout or Sellout*, ASSOCIATION OF AMERICAN LAW SCHOOLS NEWSLETTER, June 1987 at 2 (discussing the attempted purchase of Law School Admission Services, Inc., a subsidiary of LSAC, and the ensuing resolution by LSAC which rejected this offer of purchase).

208. See *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the purpose of the Copyright Act is *not*, "... primarily . . . to provide a special private benefit," but is to benefit the public by, "motiv[at]ing] the creative activity of the authors and inventors by the provision of special reward, and to allow the public access to the products of their genius . . . ." and discussing the intention of monopoly privileges authorized by Congress through the Copyright Act).

209. See Moody letter, *supra* note 122, at 1:

"[From the early 1980s], [i]n addition to the standard item-bias and other psychometric reviews, test specialists, minority consultants, and a Test Question Review Committee of law school volunteers conducted reviews of test items; however, once assembled into a test form, these questions did not receive additional sensitivity review."

210. See, e.g., *supra* notes 51, 54, 55, 64, 68 and accompanying text (providing examples and analysis of offensive questions).

211. See Moody letter, *supra* note 122, at 2:

"[Since 1989], LSAS has broadened the test-review process beyond the basic item-bias review to ensure that tests do not include inappropriate or offensive material and that they do include a balance of material recognizing the diversity of our society and the contributions of women and minorities."

owner.<sup>212</sup> Neither the district court<sup>213</sup> nor the Second Circuit<sup>214</sup> in the AAMC case acknowledged the nexus between disclosure and amelioration of race and sex bias in standardized tests. In order to eliminate these biases, it is necessary to disclose actual test questions and internal test agency research reports.

Chief Judge McCurn, in the district court opinion, recognized the state interest in eliminating race and gender bias in testing only regarding the mandated data collection in section 341-a.<sup>215</sup> In detailing the provisions of the New York law, Chief Judge McCurn noted that the law was amended in 1987 to include section 341-a "[d]ue to a concern that standardized tests may be *biased in some manner . . .*"<sup>216</sup> The provision requires that test agencies collect data and file statistical reports correlating performance with race, language, ethnicity, and gender.<sup>217</sup> However, this section of the law has nothing to do with disclosure of copyrighted questions.<sup>218</sup> Chief Judge McCurn was silent regarding race and gender bias and the disclosure of test questions and research reports.

Like Chief Judge McCurn, Judge Altamari, writing for the Second Circuit, focused mainly on the effect of the law on the AAMC.<sup>219</sup> His discussion of the state's interest is presented in the vaguest terms. Judge Altamari noted that the law was enacted "in order to open the standardized testing process to public scrutiny."<sup>220</sup> He asserted that its purpose is to review the validity and objectivity of the tests, to assure accuracy in scoring and to aid in development of better future tests.<sup>221</sup> However, there was no discussion of the leg-

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212. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (quoting Chief Justice Hughes in *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1931)). Justice Hughes stated, "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors." *Id.* at 158.

213. AAMC II, *supra* note 14, at 873.

214. AAMC III, *supra* note 14, at 519.

215. AAMC II, *supra* note 14, at 884-85 (citing N.Y. EDUC. LAW § 341-a (McKinney 1988)).

216. AAMC II, *supra* note 14, at 875 (emphasis added).

217. N.Y. EDUC. LAW § 341-a (McKinney 1988).

218. Indeed, under copyright analysis it is difficult to see how section 341-a was even properly under review by the district court. This section mandates that *data* be collected and disclosed, not that independently created and copyrighted material be disclosed. Judge Mahoney makes this point in his concurrence to the circuit court opinion. AAMC III, *supra* note 14, at 536 (Mahoney, J., concurring in part and dissenting in part).

219. AAMC III, *supra* note 14, at 519 (reversing the summary judgment and permanent injunction and remanding case for a determination of whether disclosure of STA [Standardized Testing Act] affected the "potential market for or value of MCATs . . .").

220. AAMC III, *supra* note 14, at 521.

221. AAMC III, *supra* note 14, at 524.

islative history of the Act<sup>222</sup> nor any mention of the relationship between disclosure and efforts to eliminate race and gender bias in the examinations.<sup>223</sup> Both the district court and the Second Circuit should have noted that section 341-a expresses the significant legislative concern about bias. It bears on interpreting the public interest in the test and research report disclosure provisions of the law.<sup>224</sup>

The Truth in Testing law is not just about computer scoring errors. It also was passed because test agencies failed to address concerns of race and gender bias on their own.<sup>225</sup> Yet, the public interest in equality of opportunity for education was ignored by the courts responsible for reviewing the law.

### III. THE NEED FOR CONTINUED DISCLOSURE.

#### A. Test Agencies Should Be Forced to Open the Test Process.

The Truth in Testing law was the impetus for disclosure.<sup>226</sup> When the Truth in Testing law became effective in 1980, the Educational Testing Service (ETS), the leader in standardized admissions tests, did not challenge the law in court.<sup>227</sup> ETS complied by disclosing all required tests and answers.<sup>228</sup> The LSAC, like most other test agencies, also complied with the law.<sup>229</sup>

Nevertheless, the test agency commitment to full test disclosure is tenuous. For some testing agencies, the issuance of the permanent injunction by the New York District Court in 1990 led to a return to secret testing. The Graduate Management Admission Council (GMAC), which develops the admissions tests used by business schools, was one of five testing agencies that challenged New York's Truth in Testing law in 1990 and sought to permanently enjoin en-

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222. Additionally, in the district court opinion, Judge McCurn also ignores the context in which the Act was passed. See AAMC II, *supra* note 14, at 877-81 (discussing only the administration and security of the MCAT and the alleged inability to reuse questions).

223. AAMC III, *supra* note 14, at 519. Judge Mahoney at least notes that the issue of reuse of questions is unrelated to this provision of the law. AAMC III, *supra* note 14, at 526 (Mahoney, J., concurring in part and dissenting in part).

224. N.Y. EDUC. LAW § 341-a (McKinney 1988).

225. See *supra* notes 95-112 and accompanying text (discussing the background and development of New York's Truth in Testing law).

226. Kevin Sack, *Judge Strikes Down Law Forcing Release of College Tests*, N.Y. TIMES, Jan. 19, 1990, at B1.

227. *Id.*

228. *Id.*

229. Cf. Jonathan Rowe, *A Tale of Two Tests: SAT vs. LSAT*, THE CHRISTIAN SCIENCE MONITOR, July 27, 1987, at 21 (discussing the different philosophies of ETS and LSAC regarding disclosure).

forcement of the law as applied to them.<sup>230</sup> Following initiation of this suit, all of the plaintiffs, except the GMAC, moved for a preliminary injunction.<sup>231</sup> This motion was then resolved by a stipulation specifying which tests, or test questions, would be disclosed.<sup>232</sup> The stipulation, however, did not represent full compliance with the Truth in Testing law.<sup>233</sup> The stipulation was to expire at the end of the 1990-91 test year or when the *AAMC* litigation was completed.<sup>234</sup> Due to the length of the *AAMC* proceedings, the issue was extended into the 1991-92 test year.<sup>235</sup> All of the plaintiffs, except the GMAC agreed to an extension of the stipulation.<sup>236</sup> The GMAC chose to file a motion for a preliminary injunction instead.<sup>237</sup>

Chief Judge McCurn, ruling after the Second Circuit remand of the *AAMC* case, refused to preliminarily enjoin the law.<sup>238</sup> Chief Judge McCurn found that the state had raised triable issues about the applicability of the Fair Use Doctrine.<sup>239</sup> However, the outcome of the original action, *AAMC v. Carey*,<sup>240</sup> which was remanded to the district court after the decision was appealed in the Second Circuit, may bring the return of secret testing. The case, on the remand, is still in the discovery stage.<sup>241</sup>

Test agencies which have not directly challenged the law, like ETS and LSAC, may jump on the bandwagon if the law is struck down with reference to the *AAMC*. When interviewed, Stanford H. von Mayrhauser, General Counsel for ETS, stated that the testing service continues to believe that "in general, disclosure is a positive

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230. *College Entrance Exam. Bd. v. Cuomo*, 788 F. Supp. 134, 137-38 (N.D.N.Y. 1992) (reviewing the history of the case). The other plaintiffs in the case were the Graduate Record Examination Board, the Test of English as a Foreign Language Policy Council, and the Educational Testing Service. *Id.* at 134.

231. *Id.* at 137-38.

232. *Id.* at 138 (citing the Stipulation Agreement of Parties, dated May 11, 1990). The stipulation expressed the plaintiffs' agreement to disclose a certain percentage of tests administered. *Id.* The GMAC, although it was not a moving party, also agreed to the stipulations. *Id.*

233. *See Id.* at 138, n.4 (noting that the plaintiffs did not agree to disclose all of their tests).

234. *Id.*

235. *Id.*

236. *Id.* (citing Stipulation Agreement of Parties, dated January 12, 1992). The stipulation reflected the plaintiffs' agreement to continue disclosing their tests at the same rates as they had done in the 1990-91 test year. *Id.*

237. *Id.*

238. *College Entrance Exam. Bd.*, 788 F. Supp. at 134 (denying GMAC's motion for a preliminary injunction for failing to show a likelihood of prevailing on the merits of a claim preempted by the Federal Copyright Act; holding that the use of the test was not within the Fair Use exception).

239. *Id.* at 140-43.

240. *AAMC II*, *supra* note 14, at 873.

241. Discovery in this case has been extended to May 1, 1993. As of publication of this article, no trial date has been set.

concept."<sup>242</sup> Mayrhauser implied that it is still possible that ETS could change its national policy: "If you're looking for a categorical denial that we won't seek to avail ourselves of any remedies made available to us by this ruling, I won't deny that . . . ."<sup>243</sup>

The LSAC, which did not join the GMAC in its direct challenge to the law, has also entered into a stipulation with the State of New York.<sup>244</sup> The LSAC stipulated to defer disclosure and filing of LSAT tests it administered in December 1992 and December 1993, along with any studies, evaluations, and reports, for two years from the date the tests are administered.<sup>245</sup> The LSAC entered into this stipulation at about the same time that it began using a new LSAT format.<sup>246</sup> The format is even more important now because, at the time of the format change, the LSAC also changed the scoring of the test.<sup>247</sup>

In the last eight years, there have been three different methods used by LSAC to score the LSAT.<sup>248</sup> There is no doubt that scoring affects admissions. The test appears to be a sensitive measure between students with small score differentials. Depending on the year the students took the examination, a comparison of two students with very similar scores might appear very different. With the new scoring of 120 to 180,<sup>249</sup> the increase in calibrations makes small score differences appear more significant. The LSAC itself has acknowledged that a three digit scoring system is misleading.<sup>250</sup>

The distinctions between any of these score groupings is deceptive. Any individual score reflects a broad range of accuracy, called

242. Sack, *supra* note 226, at B1.

243. Sack, *supra* note 226, at B1.

244. See Stipulation of Parties, dated January 21, 1992 (on file with FairTest, National Center for Fair & Open Testing, Cambridge, Mass.) (articulating the provisions of the agreement between LSAC and the State of New York).

245. *Id.*

246. See LSAT: SOURCES, CONTENTS, USES *supra* note 34, at 5 (describing the new LSAT format introduced in June, 1991).

247. See LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 10 (discussing the change in the scoring of the LSAT; stating that the revised version of the test cannot be equated with the previous version because the new format "does not test exactly the same qualities in the same way as they were tested by earlier versions.").

248. Until 1982, scoring was on a 200 to 800 scale. In 1982, scoring changed to a scale of 10 to 48. In 1990, it changed a third time to a scale of 120 to 180. The LSAC distributes guides to the law schools for comparing scores for years with different scoring tables. LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 9-10.

249. See LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 10 (explaining the new scoring system).

250. See Beth Bogart, *Law Schools Adjust to New LSAT Scoring System*, LEGAL TIMES, Dec. 31, 1984, at 6 (quoting LSAC Deputy Executive Director, Paul Richard). Richard stated that the LSAC changed in 1982 from a three-digit scoring to a two-digit scoring in part because the three-digit scoring gave a "misleading appearance of precision." *Id.*; see also LSAT: SOURCES, CONTENTS, USES, *supra* note 34, at 9 (acknowledging that a three digit score scale created "an impression of precision that was not warranted.").

the measurement error. The Standard Error of Measurement (SEM) for the LSAT is approximately 2.5 scaled points.<sup>251</sup> The LSAC describes the accuracy of the score as follows:

The chances are 2 out of 3 that an individual's test score is within one SEM of his or her hypothetical "true" score and nine out of ten that it is within two SEMS. A test taker's true score is the score he or she would obtain on a perfectly reliable test. When the SEM is approximately 2 scaled score points, . . . a test taker who has a true score of 35 [on the 10 to 48 scale] would obtain an observed score between 30 and 40 nine times out of ten.<sup>252</sup>

The controversy surrounding the composition of questions and scoring of the LSAT reveals that test development should be open, subject to criticism, and reflect the broad legal community. Unfortunately, this has not been the test agency tradition.<sup>253</sup> The latest change in LSAT scoring, introduced in 1990, received criticism for being done in a rush and without proper consultation with the law school community. As one law school dean pointed out, "[T]he precipitous way in which the Board [of the LSAC] has sought to make changes in the LSAT makes it appear that we are dealing with an instrument that is so delicate and so finely tuned that any delay in correcting it would cause havoc."<sup>254</sup>

### B. Test Secrecy Perpetuates Test Bias

Test agencies vigorously opposed Truth in Testing. They argued that bias would be increased because reusing questions would give students who previously saw the questions an unfair advantage over those who had not.<sup>255</sup> However, the real unfairness is the failure to disclose. If all test questions were available, perhaps through local libraries, then all test takers would, at minimum, have the opportunity to read the questions.<sup>256</sup>

251. LAW SCHOOL ADMISSION SERVICES, INTERPRETIVE GUIDE FOR LSAT SCORE USERS (Feb. 1990).

252. *Id.* (emphasis in original).

253. Muriel Cohen, *Secrecy on Questions Becomes Issue in Standardized Tests*, BOSTON GLOBE, Oct. 18, 1990, at 9 (citing EDUCATIONAL TECHNOLOGY CENTER, HARVARD UNIVERSITY, SECRET (1990) and explaining that test agencies are still not disclosing the information base from which they develop their test questions despite Truth in Testing laws).

254. Howard A. Glickstein, Dean, Touro College, Jacob D. Fuchsberg Law Center, President, Society of American Law Teachers, Address before the Board of Trustees of the Law School Admission Council 2 (Sept. 8, 1990) (on file with the author).

255. AAMC II, *supra* note 14, at 887. Additionally, the AAMC flatly stated that no disclosed questions or portions of disclosed questions would be reused in the MCAT. *Id.*

256. The test agencies publish preparation material for the tests. Unfortunately, they do not seem to be the best judge of what constitutes helpful test preparation material. See DONALD E. POWERS, PREPARING FOR THE SAT: A SURVEY OF PROGRAMS AND RESOURCES, College Board Report No. 88-7 (1988) (stating that SAT test takers surveyed rated SAT preparation programs outside of school to be the most helpful activity in raising their scores and



Secrecy exacerbates economic discrimination between test takers.<sup>257</sup> Students with money, who are connected to the right networks to know the best preparation courses, have access to the secrets of the tests. The AAMC tells us that the MCAT is a secure test because it has never been released.<sup>258</sup> This rhetoric is used to keep the test secure from bias scrutiny by educators and researchers. Meanwhile, test preparation coaching courses have used verbatim copies of the MCAT.<sup>259</sup> The AAMC sued and stopped this verbatim use of previous MCAT questions.<sup>260</sup> Nevertheless, it is clear that the test, in reality, is not "secure."

The difficulty in obtaining actual test questions does not make it impossible.<sup>261</sup> There is no such thing as an absolutely secure test.<sup>262</sup> The result is that the cost of the best test preparation

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reporting that test takers judged the College Board booklet, *TAKING THE SAT*, to be the least helpful).

257. For example, with the SAT, "studies done over the last 20 years prove that coaching courses can raise a student's score by 100 points . . ." Anthony DePalma, *SAT Coaching Raises Scores, Report Says*, N.Y. TIMES, Dec. 18, 1991, at B9. However, "FairTest argues that minorities, low-income students and those students whose first language is not English often score too low to qualify for admissions or scholarships because they cannot afford coaching classes available to more affluent candidates." Muriel Cohen, *Testing Firm Said to Hide Coaching Benefits on SATs*, BOSTON GLOBE, Dec. 18, 1991, at 78.

258. AAMC III, *supra* note 14, at 521.

259. See AAMC III, *supra* note 14, at 521 (noting that a previously administered MCAT exam, "compromised by unauthorized disclosure," is available to applicants to use as a practice exam); see also *AAMC v. Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983) (detailing AAMC's copyright infringement action where a test preparation agency's materials contained verbatim questions from previously administered exams).

260. See *Mikaelian*, 571 F. Supp. 144 (granting the AAMC's request for a preliminary injunction to enjoin a test preparation agency from using verbatim MCAT questions in its test preparation materials).

261. At the testimony in favor of the Truth in Testing law, Senator Halperin explained what everyone who is part of the right network knows:

I was the beneficiary of one of these [coaching] courses . . . I had seen those questions [for both the LSAT and the Multistate Bar] and the reason I had seen them is not because anybody saw the test ahead of time, but because over the years the same questions are used, and the people who put together these courses have a little system worked out where they select certain people to remember certain questions and they come back and they actually have a list of all the questions that are asked year after year . . . I already had an advantage because I was able to afford the cost [of the course] . . . [O]ne reason for disclosing the questions is to put everyone on equal footing since really the questions are not as secret as some would be led to believe.

*NY Joint Hearing, supra* note 80, at 23-25 (Testimony of Senator Halperin).

262. See *Hinerfeld, supra* note 180, at 72 (describing a coaching service employee's test taking on the East Coast and telephoning of test information to test takers on the West Coast on the day of the exam). In his article, *Hinerfeld* states,

Organized academic fraud is on the rise and apparently beyond the knowledge or control of authorities. Most of these students seem to know at least one person who cheated on the SAT, and the variety of ingenuity of their methods is astounding — from the buddy system, in which friends swap answers during breaks to the surrogate approach to the use of wristwatch-size data banks that can store vocabulary words and formulas. Says one college freshman: "It's easier to cheat on the SAT than to get a six-pack of beer."

*Hinerfeld, supra* note 180, at 76.

courses, the ones with close facsimile questions, will be high. Thus, those medical school applicants with money, will have a distinct advantage over other students.<sup>263</sup> Indeed, if MCAT questions are now routinely reused, the validity of the current MCAT is questionable.

Finally, the Association of American Medical Colleges argued that MCAT questions need to be reused because there is a limited pool of these questions.<sup>264</sup> This argument places a mask of neutrality on the test. How can there be bias subject to correction if there is an Aristotelian definiteness to MCAT questions? The MCAT is comprised of approximately 300 questions on math and science.<sup>265</sup> The AAMC gives the MCAT to thousands of persons with pre-med, undergraduate science backgrounds. These test takers have attended hundreds of different undergraduate colleges and had many different science and math professors, all of whom gave examinations which we can assume contained many thousands of different questions. The AAMC now asks us to believe that, contrary to the obvious experience of the whole of the academic world, the universe of possible test questions is a small, "finite pool."<sup>266</sup> Similar "limited

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263. See Joshua Hammer, *Cram Scam: Fighting Educational Injustice for Fun and Profit*; *Princeton Review Course*, THE NEW REPUBLIC, April 24, 1989, at 15 (interviewing John Katzman, founder of the Princeton Review). Katzman says he based "more than 50 percent . . ." of his teaching on having students "get inside the heads of the test makers and figure out how to get the right answers, or at least improve their odds, without actually learning much of substance." *Id.*

In the Logical Reasoning section of the LSAT certain test "coaching" tricks became insider, elitist knowledge well before official release of actual tests through the Truth in Testing law. In 1984, because of Truth in Testing legislation, David White of Testing for the Public, analyzed long-used coaching tricks based on actual LSAT forms. See WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS *supra* note 8, at 6-7. For example, White found that two out of three items designated as "Major Objective" began with a gerund (a verbal noun ending in "-ing"). He stated:

Thus, by merely remembering this rule, the candidate would be correct in the selection of 2/3 of the Major Objectives after merely reading the first word of the statement to be classified . . . The most disturbing aspect of the LSAT trick may be its origins. The gerund rule was first discovered by this author through a third hand report from a former administrator of the Stanley H. Kaplan LSAT Preparation Course. Once LSAT forms were released, this author applied the rule with success. Later, widespread knowledge of the gerund rule was confirmed in conversations with students attending some of the most prestigious, selective law schools in the nation—students who had previously taken a coaching course which taught the gerund trick."

WHITE, EFFECTS OF COACHING, QUESTIONS, AND BIAS *supra* note 8, at 6; see also Stuart Katz et al., *Answering Reading Comprehension Items Without Passages on the SAT*, 1 PSYCHOLOGICAL SCIENCE 122, 126-27 (1992) (suggesting that SAT verbal scores are heavily influenced by factors other than real verbal ability and that examinees in their study answered a substantial number of reading comprehension questions correctly without reading the passage).

264. AAMC II, *supra* note 14, at 878.

265. See AAMC III, *supra* note 14, at 521 (describing the composition of the MCAT and stating that its purpose is to measure the test taker's quantitative and reading skills and knowledge of biology, physics, and chemistry).

266. See American Assoc. of Medical Colleges v. Mikaelian, 571 F. Supp. 144, 147 (E.D. Pa. 1983) (stating AAMC's claim that there exists a finite number of potential questions due to

pool" arguments are often made by agencies and institutions that want to avoid claims that they are biased and exclusive.<sup>267</sup> Secret tests are the best insulation from scrutiny. An absolute, finite pool of questions is the best protection from responsibility for race and sex bias.

### CONCLUSION

The Educational Testing Service, constructing the LSAT for the LSAC, understands bias and corrects for it in the same way that bias is addressed by law schools and courts. There have been consistent efforts in the past ten years to be inclusive, to be diverse. The test makers acknowledge that the older tests only reflected white, male life experience. The test now includes issues about women and other cultures.

While I laud efforts to diversify, I am concerned that diversity too often means, as Leslie Bender has so aptly stated, "Add women and stir."<sup>268</sup> Too often people with institutional power, like ETS, law professors, and judges, are not careful of what they say or how they say it. They are insensitive to the whole of their audience, including the historically disempowered.

The faculty and administrators of law schools who comprise legal academia have a responsibility to assure that the LSAT is a meaningful measure of admissibility to the profession.<sup>269</sup> It is not enough that a correlation to law school performance be demonstrated. Fundamental fairness demands more. For example, suppose there was compelling statistical evidence of a nearly complete correlation be-

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the limitation of questions to "basic science course knowledge . . ." in order to avoid asking highly sophisticated questions which would unfairly advantage students with extensive education in a particular area tested over those students who took basic science courses in preparation for medical school). This is the most audacious use of the "pool" argument I have seen.

267. For example, law school faculties argue that there are so few minorities in teaching because the "pool" of qualified candidates is limited. Compare Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1762 (1989) (challenging Derrick Bell's race-based exclusion argument in *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, in *AND WE ARE NOT SAVED* 140-61 (1987) and suggesting that Bell does not sufficiently address the fact that the paucity of minority professors on law school faculties is due to the lack of minority applicants possessing the necessary qualifications) with Espinoza, *supra* note 30, at 1882 (criticizing Kennedy's assessment of Bell's argument by citing to an interpretation of statistics, compiled by the American Association of Law Schools, which found the "credentials of the majority of minority candidates hired to law schools' faculties to be comparable . . ." to other candidates).

268. Leslie Bender, *Sex Discrimination or Gender Inequality*, 57 FORDHAM L. REV. 941, 950 (1989).

269. See Glickstein, *supra* note 254, at 8 ("I believe that it is only the law schools that should be allowed to decide whether we [through the LSAT] separate people into 39 different groups or 61 different groups when we decide who deserves to be admitted to law school and to the legal profession.").

tween income of the applicant's parents and success in law school. Would law schools be justified in using parental wealth as a basis for admission?<sup>270</sup>

We need to force our institutions and ourselves to be careful in the use of language. Language is powerful. The effort to choose correct language, to try to root out bias, is not about magic formulae. Discussing law school examinations, Professor Patricia Williams writes: "This brings me back to my original issue — how to distinguish the appropriate introduction of race, gender, class, social policy, into law-school classrooms . . . I think such discussion should be ongoing, constant, among faculties willing to hear diverse points of view — as difficult as such conversations are, and as long-term and noisy as they may have to be."<sup>271</sup> Disclosure of admissions tests through Truth in Testing will continue this conversation.

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270. Grades and references are less subject to fraud than are SAT scores. "It's one more example of how one three-hour test on a Saturday morning is a lot easier to scam than a grade-point average," says Sarah Stockwell of the nonprofit student-advocacy group FairTest." Hinerfeld, *supra* note 180, at 76.

271. WILLIAMS, *supra* note 38, at 90.