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COLLOQUIUM PROCEEDING: Comments by Leslie Espinoza

Leslie Espinoza +

BIO:

+ Assistant Professor of Law, Boston College Law School. J.D., Harvard 1977; B.A., University of Redlands 1974. These remarks are based on an article, The LSAT: Narratives and Bias, 1 American U.J. of Gender and the Law 121 (1993).

SUMMARY: ... Fred is tall, dark and handsome, but not smart. ... While the case was pending administrators of other standardized tests, such as the Law School Admissions Council (LSAC) which administers the LSAT, continued to comply with the New York disclosure law. ... Negotiations continue between the State of New York and the other standardized test givers on whether or not complete or partial tests will be disclosed. ... In reviewing the testing law, the district court and the Second Circuit gave mere lip service to the significant public interest in the disclosure of actual test questions. ... I would argue that disclosure is the only effective way to monitor the bias of the testing process. ... The narrative content of the questions exposes a broader bias regarding the tenuous premise of prediction on which the LSAT relies. ... 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. ... Law itself is implicated in the institution of slavery. ... Which of the following of two would best explain, . . . blah blah blah. ...

[*33] 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?

One: Fred is popular.

Two: Fred has money.

Three: Fred is someone Joan would like to meet.

This question is from the 1988 LSAT examination. The LSAT is the gatekeeper to the legal profession. The test is used by law schools in combination with undergraduate grade point averages as the prime criteria for admission. 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.

I am going to use a gender/race critique to analyze and discuss a concrete legal issue. I intend to demonstrate how critical race analysis can be used in a targeted way to affect policy decisions made by the courts. The question at issue is whether the legislature can require the disclosure of actual standardized tests.

Prior to 1979 the LSAT and other standardized tests used for educational admissions purposes were shrouded in secrecy. Testing agencies refused to grant access to test takers, researchers or state governments. There was no ability to analyze the appropriateness of the questions, the correctness of answers, or even the accuracy of the scoring of individual examinations. What was known was that women

and minorities had substantially lower scores. There were also many anecdotal accounts of biased and disturbing questions.

In 1979 New York passed a truth in testing law, the New York Standardized Testing Act. It required the disclosure of tests and answers to the State. The law allowed test takers to request a copy of the test they were given, the correct answers and their own score sheets. The law also required test agencies to gather statistical information on the differential performance of women and minorities. Not surprisingly, the New York law was promptly challenged by the Association of American Medical Colleges (AAMC) which administers the MCAT. In 1980 a federal district court preliminarily enjoined enforcement of the Act as to the MCAT. While the case was pending administrators of other standardized tests, such as the Law School Admissions Council (LSAC) which [*34] administers the LSAT, continued to comply with the New York disclosure law.

For ten years most standardized admissions tests were disclosed, including the text of LSAT questions. Nevertheless, the administrators of the MCAT continued to refuse to disclose. A preliminary injunction remained in place, although the State of New York tried to negotiate compliance with the law. In 1988 the AAMC moved for summary judgment and alleged that the truth in testing law violated their copyright interests in the MCAT. The AAMC claimed an economic investment in the development of questions. To comply with the law, however, they would have to disclose their actual tests. The district court granted summary judgment in favor of the AAMC. On appeal, the Second Circuit removed the injunction and remanded the case for trial. Not surprisingly, the case is still pending in the district court. Negotiations continue between the State of New York and the other standardized test givers on whether or not complete or partial tests will be disclosed. Test disclosure, therefore, is still a very important issue.

The AAMC claimed that disclosure of the MCAT would harm its copyright interests. There is, however, a well known exception to copyright protection, the fair use doctrine. The applicability of the fair use doctrine is determined by balancing the public's interest in the free flow of information and the private interest of copyright holders in controlling and being rewarded for their work. In reviewing the testing law, the district court and the Second Circuit gave mere lip service to the significant public interest in the disclosure of actual test questions. The courts acknowledged that there was a public interest in disclosure, but spent the majority of their opinions addressing and gave significantly more weight to the perceived negative economic impact that disclosure might have on test administrators. Half of the fair use balance was missing.

I would argue that disclosure is the only effective way to monitor the bias of the testing process. The test questions create a narrative content, a discourse and a thematic force within the test. This discourse favors the dominant social force in our society, white men. It is only through disclosure of actual questions that we can begin to understand the relationship between test narratives and bias. Examination of the actual test exposes bias. The narrative content of the questions exposes a broader bias regarding the tenuous premise of prediction on which the LSAT relies. It is important to remember that the LSAT solely predicts, and only claims to predict, a general correlation between certain ranges of test scores and first year law school grades.

Several questions are raised and must be addressed. Should admissions decisions be based on first year performance? Should they be based on biased test questions? What makes for a good lawyer?

Let us examine what we know about some of these test questions and look at the narrative of some LSAT questions. The LSAT is promoted as an objective test. It is lauded as being able to predict which applicant will be a good lawyer. Refer to the question about Fred and Joan which is from the logical reasoning section of the test. What did this question make you think about? What associations came to mind? Did the story which comprises the question have any affect on your ability to discern [*35] the objective steps of logic? The narrative bias of test questions is the subtle or blatant atmospheric and often pervasive bias of stories, manners, sensitivities and paradigms. Bias delegitimizes the admissions enterprise. Over the years I

have collected hundreds of LSAT questions which I have found to be offensive. I have shared these questions with law students for their free associational responses and their perspectives. I am going to share just a few of these questions because that is all I have time for today. Even these few questions will reveal the relationship between narrative test bias and disempowerment.

First of all, remember Fred, who is tall, dark and handsome, but not smart? People who are tall and handsome are popular. Popular people either have money or are smart. Next, remember the rapacious Joan who would like to meet anyone with money. In response to this question one student commented that it clearly is critical of women and makes it seem that they pursue men with money. It also puts down men by implying that men who are tall, dark and handsome are not smart. Another student commented that the question reminded her of her mother's puzzlement over her desire to go to law school when she could otherwise marry a lawyer. Test questions are indeed stories. They can also form a subtle, subconscious psychological warfare and can create self-doubt. For example, take the following question, also from the logical reasoning section: 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 for the argument above. The question then gives you some choices.

Now imagine yourself as a woman taking the LSAT. If you do not have children, but think you might 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. In any event, the question makes the test taking personal. It knocks the woman reader off track. The question is gender related on its face and is gender biased in a devious way. It appears to be a neutral question about logic, but it is instead a reminder that for women, the demands that go hand in hand with expanded opportunities can leave us with a choice that is no choice at all.

What does the test tell us about the vision of what 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 test often presents a world view that excludes certain test takers. The context of the question distorts its actual meaning. Another example illustrates this point. In Evalsland where it is legal to hold slaves, the guests at a dinner party get into a debate. One of the guests contends [*36] 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.

Then the question goes on to say, "which of the following" and you have some answer choices and are to proceed with logic analysis.

As one of my African-American students expressed, first the question reminds you that you are black, then it forces you to try to divorce yourself from yourself. It requires you to pretend that you can look at the question without "you" looking at the question. Furthermore, how can this be called logical reasoning when it would be useless to make any logical arguments to our host who is obviously so blind that he will never see. Logic has no place in this situation at all. I think the student was pretty perceptive. Indeed, the question begins with the premise that it is legal to hold slaves. A vision of law is presented. Law itself is implicated in 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 analysis of slavery obscures the real content and legacy of slavery. The pretense of the question, the way the question pretends that normative judgment is not relevant and that values do not matter, is the most relevant and most biased aspect of the question.

Certain test takers, such as Hispanics, are reminded that they are clearly outside and excluded. Test takers often have to psychologically justify their inclusion. A couple of other examples illustrate. In the October 1987 LSAT logical reasoning section, test takers were asked: Few U.S. high school students achieve fluency

in languages other than their native English. Which of the following of two would best explain, . . . blah blah blah.

Of course, far from all high school students in the U.S. call English their native language.

Likewise, who are the players, the characters, and the people in the LSAT questions who create this narrative discourse? Most of them have white, "Angloish" names. However, the February 1988 exam did have one Hispanic name. This was the question: 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 on . . . blah, blah, blah.

My question is why "Maria"? Is Maria by any chance Hispanic? Remember, this is one of a handful of non-Anglo names contained in the tests. The question creates a vision of insiders and outsiders based on ethnicity.

The educational testing community has made consistent efforts in the [*37] past ten years to try to be inclusive and diverse. They have a sensitivity review process for which they should be lauded. We no longer find some of the worst kinds of questions that we were seeing in the 80s. However, we are seeing different kinds of questions in the 90s. The bias is less obvious, although it is still pervasive. Often the bias now appears in the answer choices. A question will be a "diversity question," but the correct answer will require you to take a position that is contrary to, for example, affirmative action. The correct logical choice will be the one that makes outsiders feel excluded. There is still plenty of bias and room for improving the test. The people who construct the test recognize the existence of narrative bias and are continuing to work on it.

My argument, though, is that we cannot rely on the test takers and the test givers to be the ones who monitor the test. It has not worked in the past. There is a profound public interest in taking responsibility for monitoring these tests. It is crucial that the law continues to require the disclosure of full tests, including test questions.

We need to be careful about how we use language. I know a number of the other panelists are going to talk about language. Language creates the way in which we think about ourselves and our society. Because standardized tests have become the gatekeepers of the professions, I hope that we all will continue to work and think hard about the use of language in testing. It is our obligation to root out bias rather than to perpetuate it.

Thank you.