



TEXAS TECH UNIVERSITY™



# Normalizing Struggle

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# STRUGGLE

# Normalizing Struggle



- I. Ways legal education treats struggle as a problem
- II. Pervasiveness of struggle among law students
- III. Reframe struggle as productive
- IV. Best practices for law professors
- V. Recommendations for institutions



## Part I

Legal Academia Treats Struggle  
Like a Problem:  
The Cult of Kingsfield

# Law School: Struggle = Failure



- Traditional legal pedagogy (stand and deliver, one final exam)
- Reaction to formative assessment
- Specialized ASP/bar prep



## Part II

Struggle is Normal:  
You're Not Dumb, You're New

# Kids These Days



- Evidence of decreased critical thinking skills among high school & college graduates
- *Unskilled and Unaware of It*, curse of overconfidence

# Productive Struggles



**“Learning is deeper and more durable  
when it’s *effortful*.”**

- Peter Brown, *et al.*, MAKE IT STICK (2014)



# Unproductive Struggles



- Substance abuse, mental health problems
- Stereotype threat
- Sense of belonging



## Part III

Struggle is Productive—  
and Neverending

# Best Learning Strategies Are Counterintuitive



- Spaced repetition
- Variety
- Retrieval/testing
- Mental models



## Part IV

We Should Embrace Struggle:  
Build It Into Legal Education

# In the Classroom



- Space things out
- Mix things up
- Assessment & feedback
  - Individual comments, guided self-assessment, peer feedback
- Teach studying



## Part V

Institutional Efforts:  
Struggle Is the Sign of  
Emotional Strength, Not  
Intellectual Weakness

# Institutional Efforts



- All professors should be academic support and bar prep specialists
- Institutional attitudes: Growth mindset, assessment and feedback norms/timing
- Wellness: institutional expectation that students sleep, eat, exercise, practice religion, socialize, decompress

# Normalizing Struggle



- I. Ways legal education treats struggle as a problem
- II. Pervasiveness of struggle among law students
- III. Reframe struggle as productive
- IV. Best practices for law professors
- V. Recommendations for institutions





Questions?  
Comments?







# Is There a Gender Gap on the Bar Exam?

Jane Bloom Grisé

University of Kentucky J. David Rosenberg College of Law

2020 AALS Annual Meeting

# Agenda

How do women/men perform on the bar exam?

How do women/men perform on multiple choice exams in general?

Why do women/men perform differently?

What do you think?

How do  
women/men  
perform on the  
bar exam?

- Men had higher MBE scores
- Women had higher written component scores
- Result: men had “higher average bar exam scores than females.”

*Impact of Adoption of UBE in  
New York, NCBE 2019*

# How do women/men perform on the bar exam?

- Men do better on the MBE
- Women do better on the essays & MPT
- Scores “tend to cancel” each other out and men and women “do not differ substantially” in pass rates
- If passing score raised to 675:
  - female pass rate 69.3%
  - male pass rate 72.8%

*Impact of Increase in Passing Score in New York, NCBE 2007*

## Impact of UBE in Ohio

- Male pass rate: rise from 71% to 74%
- Female pass rate: fall from 68% to 66%
- UBE: increase gender differences in pass rates from 3% to 8%

How do  
women/men  
perform on the  
MBE?

“Men outperform women  
on the MBE by about 5  
points.”

Susan Case, *Men and  
Women: Differences in  
Performance on the MBE*,  
The Bar Examiner, May  
2006.



Women's scores  
are lower than  
men's scores on  
multiple choice  
exams

SAT

LSAT

GMAT

MFT-B

MCAT

NBME

SAT Scores  
by Gender

1987-2006

Test	Men	Women
Mean SAT-V score	508	501
Mean SAT-M score	528	492

UGPA and  
Gender

Women earn higher grades than  
males in all subjects



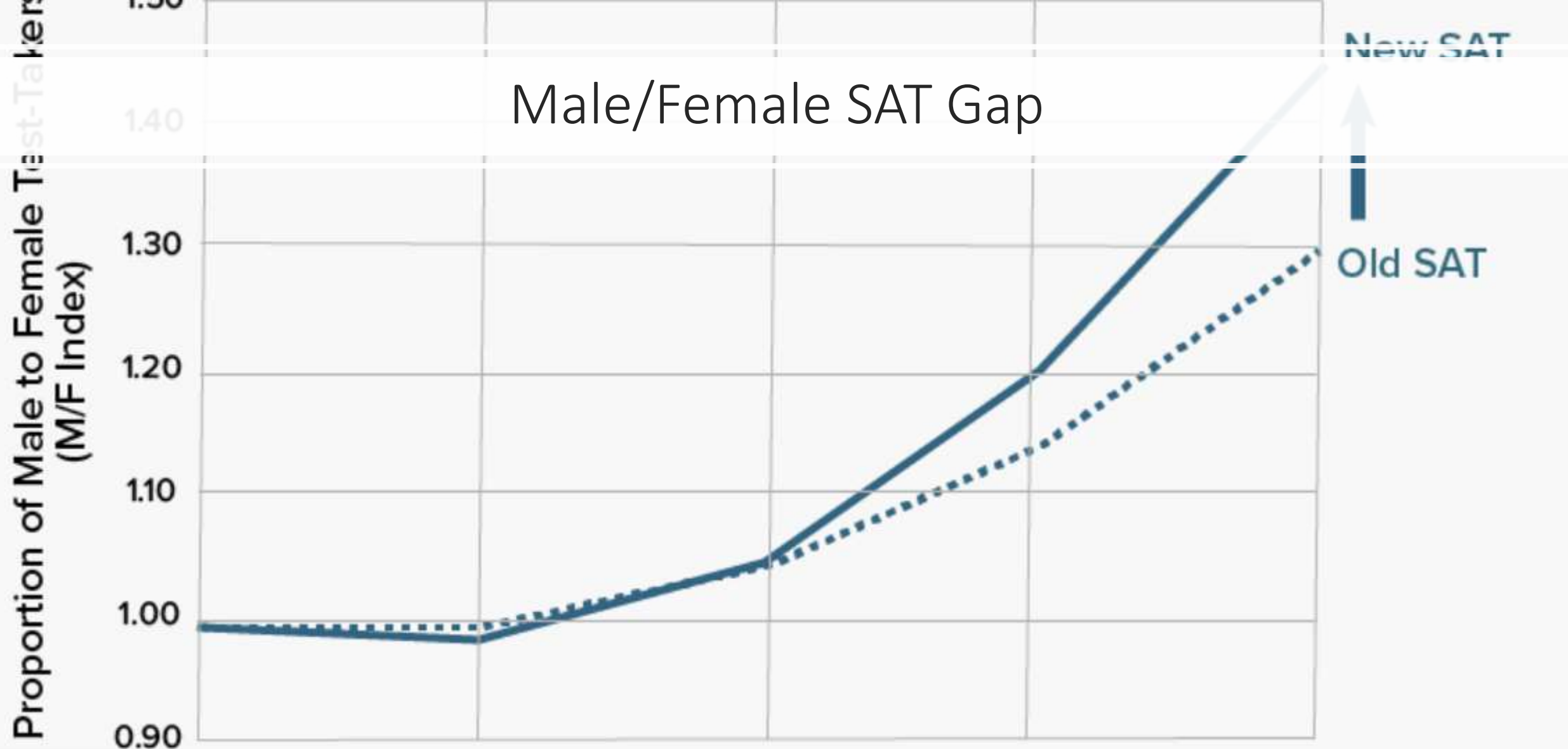
Multiple  
choice tests  
underpredict  
female  
performance

Men outscore women on  
multiple choice tests even  
when women scored  
higher in school on the  
same subject area.



Multiple  
choice tests  
impact  
students with  
high scores

The gender gap increased  
when comparing men and  
women with the highest  
test scores.



>=600	>=800	>=1000	>=1200	>=1400	New SAT
>=700	>=1060	>=1370	>=1690	>=2020	Old SAT

## LSAT Scores by Gender

Higher percentage of female test takers had scores below 149.

Higher percentage of male test takers had scores greater than 150.

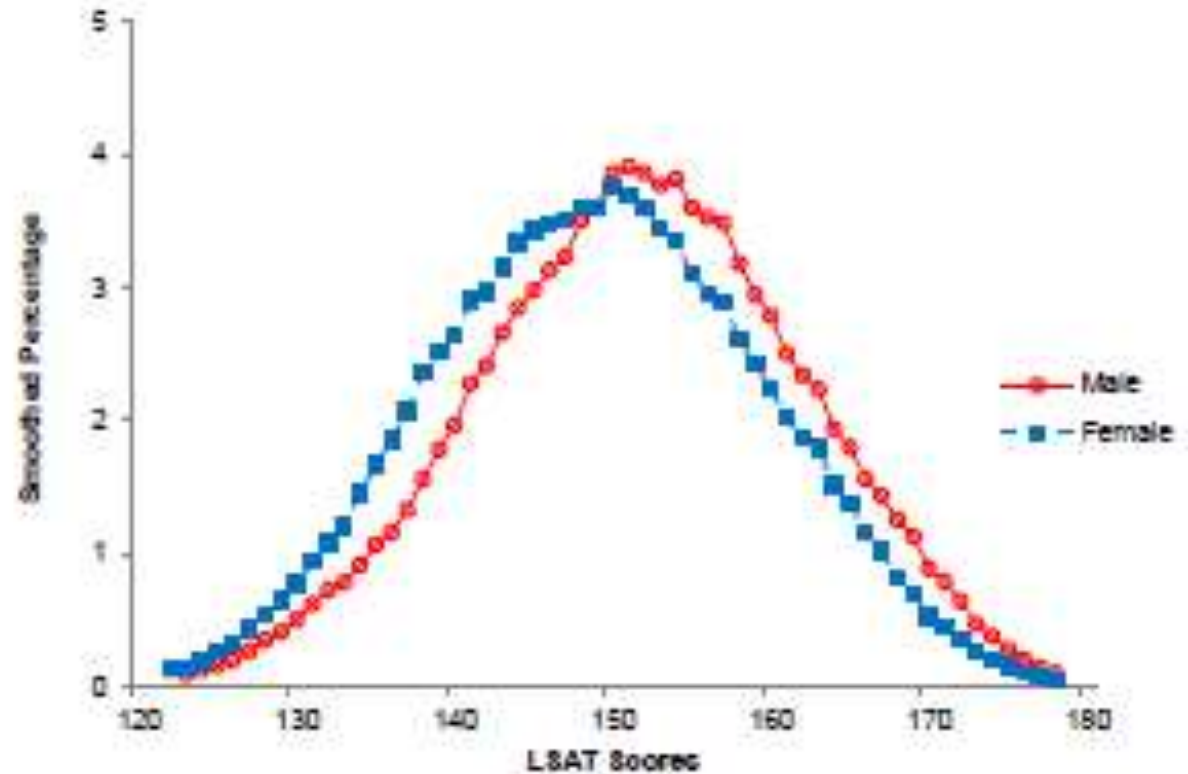


FIGURE 11. Smoothed-percentage frequency of LSAT scores by gender in 2013–2014. Note: The 420 test takers who took the Spanish LSAT in Puerto Rico in February 2014 are not included in this figure.

## LSAT Scores by Gender

Difference of  
2.02 to 2.58 points

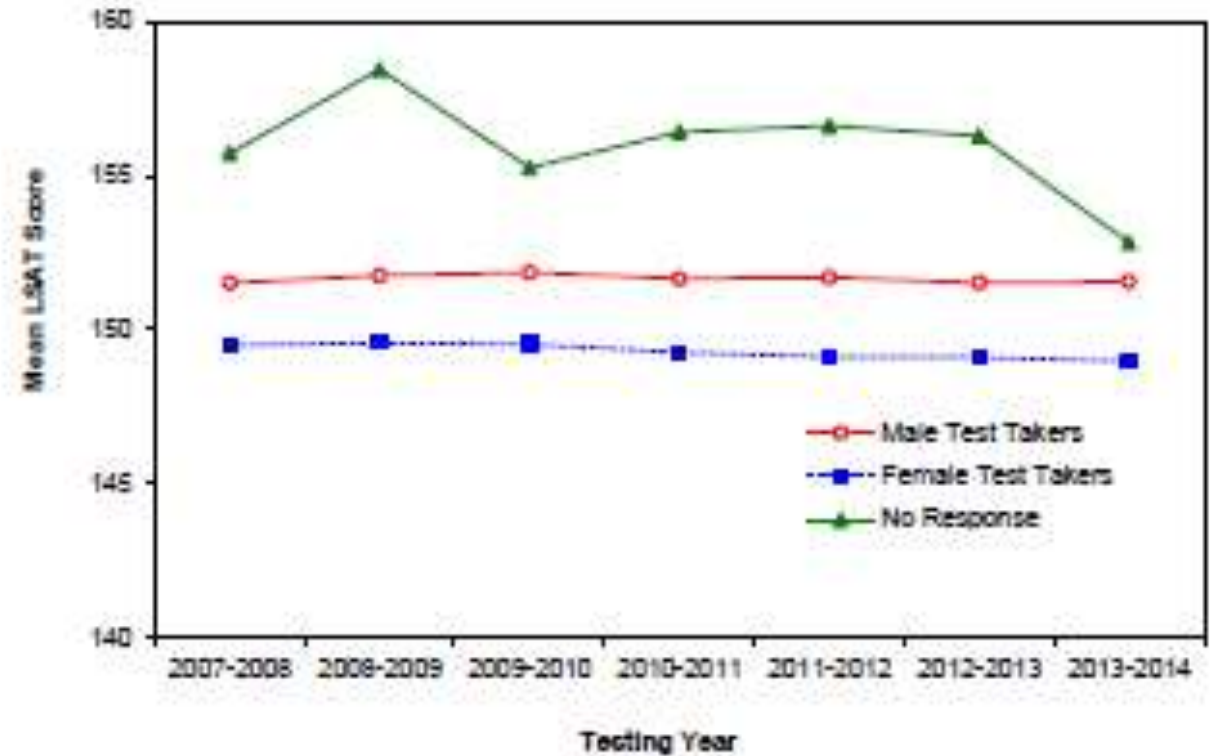


FIGURE 10. Mean LSAT scores by gender. Note: The 420 test takers who took the Spanish LSAT in Puerto Rico in February 2014 are not included in this figure. Results presented in this figure may differ from results in previous reports, since test takers who received an accommodation of extra testing time are included in all years of this figure.



# Other Tests

GMAT: Women outperform men in course work; men outscore women by 40 points.

GMAT underpredicts female student success.

MFT-B: Men perform better by 4.33 points after controlling for ACT scores.

MCAT: Women have higher UGPAs & lower MCAT scores.

NBME, Part 1: Men outperform women.

Why is there  
gender  
disparity?

Competition

Self-confidence/change answers

Risk preferences

Test anxiety

Speededness

Test-wiseness

Why do you think?



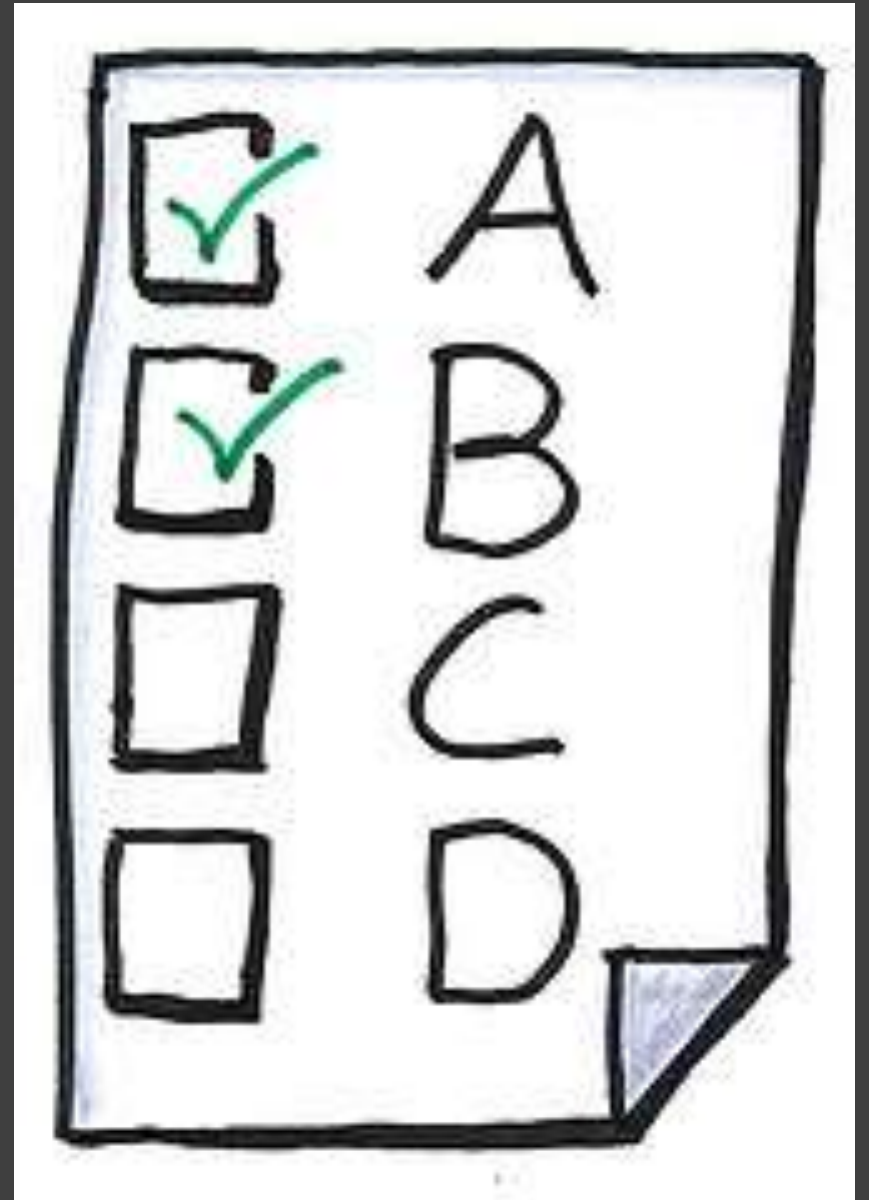
Why should  
we care?

- Some states (Kentucky and South Dakota) have separate cut scores for each segment of the exam.
- Implications for bar exam reforms.
- Impact on law school testing methods.

## Multiple choice exams

“Multiple choice items favor the shrewd, nimble-witted, rapid reader, and penalize the subtle, creative, more profound individual.”

Peter Hassmen & Darwin Hunt summarizing the conclusions of Banesh Hoffmann, *The Tyranny of Testing* (1962)





# In Plain Sight

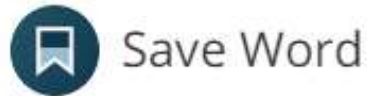
*Archetypes for Academic  
and Bar Success*



Marsha Griggs

Associate Professor, Washburn School of Law

# archetype **noun**



ar·che·type | \ 'är-ki-,tīp  \

## Definition of *archetype*

- 1 : the original pattern or model of which all things of the same type are representations or copies : PROTOTYPE

// ... the House of Commons, the *archetype* of all the representative assemblies which now meet ...

— Thomas Babington Macaulay

*also* : a perfect example

// He is the *archetype* of a successful businessman.

# Academic Archetypes

#1

The Overconfident  
Student

#2

The Student  
Leader

#3

The Retaker

#4

The Self-Diagnosed  
Student



STUDENT ID	MP1	MP1	MP2	MP2	Exam	TOTAL	%	COURSE
959574	94	94	92	92	85	457	91	A-
962018	83	83	79	79	62	386	77	C+
968918	88	88	85	85	73	419	84	B
969205	85	85	81	81	68	400	80	B-
969217	75	75	72	72	75	369	74	C
969540	81	81	83	83	89	417	83	F
969554	84	84	87	87	80	422	84	
969565	84	84	86	86	58	398	80	
969598	89	89	90	90	82	440	88	
970858	73	73	72	72	59	349	70	
972044	63	63	69	69	37	301	60	
972076	93	93	91	91	88	456	91	
972110	99	99	96	96	96	486	97	
972402	85	85	85	85	83	423	85	
972457	82	82	80	80	77	401	80	
973088	95	95	89	89	90	458	92	
973088	78	78	74	74	74	378	76	
973167	89	89	88	88	95	449	90	
973587	98	98	96	96	97	485	97	
1003366	100	100	99	99	100	498	100	
1009891	86	86	83	83	89	427	85	
1016821	88	88	86	86	70	418	84	
1017057	82	82	80	80	73	397	77	



## The Overconfident Student

# Identifying and Addressing Overconfidence

- ❑ Misjudge impact of prior experience
- ❑ Unrealistic grade expectations
- ❑ Genuinely surprised by failure
- ❑ Seek to accelerate graduation at all costs

- Distinguish prior exp. from scope of doctrinal learning.
- Communicate with math
- Set degree advising goals





# The Student Leader

# Identifying and Addressing Student Leaders

- High degree of interaction with faculty and administration
- Miss some classes due to commitments
- Strategic in course selection
- Do not ask questions in class

- Progress checks
- “**Student first**” agenda
- Bar readiness planning





# The Retaker

## Identifying and Addressing Retakers

- ◇ Record of late course withdrawal
  - ◇ Proclaim “I’m not good at tests”
  - ◇ Seek extra credit or retake opportunities
  - ◇ Unreceptive to suggestions to delay bar exam
  - ◇ Typically receive test accommodations
- ◇ Set specific and timed goals
    - ◇ **Scored Practice Tests**





# The Self-Diagnosed Student

## Identifying and Addressing Self-Diagnosed Students

- » Not receptive to correction
- » Disagree with solicited advice
- » Proclaim “I don’t learn that way”
- » Will not study or work in groups
- » May have test accommodations, but may not use them

- « Ask questions instead of offering suggestions
- « Strategic assignments and group tasks



Questions?

Comments?





# Thank You



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# ***The Case for a Uniform (MBE) Cut Score***

**Joan W. Howarth**  
**joan.howarth@unlv.edu**

**Distinguished Visiting Professor &  
Interim Assoc. Dean for Experiential Education**

**UNLV** | WILLIAM S. BOYD  
SCHOOL OF LAW

**Dean Emerita & Professor of Law**

**MICHIGAN STATE  
UNIVERSITY  
COLLEGE OF LAW**

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I have 1 point.

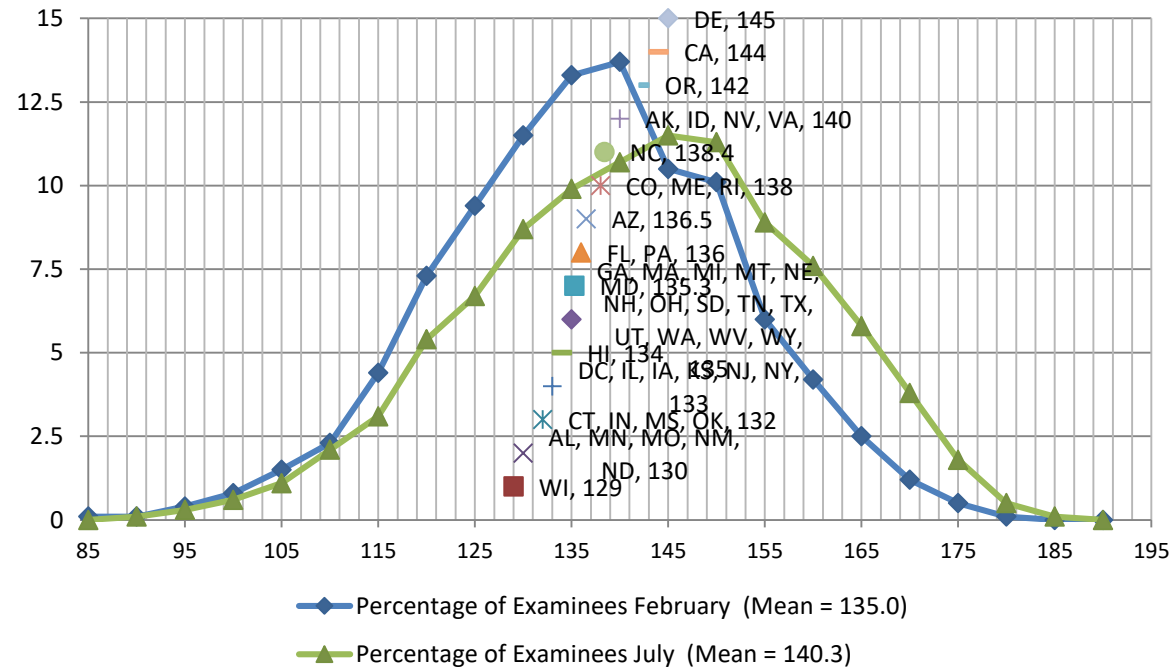
pencil →



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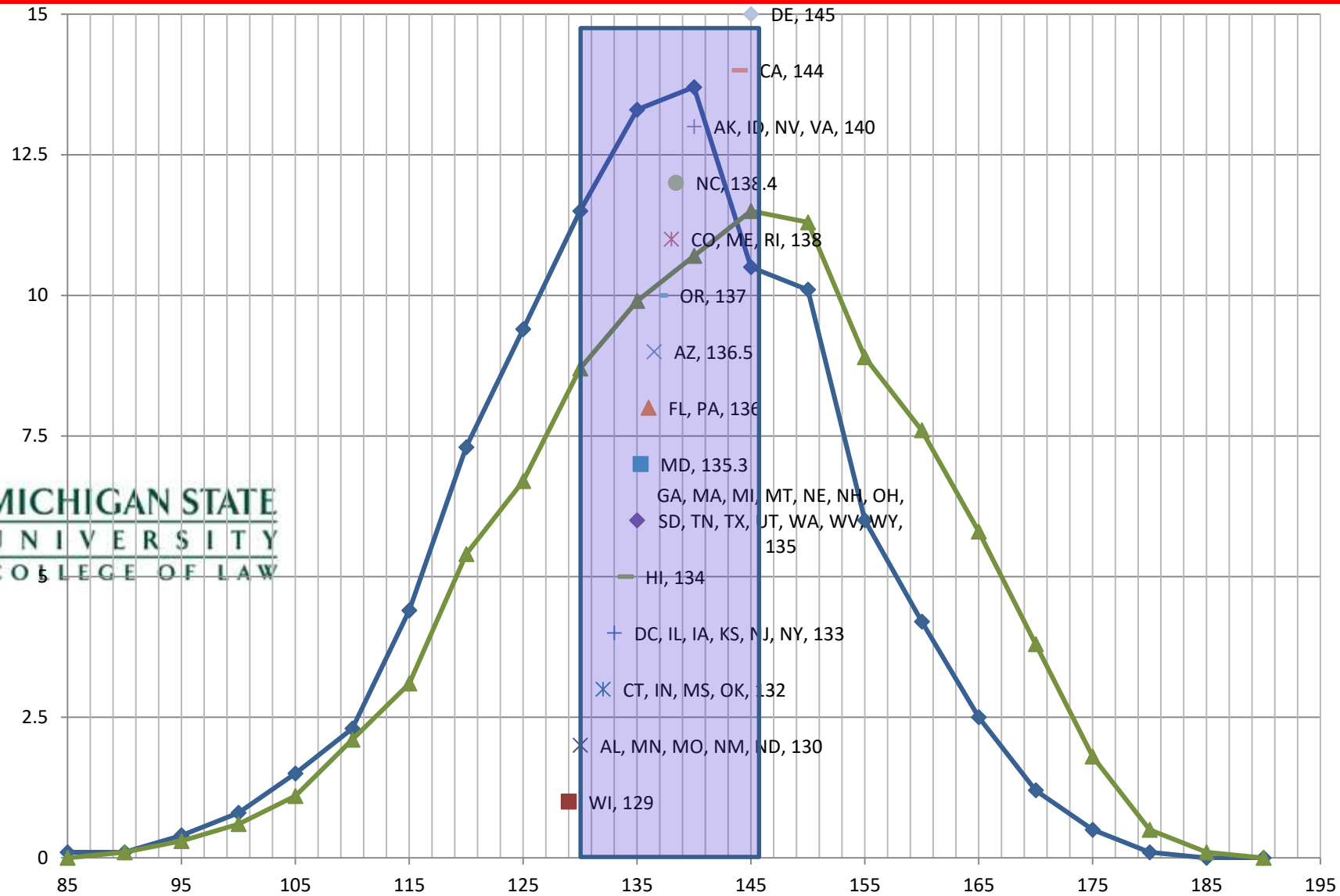
# **Eliminate MBE Cut Score Disparities**

## 2017 MBE Cut Scores and Score Distribution



Sources: *2016 MBE Statistics*, Nat'l Conf. of Bar Exam'rs. (2016), <http://www.ncbex.org/publications/statistics/mbe-statistics/>;

Nat'l Conf. of Bar Exam'rs. *Comprehensive Guide to Bar Admissions 2017*, 30-31, Chart 9, <http://www.ncbex.org/pubs/bar-admissions-guide/2017/index.html#p=42>



MBE cut scores that change from state to state:

**bad logic**

**bad science**

**bad policy**



## Three Stages of Professional Licensing Tests

I. State tests.

II. Addition of national multiple choice component with *different cut scores*.

Multiple choice questions are the strategy for **reliability**.

Law entered this stage in **1972** with MBE.

We're still in this stage.

III.

**16 Professions that Use National Multiple Choice  
Exam for State Licensing**

**Architects**

**Nurses**

**CPAs**

**Pharmacists**

**Dentists**

**Physical Therapists**

**Doctors**

**Psychologists**

**Engineers**

**Real Estate**

**EMTs**

**Appraisers**

**Lawyers**

**Social Workers**

**Mortgage Loan**

**Surveyors**

**Originators**

**Veterinarians**

**Resources on reliability, validity, equating & scaling:**

Susan M. Case, *Back to Basic Principles: Validity and Reliability*, B. EXAMINER 23, (Aug. 2006)

Susan M. Case, *Frequently Asked Questions About Scaling Written Scores to the MBE*, B. EXAMINER 41 (Nov. 2006)

Susan M. Case, *Demystifying Scaling to the MBE: How'd You Do That?*, B. EXAMINER 45–46 (May 2005)

Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increase to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 932-35 (2000-2001)

## Three Stages of Professional Licensing Tests

I. State tests.

II. Addition of national multiple choice component with *different* cut scores.

Law entered this stage in 1972 with MBE.

We're still in this stage.

**III. Adoption of *uniform* cut score for national multiple choice component.**

This stage has gathered steam since the 1980's.

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**15 Professions that Use Uniform Cut Score for  
National Multiple Choice Exam for State Licensing**

**Architects**

**Nurses**

**CPAs**

**Pharmacists**

**Dentists**

**Physical Therapists**

**Doctors**

**Psychologists**

**Engineers**

**Real Estate**

**EMTs**

**Appraisers**

**Lawyers**

**Social Workers**

**Mortgage Loan**

**Surveyors**

**Originators**

**Veterinarians**



# Why did the others move to a uniform cut score?

## **1. Logic**

Using the same test but different scores to establish the same thing (minimum competence) is not logical.

## **2. Mobility**

Professional practice increasingly crosses state lines.

## **3. Resources & Efficiency**

States don't have resources or expertise to keep up with increasingly sophisticated testing requirements.

## Cut Scores

To be used validly, a **pass-fail test needs a defensible cut score.**

## Cut Scores

“[C]ut scores provide the basis for using and interpreting test results. Thus, ... *the validity of test score interpretations may hinge on the cut scores.*”

AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, & NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, **STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING at 100** (2014) (emphasis added).



## Cut Scores & Validity

Policy makers “have an obligation to ensure that the credentialing examination remains aligned with professional practice and *the placement of the performance standards [cut scores] is an integral part of that alignment. This is an important aspect of the validity of inferences made from test results.*”

John Mattar, Ronald K. Hambleton, Jenna M. Copella, and Michael S. Finger, *Reviewing or Revalidating Performance Standards on Credentialing Examinations*, in *SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS*, Gregory J. Cizek, ed., (2d ed. 2012) at 400 (emphasis added).

# Why We Will Adopt a Uniform MBE Cut Score

## **1. Resources & Efficiency**

States are not meeting professional standards for cut score setting and reevaluation. Tradition, not validity.

## **2. Mobility**

Professional practice increasingly crosses state lines.

UBE makes cut score disparities more salient & silly.

## **3. Logic**

Using different passing scores to establish the same thing (minimum competence) on the same test is not logical.

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**Jurisdictions are all using the MBE to try to measure the same thing -- minimum competence to practice law.**

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## Cut Scores


The cut score is a **judgment call**, but the **wide disparity calls into question all the judgments, particularly** those at the **top** and the **bottom**.





# Cut scores are significant in racial & ethnic exclusion.

State Bar of Cal., Final Report on the 2017 California  
Bar Exam Studies, (2017), App. A,  
<https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf> (unnumbered  
pages, pdf 186/305)



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**3,248** people passed the July 2016 California bar exam.

**119** were African Americans.

If California used NY's cut score, it would have been **301** .

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change from CA's 144 to NY's 133 would cause increases of:

White – 51.7%

Asian - 71.7%

Hispanic – 93.7%

Black – 142.3%

State Bar of Cal., Final Report on the 2017 California Bar Exam Studies, (2017), App. A,

<https://www.calbar.ca.gov/Portals/0/documents/reports/2017-Final-Bar-Exam-Report.pdf> (unnumbered pages, pdf 186/305)

## Crowdsourcing the MBE Cut Score?

Move toward the center -

– Thank you, Oregon (142 to 137) & Nevada (140 to 138)

**135** – largest group of states

**133** – biggest # of current attorneys

**130** – recommended by Alex M. Johnson, Jr.

*(Knots in the Pipeline for Prospective Lawyers of Color, 24 STAN. L. & POL'Y REV. 379, 405-19 (2013) (recommending 130 to diversify profession))*



# 2017 MBE Cut Scores by State

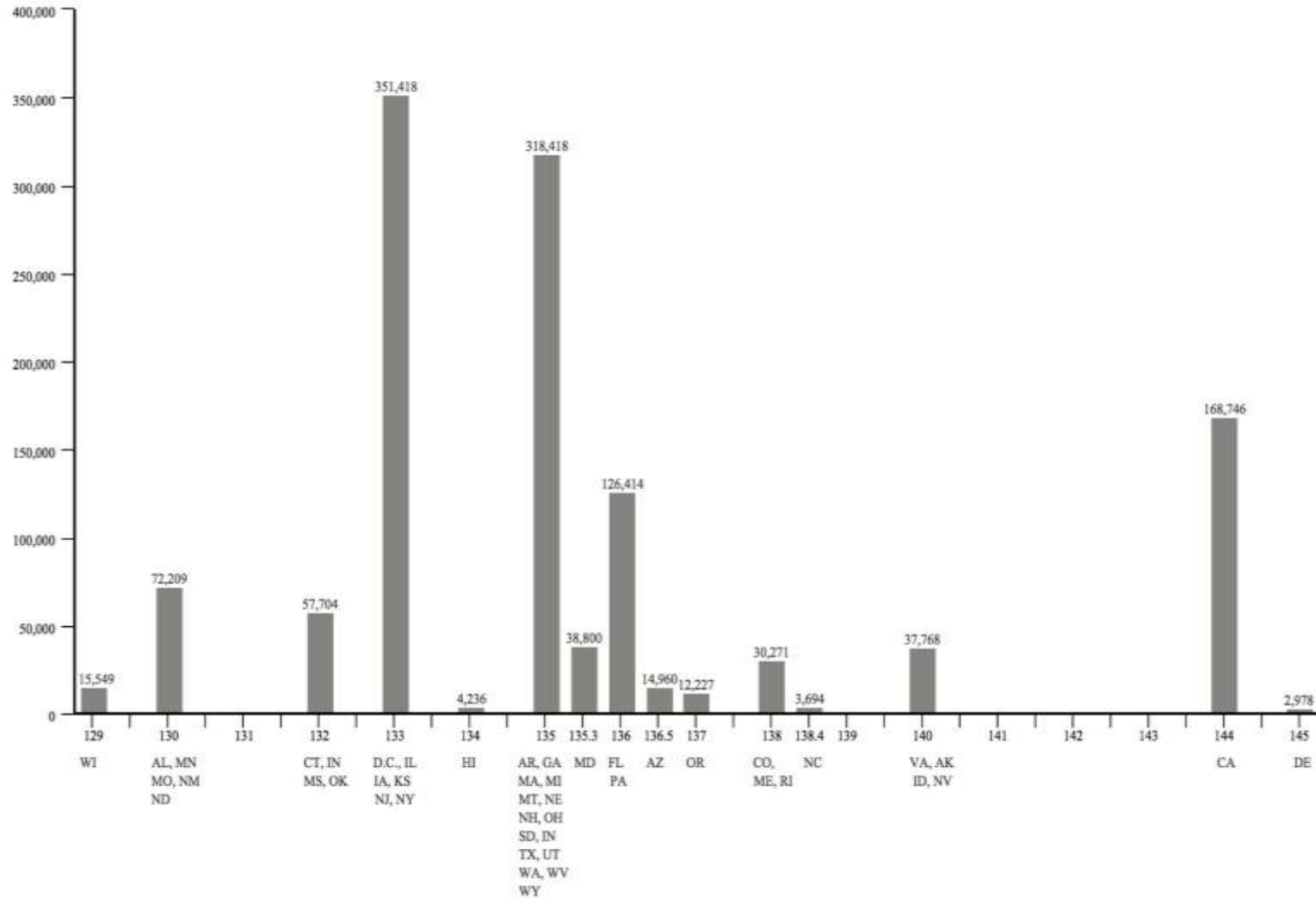
**Range =**  
**145 (DE) to**  
**129 (WI)**

**Mode =**  
**135 (14 states)**

**Largest % of  
Profession = 133**

145	DE
144	CA
143	
142	
141	
140	AK, ID, NV, VA
139	
138	NC (138.4) CO, ME, RI
137	OR
136	AZ (136.5) FL, PA
135	MD (134.3) GA, MA, MI, MT, NE, NH, OH, SD, TN, TX, UT, WA, WV, WY
134	HI
133	DC, IL, IA, KS, NJ, NY
132	CT, IN, MS, OK
131	
130	AL, MN, MO, NM, ND
129	WI

## MBE Cut Scores and Lawyer Populations



**Joan Howarth on attorney licensing:**

*Licensing Scrutiny Borrowed from Title VII*, 33 GEO. J. OF LEG. ETHICS \_\_  
(forthcoming 2020).

*What Law Must Lawyers Know?*, 19 CONN. PUBLIC INTEREST L. J. 1 (forthcoming  
2020).

*Ringing Changes: Systems Thinking About Legal Licensing*, 13 FIU L. REV. 383  
(2019) (with Judith Wegner).

*New York Leads from the Middle: Crowdsourcing the Bar Exam Cut Score*, N.Y.  
STATE BAR J. 42 (Sept. 2018).

*The Case for a Uniform Cut Score*, 42 J. LEGAL PROF. 69 (2017).

*Teaching in the Shadow of the Bar*, 31 USF L. REV. 927 (1997).

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***The Case for a Uniform (MBE) Cut Score***

**Thank you!**

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SCHOOL OF LAW