

Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards

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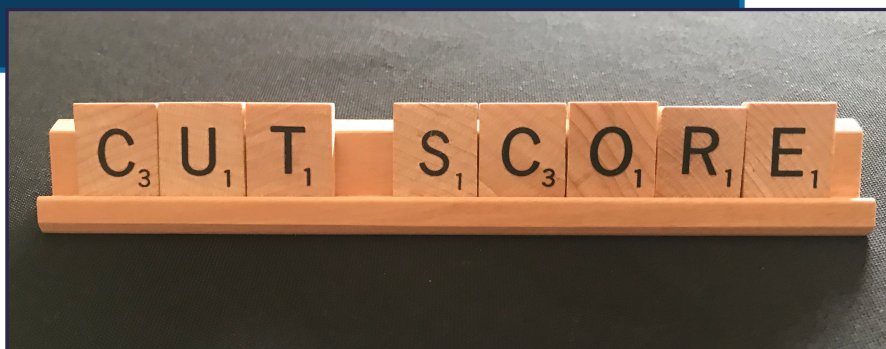
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I. Executive Summary

The selection of a minimum bar exam passing score (“cut score”)² shapes the representation of racial and ethnic minorities in the legal profession and the quality of access to justice in the state.³ California and national policy makers have not had the benefit of detailed exam performance data that analyzes the effect of the cut score on race and ethnicity. An empirical analysis will show how higher cut scores create disparities within the attorney licensing system and how those disparities affect the diversity of new licensees within the legal profession. Informed decisions using that data will contribute to the public good.

Because policy makers consider the cut score an important public protection mechanism, this study also explored whether the selection of higher cut scores better protected the public from attorneys who do not have the minimum competence to practice law. This study analyzed six years of American Bar Association (“ABA”) disciplinary data from up to 48 jurisdictions to determine how the selection of a minimum cut score affected public protection as measured by disciplinary statistics.

² This study’s use of the term “cut score” is equivalent to the California Supreme Court’s use of the term “pass score.” Both terms represent the minimum bar exam passing score an examinee must achieve to pass the CBX.

³ This study used the racial and ethnicity categories in the State Bar of *California’s Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type*, Office of Research and Institutional Accountability, March 18, 2020, <http://www.calbar.ca.gov/Portals/0/documents/reports/CA-State-Bar-Exam-Cut-Score-Simulations-Analysis.pdf> (last visited Sept. 2, 2020). In the State Bar’s simulation report, the terms Hispanic and Latino were used interchangeably. Thus, this study used the term Hispanic/Latinx, which was identical to the terms used in the State Bar of California’s *Report Card on the Diversity of California’s Legal Profession*, State Bar of California, <http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf> (last visited Sept. 2, 2020). This study defined Black to include African Americans and Blacks and Asians to include Asians, Native Hawaiians, and Other Pacific Islanders.

The Analysis

To conduct the analysis, the study used two data sets. The first data set included 85,727 examinees who sat for 21 administrations of the CBX from 2009-18 and the race and ethnicity of each examinee.⁴ The second data set included the ABA discipline data from up to 48 U.S. jurisdictions from 2013-18 and the cut scores in each jurisdiction.⁵

Using the first data set, the study determined how the selection of a minimum cut score (1) widens or narrows the racial and ethnic impacts of the bar exam and/or (2) alters the racial and ethnic composition of new attorneys joining the legal profession. Both historical actual and simulated cut scores were analyzed. Using the second data set, this study examined a third factor: the relationship, if any, between minimum cut scores and rates of attorney discipline.

The Findings

Initial and eventual passing rates differed significantly between racial and ethnic groups, and this gap was wider at higher simulated cut scores. For example, the data showed that between 2009 and 2018, using California's 1440 cut score, for every 1,000 White and 1,000 Black examinees, 805 White examinees eventually passed the CBX, while only 531 Black examinees eventually passed. See Figure 8. Similarly, for every 1,000 Asian and 1,000 Hispanic/Latinx examinees, 715 Asian and 695 Hispanic/Latinx examinees eventually passed the CBX.

⁴ *Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type*, Office of Research and Institutional Accountability, State Bar of California, March 18, 2020, <http://www.calbar.ca.gov/Portals/0/documents/reports/CA-State-Bar-Exam-Cut-Score-Simulations-Analysis.pdf> (last visited September 2, 2020). The study team wishes to acknowledge the assistance of Ron Pi, Principal Analyst with the State Bar Office of Research and Institutional Accountability, for compiling and formatting the California Bar Exam data set used in this study.

⁵ *Survey on Lawyer Discipline Systems 2018*, American Bar Association, https://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems2014/ (last visited Aug. 17, 2020).

A simulation analysis using actual examinee scores confirmed that selecting a lower cut score would have significantly narrowed the achievement gap between Whites and racial and ethnic minorities⁶ and would have increased the number of newly admitted minority attorneys in California. For example, at 1440, the achievement gap between Whites and Blacks was 27.4 percentage points. But at a simulated cut score of 1300, the achievement gap between these two groups would have been only 14.5 percentage points. This 12.9 percentage point difference in the achievement gap at 1440 and 1300 demonstrates a disparate effect of the higher cut scores.

“... selecting a lower cut score would have significantly narrowed the achievement gap between Whites and racial and ethnic minorities and would have increased the number of newly admitted minority attorneys in California.”

Using the second data set about disciplinary statistics, the study determined that no relationship exists between the selection of a cut score and the number of complaints, formal charges, or disciplinary actions taken against attorneys in the jurisdictions studied.

In California and other jurisdictions, the standard of protection to be measured by the bar exam is the minimum competency for the first-year practice of law. This study establishes that maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics but does result in excluding minorities from admission to the bar and the practice of law at rates disproportionately higher than Whites.

“... maintaining a high cut score does not result in greater public protection as measured by disciplinary statistics.”

⁶ The achievement gap is calculated by comparing pass rate percentages between racial and ethnic groups and is thus expressed as percentage points. The achievement gap is the percentage pass rate of the lowest performing group subtracted from the percentage pass rate of the top performing group.

II. History of the California Bar Exam's Cut Score

California's cut score of 1440 was the second highest in the nation until the California Supreme Court's ("the Court") August 10, 2020 order⁷ adjusted it to 1390. Although there are no clear records, the previous cut score of 1440 was apparently established by the State Bar in 1987 or earlier without any standard setting or validity study being conducted.⁸ In February 2017, responding to briefs filed by the deans of ABA,⁹ California Accredited, and California Registered law schools¹⁰, the Court directed the State Bar to conduct a "thorough and expedited study of the exam that would include . . . a meaningful analysis to determine whether protection of potential clients and the public is served by maintaining 1440 as the pass score."¹¹

On September 13, 2017, the Court received the first of seven separate reports related to the CBX, "*Final Report on the 2017 California Bar Exam Standard Setting Study*."¹²

⁷ *Order Concerning Modification to the California Bar Examination*, Supreme Court of California, August 10, 2020, https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/202007/20200810121225776.pdf (last visited Sept. 2, 2020).

⁸ *Supreme Court issues letter relating to In re California Bar Exam*, California Courts: The Judicial Branch of California, California Courts Newsroom, October 18, 2017, <https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam> (last visited Aug. 16, 2020). See also Case, Susan M., *The Bar Examiner*, Volume 81 (June 2012) at p. 30. "Validity in testing refers to the extent to which the test score reflects the attribute you are intending to measure. In the bar exam, validity means ensuring that you are testing what a newly licensed lawyer needs to know. Multiple testing methods are used because each method has strengths and weaknesses, and each is designed to test somewhat different skills, each of which is believed to be important for the practice of law. The pass/fail standard is set at a level that is believed to protect the public from applicants who lack the requisite knowledge and skills to be licensed to practice. Scores that are unreliable cannot be valid. However, validity requires more than just reliability; it is not enough to be consistent if you are consistently measuring the wrong thing."

⁹ Deans from ABA Accredited Law Schools, Letter to the Supreme Court of California, "RE: The California Bar Exam," February 1, 2017, <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/2.1.17.LTRtoCalSupCt.pdf> (last visited Sept. 2, 2020).

¹⁰ Deans from CA Accredited and CA Registered Law Schools, Letter to the Supreme Court of California, "RE: The California Bar Exam—Adjustment to the Minimum Passing Score," September 11, 2017, <http://montereylaw.edu/wp-content/uploads/2017/09/CALS-2nd-Letter-Brief-to-Supreme-Court-FINAL-2.pdf> (last visited Sept. 2, 2020).

¹¹ *Supreme Court issues letter relating to In re California Bar Exam*, supra note 8.

¹² State Bar of California, Letter to the Supreme Court of California, "RE: Final Report on the 2017 California Bar Exam Studies," September 12, 2017, <https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf>. (last visited Aug. 16, 2020). The study "utilized a modified version of the Analytic Judgment Method, a method used in the field of licensure, and involved the participation of twenty court-selected subject matter experts (SMEs). The study required the panel of SMEs to evaluate and rate a collection of bar exam essay and performance test answers from the July 2016 exam using a baseline definition of minimum competence. After the SMEs analyzed bar exam written responses and were trained to sort them by distinguishing those reflecting at least minimal competence from those that did not reflect minimal competence, Dr. [Chad] Buckendahl separately analyzed the actual scores given to such responses during the July 2016 exam scoring process to assess exam responses that were deemed minimally competent. Dr. Buckendahl then derived estimated overall bar exam scores based on the actual scores associated with written responses deemed minimally competent and concluded that the median score associated with the SMEs' determination of minimal competence was 1439." The study was widely criticized for ignoring the Multistate Bar Exam (MBE), providing confusing instructions to the panel, and reporting recommendations which did not match the panelists' understanding of their work. The Department of Consumer Affairs critique of the study described several observed abnormalities in the process of assuring the SMEs understood the meaning of

Following the release of this report, the Court responded to the requests filed by the law school deans and other public interest groups with a decision not to lower the cut score of 1440 at that time, but to await the completion of the other studies. However, upon completion of these studies, the Court stated that it would “consider any appropriate recommendation to revisit the pass score.”¹³

In response to the Court’s directive, the State Bar completed the following additional studies:

- *A historical analysis of CBX pass rate trends from 2008, 2012, and 2016 by law school type, using median LSAT scores at the time of admission.* The study found that “approximately 20 percent of the decline in bar exam pass rates could be attributable to changing applicant abilities. However, the lack of individual student performance data limited the ability to identify a causal connection between changes in applicant abilities and bar exam passage rates.”¹⁴
- *A Law School Performance Study.* A second Bolus study, completed in 2018, “examined changes in the characteristics of students taking the California Bar Exam to provide a better understanding of the declining trend of the bar passage rates. The study found that changes over time in the characteristics of exam takers accounted for between 20 and 50 percent of the decline in bar exam performance during the study period. The study was unable to account for a substantial amount of the decline in pass rates, concluding that other unexamined factors have contributed to the decade-long decrease in bar exam performance.”¹⁵
- *A content validation study to assess the alignment of bar exam content with the abilities, skills, and job-related knowledge needed by an entry-level attorney, according to a national attorney job analysis.* The study suggested that the exam’s content and cognitive complexity were consistent with job-related expectations of entry-level attorneys based on the generalized national job analysis. The study also suggested that the exam’s relevance for skills needed by California entry-level attorneys could be

“minimum competence for the first-year practice of law”—the standard they were supposed to be applying—before evaluating papers. The completion of a job analysis, specific to California attorneys, on which to base the definition of minimum competence, was also strongly recommended. See Montez, T., *Observation of the Standard Setting Study for the California Bar Exam*, <https://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>. (last visited Aug. 31, 2020) (See Table 1’s Comments/Feedback on items 10 through 16 and Chapter 2).

¹³ *Supreme Court issues letter relating to In re California Bar Exam*, supra note 8.

¹⁴ California Bar Examination Studies, 2017 Studies, <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Studies>, (last visited Sept. 29, 2020) summarizing Bolus, Roger, *Recent Performance Changes on the California Bar Examination*, Research Solutions Group, February 19, 2017. See also Report to the Supreme Court of the State of California, Final Report on 2017 California Bar Exam Standard Setting Study, September 12, 2017, <https://perma.cc/AX4R-28SA> (last visited Sept. 24, 2020).

¹⁵ California Bar Examination Studies, Law School Performance Study, <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Studies>, (last visited Sept. 29, 2020) summarizing Bolus, Roger, *Performance Changes on the California Bar Examination: Part 2*, Dec. 20, 2018, <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf> (last visited Sept. 29, 2020).

better assessed following a California-specific attorney practice analysis.¹⁶

- *A California Attorney Practice Analysis that studied the knowledge and skills needed for entry-level attorneys.* The study collected detailed, empirical data about how attorneys use their knowledge and skills to perform routine tasks in the practice of law. A working group, with members selected by the Court from state and national stakeholder groups, oversaw the study. The working group’s final report contained recommendations designed to bring the CBX into closer alignment with the current practice of law for entry-level attorneys in California.¹⁷
- *A Differential Item Functioning Analysis that studied the potential differential impact of exam questions by race, gender, and other factors.* Examining 20 bar exams from July 2009 to February 2019, the study found no major areas of concern, but recommended further action to continue improving the exam by eliminating sources of differential impact.¹⁸

In March 2020, responding to a request from the California Accredited Law Schools (“CALs”), the State Bar of California’s Office of Research and Institutional Accountability released 11 years of bar administration data to this study team to conduct an empirical analysis of whether higher cut scores: (1) have a disparate impact on diversity in the legal profession and (2) better protect the public from attorneys who do not have the minimum competence to practice law.¹⁹

On May 15, 2020, this study, the seventh related to the CBX, “*Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards,*” received approval for funding from AccessLex Institute.

¹⁶ Buckendahl, Chad W., *Conducting a Content Validation Study for the California Bar Exam*, ACS Ventures, October 4, 2017, http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/CBEStudy_Attachment_A.pdf (last visited Aug. 31, 2020).

¹⁷ California Attorney Practice Analysis Working Group, *The Practice of Law in California: Findings from the California Attorney Practice Analysis and Implications for the California Bar Exam*, State Bar of California, May 11, 2020, <http://www.calbar.ca.gov/Portals/0/documents/reports/2020/California-Attorney-Practice-Analysis-Working-Group-Report.pdf> (last visited Aug. 31, 2020).

¹⁸ MacLeod, Dag and Nuñez, Amy, *Report on and Approval of Recommendations Regarding the California Bar Exam Studies*, State Bar of California, May 14, 2020, <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000025918.pdf> (last visited Aug. 31, 2020). (Report starts on page 56).

¹⁹ *Simulation of the Impact of Different Bar Exam Cut Scores on Bar Passage, by Gender, Race/Ethnicity, and Law School Type*, supra note 4. The report compiled archival data from 21 bar exams administered over a span of 11 years, from 2009 to 2019 and conducted a simulation analysis of test-takers’ pass rates by gender, race/ethnicity, and law school type for the simulated cut scores 1300, 1330, 1350, 1390 and the actual cut score of 1440.

In June 2020, while this study was underway, the Court lowered California’s cut score to 1390.²⁰ The Court’s July 16, 2020 letter to the State Bar explained that its decision was “based on findings from recently completed bar examination studies as well as data from ongoing studies,” and that it would “consider any further changes pending recommendations offered by the forthcoming Blue-Ribbon Commission on the Future of the California Bar Examination.”²¹

This study team concluded its analysis in August 2020 and submitted its findings to the California Supreme Court in October 2020 for consideration.²²

²⁰ *California Supreme Court Issues Order Finalizing Lower Passing Score for Future Bar Exam Takers*, California Courts: The Judicial Branch of California, California Courts Newsroom, October 18, 2017, <https://newsroom.courts.ca.gov/news/california-supreme-court-issues-order-finalizing-lower-passing-score-for-future-bar-exam-takers> (last visited Aug. 16, 2020).

²¹ Supreme Court of California, Letter to the State Bar of California, “RE: California Bar Exam,” July 16, 2020, https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20206/SB_BOT_7162020_FINAL.pdf (last visited Aug. 16, 2020).

²² The study team thanks and acknowledges the members of the advisory committee who advised the team on the report analysis and findings (summary bios are included at the end of this report): Dean Emerita Joan Howarth, Dean Kevin Marshall, Joanna Mendoza, Dean Jennifer Mnookin, Professor Jerry Organ, Chris Punongbayan, Dean Daniel Rodriguez, and Professor Gary S. Rosin. The team also thanks and acknowledges Dean Greg Brandes who assisted in the report drafting and editing and retired judge Paul Keeper who assisted in editing.

III. Methodology

This study focused on three things: (1) the extent to which racial disparities and achievement gaps widen or narrow at distinct cut score thresholds; (2) the extent to which these racial and ethnic disparities affect diversity of newly admitted attorneys in the legal profession; and (3) the relationship, if any, between minimum cut scores and rates of attorney discipline.

To analyze achievement gaps, disparate impact, and diversity in the profession, this study examined data from 21 administrations of the CBX during the 11 years between February 2009 and February 2019. This data set included a total of $n = 143,198$ bar exams taken, including $n = 85,727$ unique examinees. Because the data set included each applicant's complete examination history, including the applicant's performance data for any subsequent attempts to pass the CBX across the 11-year period, the study team focused the unit of analysis on examinees, not exams. This meant that when conducting analyses using the data set, the study team counted each examinee only once, even if the examinee took the CBX multiple times. This change was important because by restructuring the data this way, the study team was able to avoid any artificial inflation in the total number of examinees who sat for the CBX across the period studied.²³

To simulate whether applying other cut scores widened or narrowed racial or ethnic disparities and achievement gaps in California, the study focused on the selection and impact of the following cut scores: 1300, 1330, 1350, 1390, and 1440.²⁴ The study determined whether each examinee in the data set would have passed the CBX on any given attempt at these five different cut scores.

²³ The data revealed that minorities were more likely to fail the exam on their first attempt, which meant they often took the CBX multiple times. Thus, to get an accurate picture of the racial and ethnic background of all examinees who sat for the exam across the 11 years, the study team counted each examinee only once. By viewing data restructured this way, the study team was able to avoid any artificial inflation in the total number of examinees who sat for the CBX across the 11 years. This is the first known study of its type to evaluate the characteristics of discrete exam takers, rather than groupings of examinees that include repeat takers counted multiple times in the data sets.

²⁴ The five cut scores used in this study were selected based on the following criteria: 1440 was California's previous cut score; 1390 is California's current cut score; 1350 is the median cut score used in the United States; 1330 is New York's current cut score, which is a jurisdiction that is similar to California; and 1300 is the lowest cut score used by multiple jurisdictions (Alabama, Minnesota, Missouri, New Mexico, North Dakota) in the United States.

Finally, to evaluate whether there was any valid relationship between cut scores and rates of attorney discipline, the study team collected and analyzed the publicly available reports of the ABA Survey on Lawyer Discipline Systems (“S.O.L.D.”).²⁵ Data from the ABA’s reports on attorney discipline complaints, charges, and actions were used as a proxy for measuring the risk of potential public harm caused by incompetent or unethical attorneys. The study analyzed the most recent six years of ABA disciplinary reports available (2013-18) from up to 48 jurisdictions to determine whether a higher cut score correlated with reduced harm to the public, as measured by discipline statistics.²⁶

Using this large data set, the study investigated whether a state’s selection of a given cut score correlated with any of the three indicators: (1) the number of complaints members of the public made against attorneys; (2) the number of lawyers charged after probable cause determinations; and (3) the number attorneys subject to public or private disciplinary action. The study treated each state’s annual reporting as a separate observation and standardized each of the three indicators to compare the information across jurisdictions by placing each in the form of the number of complaints per 1,000 attorneys.²⁷

²⁵ *Survey on Lawyer Discipline Systems 2018*, American Bar Association, *supra* note 5.

²⁶ The study team was unable to evaluate the discipline impact of a 1390 cut score because no state used that cut score during the period of the data set.

²⁷ The same results were obtained using many different ways of combining the data. In short, the results were statistically robust. Also, based on the study team’s survey of existing research, there appears to be no previously published study, in California or elsewhere, that uses such extensive datasets of actual examinee performance to analyze how different cut scores disparately impact racial and ethnic minorities.

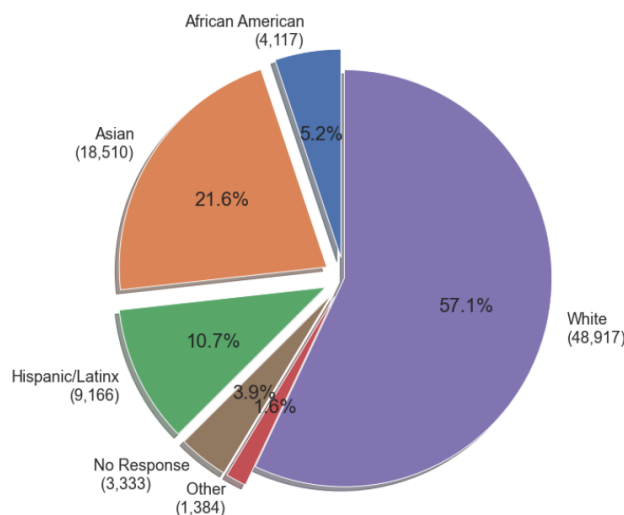
IV. Findings

A. Combining Across Years: Racial and Ethnic Demographics Among Bar Applicants

The study first examined racial and ethnic demographic trends in the population of examinees during the period studied.

Between 2009 and 2018, the number of examinees who sat for the CBX ranged from 11,525 to 12,599 per year. Over the 11 years, 85,727 unique examinees sat for the CBX. Of these 85,727 examinees, 48,917 were White (57.1%), 4,117 were Black (5.2%), 18,510 were Asian (21.6%), and 9,166 were Hispanic/Latinx (10.7%). 1,384 individuals (1.6%) identified as Other.²⁸ Because examinees who selected “Other” represented such a small group of individuals, this study focused on whether the cut score disparately impacted Blacks, Asians, Hispanic/Latinxs, and Whites. See Figure 1.

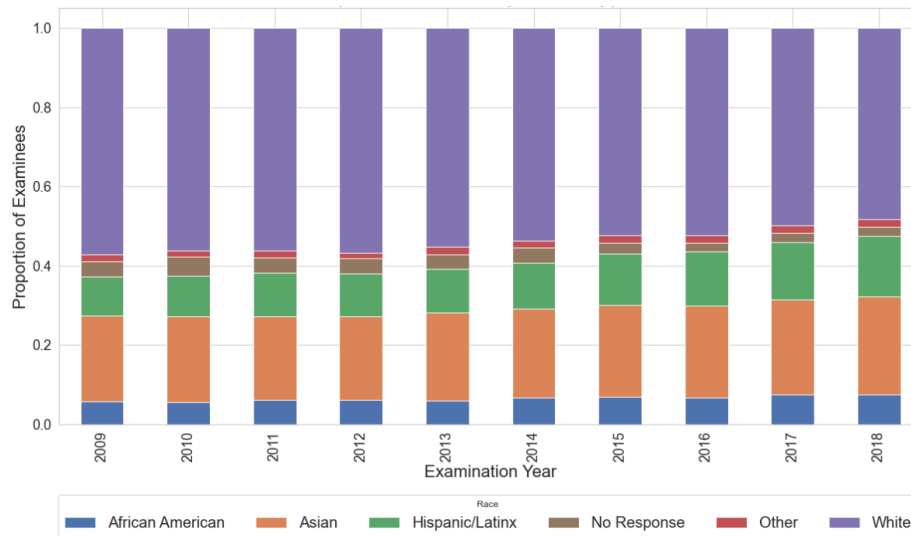
Figure 1. The Percentage of White and Minority CBX Examinees Between 2009 and 2018



²⁸ *State Bar of California's Report Card on the Diversity of California's Legal Profession*, State Bar of California, <http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf> (last visited Sept. 2, 2020). Other is defined as “Other Race, Ethnicity, or Origin” that is not American Indian/Alaska Native, Asian, Black/African American, Hispanic/Hispanic/Latinx, Middle Eastern/North African, Multiracial, or Native Hawaiian/Other Pacific Islander.

When analyzed across the 11-year period, the proportion of White examinees declined from 57.25 percent to 48.21 percent while the proportion of examinees in every other identified racial and ethnic group increased. Hispanic/Latinx examinees increased to 15.29 percent from 9.87 percent, Asian examinees increased to 24.71 percent from 21.52 percent, and Black examinees increased to 7.51 percent from 5.82 percent. See Figure 2.

Figure 2. Proportion of Examinees Based Upon Racial and Ethnic Group Membership Across Time



During these 11 years, the population of California shifted from majority White to majority minority.²⁹ Although not as dramatic as the shift in overall population, by 2018, a similar transition to majority-minority is reflected in the proportion of bar examinees, as shown in Figure 2. White examinees represented fewer than 50 percent of the examinees sitting for the CBX in 2018 for the first time in the period studied. It is important to note that the increased number of minority CBX examinees correlated with increased and improved diversity initiatives that resulted in more minorities successfully completing their legal education and qualifying to sit for the CBX.³⁰

²⁹ Johnson, Hans; McGhee, Eric; and Mejia, Marisol Cuellar, *California's Population*, Public Policy Institute of California, April 2020, <https://www.ppic.org/publication/californias-population/> (last visited Sept. 2, 2020).

³⁰ Stetz, Mike, *Most Diverse Law Schools*, The National Jurist, Winter 2019, <https://law.ucdavis.edu/news/files/Most-Diverse-Law-Schools-Article-The-National-Jurist-Winter-2019.pdf> (last visited Sept. 4, 2020). See also California LAW, <https://californialawinc.com/About-Us/History> (last visited Sept. 4, 2020).

B. Combining Across Years: Racial and Ethnic Demographics of Passers of the CBX, and Impact on the Profession

The study next examined whether the percentage increase in the diversity of examinees over an 11-year period resulted in a similar increase in the diversity of bar passers and “never passers” (those never passing the CBX during the period studied).

Despite the increase of minority examinees sitting for the CBX over the period studied, the California attorney licensee population does not reflect the state’s demographic diversity. In 2019, the attorney licensee population was still 68 percent White and 32 percent minorities.³¹ Although the number of Asians, Hispanic/Latinxs, and multiracial licensed attorneys increased over the past 30 years, the number of Black licensed attorneys has remained “stagnant.”³² The State Bar of California’s *Report Card on the Diversity of California’s Legal Profession* recognized that the state’s attorney population does not reflect its diversity.³³ See Figure 3.

“Despite the increase of minority examinees sitting for the CBX over the period studied, the California attorney licensee population does not reflect the state’s demographic diversity.”

³¹ *State Bar of California’s Report Card on the Diversity of California’s Legal Profession*, supra note 28 at p.7. The State Bar’s Diversity Report stated that over the past thirty years, the “proportion of newly licensed Black attorneys has remained stagnant,” the “proportion of Hispanic/Latinx attorneys has doubled from 5 to 10 percent” and the “proportion of new licensees who are Asian or multiracial [has] more than tripled,” but “the rapid growth in the number of Asian attorneys, which began in the 1990s, has since leveled off.”

³² *Id.*

³³ *Id.*

Figure 3. The 2019 State Bar of California Diversity Report Card³⁴

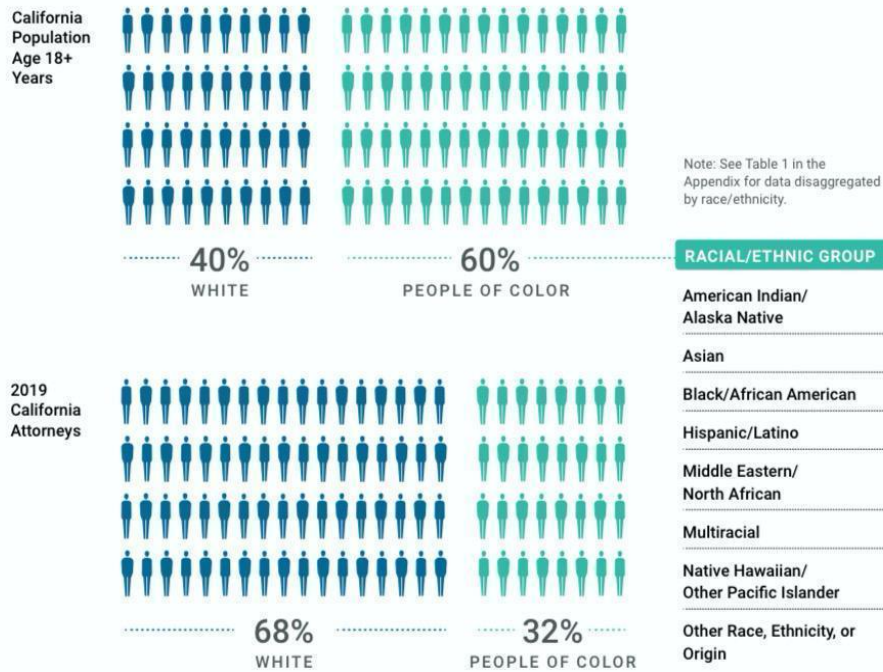


The state's attorney population does not reflect its diversity.

Between 5,000 and 6,000 attorneys are admitted to the State Bar of California annually. The number of active licensed attorneys has nearly doubled since 1980, reaching over 190,000 as of December 2019.

White attorneys account for nearly 70 percent of California's active licensed attorney population, while people of color constitute 60 percent of the state's population. Latinos, in particular, are underrepresented among California attorneys in comparison to their representation statewide: this group comprises 36 percent of the state's population yet accounts for a mere 7 percent of all of California's licensed active attorneys.

Figure 1
California's Adult Population Compared with California's 2019 Attorney Population



To further examine why licensed minorities have not followed the demographic trends in California's population or the upward trend in the number of minority CBX examinees, the study analyzed the proportion of examinees persistently failing the exam between 2009 and 2018 by race and ethnicity (the group the study referred to as "never passers").

³⁴ /d. at p. 4.

C. Between 2009 and 2018, the Number of Examinees Never Passing the CBX has Increased

Pass/fail analysis revealed that the proportion of examinees failing the bar exam each year at the 1440 cut score increased over time from 44.4 percent in 2009 to 57.8 percent in 2018. (Stated conversely, the proportion of examinees passing the bar exam has fallen from 55.6 percent to 42.2 percent).³⁵ Although the underlying reasons for this trend are debated, the identification of proportional pass rates within the groups of eventual passers and never passers proved valuable to a better understanding of the effect of the cut score.

An examination of the data between 2009 and 2018 by examinee discloses that any given examinee could retake the exam once, or multiple times, and in doing so could eventually pass the exam on a later attempt. Thus, this report uses the term “eventual pass rate” to define the number of examinees who passed the CBX on their first-attempt or any subsequent attempt. “Never passers” or its equivalent describe the examinees who never passed the CBX during the period studied, whether they took the exam only once and failed, or took it many times but never passed.³⁶

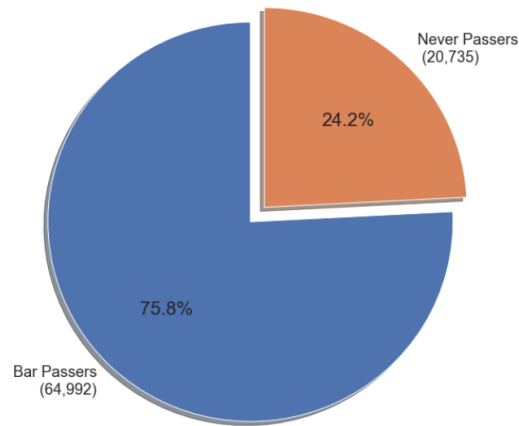
Examining the data in this way, the study calculated that the percentage of applicants who passed the bar exam the first-time or eventually at the 1440 cut score was 75.8 percent. At the same time, 20,735 (24.2%) unique examinees never passed the exam within these 11 years of exams.³⁷ See Figure 4.

³⁵ Bolus, Roger, *Performance Changes on the California Bar Examination: Part 2*, Research Solutions Group, December 20, 2018, <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf> (last visited Sept. 2, 2020). Passage rates on the CBX have declined steadily over the past decade. A 2017 study (Bolus, 2017) found that between 2008 and 2016, the percentage passing the exam declined from 62% to 44%—a drop of 18 percentage points. The reasons for the decline have been subject to extensive debate. Some stakeholders have attributed the decline to changes in the examination and its grading, others have argued that changes in the qualifications and credentials of bar examinees may have contributed. Still others have suggested that additional factors explaining this decrease in pass rates may include changes in law school curriculums or shifts in undergraduate educational practices or technology.

³⁶ A state-sponsored licensing exam ought to be maximally valid and reliable the first time an examinee takes it. Such an exam would screen out examinees not minimally competent (eventual non-passers) on the first attempt and fail no examinees with the competence required to meet the standard. Without changing the testing instrument or process, an examining body can achieve this with the choice of cut score.

³⁷ This empirical research project distinguishes between first-time passers, eventual passers, and never passers. See Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. Legal Educ. 3 (2010).

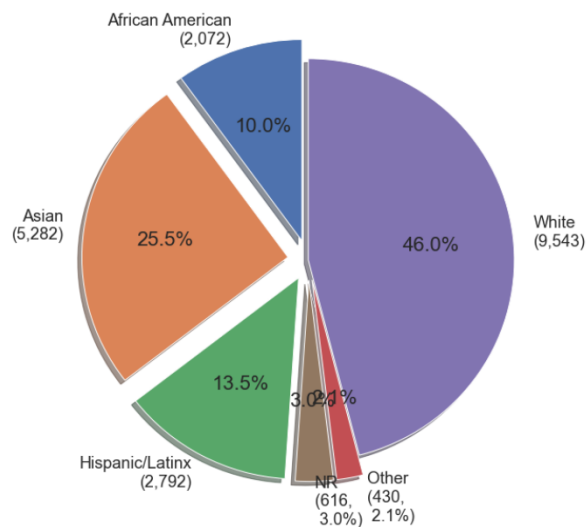
**Figure 4. Combining Across Years: Overall Bar Passage
(First Time and Eventual Pass Rates)**



D. Between 2009 and 2018, the Percentage of Minorities Never Passing the CBX was Higher Than Whites

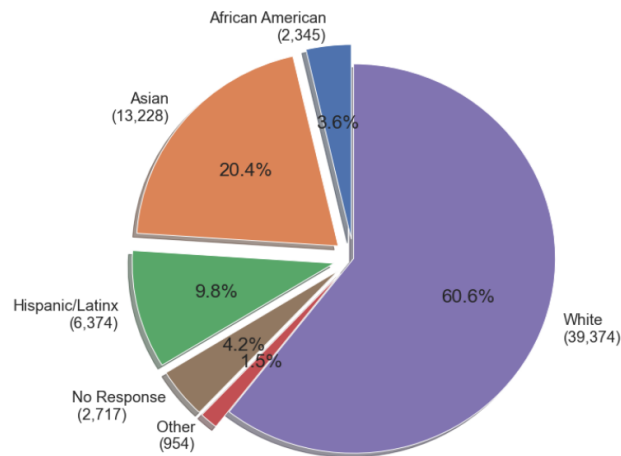
Racial and ethnic disparities existed between groups never passing the CBX. Of these never passers, 49 percent were minorities (10% Black, 25.5% Asian, and 13.5% Hispanic/Latinx) while only 46 percent were Whites. The remaining examinees selected “Other” or did not respond. See Figure 5.

**Figure 5. Combining Across Years: Distribution of
Never Passers by Racial and Ethnic Group**



Conversely, of the eventual passers, 60.6 percent were White and only 33.8 percent were minorities (3.6% Black, 20.4% Asian, and 9.8% Hispanic/Latinx). The remaining examinees selected “Other” or did not respond. See Figure 6.

Figure 6. Combining Across Years: Distribution of Eventual Passers by Racial and Ethnic Group



Wide disparities existed between racial and ethnic groups passing and not passing the CBX each year. Figure 7 shows an overall decline in bar passage percentages across all groups over time, including White examinees and Asian examinees. However, Black examinees consistently passed at a lower rate than any other racial and ethnic group, followed by Hispanic/Latinx examinees. The minority group with the highest passage rates across the years was Asian examinees, but this group’s eventual passage percentages were still consistently below those of White examinees.

“Wide disparities existed between racial and ethnic groups passing and not passing the CBX each year.”

Figure 7. Bar Passage Rates and Racial and Ethnic Disparities Across Years

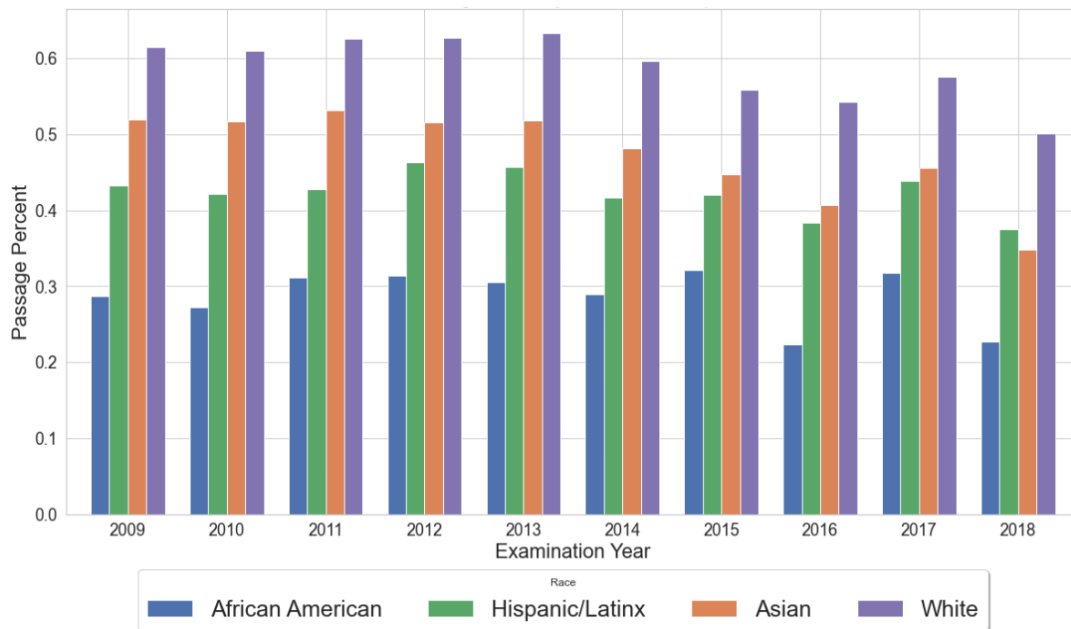


Figure 7 shows that the 1440 cut score, over the past 11 years, has consistently produced disparate passing rates among examinees of different racial and ethnic backgrounds. If an examination was objective, although there may be variation on each individual exam administration, the percentage passage rates would be expected to equalize over time and administrations, assuming a large enough data set.³⁸ However, these data revealed a consistent pattern in bar passage percentages over 21 administrations where minorities always passed at a significantly lower percentage than Whites.

Longitudinally, among examinees from 2009-18, 80.5 percent of White examinees eventually passed the bar exam. In contrast, only 53.1 percent of Black examinees eventually passed the bar exam during this period. Hispanic/Latinx and Asian examinees eventually passed the bar exam at rates of 69.5 percent and 71.5 percent, respectively. Over these 11 years, every minority group eventually passed at a rate at least 9 percentage points lower compared to Whites. See Figure 8.

³⁸ Reeves, Richard and Halikias, Dimitrios, *Race gaps in SAT score highlight inequality and hinder upward mobility*, Brookings, February 1, 2017, <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/> (last visited Sept. 2, 2020). “In a perfectly equal distribution, the racial breakdown of scores at every point in the distribution would mirror the composition of test-takers as whole.”

Figure 8. Combining Across Years: Racial and Ethnic Disparities at the Current 1440 Cut Score -- Eventual Passage

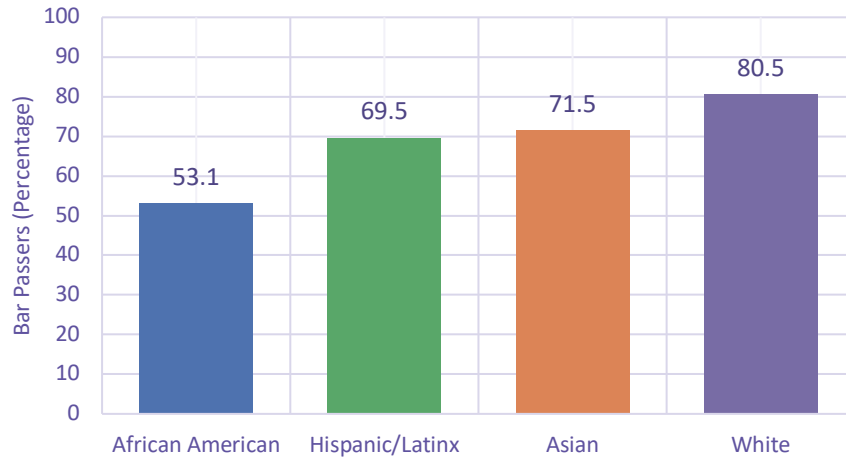
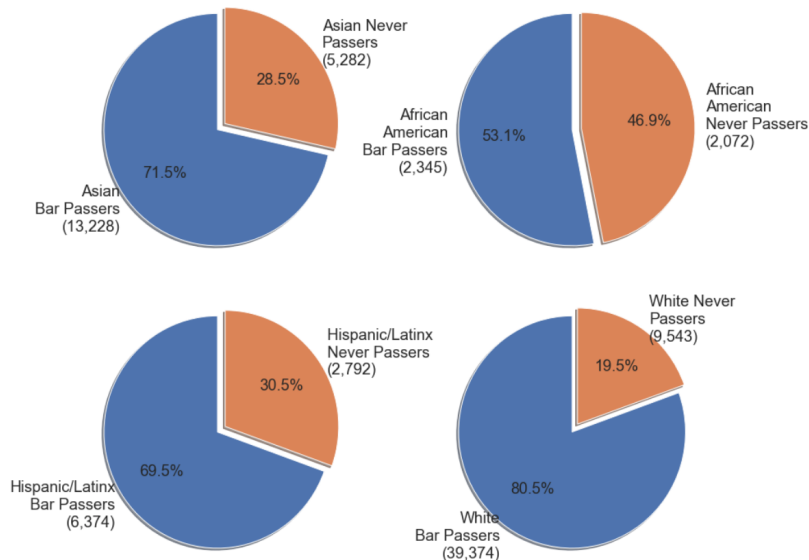


Figure 8 shows that for every 1,000 White and 1,000 Black examinees, 805 White examinees eventually passed the CBX, while only 531 Black examinees eventually passed. Similarly, for every 1,000 Asian and 1,000 Hispanic/Latinx examinees, 715 Asian and 695 Hispanic/Latinx examinees eventually passed the CBX.

These results may be characterized as predictive because of the long data window, variation among groups, and size of the subject pools examined in each group. Figure 9 shows the percentage of eventual passers and never passers by race and ethnicity.

Figure 9. Combining Across Years: Racial and Ethnic Disparities at the Current 1440 Cut Score -- Eventual and Never Passers



Over the 11 years studied, California's 1440 cut score disparately affected minority examinees. Minorities passed at significantly lower percentages compared to Whites both for individual exam administrations and across the period studied. Over these 21 administrations, there appeared to be a consistent relationship in aggregate between an examinee's race and ethnicity and the examinee's probability of eventually passing the CBX. Put simply, the data revealed that White examinees had a much higher chance of passing the CBX at 1440 compared to minorities. From Figures 7, 8, and 9, it may also be seen that as the percentage of minority examinees increased, the impact of the 1440 cut score was likely one of the factors contributing to the overall decline in passage rates.

E. The 1440 Cut Score's Disparate Impact on Minorities: Simulating Impacts on Diversity in California's Legal Profession of Alternative Cut Scores

This study also simulated how cut scores used by other major jurisdictions would impact (1) racial and ethnic disparities and (2) the diversity of new admittees to California's legal profession.

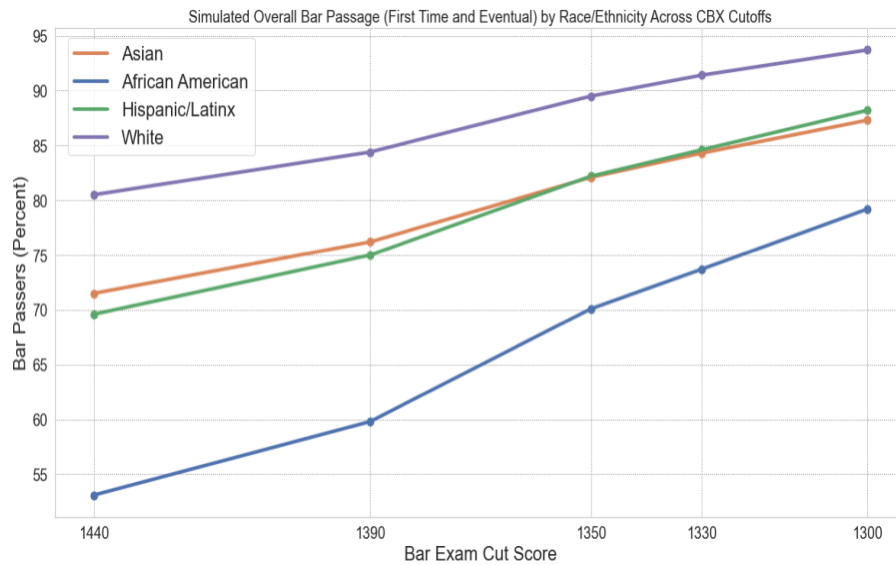
1. Simulation 1: The Effect of Cut Scores on Racial and Ethnic Disparities Among Eventual Passers and Non-Passers of the CBX

To determine if the selection of a cut score impacted the eventual passage rate and never passage rate, the study simulated how specific cut scores-1300, 1330, 1350, 1390, 1440- would have impacted passage by these examinees. The study restructured the data to analyze whether each examinee eventually or never passed the CBX across the 11-year period at each of the different cut scores.

Unsurprisingly, the total number of examinees eventually passing increased as the cut score decreased. For example, 75.8 percent of examinees passed at 1440 whereas 80.2 percent passed at 1390, and 86.0 percent of examinees passed at 1350, the national median cut score. Correspondingly, the never-passer rate fell from 24.2 percent at 1440, to 19.8 percent at 1390, and to 14.0 percent at 1350.

When analyzed by racial and ethnic groups, the number of examinees eventually passing increased for every racial and ethnic group as the cut scores decreased. See Figure 10.

Figure 10. The Effect of Bar Exam Cut Scores on Racial and Ethnic Disparities



While every racial and ethnic group's performance would have improved with the selection of a lower cut score, the data show that the eventual pass rates of minority examinees increased at a much higher rate compared to Whites, particularly for Hispanic/Latinx and Blacks. Figure 10's steeper lines for minorities compared to Whites as the cut score changed from 1440 to 1300 in the simulation mean that selecting a lower cut score would have had a greater impact on the proportion of minorities eventually passing the CBX and joining the legal profession.

The largest step-increase in minority eventual pass rates occurred when selecting 1350 as the cut score as evidenced in Figure 10 where the line is the steepest between 1390 and 1350. In Figure 10, the lines come closest together at 1300. This represented the greatest narrowing of the achievement gap between Whites and minorities.

This simulation of eventual pass rates by race and ethnicity across the data set strongly suggests the 1440 cut score has resulted in a negative racial disparity. Adjusting the cut score to national normative levels would decrease this effect.

Figure 11 shows eventual passers and never passers by race and cut score. Taking all other factors out of the equation, Figure 11 clearly illustrates how selection of the cut score would have widened or reduced the achievement gap among racial and ethnic groups at different cut scores.

Figure 11. The Effect of Bar Exam Cut Scores on Racial and Ethnic Disparities



This simulation of eventual pass rates by race and ethnicity strongly suggests the previous cut score of 1440 and current cut score of 1390 result in a greater racial disparity in those admitted to the legal profession in California when compared to the national median cut score of 1350 and the lower cut scores of 1330 and 1300.

Based on this simulation analysis, had the Court's recent decision to reduce the cut score to 1390 been in place throughout the period studied, it would have reduced the achievement gap, but only by 2.7 percentage points. This means that between 2009 and 2018, if the cut score had been 1390, the top performing racial and ethnic group would have passed the bar exam at 84.4 percent, while the lowest performing racial and ethnic group would have passed the bar exam at 59.7 percent; a racial and ethnic impact gap of 24.7 percentage points compared to a gap of 27.4 percentage points at 1440. See Figure 12.

Selection of 1350, the national median cut score, would have narrowed the racial and ethnic achievement gap between the top performing and lowest performing racial and ethnic groups by 8 percentage points, to 19.4 percentage points. The achievement gap would have been 27.4 percentage points at 1440, 24.7 percentage points at 1390, and 19.4 percentage points at 1350.³⁹

As shown in Figure 12, if the cut score were 1330, the achievement gap between the top performing and lowest performing racial and ethnic groups would have narrowed by 9.4 percentage points to an achievement gap of 18 percentage points.

If the cut score were 1300, the achievement gap between the top performing and lowest performing racial and ethnic groups would have narrowed by 12.9 percentage points to an achievement gap of 14.5 percentage points. See Figure 12.

Figure 12. The Achievement Gap Between Top Performing and Lowest Performing Racial and Ethnic Groups by Bar Exam Cut Scores

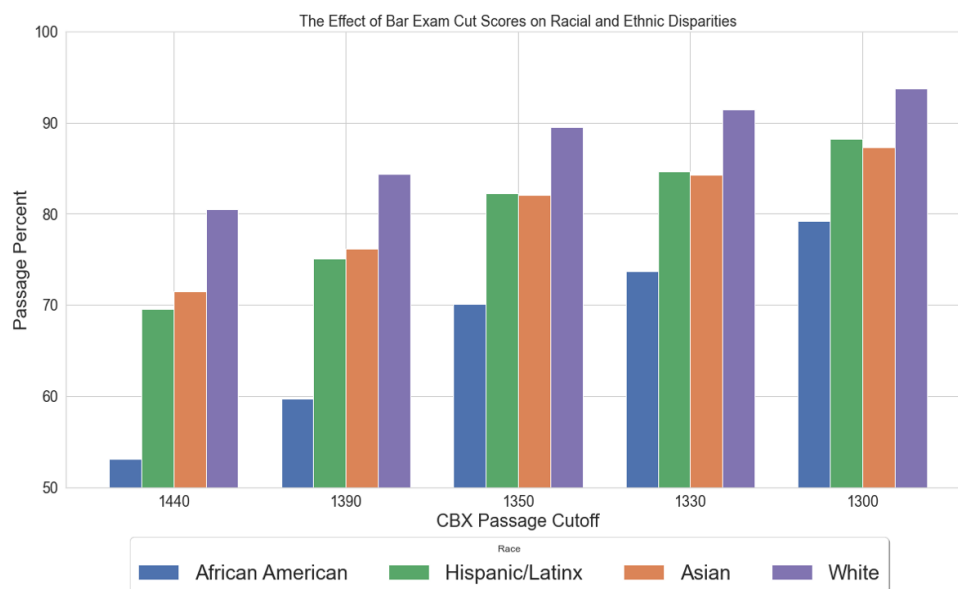
	1440	1390	1350	1330	1300
Achievement Gap	27.4	24.7	19.4	18	14.5
Percentage Points the Achievement Gap Narrowed Compared to the Previous Cut Score	N/A	2.7	5.3	1.4	3.5
Percentage Points the Achievement Gap Narrowed When Compared to 1440	N/A	2.7	8	9.4	12.9
Percentage Points the Achievement Gap Narrowed When Compared to 1390	N/A	N/A	5.3	6.7	10.2

³⁹ This narrowing of the achievement gap by 29.3 percent is calculated by subtracting the achievement gap at 1350 (19.37%) from the prior achievement gap at 1440 (27.41%). This amount is then divided by the prior achievement gap at 1440.

Figure 11 and Figure 12 show the narrowest achievement gap in this analysis is at the 1300 cut score, where the lowest performing group would eventually pass at a 79.2 percent rate, and the top performing group at a 93.7 percent rate.⁴⁰

Figure 13 includes the passage percentage of each racial and ethnic group at each cut score to show how the achievement gap between minorities and Whites closed as the cut score lowered.

Figure 13. The Effect of Bar Exam Cut Scores on Narrowing Racial and Ethnic Achievement Gaps



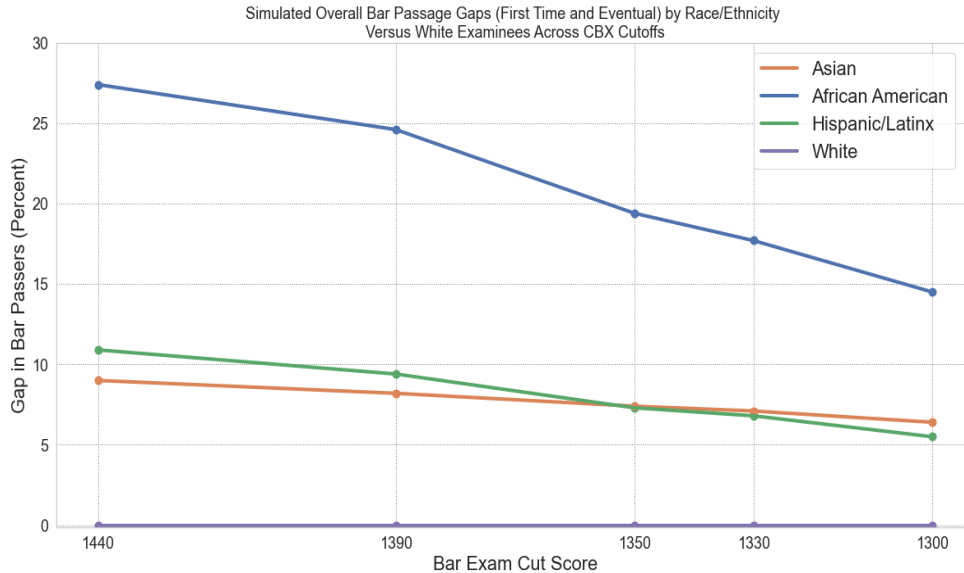
Figures 11, 12, and 13 also showed the greatest step difference in eventual passage rates occurred when the cut score changed from 1390 to 1350, where the achievement gap narrowed by 5.3 percentage points. The next greatest narrowing of the achievement gap was when the score was changed from 1330 to 1300 (a difference of 3.5 percentage points in the achievement gaps).

This study demonstrated that the selection of a lower cut score would have narrowed the racial and ethnic disparities in eventual passage rates during the period studied. Insofar as

⁴⁰ Currently, only six states have a cut score of 1300 or lower: Alabama, Minnesota, Missouri, New Mexico, North Dakota, and Wisconsin. See *NCBE Comprehensive Guide to Bar Admission Requirements 2020*, Chart 10 at p. 36-37. https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf (last visited Sept. 29, 2020).

diversity in the profession is a significant value, as the State Bar of California has indicated that it is,⁴¹ cut score policy makers need to recognize that the choice of the cut score is impinging upon our collective ability to achieve those goals. See Figure 14.

Figure 14. The Effect of Bar Exam Cut Scores on Narrowing Racial and Ethnic Achievement Gaps On the CBX



At 1390, the number of examinees eventually passing the CBX would have increased by 3,760 examinees. Of these examinees, 1,675 would have been additional attorneys of color; 294 additional Black attorneys, 501 additional Hispanic/Latinx attorneys, and 880 additional Asian attorneys.

At 1350, the number of examinees eventually passing the CBX would have increased by 8,734 (65,006 at 1440 to 73,740 at 1350). Of these 8,734 examinees, 3,876 would have been attorneys of color; 753 additional Black attorneys, 1,162 additional Hispanic/Latinx attorneys, and 1,961 additional Asian attorneys.

⁴¹ The State Bar of California, Letter to the Supreme Court of California, “RE: Amended Cover Letter to the *Final Report on the 2017 California Bar Exam*,” September 14, 2017, <https://perma.cc/AX4R-28SA> (last visited Sept. 24, 2020). The State Bar recognized that “a Standard Setting Study is only one data element relevant to the ultimate policy decision to establish a pass line.” In its final report to the Court, it outlined “the key issues relevant to a decision by the Court,” which included inter-related issues of “public protection, access to justice, and diversity.” See also *Promoting Inclusion and Diversity*, State Bar of California, <http://www.calbar.ca.gov/About-Us/Our-Mission/Promoting-Inclusion-and-Diversity> (last visited Sept. 24, 2020).

At 1330, the number of examinees eventually passing the CBX would have increased by 10,564, and California would have had an additional 4,665 attorneys of color: 912 additional Black attorneys, 1,379 additional Hispanic/Latinx attorneys, and 2,374 additional Asian attorneys.

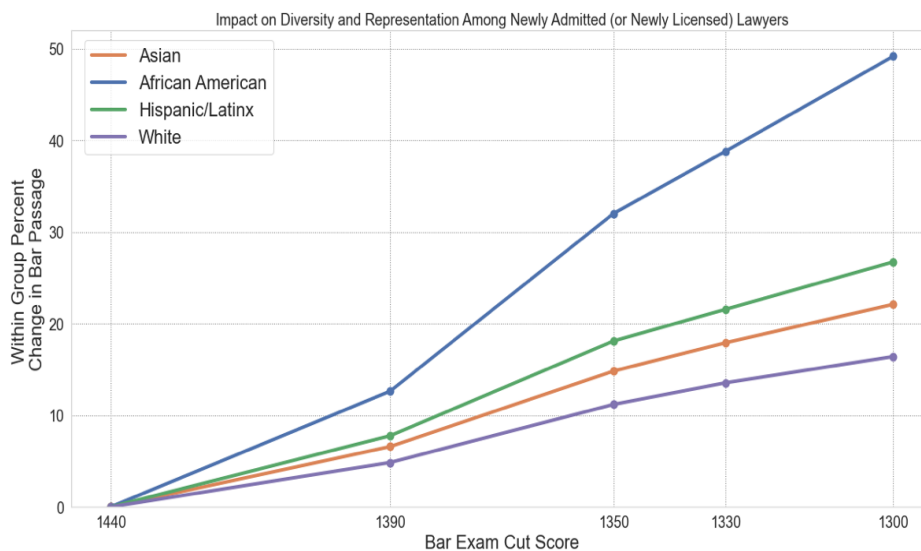
At 1300, the number of examinees eventually passing would have increased by 12,907 and an additional 5,793 attorneys of color would have joined the legal profession: 1,154 additional Black attorneys, 1,709 additional Hispanic/Latinx attorneys, and 2,930 additional Asian attorneys.

2. Simulation 2: The Effect of Exam Cut Scores on Diversity in the Legal Profession

The second simulation analyzed how the selection of a cut score would alter the inflow and overall number of newly admitted racial and ethnic minorities to the legal profession in California.⁴²

Figure 15 shows how the cut score has a powerful in-group impact on the number of newly admitted racial and ethnic minorities in the legal profession.

Figure 15. The Effect of Bar Exam Cut Scores on Relative Percentage Increase in Racial and Ethnic Bar Passage



⁴² This study did not examine lawyers exiting the legal profession. Rather, the research focused on new licensees and how this inflow of new attorneys affects the availability of racial and ethnic minority lawyers in the legal profession.

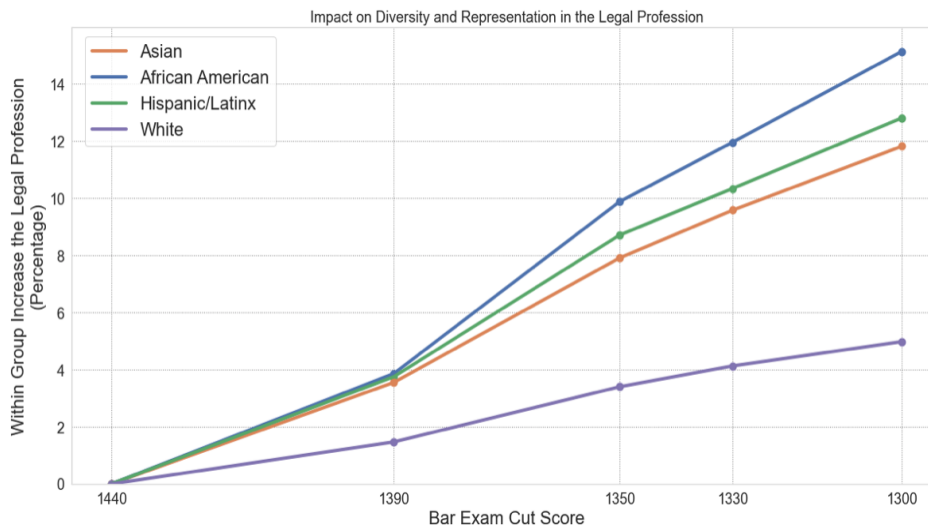
While all racial and ethnic groups would have passed the CBX at higher percentage rates if 1350 had been adopted as the cut score in 2009, the most significant in-group percentage increase would have been with Black lawyers.

If 1390 had been adopted as the cut score in 2009, the number of newly licensed Black lawyers would have increased by 12.5 percent. Similarly, if 1350 had been adopted as the cut score in 2009, the number of additional Black lawyers would have increased by 32.1 percent. Finally, if 1300 had been adopted as the cut score in 2009, the number of additional Black lawyers would have increased by 49.2 percent.

For Hispanic/Latinx, at 1390 the number of newly licensed attorneys would have increased by 7.9 percent. At 1350 and 1300, the increase would have been 18.2 percent and 26.8 percent, respectively. For Asians, at 1390 the number of newly licensed attorneys would have increased by 6.7 percent. At 1350 and 1300, the increase would have been 14.8 percent and 22.1 percent, respectively.

To analyze how these inflows of newly admitted attorneys would have altered the overall number of racial and ethnic minorities in the legal profession, this study combined this simulated analysis with the prior analysis reported by the State Bar on diversity within California's legal profession.⁴³ The results are shown in Figure 16.

Figure 16. Demographic Changes in the Legal Profession



⁴³ State Bar of California's Report Card on the Diversity of California's Legal Profession, supra note 28.

There was a total of 190,609 active lawyers in California in June 2020.⁴⁴ The State Bar reported that 68 percent of these active lawyers were White, 4 percent were Black, 13 percent were Asian, and 7 percent were Hispanic/Latinx. As such, in June 2020, there were approximately 129,614 White lawyers; 7,624 Black lawyers; 13,343 Hispanic/Latinx lawyers; and 24,779 Asian lawyers in California.⁴⁵

Had 1390 been adopted as the cut score in 2009 and maintained throughout the period studied, California would have added 294 Black lawyers, for a total of 7,918 Black active lawyers in California, which would have been a 3.9 percent increase. There would also be an additional 501 Hispanic/Latinx lawyers and 880 Asian lawyers, increasing these totals to 13,844 Hispanic/Latinx active lawyers and 25,659 Asian active lawyers in California, respectively a 3.8 percent increase and 3.6 percent increase.

Had 1350 been adopted as the cut score in 2009, California would have an additional 753 Black lawyers, a 9.9 percent increase. Relatedly, the change would reflect an 8.7 percent increase (+1,162) in the total number of Hispanic/Latinx lawyers in California, and a 7.9 percent increase (+1,961) in the total number of Asian lawyers in California.

Had 1300 been adopted as the cut score in 2009, this change would have resulted in an increase of 1,154 additional Black lawyers, a 15.14 percent increase. Similarly, the change would reflect a 12.8 percent increase (+1,709) in the total number of Hispanic/Latinx lawyers in California, and an 11.8 percent increase (+2,930) in the total number of Asian lawyers in California. See Figure 17.

“... cut scores significantly impact the number of minorities admitted to the California Bar. This difference varies among racial and ethnic groups and has historically affected the diversity of new applicants to the California legal profession.”

⁴⁴ *Attorney Demographics*, The State Bar of California, <https://members.calbar.ca.gov/search/demographics.aspx> (last visited June 22, 2020). This study used the 2020 California Attorneys Demographics data to represent the effect that a lower cut score would have had on California’s racial and ethnic diversity if it had been adopted between 2009 and 2018. If the period studied also included the examinees who took the CBX in 2019, it is likely that a lower cut score would have resulted in more attorneys of color joining the profession.

⁴⁵ *State Bar of California’s Report Card on the Diversity of California’s Legal Profession*, supra note 28 at p. 26.

**Figure 17. The Number of Attorneys in California in June 2020
by Race and Ethnicity and Cut Score**

	1440 (Actual)	1390	1350	1300
Blacks	7,624	7,918 (+3.9%)	8,377 (+9.9%)	8,778 (+15.14%)
Hispanic/Latinx	13,343	13,844 (+3.8%)	14,505 (+8.7%)	15,052 (+12.8%)
Asians	24,779	25,659 (+3.6%)	26,740 (+7.9%)	27,709 (+11.8%)
Whites	129,614	131,515 (+1.5%)	134,018 (+3.39%)	136,071 (+4.98%)

Thus, Simulation 2 revealed that cut scores significantly impact the number of minorities admitted to the California Bar. This difference varies among racial and ethnic groups and has historically affected the diversity of new applicants to the California legal profession.

F. There is No Statistically Significant Relationship Between Cut Scores and Attorney Discipline According to the ABA's Discipline Data

A commonly heard argument is that high cut scores protect the public by screening out unethical or incompetent attorneys.⁴⁶ The ABA, as the national organization that provides The

⁴⁶ This note will briefly address how other articles that studied whether bar exams and cut scores protect the public compare to this study. The article "*The High Cost of Lowering the Bar*" concluded there was a correlation between California's cut score and attorney discipline [Anderson, Robert and Muller, Derek T., *The High Cost of Lowering the Bar*, 32 *Georgetown Journal of Legal Ethics* 307 (2019)]. However, the results should be read with caution. Because Anderson and Muller did not have access to the bar exam scores of the attorneys in their study, they used "each lawyer's law school to estimate his or her Law School Admissions Test (LSAT) score, and the estimated LSAT score to estimate his or her bar exam score." This meant that the study's conclusions were largely based on hypothetical data and required the assumption that every attorney's LSAT score would predict his or her MBE score and bar exam score, which would include the score on the written portion of the exam. Unlike the Anderson and Muller study, this study used a large sample of actual bar exam scores and data from the ABA's S.O.L.D. reports in determining that there was no correlation between actual discipline steps (complaints, charges, and actions) and cut scores. In addition, as argued by Merritt in her article "Bar Exam Scores and Lawyer Discipline," [Merritt, Deborah J., *Bar Exam Scores and Lawyer Discipline*, (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/> (last visited Sept. 24, 2020)], Anderson and Muller's causal inference between the bar exam and attorney discipline should be read with caution for two reasons. "First, as Anderson and Muller point out, '[t]here is virtually no discipline in the first 10 years of practice.' If the bar exam measured qualities related to attorney discipline, one would expect to see disciplinary cases emerge during those 10 years. . . . Second, attorney discipline almost never rests on lack of knowledge about legal doctrine, poor reasoning skills, or bad writing—the skills currently measured by the bar exam." As Leslie Levin, Christine Zozula, and Peter Siegelman stated in their 2013 article, *A Study of the Relationships between Bar Admissions Data and Subsequent Lawyer Discipline*, ". . . attorneys most often received discipline for failing to communicate with clients (20.0%), lack of diligence (17.93%), and failure to safeguard client property (11.26%). Only 4.14% of disciplinary sanctions related to 'competence'—and even some of those cases may have reflected incompetence in areas that are not tested by the bar exam." See Levin, Leslie C. and Zozula, Christine and Siegelman, Peter, *A Study of the Relationship between Bar Admissions Data and Subsequent Lawyer Discipline* (March 15, 2013), <https://ssrn.com/abstract=2258164> (last visited Sept. 24, 2020). Finally, the article "*Does the bar exam protect the public?*" solely discussed the impact of diploma privilege and not a cut score. [Rozema, Kyle,

Model Rules of Professional Conduct, selected three measures—complaints filed, charges filed, and the number of disciplinary actions—as the standard for assessing attorney behavior and regulation. The ABA’s Center for Professional Responsibility “is the only organization that collects, analyzes and compiles statistics about lawyer regulatory systems on a national basis.” This data is published in the Survey on Lawyer Discipline Systems (S.O.L.D.) and “serves to educate the public, the profession, the news media, courts and disciplinary agencies about sanctions imposed, caseload, budget and staffing activity in each jurisdiction.”⁴⁷ Using this data, the second part of this study examined whether the selection of a high cut score reduced the number of complaints filed,⁴⁸ attorneys charged,⁴⁹ or attorneys subject to disciplinary action.⁵⁰

The analysis used six years of disciplinary data from up to 48 U.S. jurisdictions from 2013-18 and explicitly tested for correlation between cut score and rates of discipline. The precise number of states reporting to the ABA varied by year, but all 51 jurisdictions (including Washington, D.C.) reported some disciplinary data to the ABA, usually the number of public

Does the Bar Exam Protect the Public? (May 28, 2020) Available at SSRN: <https://ssrn.com/abstract=3612481>]. The article stated that “lawyers admitted on diploma privilege receive public sanctions at similar rates to lawyers admitted after passing the bar exam for the first decade of their careers, but small differences emerge after a decade, and larger differences emerge after two decades.” The article concluded that within 25 years of bar admission the public sanctions could increase by 0.1% to 2%, which would impact a small number of attorneys. In contrast, this study evaluated discipline data by jurisdiction cut score from up to 48 different jurisdictions (instead of one jurisdiction) to determine that no correlation existed.

⁴⁷ *Survey on Lawyer Discipline Systems 2018*, American, supra note 5. Because “the Survey has been used by courts and disciplinary agencies to effect changes in caseload management, staffing, and funding of their lawyer disciplinary systems. . . it is essential that the Center maintain accurate data with respect to each jurisdiction.”

⁴⁸ *Id.* When synthesizing this information in the S.O.L.D., the ABA defines a *complaint* as “Any information received by the disciplinary agency regarding lawyer conduct that requires a determination as to whether the disciplinary agency has jurisdiction over the lawyer or matter(s) complained of, or whether sufficient facts are alleged that would, if true, constitute misconduct. These complaints are sometimes called grievances or requests for the investigation of a lawyer. These complaints may be in the form of a written submission, e-mail submission, a telephone or in-person discussion whose contents are reduced to writing, or other information received by the disciplinary agency, including written, audio or visual media reports, records of criminal convictions, etc.” See *2016 Survey on Lawyer Discipline Systems*, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016sold_results.pdf (last visited Sept. 2, 2020) at 66.

⁴⁹ *Id.* at 66. Within these reports, the ABA defines a *charge* as “After a determination has been made that there is probable cause to believe that misconduct occurred, any document, pleading or notice filed by the disciplinary agency or appropriate authority with the designated adjudicatory tribunal, wherein a lawyer is charged with specified acts of misconduct and violations of the rules of professional conduct and a disciplinary sanction is sought.”

⁵⁰ *Id.* Within these reports, the ABA defines a *disciplinary action* as “. . . lawyers receiving private /non-public disciplinary sanctions[and] lawyers publicly disciplined.” Private/non-public sanctions are defined as “Any disciplinary sanction where the identity of the lawyer sanctioned is kept confidential. Such private sanctions may include censure, admonition or reprimand. In cases where a lawyer receives a private sanction, a description of the conduct for which that lawyer has been disciplined, without disclosing the name of the lawyer, may still be published for the education of the profession and the public. For purposes of this Survey, if such publication occurs the sanction is still considered private/non-public.”

and/or private disciplinary actions taken in the jurisdiction that year.⁵¹

According to the State Bar “. . . the principal concern in setting any cut score must be public protection” and “. . . the only currently available proxy for public protection is discipline data.”⁵²

Based on the analysis of the ABA disciplinary data by jurisdiction, no statistically significant relationships between the selection of a cut score and any of the three disciplinary indicators were observed.

1. Complaints Brought by the Public Against Attorneys

For six years of disciplinary data from up to 48 U.S. jurisdictions, there was no statistically significant negative relationship between the selection of a cut score and complaints brought by members of the public. See Figure 18.⁵³

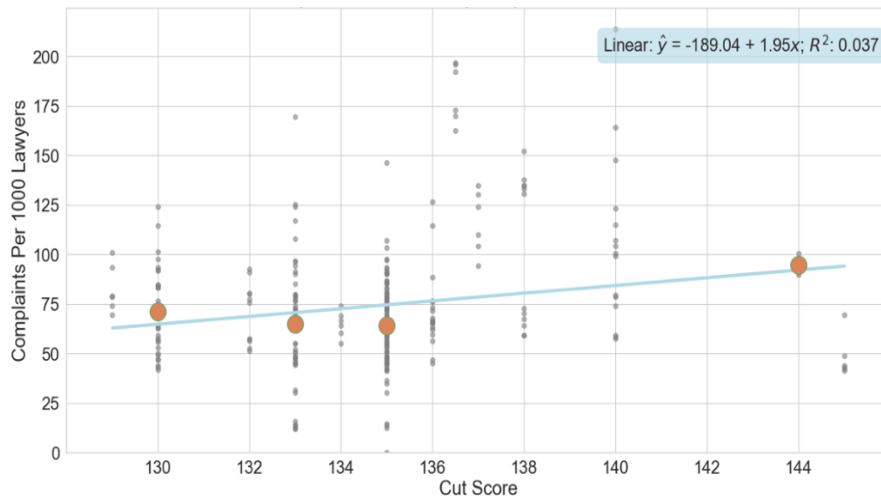
“Based on the analysis of the ABA disciplinary data by jurisdiction, no statistically significant relationships between the selection of a cut score and any of the three disciplinary indicators were observed.”

⁵¹ Specifically, between 2013 and 2018, the number of jurisdictions reporting the complaints received was: 45 in 2013, 47 in 2014, 48 in 2015, 48 in 2016, 46 in 2017, and 46 in 2018. The number of jurisdictions reporting the lawyers charged was: 42 in 2013, 46 in 2014, 48 in 2015, 46 in 2016, 44 in 2017, and 45 in 2018. The number of jurisdictions reporting the lawyers privately disciplined was: 37 in 2013, 36 in 2014, 38 in 2015, 35 in 2016, 34 in 2017, and 35 in 2018. The number of jurisdictions reporting the lawyers publicly disciplined was: 44 in 2013, 45 in 2014, 48 in 2015, 48 in 2016, 46 in 2017, and 47 in 2018. Specifically, between 2013 and 2018, the number of jurisdictions reporting the complaints received was: 45 in 2013, 47 in 2014, 48 in 2015, 48 in 2016, 46 in 2017, and 46 in 2018. The number of jurisdictions reporting the lawyers charged was: 42 in 2013, 46 in 2014, 48 in 2015, 46 in 2016, 44 in 2017, and 45 in 2018. The number of jurisdictions reporting the lawyers privately disciplined was: 37 in 2013, 36 in 2014, 38 in 2015, 35 in 2016, 34 in 2017, and 35 in 2018. The number of jurisdictions reporting the lawyers publicly disciplined was: 44 in 2013, 45 in 2014, 48 in 2015, 48 in 2016, 46 in 2017, and 47 in 2018. The team harnessed the ABA's *Survey on Lawyer Discipline Systems* to collect all the available data for each state within the ABA's reports for years 2013 - 2018. Several states were not accounted for in these ABA reports in particular years. To be as exhaustive and complete as possible for this data analysis, the team gathered discipline data from official reports located on these state websites. As a robustness check, and to ensure that including additional states do not affect the overall results of the study, the data was analyzed with and without these particular data points. The conclusions do not change, and the beta/slope relationship between bar exam cut score and discipline across these criteria consistently suggest no negative relationship. Complaints, charges, and disciplinary actions taken against lawyers do not decrease with higher bar exam cut scores. R-squared values remain trivially small, suggesting that including or excluding these data points has no effect on the overall findings.

⁵² The State Bar of California, Letter to the Supreme Court of California, “RE: Amended Cover Letter to the *Final Report on the 2017 California Bar Exam*,” supra note 41. “First, and most importantly, the principal concern in setting any cut score must be public protection. However, no clear measure or definition for public protection in the context of a licensing exam has been established. Through the course of this study we have learned that the only currently available proxy for public protection is discipline data, problematic on many fronts, most especially because an exam governing entry into the practice is not intended to be predictive of future misconduct.”

⁵³ In Figure 18, as well as Figure 19 and 20, every black dot on the chart represents a state that uses the cut score appearing on the X axis. The orange dots are the averages.

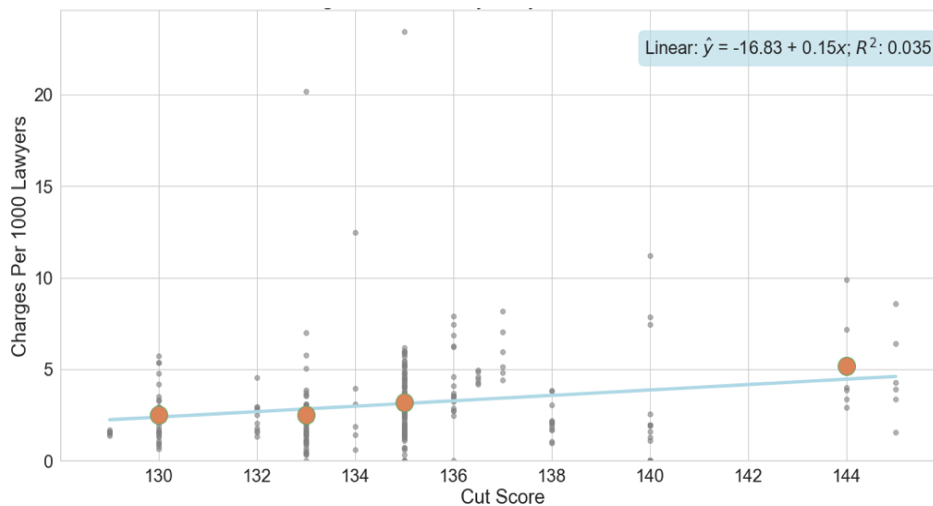
Figure 18. Linear Fit and R2 Value for the Number of Complaints Filed per 1000 Lawyers from 2013-18⁵⁴



2. Charges Filed After Probable Cause

The data also did not show a statistically significant negative relationship between the selection of a cut score and the number of attorneys formally charged after a finding of probable cause. Thus, at least according to disciplinary statistics, higher cut scores did not correlate with increased protection of the public from incompetent or unprofessional attorneys. See Figure 19.

Figure 19. Linear Fit and R2 Value for the Number of Charges Filed per 1000 Lawyers from 2013-18

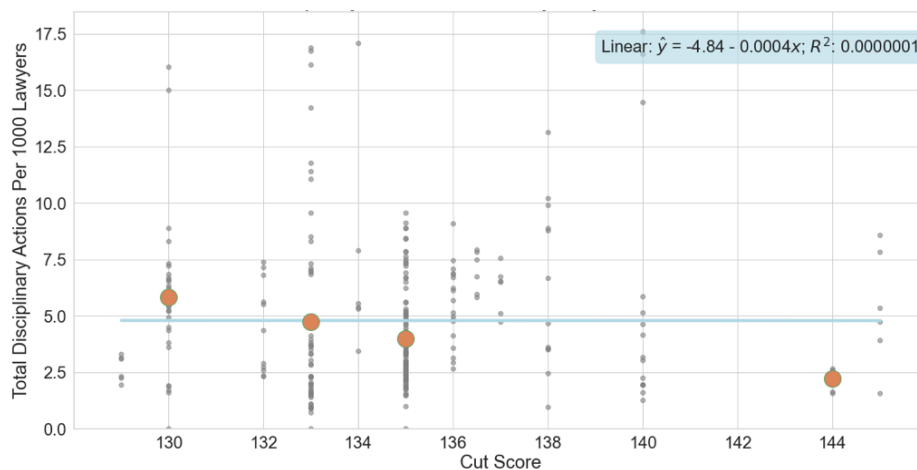


⁵⁴ For Figures 18, 19, and 20, outliers have been screened out based on Cook's distance $>4/N$.

3. Disciplinary Action Filed Per 1,000 Lawyers

Finally, the study did not observe a significant negative relationship in the data between the selection of a cut score and the number of attorneys disciplined in a jurisdiction. Unlike the analysis of complaints and charges filed, the relationship between cut score and disciplinary action was linear, with the same rate of disciplinary action taken per 1,000 lawyers regardless of cut score. See Figure 20.

Figure 20. Linear Fit and R2 Value for the Number of Disciplinary Actions Taken per 1,000 Lawyers from 2013-18



4. Implications of the Finding of No Correlation Between Cut Score and Complaints, Charges, or Disciplinary Action

Examination of whether a high cut score reduced the number of complaints filed, attorneys charged, or attorneys subjected to disciplinary action revealed no significant relationship between the cut score chosen and discipline system activity. The data suggests no causal or predictive relationship between high cut scores and public protection as measured by disciplinary statistics.

There are some limitations to using this type of disciplinary data as the proxy for attorney competence. One concern is that jurisdictions use very different disciplinary and investigative processes and allocate varying amounts of funding to their respective disciplinary systems. It is possible that these differences might account for the lack of significance in Figure 19 and Figure 20 related to charges filed and disciplinary actions taken.

However, the public complaint data in Figure 18 represented an index of the public's perception of harm caused by attorneys in that jurisdiction, expressed as complaints per 1,000 licensed attorneys. The simple filing of a complaint is disconnected from disciplinary system funding, prosecutorial investigations, or adjudicatory processes. Therefore, in the absence of any other objective data related to measuring public protection across jurisdictions, the number of complaints filed is a reasonable and clear proxy for measuring whether the public of that jurisdiction feels protected from attorney incompetence or ethical misbehavior. Summarizing six years of complaint data from up to 48 jurisdictions, Figure 18 indicates that there is no statistically significant relationship between high cut scores and this measure of public protection.

An additional consideration is the possibility that differences in jurisdictional culture affected the number of complaints filed by consumers of legal services in a given jurisdiction. Such cultural differences could include the perception that complaints are not acted upon, a more aggressive consumer protection environment, a fear of retaliation, or a sense that the act of complaining is an admission of client fault or incompetence. Using consumer complaints as a measure of incompetence also assumes clients are accurate assessors of attorney competence. However, considering the breadth of the data and the general similarities among populations and discipline systems, it would be difficult to quantify and measure how differences among jurisdictional attitudes and client expectations might impact complaint filing. As Figures 18, 19, and 20 illustrate, there were differences, both year to year within the same jurisdiction and between jurisdictions in the same year. But in the aggregate, over this large data set and long time frame, no significant relationship between high cut scores and attorney discipline can be observed.

The results of the analysis of disciplinary data in the context of jurisdictional cut scores is not intended to measure whether there is a relationship between an individual attorney's score on the CBX and their future risk of unprofessional or unethical behavior. However, the data clearly indicate that from the standpoint of how jurisdictions regulate licensed attorneys, there is no statistical relationship suggesting that jurisdictions with higher cut scores have a lower incidence of complaints, charges, or disciplinary actions. Therefore, arguments that high cut scores in a specific jurisdiction better protect the public are not supported by these findings.

V. Selecting the California's Cut Score is an Important Policy Decision that Should be Informed by Data on Racial Disparity and Disciplinary Rate

The State Bar of California's mission is to protect the public and includes the primary functions of licensing, regulating, and disciplining attorneys; the advancement of the ethical and competent practice of law; and supporting efforts to create greater access to, and inclusion in, the legal system for minorities.⁵⁵ The CBX and the policies related to exam content, format, scoring, and cut score play a crucial role in each of these primary responsibilities.

A. Public Protection Policy

Historically, the presumption that maintaining one of the highest cut scores in the nation provided the highest level of public protection has played a prominent role in both rhetoric and policy making in California. If true, this could be a valid, rational reason for setting a high cut score standard. However, at least as measured by complaints, disciplinary charges, and disciplinary actions, that is not the case. At the same time, it is also now clear that California's high cut score adversely impacts the number of minority applicants admitted to the profession.

The CBX is one important part of a regulatory scheme for new attorneys, grounded in the need for public protection. The CBX determination of minimum competence is paired with a separate professional responsibility exam, specific and rigorous pre-licensing education requirements, and a moral character evaluation, all of which are intended, in concert, to assure that the public is protected from practitioners who do not have the minimum competence, and other skills, abilities and traits of character, to ethically and competently begin the practice of law

This study is particularly valuable because no previous studies of the relevant data in any jurisdiction have assessed specific cut scores as measures of the CBX's racial impacts on eventual passers and never passers. Furthermore, no previous studies assessed the relationship between cut scores and the incidence of discipline by cut score across multiple jurisdictions. Both of these analyses offer important public protection insights highly relevant

⁵⁵ *Our Mission: What We Do*, State Bar of California, <https://www.calbar.ca.gov/About-Us/Our-Mission> (last visited Sept. 2, 2020).

for policymakers to make effective and valid decisions related to establishing the appropriate cut score for a specific jurisdiction.

A logical relationship should exist between cut scores in the range used by states and competence, and between competence and the incidence rate of discipline (complaints, charges filed, and actions). If there were a protective effect of higher cut scores, some relationship with disciplinary statistics would be expected to exist. However, as reported to the ABA, during the period studied, no such statistically significant relationship existed, and in fact, the data points slightly toward the opposite relationship (states with higher cut scores and a greater rate of complaints, charges and actions). The fact that no statistically significant relationship existed between the choice of cut score and disciplinary complaints raises significant doubt about whether public protection is a rational basis for maintaining a particular cut score, especially when high cut scores also have the disparate racial effects reported in this study. This is an important finding that should be valuable to policymakers when considering other possible implications of using high cut scores to restrict attorney licensure.

B. Diversity of the Profession Policy

Access to justice, and inclusion in the legal system, are primary policy missions of the State Bar and the Court.⁵⁶ Increasing diversity of the profession is expected to improve both access and inclusion, and this cannot be accomplished without admitting more minority attorneys.⁵⁷ If the selection of the cut score for the CBX has a statistically significant disparate impact on

⁵⁶ *Supreme Court of California Issues Statement on Equality and Inclusion*, California Courts: The Judicial Branch of California, California Courts Newsroom, June 11, 2020, <https://newsroom.courts.ca.gov/news/supreme-court-of-california-issues-statement-on-equality-and-inclusion>, (last visited Aug. 22, 2020). “We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person. In our profession and in our daily lives, we must confront the injustices that have led millions to call for a justice system that works fairly for everyone. Each member of this court, along with the court as a whole, embraces this obligation. As members of the legal profession sworn to uphold our fundamental constitutional values, we will not and must not rest until the promise of equal justice under law is, for all our people, a living truth.”

⁵⁷ “Having a diverse legal profession positively impacts the administration of justice, ensures fairness, and promotes the rule of law. The mandate to promote a diverse and inclusive legal profession is central to the State Bar’s mission of public protection. See Report Card on the Diversity of the California Legal Profession, <http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf> (last visited Sept. 24, 2020).

access to the profession on the basis of race and ethnicity, that impact should be an important consideration for policymakers.⁵⁸

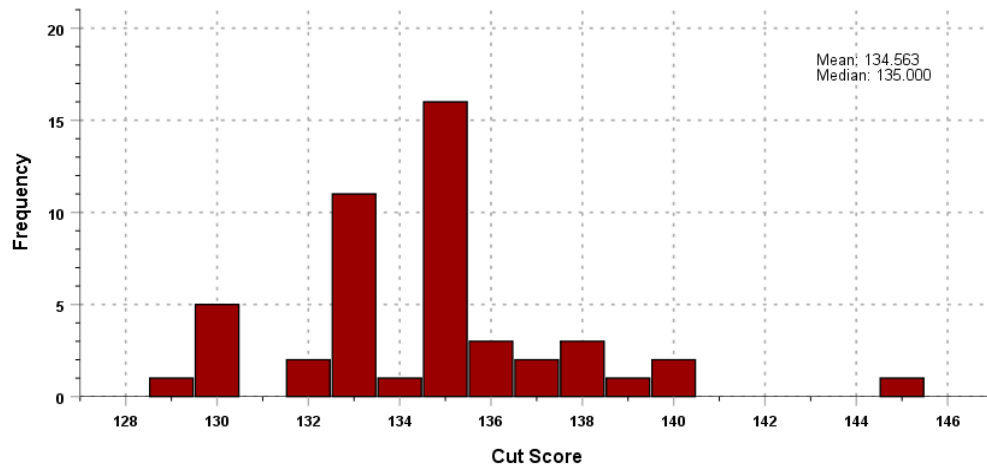
California's recent decision to lower the cut score to 1390 moved California from having the second-highest cut score to the fourth-highest cut score. However, at 1390, California remains at the 93.8th percentile of all cut scores. See Figure 21. More importantly, these data established that 1390 will continue the long-standing pattern of significant, divergent passing rates between Whites and minorities on the CBX. Although these data reflected that each reduction of the cut score increased the number of minority passers, the use of 1390 would have had only a modest quantitative impact over the period studied. At 1390, the CBX would, and will, continue to produce significantly disparate pass rates on the basis of race and ethnicity when compared to the national median cut score of 1350, the New York standard of 1330, and the simulated model of 1300.

The study data show that the choice of cut score relates directly to eventual passing rates, and lower cut scores produce more racially and ethnically comparative passing rates. If 1300 had been adopted as the cut score in 2009, 1,154 more Black, 1,709 more Hispanic/Latinx, and 2,930 more Asian lawyers would have been admitted to practice in California. If 1350 had been adopted, 753 more Black attorneys, 1,162 more Hispanic/Latinx attorneys, and 1,961 more Asian attorneys would have been admitted to the practice in California. At 1390, 294 more Black, 501 more Hispanic/Latinx attorneys, and 880 more Asian attorneys would have been admitted to practice in California.

“The fact that no statistically significant relationship existed between the choice of cut score and disciplinary complaints raises significant doubt about whether public protection is a rational basis for maintaining a particular cut score, especially when high cut scores also have the disparate racial effects reported in this study.”

⁵⁸ See Howarth, Joan W., *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 Geo. J. of Legal Ethics 931, 958 (2020), available at <https://scholars.law.unlv.edu/facpub/1294> (exam validity and nondiscrimination goals support cut score of 1300 as currently used by five states).

Figure 21. Distribution of July 2020 Bar Exam Cut Scores



Source: Based on *Comprehensive Guide to Bar Admission Requirements 2020*, Chart 10, *Grading and Scoring* (National Conference of Bar Examiners & American Bar Association Section of Legal Education and Admissions to the Bar 2020). The cut score for California has been adjusted to the 139 cut score recently adopted by the California Supreme Court.

Figure 21 illustrates the distribution and range of current cut scores across all jurisdictions.⁵⁹ The lowest cut score is currently in Wisconsin at 1290 and the highest cut score is currently in Delaware at 1450 (for comparison purposes adjusting the cut scores to the 2000 point scale used in this study vs. the 200 point scale used by the NCBE). The median of the national range of scores is 1350.

C. Application of the Study to Policy Making

The purpose of this study is not to recommend which cut score is appropriate for California, nor to explain *why* passing rates are racially and ethnically disparate at different cut scores. As previously stated, the establishment of a cut score is a policy decision made by each jurisdiction based on many different policy considerations. This study provides policy makers with relevant and previously unavailable empirical data and analyses to assist in policy decisions that may be influenced by the relationship between cut scores, public protection, and disparate impact on the basis of race and ethnicity.

Confidence in the legal system is essential to the protection of the rule of law, and a bar licensee population representative of the people of California will help build confidence that

⁵⁹ *NCBE Comprehensive Guide to Bar Admission Requirements 2020*, Chart 10 at p. 36-37.
https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf (last visited Sept. 29, 2020).

there is one system of equal justice for all Californians.⁶⁰ The authors of this study hope that this analysis provides a better understanding of the important relationship between cut scores and racial representation in the bar licensee population, and provides valuable data suggesting that high cut scores do not reduce or prevent the incidence of attorney misconduct. It is hoped that the empirical data, not unsupported rhetoric, informs the policy-making decisions on setting an equitable and appropriate cut score.

VI. The Study Team

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⁶⁰ *Id.* See also *2019 California Justice Gap Study, Executive Report*, The State Bar of California, <http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf> (last visited Sept. 11, 2020).

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