

ARTICLES

The High Cost of Lowering the Bar

ROBERT ANDERSON IV* AND DEREK T. MULLER†

ABSTRACT

State bar licensing authorities and law schools have been debating whether the passing score on the bar exam is set at the right level or should be lowered. Much of the debate centers on generalizations without evidence about the effect that changes to the bar exam may have.

We present data suggesting that lowering the bar examination passing score will likely increase the amount of malpractice, misconduct, and discipline among lawyers. Using a large dataset drawn from publicly available California State Bar records, our analysis shows that bar exam score is significantly related to likelihood of State Bar discipline throughout a lawyer's career. We investigate these claims by collecting data on disciplinary actions and disbarments among California-licensed attorneys. We find support for the assertion that attorneys with lower bar examination performance are more likely to be disciplined and disbarred than those with higher performance.

Although our measures of bar performance have only modest predictive power of subsequent discipline, we project that lowering the passing score would result in the admission of attorneys with a substantially higher probability of bar discipline over the course of their careers. But we admit that our analysis is limited due to the imperfect data available to the public. And we do not infer a causal relationship between low bar scores and high discipline rates. For a precise calculation, we call on state licensing authorities to use their internal records on bar scores and discipline outcomes to determine the likely impact of changes to the passing score.

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† Associate Professor of Law, Pepperdine University School of Law.

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The culmination of a law student’s educational journey is taking and passing a state bar exam, the final step to professional licensing as an attorney. The passage of a bar exam, once an arduous but almost guaranteed rite of passage for a law school graduate, has transitioned to a genuinely precarious proposition over the last decade. In July 2018, nationwide performance on the bar exam reached the lowest level since 1984.¹ In one of the largest and most heavily affected states, California, the pass rate on the July 2018 bar exam was 40.7%, reaching a sixty-seven-year low.² The final step in the process of becoming a lawyer has now become uncertain for more law graduates than at any time in recent memory.

The steep decline in bar pass rates over the last decade has prompted many states to consider lowering the bar exam passing score (often called the “cut score”). The Supreme Court of California commissioned a series of studies from the State Bar of California to reexamine the bar exam. In 2017 the California

1. Mark A. Albanese, *July 2018 MBE: The Storm Surge, Again*, THE BAR EXAMINER, Fall 2018, at 30, available at http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2018%2FBCE-TestingColumn-870318.pdf [<https://perma.cc/G2BQ-RVDM>].

2. Cheryl Miller, *Nearly Six in 10 Failed California’s July 2018 Bar Exam*, THE RECORDER (November 16, 2018, 09:53PM), <https://www.law.com/therecorder/2018/11/16/nearly-six-in-10-failed-californias-july-2018-bar-exam/> [<https://perma.cc/S62A-2J8D>].

Supreme Court ultimately decided to leave the passing score in place at that time.³ But the continuing declines in pass rate in 2018 in California and across the nation have reignited the debate. The controversy has caused many to wonder what the role and even purpose of the bar exam is, and the Supreme Court of at least one major state (Texas) has asked for a task force report about whether to effectively abolish the bar exam by adopting a “diploma privilege.”⁴

The process of licensing lawyers through the use of a written bar examination took hold in the early twentieth century and gained momentum through the creation of the National Conference of Bar Examiners around mid-century.⁵ The bar exam is designed as a test of minimum competence of prospective lawyers.⁶ It tests legal reasoning, and bar exam scores correlate with other measures of legal ability.⁷ Like any test, however, it is not perfect, and scrutiny of its imperfections has highlighted a rift between the licensing authorities and law schools.⁸ But much of this debate centers on generalizations without evidence about the effect that changes to the bar exam may have.

To help provide evidence for a more meaningful debate, we have examined the relationship between bar exam scores and career discipline rates. In this Essay,

3. Ross Todd, *California Supreme Court Won't Lower Bar Exam Passing Score*, THE RECORDER (October 18, 2017, 06:56PM), <https://www.law.com/therecorder/almID/1202800795713/California-Supreme-Court-Wont-Lower-Bar-Exam-Passing-Score/> [https://perma.cc/C3G9-GU2Q].

4. See Order Establishing Task Force on the Texas Bar Examination, Misc. Dkt. No. 16-9104 (Tex. June 24, 2016), available at <http://www.txcourts.gov/media/1400859/169104.pdf> [https://perma.cc/553P-5XLW]. The Task Force ultimately recommended against the “diploma privilege,” a route to professional licensure used only in Wisconsin. See TASK FORCE ON THE TEXAS BAR EXAMINATION, RECOMMENDATIONS AND REPORT 28 (2018), available at https://www.txcourts.gov/media/1441612/final-task-force-report_051518.pdf [https://perma.cc/T3DC-PFNL].

5. See Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards* at 4, available at https://media.law.wisc.edu/m/ywq4n/gargoyle_21_1_2.pdf [https://perma.cc/2RYQ-R6R3].

6. See, e.g., Ill. Sup. Ct. R. 701(a) (“Subject to the requirements contained in these rules, persons may be admitted or conditionally admitted to practice law in this State by the Supreme Court if they are at least 21 years of age, of good moral character and general fitness to practice law, and have satisfactorily completed examinations on academic qualification and professional responsibility as prescribed by the Board of Admissions to the Bar or have been licensed to practice law in another jurisdiction and have met the requirements of Rule 705.”); AM. EDUC. RESEARCH ASS’N, AM. PSYCHOLOGICAL ASS’N, & NAT’L COUNCIL ON MEASUREMENT IN EDUC., THE STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 63–64 (2014) (“The primary purpose of licensure or certification is to protect the public . . . [and] to provide the public . . . with a dependable mechanism for identifying practitioners who have met particular standards. The focus of test standards is on levels of knowledge and skills necessary to assure the public that a person is competent to practice . . . [and] to help ensure that those certified or licensed meet or exceed a standard or specified level of performance.”).

7. See NCBE Testing and Research Department, *The Testing Column*, THE BAR EXAMINER, Winter 2017–18, at 34, 37, available at http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2018%2FBFE-860417-TestingColumn.pdf [https://perma.cc/8T3D-HAGB].

8. See, e.g., David L. Faigman, Stephen C. Ferruolo & Jennifer L. Mnookin, *Why Is It So Much Harder To Become A Lawyer In California Than In New York?*, L.A. TIMES, Nov. 29, 2018, <https://www.latimes.com/opinion/editorials/la-ed-california-bar-exam-20171006-story.html> [https://perma.cc/784R-WNZQ]; David L. Faigman, *The California Bar Exam Flunks Too Many Law School Graduates*, L.A. TIMES, Mar. 21, 2017, <https://www.latimes.com/local/lanow/la-me-ln-bar-pass-score-20171018-story.html> [https://perma.cc/HD4W-UT49].

we present data suggesting that lowering the bar examination passing score will likely increase the amount of disciplinary rulings against lawyers. Using a large dataset drawn from publicly available California State Bar records, our analysis shows that bar exam score is significantly related to likelihood of State Bar discipline throughout a lawyer's career. We investigate these claims by collecting data on disciplinary actions and disbarments among California-licensed attorneys. We find support for the assertion that attorneys with lower bar examination performance are more likely to be disciplined and disbarred than those with higher performance.

Although our measures of bar performance have only modest predictive power of subsequent discipline, we project that lowering the passing score would result in the admission of attorneys with a substantially higher probability of bar discipline over the course of their careers. But we admit that our analysis is limited due to the imperfect data available to the public. And we do not infer a causal relationship between low cut scores and high discipline rates. For a precise calculation, we call on state licensing authorities to use their internal records on bar scores and discipline outcomes to determine the likely impact of changes to the passing score.

I. BACKGROUND

The passing score in California is 1440 on a 2000-point scale, exceeded only by Delaware's 1450.⁹ It has also maintained this score since it first adopted the Multistate Bar Exam ("MBE") in 1987. In choosing this score, California conducted a study that concluded that a score of 1440 was comparable to the old standard of scoring at least 70% on the bar exam that predated the MBE.¹⁰ This provides a stable history of passing scores.

California has considered lowering its bar exam score in response to the recent decline in bar passage rates. The pass rate on the July 2016 California bar exam was the lowest since 1984,¹¹ before rebounding slightly in July 2017,¹² and falling

9. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 33–34 (2018), <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html#p=45> [https://perma.cc/27PK-TXD5]. Most states calculate the score on a 200-point scale. California calculates its score on a 2000-point scale. We use the 2000-point scale throughout this Essay for consistency. Readers can simply divide all scores mentioned in this Essay by 10 to interpret the results in other states.

10. See REPORT TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, FINAL REPORT ON THE 2017 CALIFORNIA BAR EXAM STANDARD SETTING STUDY, 4 (2017), <http://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf> [https://perma.cc/AX4R-28SA] ("The one thing that has remained relatively constant [between 1920 and 2017], however, is the pass line which has remained at, or very close to, 70 percent.").

11. Cheryl Miller, *California Law School Deans Want Bar Exam Pass Score Lowered*, THE RECORDER (Feb. 1, 2017, 3:00 PM), <http://www.therecorder.com/id=1202778168822/California-Law-School-Deans-Want-Bar-Exam-Pass-Score-Lowered?slreturn=20170231011356> [https://perma.cc/J99S-XL4D].

12. Cheryl Miller, *How California Law Schools Fared on July 2017 Bar Exam*, THE RECORDER, <https://www.law.com/therecorder/sites/therecorder/2017/12/27/how-california-law-schools-fared-on-july-2017-bar-exam/> [https://perma.cc/JD83-SF7D] (last updated Jan. 2, 2018, 4:55 PM).

to a new low in 2018.¹³ Part of this decline was assuredly due to the decline in ability of test-takers. Student demand for legal education began to decline in 2010, which led to law schools admitting students with lower qualifications and more likely to fail the bar exam.¹⁴

The deans of law schools accredited by the American Bar Association complained that the California bar exam's passing score is too high and fails too many prospective attorneys.¹⁵ The same concerns have been shared by deans of California accredited law schools.¹⁶ The relatively high passing score for the California bar makes it one of the most difficult bar exams in the country.¹⁷ The resulting outcry from California law school deans has prompted the State Bar of California to reexamine the bar exam. In early discussion on the topic, the Executive Director of the State Bar told the state Assembly Judiciary Committee there is "no good answer" for why the passing score is set where it is.¹⁸ Some deans have even begun to question the "validity" of the exam—whether the bar exam adequately measures minimal competence for the practice of law.¹⁹

Most states have passing scores between 1330 and 1360, which California deans have proposed implementing in California.²⁰ California's high score limits the number of lawyers that may serve the public, and, to the more-pressing

13. See Miller *supra* note 2.

14. See Roger Bolus, *Recent Performance Changes on the California Bar Examination (CBE): Insights from CBE Electronic Databases* 17 (2017), <http://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf> [https://perma.cc/WGF4-UZ59] (describing that at least some of the change in pass rates is attributable to changes in quality of test-takers); Roger Bolus, *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> [https://perma.cc/WGF4-UZ59] (same).

15. See Miller, *supra* note 11.

16. Claudia Meléndez Salinas, *Monterey Law School Leads Fight to Lower Bar Exam's Minimum Passing Score*, MONTEREY HERALD (Mar. 30, 2017, 6:10 PM), <http://www.montereyherald.com/article/NF/20170330/NEWS/170339981> [https://perma.cc/6JHC-AJX3].

17. See *supra* note 8. Delaware requires a scaled score of 1450 to pass the bar exam. California has the second-highest cut score of 1440. As of 2018, just four other states had cut scores of 1400 or higher: Alaska, Nevada, North Carolina, and Virginia.; ABA, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2019 33 (2019), www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf [https://perma.cc/6AFG-YNHE] (last visited Apr. 25, 2019).

18. David L. Faigman, *The California Bar Exam Flunks Too Many Law School Graduates*, L.A. TIMES (Mar. 21, 2017, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-faigman-california-bar-exam-cut-score-20170321-story.html> [https://perma.cc/5KHX-U63H].

19. Cheryl Miller, *Frustrated Law Deans Take Bar-Exam Complaints to Lawmakers*, THE RECORDER (Feb. 14, 2017, 7:18 PM), <http://www.therecorder.com/id=1202779158816/Frustrated-Law-Deans-Take-BarExam-Complaints-to-Lawmakers> [https://perma.cc/A3CS-X6CF].

20. This recommended range has varied over time. Compare Miller, *supra* note 11. (February proposal recommending a cut score in the range of 1330 to 1360), with Letter from Joan R. M. Bullock, President & Dean, Thomas Jefferson Sch. of Law et al., to State Bar of Cal. (Aug. 25, 2017), <http://taxprof.typepad.com/files/ca-law-deans-comment-to-ca-bar-082517.pdf> [https://perma.cc/8SQU-7EBP] (August proposal recommending a cut score in the range of 1330 to 1390), and Lyle Moran (@lylemoran), TWITTER (Oct. 2, 2017, 1:17 PM), <https://twitter.com/lylemoran/status/914947408907313152> [https://perma.cc/8USL-KQYP] (October proposal recommending a cut score in the range of 1350 to 1390).

concern of California law school deans, it limits the opportunities of law school graduates.

But lowering the score may also have significant costs. The bar exam is designed to be a test of minimum competence. Lowering the cut score means students who performed worse on the bar exam will practice law. That may result in lower quality attorneys practicing in California. We set out to examine that relationship.

II. DATA AND METHODOLOGY

We collected data on all attorneys listed on the California State Bar website.²¹ We used a computer script to crawl the bar numbers sequentially of all California attorneys, yielding a dataset of 240,707 California attorneys admitted to the bar from 1975 through 2016. We collected the attorneys’ law schools, undergraduate schools, and date of admission to the California bar. In addition, we collected information on each member’s public record of discipline, if any. The discipline types we collected fall in three broad categories: disbarred, resigned with charges pending, and other public record of discipline. The discipline records are set forth in Table I, below.

TABLE I
NUMBER OF LAWYERS BY DISCIPLINE STATUS

<i>Member Status</i>	<i>Number of Lawyers</i>	<i>Percentage</i>
Disbarred	1,877	0.8%
Resigned with Charges Pending	1,150	0.5%
Other Public Record of Discipline	3,426	1.4%
No Public Record of Discipline	234,253	97.3%

The incidence of discipline is low overall but increases substantially with the attorney’s number of years of practice. There is virtually no discipline in the first ten years of practice, then the rate of discipline increases in a roughly linear fashion. For each year after the tenth year, the percentage of attorneys disciplined increases by approximately 0.15 percentage points, reaching approximately 5% at thirty-five years since admission to the bar and 7% at forty years since admission.

21. *Attorney Search*, THE STATE BAR OF CALIFORNIA, <http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch> [<https://perma.cc/EV59-Z7JG>].

Our objective is to estimate whether and how much lowering the passing score might increase the rate of professional discipline among attorneys in California. We do not have access to the bar exam scores of these attorneys. Accordingly, we use proxies to estimate those scores. Specifically, we use 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 works because there is a correspondence between a law student's law school and LSAT score, and between his or her LSAT score and his or her expected MBE score.²² The overall bar exam score, in turn, is scaled to the MBE score, allowing us to predict bar exam scores.

To estimate bar exam scores for each attorney, we collected data on 25th and 75th percentile LSAT scores of the full-time law school entering classes from 1996 to 2006.²³ We average these figures and predict the law school's average bar exam score by interpolating from data published by the National Conference of Bar Examiners. Our analysis includes all graduates from 1975 to 2006. We end in 2006 because there is almost no public discipline imposed in the first ten years of practice and our data ends with 2016.

The fact that LSATs vary by law school and MBE scores vary by LSAT does not necessarily allow reliable inferences about law schools' MBE scores. But because of an unusual release of data for July 2016 from the State Bar,²⁴ we were able to validate our technique against the actual bar exam scores for California schools. Most graduates of American Bar Association-accredited law schools pass the California bar exam on the first attempt.²⁵ But the passing scores can vary significantly. Consider the July 2016 bar exam: Stanford had a first-time pass rate of 91%, but its mean exam score was a 1620, far exceeding the 1440 cut

22. Research from the National Conference of Bar Examiners pegs the correlation between LSAT and MBE score at 0.57. Susan M. Case, *The Testing Column: Identifying and Helping At-Risk Students*, THE BAR EXAMINER, Dec. 2011, at 30, 30–32, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2011/800411Testing.pdf [https://perma.cc/Q6TW-Q5DD].

23. Consistent and reliable LSAT data before 1996 is not readily obtainable for many law schools. But the results are not likely to vary based on the years chosen. There is substantial evidence that the hierarchy among law schools has persisted since at least the 1920s, with relatively little movement of schools in that hierarchy, regardless of the particular ranking methodology one adopts. See Olufunmilayo B. Arewa, Andrew P. Morris & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941 (2014).

24. See, e.g., Cheryl Miller, *By the Numbers: How California Law Schools Fared on the Bar Exam*, THE RECORDER (Dec. 12, 2016, 7:40 PM), <http://www.therecorder.com/id=1202774508208/By-the-Numbers-How-California-Law-Schools-Fared-on-the-Bar-Exam?mcode=0&curindex=0&curpage=ALL> [https://perma.cc/J3BJ-WWUJ].

25. For the July 2016 administration of the bar exam, first-time takers who graduated from American Bar Association-accredited law schools passed at a 61.9% rate. See *General Statistics Report, July 2016 California Bar Examination*, THE STATE BAR OF CAL. (July 2016), http://www.calbar.ca.gov/Portals/0/documents/admissions/Statistics/JULY2016STATS120716_R.pdf [https://perma.cc/G4W7-V6HS]. For the July 2011 test, first-timers passed at a 73.6% rate. See *General Statistics Report, July 2011 California Bar Examination*, THE STATE BAR OF CAL. (July 2011), <http://www.calbar.ca.gov/Portals/0/documents/admissions/examinations/JULY2011STATS.122811-R.pdf> [https://perma.cc/L86A-ZF5K].

score.²⁶ The University of Southern California had a first-time pass rate of 88%, but its mean exam score was a 1562.²⁷ These are quite similar to the scores predicted by our model (1605 for Stanford and 1570 for USC). Our estimates for other schools were similarly accurate. Our bar exam score estimates also closely correspond with the actual bar exam scores achieved by graduates of schools within the same LSAT ranges, as disclosed by a California State Bar report.²⁸

With an estimate of bar exam score for each attorney (which is based on the estimated mean for the attorney’s school), we then use a logistic regression to model the relationship between estimated bar exam score, years since admission to the bar, and probability of discipline.²⁹

III. BAR EXAM EFFECT ON DISCIPLINE RATES

A. RESULTS

We estimate a simple logistic regression model of the probability of attorney discipline as a function of years of practice and estimated bar examination score. The results of our model are presented below in Table II. The results show that the estimated bar exam score is strongly related to the probability of discipline, as is the number of years since admission to the bar. The model includes an interaction effect between the two variables because the effect of each changes with the level of the other.

TABLE II

MODELING BAR EXAM SCORE AND DISCIPLINE

Estimated Bar Exam Score	−0.138*** (0.012)
Years Since Admission	−0.186** (0.061)
Estimated Bar Exam Score * Years Since Admission	0.0016*** (0.0004)

Logistic regression with a binary dependent variable equal to 1 if the attorney was disciplined over his or her career and 0 otherwise. N=104,992. Standard errors in parentheses. * Indicates significant at 5% level. ** Indicates significant at 1% level. *** Indicates significant at 0.1% level.

26. Miller, *supra* note 12.

27. *Id.*

28. See ROGER BOLUS, RESEARCH SOLS. GRP., RECENT PERFORMANCE CHANGES ON THE CALIFORNIA BAR EXAMINATION (CBE): INSIGHTS FROM CBE ELECTRONIC DATABASES 15 tbl.5 (2017), available at <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Final-Bar-Exam-Report.pdf?ver=2018-11-15-110106-057> [<https://perma.cc/N6R2-C9VY>].

29. Ideally, the methodology for this study would have used survival analysis, as it is likely that low bar exam scores may accelerate the time to discipline, not only increase its likelihood. However, we do not have the detailed data on the dates of discipline that would allow us to conduct this analysis. State licensing authorities do have this information, and should conduct their analyses in that manner.

The logistic regression coefficients in [Table II](#) can be a bit difficult to interpret directly. What they imply, however, is that over the course of a thirty-five-year career, the model estimates that the probability of discipline increases by approximately one percentage point for each ten point decrease on the California scale within the range of passing scores reportedly being considered by the State Bar (1330 to 1440). If California's passing score were lowered to 1330, as has been proposed, attorneys passing the bar with a score of 1330 would have an estimated 19% chance of discipline over thirty-five years of law practice. If it were lowered to 1350, we estimate an approximately 16.8% chance of discipline for attorneys receiving that score.³⁰ This compares with an estimate of approximately 8.8% chance for attorneys who pass with the borderline current passing score of 1440 and 3.7% for first-time passers generally.³¹

The model's predictions are depicted graphically in [Figure 1](#), below, where the curved line shows the predicted discipline rates by bar examination score for attorneys with thirty-five years of practice experience since admission to the bar. We superimposed with labeled points on the graph the actual rate of discipline for attorneys who graduated from various law schools and who have about thirty-five years of practice.³²

B. VALIDATION OF THE MODEL

We do not have the benefit of all of the data necessary to make exact calculations to model the relationship between bar score and discipline. In particular, we do not have individual data for LSATs, much less bar exam scores (which are not even available to successful candidates themselves). As a result, this analysis pieces together various individual and aggregate items of information from different years. It requires numerous assumptions that we believe are reasonable but may not ultimately reflect the true relationships. Thus, in this Part we validate our model by testing it against another approach derived independently of the model.

We do have individual data for one very important piece of information: whether candidates were admitted to the bar in December or in June. The vast majority of candidates are admitted in one of those two months, corresponding to

30. This probability is calculated using the intercept of 15.98 as $\exp(15.98 + 0.138 * 144 - 0.186 * 35 + 0.0016 * 35 * 144) / [1 + \exp(15.98 + 0.138 * 144 - 0.186 * 35 + 0.0016 * 35 * 144)]$. Probabilities for other combinations of years and bar scores can be calculated by substituting in values for the score of 144 and 35 years.

31. This estimate is based on an estimated first time passer mean score of 1552.5, which has been documented in California bar studies. See STEPHEN P. KLEIN & ROGER BOLUS, COMPARISONS OF EVENTUAL PASSING RATES IN THE 1990 AND 1991 COHORTS 2 (1994), http://www.seaphe.org/pdf/past-bar-research/Comparisons_of_Eventual_Passing_Rates_in_the_1990_and_1991_Cohorts.pdf [<https://perma.cc/R8QE-M87W>].

32. More precisely, we pooled attorneys with at least 33 years and up to 37 years since bar admission to ensure enough attorneys for each school to produce a reasonably reliable estimate. The horizontal position of each law school is the estimated median score on the bar examination, based on the law school's estimated median LSAT.

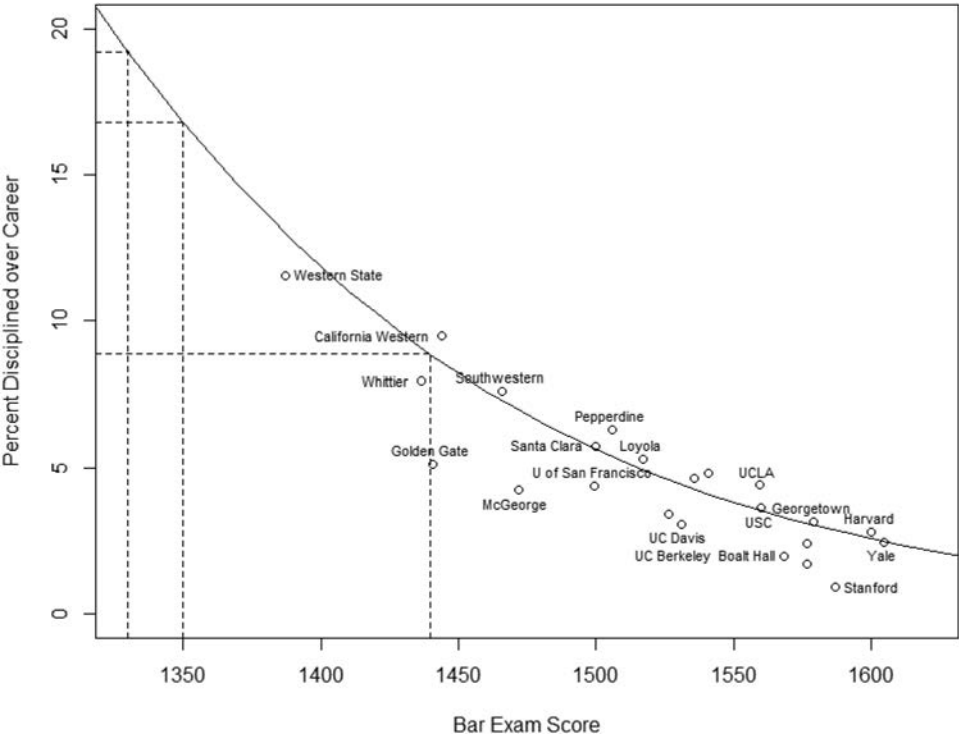


FIGURE 1

those who passed the bar in July and February administrations of the bar exam, respectively. The vast majority of those who pass in July are first-time takers (never having failed) and the majority of those who pass in February are repeaters (having previously failed).³³ By examining the discipline rates between these two groups, we can get a sense for how bar examination score plays into discipline rate on an individual level.

Our data indicates that attorneys admitted in December (almost all of whom are first-time passers) have a discipline rate of about 4.7% at thirty-five years.³⁴ In contrast, those admitted in June (more than half of whom are repeaters) have a discipline rate of about 9.1% at thirty-five years. These figures, however, understate the difference, because almost half of February takers who pass are first-time takers and some July takers who pass are repeaters.³⁵ Adjusting for this fact,

33. STATE BAR OF CAL., GENERAL STATISTICS REPORT FEBRUARY 2018 CALIFORNIA BAR EXAMINATION 1 (2018), http://www.calbar.ca.gov/Portals/0/FEB2018_CBX_Statistics.pdf [https://perma.cc/K95B-VLMC]; STATE BAR OF CAL., GENERAL STATISTICS REPORT JULY 2018 CALIFORNIA BAR EXAMINATION 1 (2018), http://www.calbar.ca.gov/Portals/0/documents/admissions/JULY2018_CBX_Statistics.pdf [https://perma.cc/3TJX-4MVR].

34. See *Attorney Search*, *supra* note 21.

35. See *supra* note 33, at 1.

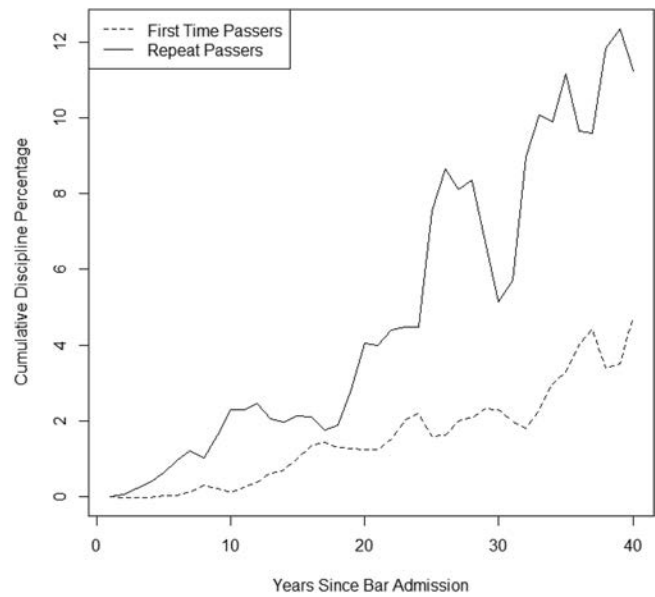


FIGURE 2

the rate of discipline among first-time passers is likely only about 3.8%, and the rate of discipline among repeaters is likely over 12%.³⁶

Figure 2 below shows this relationship of cumulative discipline for first-time passers and repeat passers as a function of years since bar admission. For both groups, the cumulative rate of discipline (percent ever disciplined) increases over time, as lawyers who have been admitted to the bar longer have more opportunities for discipline. But the repeat passers have a higher rate of discipline for all levels of experience, and as years of experience increase, the two rates diverge from one another.

This corresponds almost perfectly to our model’s predictions. Those who pass the bar on the first time have historically had an average score of approximately 1552.5,³⁷ which corresponds to a discipline rate of 3.7% in our model (see Figure 1), almost identical to the 3.8%. Those who pass the bar on two or more attempts have an average first-time score of 1367.5, or almost 200 points lower, on average.³⁸ That score would predict a discipline rate of about 15% under our model. Note, however, that all of these takers scored over 1440 on a subsequent exam, so their likely “true” ability is probably slightly above 1400, averaging out the noise

36. We calculate these figures by setting up two equations, one for February and one for July, where the total discipline rate for each exam is equal to the (unknown) discipline rate for first-time and repeat takers, weighted by the number of passers in each category for each exam. We then solve for the first-time discipline rate and repeater discipline rate, giving 3.82% and 12.62%, respectively.

37. See KLEIN & BOLUS, *supra* note 31.

38. See *id.*

of the performance on the two tests. That would give a discipline rate of 12%. Thus, although our model relies on aggregate (and noisy) data, it gives roughly accurate predictions of the individual data we do have.³⁹

C. SIMILAR STUDIES AND OTHER EVIDENCE

Our findings are also bolstered by research conducted in other studies. In a smaller study of Connecticut attorney discipline,⁴⁰ researchers found that failing the bar exam was a significant predictor of discipline, even when many “character and fitness” variables are controlled.⁴¹ In addition, the study found that law school grades were among the strongest predictors of subsequent discipline, even when character and fitness variables were controlled.⁴² Law school grades are tightly correlated with bar exam scores, providing further evidence of a connection between bar score and discipline.⁴³ The researchers did not focus on these findings in the text of their work, but the results are contained in the analysis presented. This provides strong evidence supporting the relationships we have found, even when other potential causes have been statistically controlled. A more recent study based on Tennessee data found that bar exam failure, especially repeated bar exam failure, predicted subsequent professional discipline.⁴⁴

We also find support for our findings in other California State Bar data that examine the question the other way around. The above analysis attempts to predict the probability of discipline given bar failure, but California also allows one to examine the probability of bar failure given discipline. Disciplined attorneys are often required to retake the bar exam as a condition of reinstatement. Over the period from 2011 to 2018, only 37 of 360 total attempts by such disciplined attorneys resulted in a passing score, constituting a 10.3% pass rate.⁴⁵ This extremely low rate of bar passage among disciplined attorneys is striking, especially considering disciplined attorneys succeeded in passing the California bar in the past (most likely after multiple attempts). This provides further evidence for the link between bar score and discipline.

39. We concede that our model relies on LSAT scores as a proxy for bar scores, but this validation eliminates the use of LSAT scores from the analysis. Better, of course, would be individual bar exam scores that the State Bar could use for a precise analysis.

40. LESLIE C. LEVIN ET AL., LAW SCH. ADMISSION COUNCIL, A STUDY OF THE RELATIONSHIP BETWEEN BAR ADMISSIONS DATA AND SUBSEQUENT LAWYER DISCIPLINE 1 (2013), <https://www.lsc.org/data-research/research/study-relationship-between-bar-admissions-data-and-subsequent-lawyer> [<https://perma.cc/97RX-GYQK>].

41. *Id.* at 26 (presenting data as to the logistic regression predicting discipline in Model 4). In models in which law school rank and grades were controlled, prior failing attempts were not statistically significant, but that is because law school grades are an excellent predictor of bar exam scores.

42. *Id.*

43. See Bolus, *supra* note 14, at 34.

44. See Jeffrey S. Kinsler, *Is Bar Exam Failure a Harbinger of Professional Discipline?*, 91 ST. JOHN'S L. REV. 883 (2018).

45. Calculation by the authors based on State Bar data available at <http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Exam-Statistics> [<https://perma.cc/RL8K-5H9S>] (last visited May 5, 2019).

D. CAVEATS

We must present some caveats to our analysis. The most important is that we do not have individual data for bar examination scores, and therefore our analysis relies on aggregate data to a significant extent. But the individual data that we do have on bar passage strongly confirms our results, and independent research in other states further bolsters the relationship. As a result, we are confident that the relationship between lower bar examination score and higher discipline is accurate. The question is one of the magnitude of the effect.

The magnitude of the effect may be larger or smaller than we estimate here. Note in [Figure 1](#) that the rate of discipline increases faster as bar examination scores drop. It is possible that the true relationship is linear, which is suggested somewhat by the scatterplot of law schools in [Figure 1](#). This would mean the predicted rate of discipline for the lower exam scores would be closer to 15%, instead of the 19% we predict. More likely, however, is that the rate of discipline rises *faster* than we predict for very low bar scores. This is because at the lower end of law schools we only have data on those who eventually pass the bar—and many do not eventually pass. Those who pass the bar obviously have higher exam scores than the school as a whole, particularly at schools with lower bar passage rates. Accordingly, it is possible the true discipline rate at the 1330 passing score would be *much* higher than our model suggests. Of course, it is also possible that the reverse is true, which is why an investigation of the granular data by state licensing authorities is so important.

IV. DISCUSSION

A. THE NEED FOR INDIVIDUALIZED DATA

Our analysis finds that lowering the bar exam passing score will increase the amount of attorney discipline in California. We cannot establish with precision the exact discipline rate that will result from lowering the passing score. We can, however, assert with confidence that there is a relationship between bar examination score and probability of discipline. The data we have collected should raise serious concerns about the effect on consumers of lowering the passing score.

The only way to make precise estimates of the impact of changing the passing score is for state bar licensing authorities to use internal records on bar examination scores and discipline outcomes to determine the likely fallout. This would also have the advantage of potentially including non-public records of discipline that we cannot analyze. It is especially important to perform this analysis prior to changing the passing score, because discipline does not manifest until many years after bar admission. As a result, the public will not know the extent of the effects of lowering the passing score for many years, or even decades. Accordingly, we strongly recommend the California State Bar and other licensing authorities undertake that analysis prior to changing passing scores.

Our findings do not answer the question of whether the California Supreme Court or the governing authorities of any other state should change the passing score. They do, however, suggest that there are costs to lowering the passing score that are not widely appreciated or acknowledged. There are costs and benefits on both sides of the analysis. A change will make legal services more available to those who cannot afford them. On the other hand, we are confident that lowering the bar exam score will create additional instances of malpractice and professional misconduct. The California State Bar and other licensing authorities must make judgments about risk tolerance and the acceptable levels of likely attorney discipline. And state licensing authorities in other jurisdictions should engage in similar analyses.

The relationship between scores on the Multistate Professional Responsibility Exam (MPRE) and career discipline rates is also worth investigating. Unlike the bar exam, which is designed to be a test of minimum competency to practice law, the MPRE, of more recent vintage, is expressly designed to “measure examinees’ knowledge and understanding of established standards related to the professional conduct of lawyers.”⁴⁶ Topics of interest include examining whether discipline rates differ for those admitted before and after a jurisdiction implements an MPRE requirement, and whether MPRE scores are any more predictive than general bar exam scores.

B. POSSIBLE CAUSES FOR DISPARITIES IN DISCIPLINE RATES

Our model concludes that there would be an increase in discipline if the score were lowered. But we make no effort to identify reasons *why* attorneys with lower scores on the bar exam are subject to higher discipline rates. We concede there are many possibilities for disparities in discipline rates that ought to be considered among the costs and benefits of lowering the passing score. The causal mechanism for the correlation between low bar scores and discipline is vital not only for the question of whether to lower the passing score, but what protective mechanisms should be put in place if the passing score is lowered.

For example, there is a socioeconomic gap between the students who attend the most elite law schools and those who attend more marginal law schools.⁴⁷ That gap may manifest itself in racial or socioeconomic disparities in attorney discipline, including disparate treatment in investigation and prosecution. If that is the cause of the connection, it would suggest a need for increased attention to demographic effects on discipline. We lack sufficient data to evaluate these possibilities.⁴⁸

46. *Jurisdictions Requiring the MPRE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/> [https://perma.cc/ZK2M-2URH] (last visited May 5, 2019).

47. See, e.g., Richard H. Sander, *Class in American Legal Education*, 88 DENVER U. L. REV. 631 (2011).

48. The State Bar has been reluctant to collect and disclose such information. See, e.g., THE STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL SIZE LAW FIRMS AND LARGE SIZE LAW FIRMS 14 n.3 (2001), <http://www.calbar.ca.gov/>

Another possibility is that employment opportunities may differ significantly and contribute to different discipline rates. Graduates of more elite law schools secure jobs with higher compensation,⁴⁹ which provides them greater financial security and perhaps reduces the likelihood that they would feel compelled to engage in certain types of unethical behavior, such as stealing money from a client.⁵⁰ Graduates of some law schools may also be less likely to encounter practice settings where complaints are more common or ethical issues are encountered more frequently. Indeed, many graduates of elite law schools working at elite law firms likely never handle billing, whereas solo practitioners are much more likely to handle clients' money and engage in behavior likely to lead to comingling of funds.⁵¹ If this mechanism explains the connection, it would suggest the need for a graduated system of law firm regulatory supervision, with increased safeguards to protect clients from the types of practitioners who might victimize them.

It may be the case that graduates of more elite law schools are more sophisticated in covering up their unethical behavior or are more likely to successfully resist allegations before the state bar. That causal mechanism would suggest important needed reforms in how the discipline process is conducted.

One common criticism of our work is that many states have lower passing scores and yet seem to have functional markets for legal services. We are unable to compare our results against states like New York with lower cut scores. Cross-state comparisons may have little value due to disparities in state bar disciplinary procedures, enforcement, and priorities.⁵² Nevertheless, we do have strong support for our conclusions from studies conducted in Connecticut and Tennessee,⁵³ lending some credence to the conclusion that the effect is not specific to California.⁵⁴

Portals/0/documents/reports/2001_SB143-Report.pdf?ver=2017-05-19-134106-347 [https://perma.cc/S5KM-VNN7] (discussing reluctance to collect data on size of law firm, type of practice, and ethnicity).

49. See Arewa, Morriss, & Henderson, *supra* note 23, at 967.

50. See, e.g., Eli Wald, *Book Review*, 59 J. LEGAL EDUC. 311, 323–24 (2009) (reviewing RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008)) (describing ethical dilemmas arising from short-term financial needs and uncertain cash flow for solo practitioners).

51. See THE STATE BAR OF CAL., *supra* note 48, at 14 (finding that two-thirds of complaints received by the state bar in a one-year period were against sole practitioners, along with 68% of investigation files and that 78% of disciplinary cases prosecuted and completed).

52. See generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011) (studying attorney discipline nationwide to address differences and difficulties in competing systems); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (addressing challenges of cross-jurisdictional practice of law given the disparities in professional discipline across jurisdictions).

53. See *supra* notes 40–44 and accompanying text.

54. The California State Bar included in its report a chart that purports to display the relationship between each state's cut score and attorney discipline rates, with its conclusion that there is no relationship between cut scores and discipline. See REPORT TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, *supra* note 10, at 44–45. We believe cursory analyses like these are deeply flawed for reasons set forth at Robert Anderson, *The California Bar Exam and Attorney Discipline Debate Takes a Strange Turn*, WITNESSETH (Sept. 5, 2017), <http://witnesseth.typepad.com/blog/2017/09/the-california-bar-exam-and-attorney-discipline-debate-takes-a-strange-turn>.

C. THE EFFECT OF LOWERING THE SCORE

As discussed, there are many possible reasons *why* attorneys may be subject to discipline unrelated to their performance on the bar exam. If those things are the actual cause of attorney discipline, why should the bar score be the basis for evaluating discipline?⁵⁵ Even though sole practitioners are subject to higher discipline rates, one would hardly recommend limiting the number of sole practitioners. Or even though men are subject to higher discipline rates,⁵⁶ one would not suggest restricting the practice of law based on gender. Should bar score be any different?

We are sympathetic to these concerns. Nevertheless, none of these concerns undermine our point that discipline rates are still higher among attorneys with lower bar scores. Even if we controlled for a number of additional factors, this underlying fact would remain unchanged. While there might be reasons that explain *why* a disparity in discipline exists, lowering the cut score would still increase the likelihood of discipline, regardless of the reason why. And awareness of the effect of lowering the score should alter how a licensing authority approaches its cost-benefit analysis.

D. WADING INTO THE COST-BENEFIT DEBATE

Given that lowering the bar exam score will increase the number of attorneys who face discipline over the course of their careers, should the score nevertheless be lowered, or should it remain the same? We do not offer thoughts on the best answer to this question—the risk tolerance for excluding ethical attorneys or admitting attorneys who will face discipline, for instance, and the costs associated with each of them—because the relationship between bar exam scores and discipline rates is just one part in a cost-benefit analysis. But we offer several ways of using this evidence to think about the larger question.

For example, the discipline rate is relatively low—about 5% after thirty-five years of practice. Should this affect a State Bar's decision-making process regarding the cut score? By lowering the cut score, we would expect the entering cohort to have a thirty-five-year discipline rate exceeding 10%, and perhaps approaching 20% at the very low end of those admitted, depending on how low the cut score is set and subject to individualized data from the State Bar.

By lowering the cut score, there would be more attorneys who would provide more legal services to the public and potentially increase access to justice and

html [https://perma.cc/ASR4-5VFE]; and Derek T. Muller, *An Odd and Flawed Last-Minute Twist in the California Bar Exam Discussion*, EXCESS OF DEMOCRACY (Sept. 6, 2017), <http://excessofdemocracy.com/blog/2017/9/an-odd-and-flawed-last-minute-twist-in-the-california-bar-exam-discussion> [https://perma.cc/HM44-6XY4].

55. See, e.g., Deborah J. Merritt, *Bar Exam Scores and Lawyer Discipline*, LAW SCHOOL CAFE (June 3, 2017), <https://www.lawschoolcafe.org/2017/06/03/bar-exam-scores-and-lawyer-discipline/> [https://perma.cc/P75A-JVSN].

56. See, e.g., Patricia W. Hatamyer & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 801 (2004).

likely lower costs for consumers. The prospect that, eventually, 10% to 20% of those attorneys admitted with passing scores under a new, lower cut score will one day face discipline may not be enough to outweigh these prospective benefits. That said, “not all lawyer misconduct is detected or subject to discipline,”⁵⁷ and a lower score may invite a greater number of problems that we are unable to measure.

Another benefit of lowering the score redounds to recent law school graduates. Law students who graduate with significant debt and fail the bar on the first attempt often delay gainful employment as they retake the exam, which is a costly enterprise. Indeed, most people will eventually pass the bar, if they repeat the exam enough times.⁵⁸ But even if the cut score is lowered, there will always be some cohort of test-takers who are close to passing the bar and would succeed on a retake—the question is one of the appropriate line.

It might also be the case that our findings do not necessarily weigh against lowering the cut score, but instead suggest some urgency in the State Bar finding markers that portend likely discipline and intervening at early stages. Bar exam score is a marker of likely discipline (regardless of the cause), and the remedy may be for intervention from the State Bar or others early in their career, before discipline arises. If the State Bar chooses to lower the cut score, it might simultaneously supplement that decision with programs to intervene earlier and more successfully in the careers of attorneys likely to be subject to discipline. Or, in the event that the cut score remains the same, deeper study into markers of likely discipline may provide fruitful opportunities for earlier and better intervention, before the need for discipline arises.⁵⁹

E. EFFECT ON LEGAL EDUCATION

The decision to lower the passing score may also have an effect on legal education. Historically, almost all ABA-accredited law schools have predicted bar scores higher than the current passing score. Reducing the cut score from California’s 1440 to New York’s 1330 on a 2000-point scale is the equivalent of moving from an LSAT score of 151 down to an LSAT score of 141.⁶⁰ This is below the 25th percentile of all but one ABA-accredited law school in

57. Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirement*, 2014 BYU L. REV. 775, 785 n.59 (2014).

58. See, e.g., Michael Simkovic, *Failed the Bar Exam? Try Again*, BRIAN LEITER’S LAW SCHOOL REPORTS (Nov. 3, 2015), <http://leiterlawschool.typepad.com/leiter/2015/11/failed-the-bar-exam-try-again-michael-simkovic.html> [<https://perma.cc/64SQ-U7XV>]; Derek T. Muller, *What Happens After a Test-Taker Fails the Bar on a First Attempt? Some Data from Texas*, EXCESS OF DEMOCRACY (Nov. 5, 2015), <http://excessofdemocracy.com/blog/2015/11/what-happens-after-a-test-taker-fails-the-bar-on-a-first-attempt-some-data-from-texas> [<https://perma.cc/Q2K4-JUMV>].

59. Cf. Margaret Fuller Corneille, *Bar Admissions: New Opportunities to Enhance Professionalism*, 52 S.C. L. REV. 609 (2001).

60. See Case, *supra* note 22, at 31 Tbl. 2.

California.⁶¹ Indeed, this is probably well below the performance of many non-ABA accredited schools in California.⁶² The result of lowering the passing score to 1330 would be that the vast majority of graduates of an ABA-accredited law school would pass on the first time,⁶³ and virtually all graduates of any law school would eventually pass, reducing the bar exam's role as a meaningful consumer protection check, and placing more weight on law school admissions and academic dismissal policies for consumer protection.

The repercussions of a lower bar exam passing score may unleash a sort of vicious cycle in the law school market. The current bar exam passing score probably plays a role in preventing law schools from admitting larger classes of weaker applicants and in encouraging law schools to academically dismiss students who are not succeeding in law school. Once the impediment is removed, it is possible this will entice existing law schools to increase class size with weaker applicants, attract new law schools into the market with lower admission standards, and eventually reproduce the current crisis at the new, lower passing score.

The findings also have broader implications beyond the current passing score debate. There is a debate about the extent to which bar examination scores (and the law school grades with which they correlate closely) accurately reflect what graduates need to competently represent clients.⁶⁴ The fact that bar examination scores predict the rate of discipline suggests they may have validity in predicting professional competence, at least as a measure of minimum competence. More data and further investigation would bear out whether this relationship exists and how meaningful it is.

V. CONCLUSION

Our study demonstrates a relationship between bar exam scores and discipline rates. If the cut score on the bar exam is lowered, we project that the entering cohort of attorneys would be subject to higher discipline rates over the course of

61. ABA Standard 509 disclosures reveal that in 2016, Thomas Jefferson School of Law had the lowest 25th percentile LSAT score (141) in its entering class among California law schools in 2016. The nearest schools, the University of La Verne and Whittier Law School, had 25th percentile LSAT scores of 144. See *ABA Required Disclosures*, AM. BAR ASS'N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, <http://abarequireddisclosures.org/> [https://perma.cc/8SS5-ZHYP] (last visited Mar. 24, 2018) (click on "509 Required Disclosures" then select desired year and school).

62. See STEPHEN P. KLEIN & ROGER BOLUS, ANALYSIS OF CHANGES IN TEST SCORES AND PASSING RATES ON THE CALIFORNIA BAR EXAM FROM 1997 TO 2002 6 (2003), http://www.seaphe.org/pdf/past-bar-research/Analysis_of_Changes_in_Test_Scores_and_Passing_Rates_on_the_CA_Bar_Exam_From_1997_to_2002.pdf [https://perma.cc/3TUK-DXWT].

63. Even with the historically low score of the July 2016 exam, the California mean score for first-time ABA-accredited law school graduates was 1482. Miller, *supra* note 24. Assuming a normal distribution of scores and a standard deviation of 140, that would translate into an 86% passing rate. *Accord* BOLUS, *supra* note 14.

64. See Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, THE ASS'N OF AM. LAW SCHS. (2017), <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/> [https://perma.cc/3EFV-YJA2] (describing flaws in the bar exam).

their careers. But our predictions cannot be exact with the data available, and individualized data is needed to help evaluate how dramatic that increase in discipline rates may be. While we do not conclude that lower scores *cause* higher discipline, we recognize the inevitable effect of lowering the cut score will be an increase in attorneys facing discipline. As state bars examine whether to lower their cut scores—indeed, several have recently done so⁶⁵—we have identified one relevant factor worth considering in the overall cost-benefit analysis. Furthermore, even if state bars decide to keep their cut scores in place, the relationship between bar scores and attorney discipline is an important marker of likely future misconduct, a piece of data state bars should consider in developing professional disciplinary and intervention programs in the future.

65. See, e.g., *Bar Exam*, IDAHO STATE BAR, <https://isb.idaho.gov/admissions/bar-exam/> (last visited Mar. 24, 2018) (noting that Idaho Bar Commission Rule 217 lowers the cut score from 1400 to 1360); Natalie Bruzda, *Nevada Lowers Bar for State Legal Exam as Passage Rate Skids*, LAS VEGAS REVIEW-JOURNAL (Aug. 1, 2017, 4:42 PM), <https://www.reviewjournal.com/news/education/nevada-lowers-bar-for-state-legal-exam-as-passage-rate-skids/> [<https://perma.cc/XFF8-U52P>] (lowering cut score from 1400 to 1380); William Vogeler, *Oregon Lowers Cut Score to 137, Bar Pass Rate Jumps*, FINDLAW: GREEDY ASSOCIATES (Oct. 10, 2017, 6:00 AM), http://blogs.findlaw.com/greedy_associates/2017/10/oregon-lowers-cut-score-to-137-bar-pass-rate-jumps.html [<https://perma.cc/FY6G-ZZBD>] (lowering cut score from 1420 to 1370).