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We must set a reasonable standard for passing the bar

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Twelve years ago, I became president of the State Bar of California for one reason -- to improve the delivery of legal services to every person in California. When the bar denies qualified people the ability to practice law, it fails that mission. And California is failing. Millions of Californians cannot find or afford a lawyer to assist them with the most basic legal needs -- health care, housing conditions, estate planning, guardianships, credit disputes, family disputes, veterans' benefits, immigration services, etc. And yet, in the decade since I completed my term, the state has continued to fail in its responsibility to ensure that Californians are receiving the legal services they need. Today, over 1,000 Californian bar applicants each year achieve a score that would qualify them to practice law in New York, Texas, Pennsylvania and Illinois and yet they are denied admission to the California bar because of the unjustifiably high score required to pass the bar exam. California's needlessly high threshold score hurts residents and every person who cares about justice by screening out people who are qualified to become attorneys.

I've been a California lawyer for 30 years: I attended UC Berkeley Law, clerked on the U.S. Supreme Court, appeared before the highest courts in California and the U.S., and worked with thousands of lawyers in dozens of states across the country. My experience confirms what studies have shown: There is no discernible correlation between California's high "cut score" and the quality of legal performance. Our bar exam is not a precise instrument that perfectly calibrates the quality of a lawyer. The bar exam focuses on the ability to memorize mountains of information and on critical reasoning. Those are certainly necessary skills for lawyers. But at some point, the test measures meaningless differences in those skills, while overlooking other essential real-world lawyering capabilities and traits that the exam does not measure at all. The bar exam doesn't test, for instance, someone's capacity for persuasion, sound judgment, the ability to negotiate, or to be a team player. I've known California lawyers who graduated at the top of their law class, easily passed the bar exam on the first try, and were not good lawyers. They lacked empathy or ethics, or they were disorganized or they were just temperamentally unsuited for the job. On the other hand, I've known lawyers who failed the bar in California and have gone on to become some of the most successful and respected lawyers practicing in other states.

I understand that the bar exam serves a valuable purpose -- to ensure that people practicing law have certain basic qualifications -- and I would never suggest lowering California's standards to admit people who are unqualified. But that's not required. We are talking about a marginal change in the cut score that would have dramatic results. This would be fairer to both the people of California and to bar applicants -- people who put in the tremendous effort and cost that it takes to become a lawyer.

Becoming a lawyer is hard. Every year, thousands of aspiring lawyers sit for the California bar exam. By the time they reach that point, they have made innumerable personal sacrifices for the privilege of practicing law in California. And yet, after doing all of this, over a thousand of them are denied admission because of California's abnormally high cut score, even though there is no meaningful evidence that their score reflects a lack of capacity to practice.

Lowering the bar exam cut score would also reduce the economic disparities in who becomes a lawyer and where lawyers are likely to practice. If you come from a family of means and just graduated from law school, you can devote time to studying and take expensive preparatory courses. If on the other hand, you're working full time and trying to squeeze in studying in the evenings, you start out with an economic disadvantage that is more likely to result in a marginally lower bar score. Passing the exam should depend on meeting basic standards; it shouldn't depend on whether you can afford prep courses that teach test construction and can yield an extra five to seven points. Yet, today, the State makes it more likely that the less affluent student will fail, and have to re-take the test, incurring thousands more dollars in review classes and exam fees, and falling further into economic distress.

Data confirms that California's unjustifiably high cut score has a disparate impact on people from underserved and middle-class communities. If California's cut score had been in line with the national average for the July 2018 exam, for example, the number of black test-takers who passed would have more than doubled, while 68% more Latinx and 64% more Asian test-takers would have had an opportunity to enter the state's legal ranks. This disparity in passage rates leads to a disproportionately white legal community that doesn't reflect the demographic composition of the state.

The bar score's effect on lawyer diversity means that California's lawyer shortage hits minority and rural communities the hardest. We are not only unnecessarily weeding out qualified candidates, we are reducing the number of lawyers from underserved communities who are most likely to help meet that need in their hometowns.

I'm not alone in my concerns. The deans of the 20 top ranked law schools in this state have called for the state to lower the bar passing score to that of comparable states. The California Supreme Court, too, has raised concerns and directed the State Bar to conduct an analysis of the knowledge, skills, and abilities needed by entry-level attorneys. This is a step in the right direction. But as members of the bar, we also should do our part to ensure that the exam is not a tool to protect our monopoly over practicing law. We need to demand that the state set a reasonable standard for bar passage, so that we can all start doing a better job of meeting the needs of all Californians. □