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2017

### The Case for a Uniform Cut Score

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# THE CASE FOR A UNIFORM CUT SCORE

*Joan W. Howarth\**

## I. INTRODUCTION

Attorneys have become accustomed to indefensible state-by-state disparities in the cut score for our national, multiple-choice licensing test, the Multistate Bar Exam (MBE).<sup>1</sup> MBE cut scores range from 129 in Wisconsin to 145 in Delaware.<sup>2</sup> The states with the most licensed attorneys,<sup>3</sup> New York and California, use MBE cut scores of 133 and 144 respectively, landing on different sides of the national MBE score bell curve.

No one pretends that these disparities are justified because practicing law as a new lawyer is more difficult in California than in New York. The

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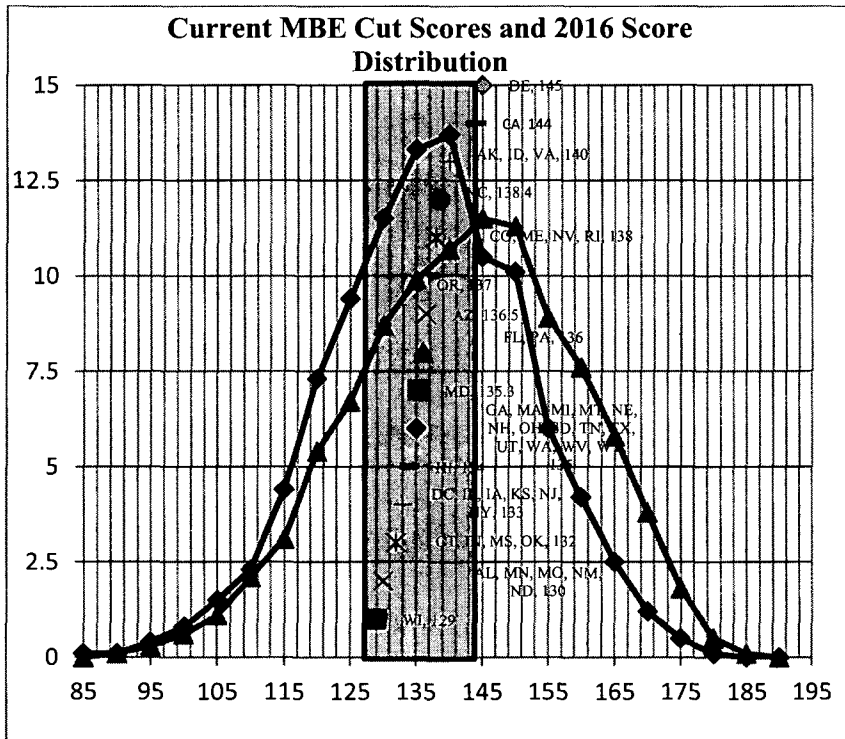
1. On a pass-fail test, the cut score, also known as the passing standard, is the score needed to pass the test. Gregory J. Cizek, *An Introduction to Contemporary Standard Setting: Concepts, Characteristics, and Contexts*, in *SETTING PERFORMANCE STANDARDS: FOUNDATIONS, METHODS, AND INNOVATIONS* 3, 4-5 (Gregory J. Cizek, ed., 2d ed. 2012) [hereinafter Cizek 2012]. In any test administration, raising the cut score lowers the pass rate, and vice versa. For earlier commentary criticizing MBE cut score disparities, see Alex M. Johnson, Jr., *Knots in the Pipeline for Prospective Lawyers of Color: The LSAT is Not the Problem and Affirmative Action is Not the Answer*, 24 *STAN. L. & POL'Y REV.* 379, 405-19 (2013) (urging adoption of a uniform cut score, 130, to diversify the profession); Gary S. Rosin, *Unpacking the Bar: Of Cut Scores and Competence*, 32 *J. LEGAL PROF.* 67, 69, 92-93 (2008) (suggesting that bar examiners need to achieve consensus on meaning of minimum competence).

2. 2016 *MBE Statistics*, NAT'L CONF. OF BAR EXAM'RS. (2016), <http://www.ncbex.org/publications/statistics/mbe-statistics/>; NAT'L CONF. OF BAR EXAM'RS., *COMPREHENSIVE GUIDE TO BAR ADMISSIONS 2017*, 29-30, Chart 9, <http://www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=1>. [hereinafter NCBE Guide].

3. Of the 1,335,963 active attorneys in the United States in 2017, 177,035 are in New York and 168,746 are in California. Texas is a distant third, with 89,361. ABA National Lawyer Population Survey 2017, [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf).

MBE cut score is typically more an aspect of a state bar's culture and history than a purposeful decision.

Figure 1<sup>4</sup>



These MBE cut score disparities undermine simple logic, psychometric validity, and optimal protection of the public. They constitute bad logic because every state is attempting to use the same test to predict exactly the same thing: minimum competence to practice law. They are bad science because setting a cut score is a “critical step”<sup>5</sup> in assuring the validity<sup>6</sup> of

4. 2016 MBE Statistics, NAT'L CONF. OF BAR EXAM'RS. (2016), <http://www.ncbex.org/publications/statistics/mbe-statistics/>; NAT'L CONF. OF BAR EXAM'RS. Comprehensive Guide to Bar Admissions 2016, 29-30, Chart 9, <http://www.ncbex.org/pubs/bar-admissions-guide/2016/index.html#p=1>; <https://www.reviewjournal.com/news/education/nevada-lowers-bar-for-state-legal-exam-as-passage-rate-skids/>.

5. AM. EDUC. RES. ASS'N, AM. PSYCH. ASS'N, & NAT'L COUNCIL ON MEAS. IN EDUC., STANDARDS FOR EDUC. AND PSYCH. TESTING 53 (1999) [hereinafter STANDARDS 1999].

6. “Validity refers to the degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests. Validity is, therefore, the most fundamental consideration in developing and evaluating tests.” STANDARDS 1999, *supra* note 5, at 9.

the use of the exam.<sup>7</sup> MBE cut score disparities are also bad policy, which explains why professions other than law have moved to uniform multiple-choice test cut scores in their licensing tests.

## II. THE EVOLUTION OF PROFESSIONAL LICENSING TESTS

Other professions have progressed through the same three stages of licensing, the first two of which are familiar in law.

### A. *Stage One: State Tests With No National Components.*

Jurisdictions originally used oral tests for attorneys, from the first in Delaware in 1737<sup>8</sup> to the beginning of the twentieth century when written tests became common.<sup>9</sup> In 1915 the American Bar Association urged states to elevate their standards by requiring law school and passage of an examination for licensure.<sup>10</sup> Licensing regimens for other professionals developed in similar ways.

### B. *Stage Two: State Licensing Tests Incorporate Some National Components*

Gradually national, non-profit organizations were created to support and professionalize state licensing efforts. The National Conference of Bar Examiners (NCBE) was founded in 1931,<sup>11</sup> sixteen years after the National Board of Medical Examiners<sup>12</sup> and twelve years after the National Council

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7. "When test scores are used or interpreted in more than one way, each intended interpretation must be validated." STANDARDS 1999, *supra* note 5, at 9. "[I]n some situations the validity of test interpretations may hinge on the cut scores." *Id.* at 53.

8. State Bar of Cal., *Cal. Bar Examination: Information and History* (undated) at 3.

9. ROBERT STEVENS, LAW SCHOOL: LEGAL ED. IN AMER. FROM THE 1850S TO THE 1980S 25 (1983). For a history of the California bar exam, see *Final Report on the 2017 California Bar Exam Standard Setting Study* 3-6 (State Bar of Cal. Sept. 12, 1917 [hereinafter CA Report], <https://www.calbar.ca.gov/Portals/0/documents/communications/CA-State-Bar-Bar-Exam09122017.pdf>).

10. *The Standard Rules for Admission to the Bar: As Adopted by the Sect.on Leg. Educ.and Recommended to the Amer.Bar Ass'n*, 4 AMER. L. SCH. REV. 201 (1916). The current Managing Director of the ABA Section of Legal Education and Admissions to the Bar recently called for renewed attention to this same "first principle." Barry Currier, *From the Managing Director: Legal Education and the Bar Exam as Requirements for Licensure*, 49 SYLLABUS(2017-2018), [https://www.americanbar.org/groups/legal\\_education/publications/syllabus\\_home/volume-49-2017-2018/syllabus-fall-2017—49-1-/from-the-managing-director.html](https://www.americanbar.org/groups/legal_education/publications/syllabus_home/volume-49-2017-2018/syllabus-fall-2017—49-1-/from-the-managing-director.html).

11. Arthur Karger, *The Continuing Role of the NCBE in the Bar Admissions Process*, B. EXAMINER, May 1996 at 14; STEVENS, *supra* note 9, at 177 (giving date of 1930).

12. The National Board of Medical Examiners (NBME) was founded in 1915 to "provide . . . a single national exam," that existed in parallel with state exams until the 1960s. Email from Donald Melnick, M.D., NBME President (2000-2017), to Michael Jodojn (Jun. 5, 2017, 10:01 a.m.) (on file

of Architectural Review Board,<sup>13</sup> for example. After many decades supporting state licensing in other ways, these organizations developed psychometric expertise to create test components for use by states. The NCBE, for example, introduced the MBE in 1972.<sup>14</sup>

Multiple-choice tests like the MBE are ubiquitous throughout professional licensing because psychometricians use them in their dominant strategy to enhance reliability, the degree to which a test's score always means the same thing.<sup>15</sup> Multiple-choice tests typically include some repeat questions, whose degree of difficulty is already known. Psychometricians compare how test takers do on the repeat and the new questions, using the scores on the repeat questions to determine the degree of difficulty of the new questions, and of the entire test. These statistical processes convert raw multiple-choice scores to equated scores.<sup>16</sup> This equating process is the first of two big psychometric steps focused on reliability.

The second statistical step, scaling, uses the greater reliability of the equated multiple-choice score to improve the reliability of scores from less objective parts of the test, such as essays. Essay grades are notoriously unreliable because the questions change, and the grading is more subjective. To counter these potential inconsistencies in scores for written components, psychometricians use statistical scaling processes to match, in a way, the raw essay scores to the equated multiple-choice scores.<sup>17</sup> Currently, almost all jurisdictions scale their essay scores to the MBE.<sup>18</sup>

Bar examiners publish complex scoring formulae and include a variety of other test components, but scaling makes the MBE cut score a crucial decision concerning the degree of difficulty of the entire exam. For example, scaling means that the number of candidates who pass the MBE can determine the number who pass the essays. The MBE cut score also can be compared from state to state. The same equating and scaling

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with author) [hereinafter Melnick email]. The entity that is today the National Council of Architectural Review Board was founded in 1919. <https://www.ncarb.org/about/history-ncarb>.

13. The entity that is today the National Council of Architectural Review Board was founded in 1919. <https://www.ncarb.org/about/history-ncarb>.

14. Karger, *supra* note 11, at 18.

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

16. For a detailed description of the MBE scaling and equating processes, see Deborah J. Merritt, Lowell L. Hargens & Barbara F. Reskin, *Raising the Bar: A Social Science Critique of Recent Increase to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 932-35 (2001).

17. For explanations of bar exam scaling written for bar examiners, see Susan M. Case, *Frequently Asked Questions About Scaling Written Scores to the MBE*, B. EXAMINER 41 (Nov. 2006); see also Susan M. Case, *Demystifying Scaling to the MBE: How'd You Do That?*, B. EXAMINER (May 2005, at 45-46).

18. NCBE GUIDE, *supra* note 2, at 30-31.

practices used in law are used in other professions, with multiple-choice scores anchoring other state-specific test components, such as essays or performance tests for doctors, engineers, nurses, and others.

### C. Stage Three: State Licensing Using a National Component with a Uniform Cut Score

The third stage begins when states agree to use a uniform cut score for the national multiple-choice component of their exams. Nurses and engineers adopted uniform cut scores in the 1980s,<sup>19</sup> leading a trend that gathered momentum over the next several decades. Today, doctors,<sup>20</sup> nurses,<sup>21</sup> dentists,<sup>22</sup> veterinarians,<sup>23</sup> physical therapists,<sup>24</sup> engineers,<sup>25</sup> surveyors,<sup>26</sup> architects,<sup>27</sup> certified public accountants,<sup>28</sup> mortgage loan

19. Nurses have used a uniform cut score since 1989. Email from Maureen Cahill, Senior Policy Advisor, National Council of State Boards of Nursing (NCSBN), to Joan Howarth (Apr. 26, 2017, 8:04 a.m.) (on file with author) [hereinafter Cahill email]. Engineers adopted a uniform cut score in the 1980s. Telephone Interview with Davy McDowell, Chief Operating Officer, Nat'l Council of Examiners for Engineering and Surveying (NCEES), Mar. 20, 2017 [hereinafter McDowell Conversation].

20. The United States Medical Licensing Examination (USMLE) is a three-step examination sponsored by the Federation of State Medical Boards (FSMB) and the NBME. The USMLE has used a uniform national cut score for each of its steps since 2004. Melnick *email*, *supra* note 12. See United States Medical Licensing Exam, <http://www.usmle.org/> (Last Visited Sept. 18, 2017).

21. See Cahill email, *supra* note 19, see also, *NCLEX & other exams*, National Council of State Boards of Nursing, <https://www.ncsbn.org/nclex.htm> (last visited, Sept. 18, 2017)

22. The Joint Commission on National Dental Examinations (JCNDE) creates and sets a uniform passing score for dental examinations used by states for licensure. See The Joint Commission on National Dental Examinations, *National Board Dental Examinations*, <http://www.ada.org/en/jcnde/examinations> (last visited Sept. 19, 2017).

23. The International Commission on Veterinary Assessment (ICVA) creates the North American Veterinary Licensing Exam (NAVLE), and sets the passing score. See, International Commission on Veterinary Assessment, *Scoring Process*, <https://www.icva.net/navle-general-information/scoring-process/> (last visited, Sept. 19 2017).

24. The National Physical Therapy Licensure Examinations (NPTE) are the uniform national tests for state licensure as a physical therapist. The Federation of State Boards of Physical Therapy provides information about their standard setting process for the PPTE, including that the cut score is regularly revisited every five years. See, The Federation of State Boards of Physical Therapy, *NPTE Standards*, <http://www.fsbpt.org/FreeResources/NPTEstandards.aspx> (last visited Sept. 19, 2017). A uniform national cut score for the NPTE was adopted in 1996. The Federation of State Boards of Physical Therapy, *History*, <http://history.fsbpt.org/> (last visited Sept. 19, 2017).

25. The National Council of Examiners for Engineering and Surveying (NCEES) provides and scores tests used by states for licensing Engineers and Surveyors. See National Council of Examiners for Engineering and Surveying, *Licensure*, <http://ncees.org/licensure/> (last visited Sept. 19 2017). They use a uniform passing score. The national examinations were adopted by all states in the 1960s and for comity purposes, adopted a national cut score in the 1980s. McDowell Conversation, *supra* note 19.

26. See National Council of Examiners for Engineering and Surveying, *Licensure*, <http://ncees.org/licensure/> (last visited Sept. 19 2017)

27. The National Council of Architectural Regulation Boards creates standardized tests used by states for licensing architects, including the Architect Registration Examination, and set uniform passing scores. See National Council of Architectural Regulation Boards, *Get Licensed*, <https://www.ncarb.org/get-licensed> (last visited Sept 19, 2017).

originators,<sup>29</sup> psychologists,<sup>30</sup> emergency medical technicians,<sup>31</sup> social workers,<sup>32</sup> and real estate appraisers<sup>33</sup> include a national multiple-choice test *with a uniform cut score* as a requirement for state licensure. Law's exceptionalism is remarkable.

Figure 2.

<b>Professions with Uniform Cut Scores</b>	
<b>Architects</b>	<b>Nurses</b>
<b>CPAs</b>	<b>Pharmacists</b>
<b>Dentists</b>	<b>Physical Therapists</b>
<b>Doctors</b>	<b>Psychologists</b>
<b>Engineers</b>	<b>Real Estate Appraisers</b>
<b>EMTs</b>	<b>Social Workers</b>
<b>Lawyers</b>	<b>Surveyors</b>
<b>Mortgage Loan Originators</b>	<b>Veterinarians</b>

### III. WHY OTHER PROFESSIONS HAVE MOVED TO UNIFORM CUT SCORES

Longstanding habits of state control are not easily set aside, but architects, social workers, dentists and other professions have overcome

28. Certified public accountants take a Uniform CPA Exam produced by the American Institute of CPAs with a uniform cut score. See American Institute of Certified Public Accountants, *Uniform CPA Examination* *FAQ's*- *Scoring* (Mar. 3, 2017) [http://www.aicpa.org/BecomeACPA/CPAExam/ForCandidates/FAQ/Pages/computer\\_faqs\\_3.aspx#uniform](http://www.aicpa.org/BecomeACPA/CPAExam/ForCandidates/FAQ/Pages/computer_faqs_3.aspx#uniform).

29. A national test for mortgage loan originators is administered by the National Multistate Licensing System and Registry (NMLS). Each state uses the same cut score, and some states add state components. See The Mortgage Loan Originator (MLO) Testing Handbook, (NMLS), available at <http://mortgage.nationwidelicensingsystem.org/profreq/testing/Documents/MLO%20Handbook.pdf>.

30. All states accept the recommended passing score on the test for licensed psychologists, although some states use a different score for supervised practice. EPPP Handbook at 10, available at [http://c.ymcdn.com/sites/www.asppb.net/resource/resmgr/eppp\\_/EPPP\\_Cand-Handbook-May\\_23\\_2.pdf](http://c.ymcdn.com/sites/www.asppb.net/resource/resmgr/eppp_/EPPP_Cand-Handbook-May_23_2.pdf).

31. Forty-six states require passage of certification tests offered by the National Registry of Emergency Medical Technicians for licensure. See National Registry of Emergency Medical Technicians, *The NREMT*, <https://www.nremt.org/rwd/public/document/about> (last visited Sept 19, 2017).

32. The Association of Social Work Boards (ASWB) creates standardized licensure tests used by all fifty states, which use uniform cut scores established by the ASWB. See Association of Social Work, *Exam Scoring*, <https://www.aswb.org/exam-candidates/about-the-exams/exam-scoring/> (last visited Sept 19, 2017).

33. Real estate appraisers are licensed by the states, but must pass a National Uniform exam for which each state uses the same cut score. See The Appraisal Foundation, *National Uniform Licensing and Certification Examinations*, [http://www.appraisalfoundation.org/imis/TAF/AQB\\_National\\_Exam.aspx](http://www.appraisalfoundation.org/imis/TAF/AQB_National_Exam.aspx) (last visited Sept. 19, 2017).

these impediments. Other professions have adopted uniform cut scores because of high-stakes testing standards, increasing professional mobility and simple logic.

#### A. *Cut Score Disparities Undermine Validity.*

The cut score is aimed at the dividing line that separates minimal competence from *barely* below minimal competence. Therefore, not surprisingly, psychometric standards require that licensing tests “be precise in the vicinity of the passing, or cut, score.”<sup>34</sup> The “validity of test score interpretations may hinge on the cut scores.”<sup>35</sup> The “placement of the performance standards [cut scores] . . . is an important aspect of the validity of inferences made from test results.”<sup>36</sup> And “[v]erifying the appropriateness of the cut score or scores on a test used for licensure or certification is a critical element of the validation process.”<sup>37</sup> By adopting uniform cut scores, other professions have taken seriously these fundamental psychometric principles meant to ensure that the test does what it purports to do.

#### B. *Geographic Boundaries Are Less Relevant*

No profession is immune from the increased mobility of twenty-first century lives, or the dramatic reach of technology-enhanced practice. An accountant or a lawyer might start her career in one state, take a different position in another, and use technology to serve clients in multiple states, all without leaving her hometown. Other professions have moved to uniform cut scores in part to facilitate this reality.

The Uniform Bar Exam (UBE) juggernaut reveals this trend in law. The now twenty-eight UBE jurisdictions have agreed to use the same test components and weigh those components the same way so that scores can be transferred. But UBE jurisdictions continue to use different cut scores.<sup>38</sup> UBE cooperation makes the foolishness of gaining or losing minimum competency by crossing state lines increasingly apparent. For example, ABA accreditors are now grappling with the complications of counting a law school’s graduate as either a pass or a fail depending on the order in

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34. STANDARDS 1999, *supra* note 5, at 157.

35. AM. EDUC. RES. ASS’N, AM. PSYCH. ASS’N, & NAT’L COUNCIL ON MEAS. IN EDUC., STANDARDS FOR EDUC. AND PSYCH. TESTING at 100 (2014) [hereinafter STANDARDS 2014].

36. John Mattar, Ronald K. Hambleton, Jenna M. Copella, and Michael S. Finger, *Reviewing or Revalidating Performance Standards on Credentialing Examinations*, in Cizek 2012, *supra* note 1, at 399-400.

37. STANDARDS 2014, *supra* note 35, at 176.

38. See NCBE GUIDE, *supra* note 2, at 33.



which she seeks admissions to multiple UBE jurisdictions. These impossible intricacies will worsen until the cut score is uniform.

### *C. Disparate Cut Scores Defy Logic*

State-by-state cut score disparities are fundamentally illogical. In each profession that uses a national multiple-choice test as a component of licensure, the purpose of the test is to establish minimal competence to practice the profession. Other professions have moved to a uniform cut score in part because of the flawed logic of attempting to use the same pass-fail test to measure the same thing (minimum competence) but setting the passing score at different points. Nurses, doctors, social workers do not gain or lose minimum competence by crossing state lines any more than lawyers. The difference is that the nurses, doctors, social workers, engineers, vets, dentists, accountants, and other professions have given up the illogical pretense that minimal competence - *as measured by the same multiple-choice test* - changes from state-to-state.

### *D. Proper Standard Setting is Too Burdensome for States to Handle Well.*

The current practice of each state setting its own MBE cut score prevails only because states do not approach the task in the way that professional psychometric standards require.

#### *1. Sound Cut Scores are Set Through Transparent, Deliberate, Rational Processes.*

Many bar examiners have no idea the basis on which their state's MBE cut score was established. These longstanding mysteries are directly contrary to professional norms for licensing tests. "Where the results of the standard-setting process have highly significant consequences, and especially where large numbers of examinees are involved, those responsible for establishing cut scores should be concerned that the process by which cut scores are determined be clearly documented and defensible."<sup>39</sup> Standard setting "should be based on data; and ... the data should be combined in a deliberate, considered, open, and reproducible manner; that is, using a defensible standard setting process."<sup>40</sup> Public

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39. STANDARDS 1999, *supra* note 5, at 54.

40. William A. Mehrens & Gregory J. Cizek, *Standard Setting for Decision Making: Classification, Consequences, and the Common Good*, in Cizek 2012, *supra* note 1, at 36.

engagement with cut score determinations “is a healthy manifestation of truly democratic processes.”<sup>41</sup>

Adherence to these professional standards regarding transparency is especially crucial to counter potential, perceived, or actual conflicts of interest, or anti-competitive behavior when a profession is setting the bar for new entrants to the profession. “Passing a credentialing examination should signify that the candidate meets the knowledge and skill standards set by the credentialing body, independent of the availability of work.”<sup>42</sup> The actual purposes and values behind cut scores are impossible to ascertain without transparent processes. An opaque claimed rationale of public protection is no more credible coming from a jurisdiction attempting to justify a high MBE cut score than from dentists trying to prevent others from whitening teeth<sup>43</sup> or optometrists trying to prevent opticians from making eyeglasses.<sup>44</sup>

## 2. *Setting a Cut Score is a Complex Policy Decision*

State licensing decision makers in other professions relegate standard-setting to national entities because the process is burdensome and difficult.<sup>45</sup> Psychometric standards suggest that test-makers should not remove themselves from the crucial cut-score determinations.<sup>46</sup> Also, ideally, construction of a licensing test takes the cut score into account.<sup>47</sup>

Standard-setting studies are one potential aspect of arriving at a defensible cut score. National organizations charged with setting licensing cut scores routinely engage in these studies, as have some bar examiners.<sup>48</sup> Although dozens of methods have been designed, the process often involves asking trained panels of subject matter experts to evaluate whether actual test answers represent minimal competence or fall below.<sup>49</sup> Unfortunately, however, these studies suffer reliability problems.<sup>50</sup> Different methods are known to produce different results, and even the

41. *Id.* at 33.

42. STANDARDS 1999, *supra* note 5, at 158.

43. *See* N.C. State Bd. of Dental Examiners v. FTC, 574 U.S. \_\_ (2015).

44. *See generally* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding rational basis for due process challenges to economic protectionist measures).

45. California’s recent extensive yet incomplete efforts are described in CA Report, *supra* note 9. The California Supreme Court decided on October 18, 2017, not to adjust its cut score at this time. *See* <https://newsroom.courts.ca.gov/news/supreme-court-issues-letter-relating-to-in-re-california-bar-exam>.

46. “Standard 1.2The test developer should set forth clearly how test scores are intended to be interpreted and used.” STANDARDS 1999, *supra* note 5, at 17.

47. STANDARDS 2014, *supra* note 35, at 107-08.

48. CA Report, *supra* note 9, at 6-9; *see generally* Merritt et al., *supra* note 16.

49. *See generally* Merritt et al., *supra* note 16 (explaining the Klein method and the problems with it).

50. *Id.*

same method, when repeated with different panelists, is known to produce different results.<sup>51</sup> At best, complex and costly standard-setting studies achieve results that add one additional factor for decision-makers to consider, among others.<sup>52</sup> Even a careful, successful standard-setting study unmarred by procedural irregularities is just one aspect of setting a cut score.

### 3. *Test Validity Requires that Cut Scores be Reviewed Periodically*

Professional norms require that cut scores of licensing tests be reviewed periodically – in conjunction with content validity studies – to ensure that the test used is valid. Performance standards (cut scores) need to be reviewed when the test content or structure changes, if the profession changes, and simply because of the passage of time.<sup>53</sup> The usefulness of standard-setting studies increases if they are done regularly. Nurses, for example, review their multiple-choice cut score every three years, engineers and physical therapists every five years.<sup>54</sup> Yet, no state publishes a schedule for routine, periodic review of its MBE cut score.<sup>55</sup> With all the other fiscal and operational pressures on state courts and bar examiners, routinely re-evaluating cut scores is not a priority.

## IV. THE PATH FORWARD

The MBE cut score disparity problem will be addressed by using transparent and detailed risk analysis to move to a consensus middle ground.

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51. Michael T. Kane, *The Future of Testing for Licensure and Certification Examinations*, in *THE FUTURE OF TESTING* 145, 171 (Barbara S. Plake & Joseph C. Witt, eds. 1986); cf. MICHAEL J. ZIEKY, MARIANNE PERIE, & SAMUEL A. LIVINGSTON, *CUTSCORES: A MANUAL FOR SETTING STANDARDS OF PERFORMANCE ON EDUCATIONAL AND OCCUPATIONAL TESTS* 3 (2008).

52. A simple version of such a study would consist of administering a MBE test to a group of competent, licensed attorneys. Those results would be evaluated in light of psychometric expectations that experienced professionals will score higher than novices on valid licensing tests.

53. Mattar et al., *supra* note 36, at 399.

54. See Cahill email, *supra* note 19; McDowell conversation, *supra* note 19; & note 24, *supra*.

55. California recently enacted a court rule to require that the validity of the bar exam be analyzed every seven years, a process likely to encompass cut score review. Cal. Rules of Court, rule 9.6 (b), effective Jan. 1, 2018, available at [http://www.courts.ca.gov/documents/Title\\_9\\_2017.pdf](http://www.courts.ca.gov/documents/Title_9_2017.pdf).

### A. Articulating a “Ratio of Regret”

A cut score represents a policy decision. “Cut scores embody value judgments as well as technical and empirical considerations.”<sup>56</sup> Precision is lacking, so the cut score will be set too high or too low. Balancing those risks is largely a question of values. Therefore, decision makers should undertake a careful consideration of the risks of error, similar to what standard setting experts Gregory Cizek and Michael Bunch have called a “ratio of regret.”<sup>57</sup> The policymakers should carefully consider the costs of errors, identifying risks and values with specificity, and attempt to adopt cut score policies to minimize regret.

Protection of the public is the touchstone. In the professional licensure context, “the cut score represents an informed judgment that those scoring below it are likely to make serious errors for want of the knowledge or skills tested.”<sup>58</sup> But, simply slapping the justification of public protection on a cut score decision is insufficient; errors in either direction hurt the public. Setting the bar too low risks licensing attorneys lacking in minimal competence; setting the bar too high risks depriving the public of competent attorneys and increasing the cost of representation.

The skills currently tested, doctrinal knowledge and analysis, are fundamental to attorney competence. In a “ratio of regret” deliberation, this clarity about the importance of doctrinal analysis could be balanced against any underlying validity questions regarding the exam. How strong is the evidence that the content – the competencies, the subjects, and the level of specificity – is valid?<sup>59</sup> A high-degree of confidence in content validity is necessary to link minimum competency to any particular cut score.

Assuming content validity, the primary risk of an MBE cut score set too low is an increase in attorneys who are not equipped to remember and analyze legal doctrine for their clients. Decision makers charged with choosing a cut score should consider the extent of the problem of doctrinal

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56. STANDARDS 1999, *supra* note 5, at 54. “[T]he state of the art in both testing and public policy support the careful, comprehensive, and systematic processes that should be used to derive cut scores, and the informed deliberations that should characterize the adoption and continued monitoring of their use.” Mehrens & Cizek, *supra* note 40, at 33.

57. GREGORY J. CIZEK & MICHAEL B. BUNCH, STANDARD SETTING: A GUIDE TO ESTABLISHING AND EVALUATING PERFORMANCE STANDARDS ON TESTS 304 (2007).

58. STANDARDS 1999, *supra* note 5, at 53.

59. See Deborah Jones Merritt, *Validity, Competence, and the Bar Exam*, AALS NEWS, Spring 2017, <http://www.aals.org/about/publications/newsletters/aals-news-spring-2017/faculty-perspectives/>; Tracy A. Montez, *Observations of the Standard Setting Study for the California Bar Examination* 10 (Calif. Dept. of Consumer Affairs, July 2017), <http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Tracy-Montez-ReviewBarExamstudy.pdf>. “Given that a state-specific occupational analysis does not appear to have been conducted, it is critical to have this baseline for making high-stakes decisions . . .”; *id.*

error in the profession, and existing mechanisms to mitigate the impact of these errors, such as disbarment and malpractice. This inquiry might suggest the need for more resources to answer character and fitness inquiries, new requirements for training in law office management, or better addiction and mental health support services, in addition to clarifying the cut score determination.

Decision makers should also consider the consequences of setting the cut score too high. The first-level risk is that setting the cut score too high denies the public access to competent attorneys.<sup>60</sup> Values related to access to justice are implicated if competent attorneys are prevented from practicing, in part because fewer attorneys may mean increased costs for legal services. Decision makers could take into account the extent that these risks can be mitigated by policies permitting repeat testing. This, in turn, could lead to consideration of the benefits and costs of delayed admission for candidates who will eventually succeed.

Decision makers could use their "ratio of regret" analysis to consider the relationship of cut score mistakes on efforts for a diverse and inclusive profession, a specific aspect of public protection. For a jurisdiction strongly committed to a diverse and inclusive profession, regret from setting the cut score too high (and therefore keeping out competent attorneys of diverse racial and ethnic backgrounds) would be especially strong.<sup>61</sup> This concern is especially salient in light of the combination of persistent disparities in bar passage rates<sup>62</sup> and questions about content validity of the exam.<sup>63</sup> Thoughtful commentators have argued that "[a]rtificially high bar passage standards are of special concern because those standards can have a disproportionate impact on minority applicants to the bar."<sup>64</sup>

Decision makers could choose to consider the impact on legal education if the cut score is too high or too low. A cut score that is too low may enable law schools to give what bar examiners and courts might consider short shrift to doctrine and analysis.<sup>65</sup> A cut score that is too high

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60. "If the standards for the cognitive abilities are artificially high, the licensing examination is likely to exclude many [ . . . ] who would make good practitioners." Kane, *supra* note 51, at 170.

61. Recent California modeling shows that the higher the studied cut score, the larger the racial disparities in pass rates. CA Report, *supra* note 9, at Appendix I, 11; *see generally* Johnson, *supra* note 1.

62. *See* Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, 6 B. EXAM'R 8, 8 (Nov. 1997), discussed in Merritt, et al., *supra* note 16, at 966-67.

63. *See* Merritt, *supra* note 59; Montez, *supra* note 59.

64. Merritt, et al., *supra* note 16, at 965.

65. Any defensible cut score would be too low to affect the curriculum at law schools whose students enter with the highest LSAT scores.

may push law schools to emphasize bar-subject doctrinal analysis and test taking skills at the expense of experiential learning, lawyering skills, or non-bar-subjects, including federal statutes and regulations and specializations, such as bankruptcy or immigration.

Finally, the ratio of regret or risk of error analysis may take into consideration the need for special vigilance in guarding against protectionism. This is not a relevant concern for the risk of error in setting a cut score too low, but the legal profession needs to be concerned about perceived and actual economic protectionism in setting unusually high cut scores.<sup>66</sup>

### B. Crowdsourcing to a Consensus Cut Score

Using this type of serious risk analysis, decision makers should move to a uniform MBE cut score by arriving at a middle-ground consensus. States with very low cut scores should move up, and states with very high cut scores should move down. Typical standard setting studies attempt to produce a cut score recommendation by training perhaps dozens of lawyers and judges to try to recognize whether minimal competence is revealed in sample essay answers.<sup>67</sup> Rather than these small and contrived studies of disappointing reliability, MBE cut score decision makers can consider the state of the profession in jurisdictions using the most prevalent cut scores. Two candidates for compromise are 135, the cut score currently adopted by the largest number of states,<sup>68</sup> and 133, the cut score currently being used by jurisdictions with the largest total attorney population.<sup>69</sup>

Usually licensing cut scores are difficult to evaluate in part because the professional performance of candidates with scores below the cut score – who do not receive the license – cannot be assessed.<sup>70</sup> But our current cut score variation creates a massive natural experiment. What problems exist, if any, in a state with a 130 or 133 cut score, that are different or on a different scale than competency problems in a state with a higher cut score? In the absence of data suggesting harms suffered from cut scores in those

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66. Michael Simkovik, *Is California's Bar Examination Minimum Passing Score Anti-Competitive?*, BRIAN LEITER'S LAW SCHOOL REPORTS (July 18, 2017), [http://leiterlawschool.typepad.com/leiter/2017/07/is-californias-bar-examination-minimum-passing-score-anti-competitive.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+typepad%2FKiyu+%28Brian+Leiter%27s+Law+School+Reports%29](http://leiterlawschool.typepad.com/leiter/2017/07/is-californias-bar-examination-minimum-passing-score-anti-competitive.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+typepad%2FKiyu+%28Brian+Leiter%27s+Law+School+Reports%29).

67. See generally, Meritt et al., *supra* note 16 (describing the Klein method in detail).

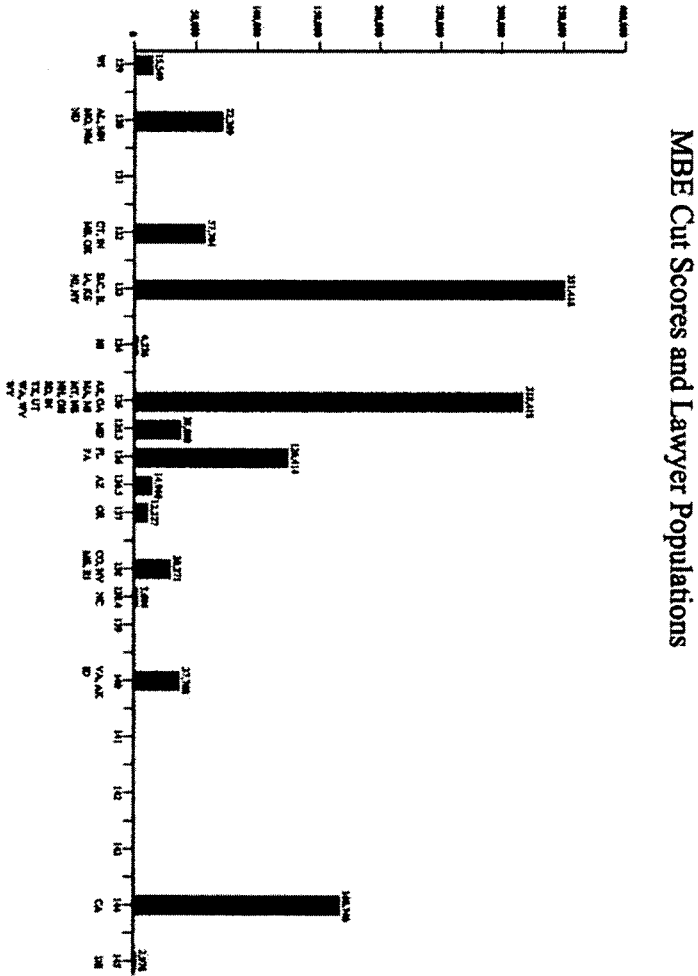
68. See 2016 MBE Statistics, *supra* note 2.

69. See 2016 MBE Statistics, *supra* note 1; ABA National Lawyer Population Survey 2017, *supra* note 3.

70. STANDARDS 1999, *supra* note 5, at 60.

jurisdictions,<sup>71</sup> states should follow the crowd. The sooner we reach that consensus uniform MBE cut score, the sooner we eliminate one of the significant validity problems with attorney licensing.

Figure 3



71. "There is no empirical evidence that indicates that California lawyers are more competent than those in other states [with lower cut scores]." CA Report, *supra* note 9, at 17-18.

## V. CONCLUSION

Justice Brandeis advised that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>72</sup> States should cherish their authority over attorney licensing, including their opportunity to provide meaningful public protection in innovative ways. Attorney licensing is, indeed, ripe for innovation.<sup>73</sup> States should be asking, what is minimum competence to practice law? How do we best protect the public? New York has added pro bono and experiential experience requirements<sup>74</sup>, and California recently considered imposing new experiential course requirements for licensing.<sup>75</sup> But resting the case for state autonomy on setting a different cut score on the common, national portion of the exam is illogical, unfair, unambitious, and does harm other states. The public deserves valid licensing tests. Eliminating MBE cut score disparities would be an important step in that direction.

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72. *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1935) (Brandeis, J., dissenting).

73. *See, e.g.*, Eileen Kaufman, Andi Curcio, & Carol Chomsky, *A Better Bar Exam – Look to Upper Canada*, LAW SCHOOL CAFÉ (July 25, 2017), <https://www.lawschoolcafe.org/2017/07/25/a-better-bar-exam-look-to-upper-canada/>; Merritt, *supra* note 59.

74. *See* Mandatory 50-Hour Pro Bono Requirement, THE NEW YORK STATE BOARD OF LAW EXAMINERS (2013), <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>; <http://www.courts.state.ny.us/ctapps/520rules10.htm#B18>.

75. *See* Excerpt from a State Bar of California Committee Agenda Admissions & Education Committee (May 10, 2016), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/August2016CouncilOpenSessionMinutes/2016\\_california\\_bar\\_admissions\\_requirements.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2016CouncilOpenSessionMinutes/2016_california_bar_admissions_requirements.authcheckdam.pdf).