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GUEST COLUMN

Keep California meritocratic

By Mitchell Keiter

Americans, especially Californians, celebrate meritocracy, the idea that what *what we do* matters more than *where we are from*. Many crossed the ocean – and the continent – for a second chance, a new beginning. The California bar exam has long embodied this principle.

We care less about where people are from; most states insist lawyers have degrees from ABA-accredited schools, but California welcomes all backgrounds. Students who attended an ABA-accredited school, attended other schools, apprenticed with a lawyer or judge, or studied by correspondence all may take the bar exam. Bus. & Prof. Code Section 6060(e).

But California cares about *what we do*. Notwithstanding the minimal barriers to taking the exam, passing is another matter; the state has the nation's second-highest minimum passing ("cut") score at 1440. (Most cut scores are in the 1300's.) Many other states will thus license the student scoring 1350 from an ABA school, but refuse one scoring 1450 from the wrong school, whereas California is more concerned with what the student knows than where she learned it. This could soon change.

Friedman

The Court of Appeal recently upheld Huntington Beach's requirement that city attorney applicants have not only 10 years' experience but also a degree from an ABA-accredited school. *Friedman v. Gates* [G057078] *rev. denied* Jan. 29, 2020. The court justified this by noting other states require an ABA-school degree. But California, by statute, expressly rejects that policy. Performance matters here, not pedigree.

The court also justified the exclusion by citing disparate pass rates; 54% of ABA graduates passed the July 2016 bar exam, against only 13% of State Bar-accredited school graduates. But there is no need to predict which pool of graduates is *more likely* to pass the exam because those now applying *have already passed*. Applicants should be judged on their *own* record of success, not that of their class.

And if unaccredited schools provide inferior training, isn't it *more* impressive to overcome that obstacle and pass as one of 13%, without the help of Phi Beta Kappa classmates?

It may well be that an ABA graduate is most qualified for the position. But Huntington Beach should base that determination on what candidates *have done* in their decade-plus of practicing law, not on the law school they *are from* – largely determined by college GPA's recorded while teenagers.

Bar Exam

As the Court of Appeal enhanced the weight of pedigree, the Supreme Court may soon diminish the weight of performance. Faced with declining pass rates, the high court is considering whether to arrest this trend simply by lowering the cut score. Combined with *Friedman*, this would render California more like other states. Students who score 1350 with ABA accreditation would be better off than students scoring 1450 without it.

Not only in California is performance declining; students' performance nationwide has dropped to a 34-year low. Before granting a license to practice law as a participation trophy, we ought to determine why scores have fallen. Does smartphone addiction undermine attention span and writing skills? Does watching videos sharpen the intellect less than reading?

The decline in bar exam pass rates was predictable, because incoming law school classes have been arriving with weaker credentials. Far fewer students applied in the past decade but almost as many attended law school, suggesting it became easier to win admission. And *lower admission standards correlate with lower performance*. Students scoring high (160+ on the LSAT) almost always pass the bar, whereas students scoring low (150-) usually do not.

So racial disparity will remain even if the State Bar reduces the minimum score. With the 1440 cut score in 2016, nearly 21% of blacks, 34% of Hispanics, 37% of Asians, and 51% of whites passed the bar. If the cut score had been only 1390, then 29% of blacks, 43% of Hispanics, and 46% of Asians, would have passed, along with 60% of whites. Even if the cut score were 1330, fewer than half of blacks would have passed, compared to 77% of whites.

What should concern the State Bar is not just disparity among racial groups but the decline for all of them. In 2008, 35% of blacks, 49% of Hispanics, 56% of Asians and 68% of whites scored 1440 or higher. None of these groups would pass today at close to those rates – even if the cut score dropped 50 points.

SAT

Though it is not proposing to prevent disparate impact by abolishing the bar exam altogether (yet), the ACLU is demanding the University of California exclude the SAT from its admissions process. To be sure, family wealth can help students do better on standardized tests. But wealth can assist students in every aspect of their college applications. Standardized tests are the hardest part of the admissions process to game.

Wealthy students can spend thousands of dollars on travel so they can write essays about how they appreciate other cultures. Applicants can pay thousands of dollars for writing coaches to "edit" their essays, or just write them altogether, as universities do not monitor authorship. Wealthy students can accept unpaid internships (because they don't need to earn

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money), arranged by well-connected parents.

The SAT is the one moment when students must perform on their own, disconnected from parents, advisors, or coaches. Even grades can be manipulated; inflated or opaque grading systems can easily conceal underperformers. But for the naked truth of the SAT, wealthy parents would not need to find fake "sailing teams" for their offspring.

SAT scores are not unique; classroom achievement also correlates with wealth. But grade point averages do not clearly reflect this correlation, because, unlike the uniform SAT, grades are a weak proxy for academic achievement. Grading curves render A's as common at weak schools as strong ones – but 1500's are not. An A from a school sending very few students to college means less than an A earned where everyone goes to college (and many to elite ones), just as an A at Stanford or a UC law school means more than an A from an unaccredited school. And every admissions officer and hiring manager knows it.

If there is no common benchmark for review, the *Friedman v. Gates* theory, that only students from good schools need apply, will ultimately harm students from lesser schools. Universities could follow Huntington Beach and disregard applications from graduates of less prestigious schools.

The real beneficiaries of an SAT-free admissions process would be students at well-regarded private schools, who could benefit from their school's reputation without having to prove through testing that they lived up to it. Admission to an elite high school would become a de facto "pre-admission" to a well-regarded college, regardless of one's record in between. "A" students from poorer schools would lose the chance to prove their success was not simply the product of being a "big fish" in a "small pond."

The Way Forward

Many deans from nonelite schools have urged a drop in the cut rate to solve their dual crisis. One, they may lose accreditation if their pass rates stay below 75%, and two, students who invested years and small fortunes have nothing to show for it. Lowering standards solves both problems.

There is a better way. The ABA should cease measuring schools by their pass rates, as these depend less on the quality of the *instruction* provided than the quality of the *instructed*. Students admitted to elite schools will naturally outperform the students who were rejected and then enrolled in lower-ranked schools. Those schools should not be punished for giving those students a chance.

And regarding the speculation that students with sub-1440 scores would tend disproportionately to aid underserved communities, why not make that consequence certain? Students scoring above a lower minimum could enjoy a qualified license – on behalf of needy clients. (See Keiter, "How about a qualified license to practice law?" Daily Journal, Oct. 4, 2017.) This would let graduates use their legal education productively, preserve the California Bar's high standards, and ensure indigent litigants get the help they need. Win. Win. Win.