Appendix A

The Law School Experience

ADMISSION TO LAW SCHOOL

We have seen that although initially there were few requirements for taking the **bar examination**, educational requirements gradually were introduced. Today, with the exception of those few states permitting applicants to "read the law" with a mentor, state bars require applicants to have graduated from law school. The course of study at law schools was gradually extended and today involves a three-year course of study. As late as 1935, only nine states required a law degree to take the bar. A law degree is now a requisite for taking the bar in forty-seven states. In 1949, only 62 percent of practicing lawyers held law degrees; in 1970, 93 percent had law degrees (I. L. Horowitz 2005: 564–566).

There are roughly 202 American Bar Association (ABA)–accredited law schools in the United States. California is one of the states providing state accreditation to schools that are not certified by the ABA. Various states, in turn, allow graduates of the California bar exam to take their bar examination. ABA accreditation is based on a list of factors, including library facilities, faculty-to-student ratio, faculty quality, curriculum, the quality of the facilities, admissions policies, and the passage rate on the bar exam. The significant point is that the ABA is able to dictate the character of American law schools and the content of the curriculum. It takes several years for a newly established law school to meet the requirements for accreditation. The ABA for the first time has stated that it will remove accreditation from schools with a less than 75 percent passage rate on the bar exam within two years of students' graduation, a standard that at least eighteen schools are at present unable to meet. Critics complain that the "stranglehold" of the ABA over legal education prevents innovative approaches to legal education (ABA Section of Legal Education and Admissions to the Bar n.d.).

U.S. News ranks law schools based on the quality of education. These rankings are based on objective factors such as student scores on the Law School Admission Test (**LSAT**), faculty, resources, and placement along with how lawyers and judges perceive the quality of the school.

Critics complain the rankings may not be a good guide for students because they do not include factors like diversity, the availability of clinical programs, the strength of a school's program in various specialty areas, or student satisfaction. More important is the fact a student's career aspirations may be well served at a lower-ranked institution. Highly ranked national law schools tend to place students in large prestigious firms across the country, and "local" law schools generally produce lawyers who staff local government and who serve the needs of the local community. Students who want to practice in a local area may find that by attending a local law school and interning with a government agency, small firm, or corporation, they are more attractive to an employer than are graduates of a national law school.

U.S. News has addressed criticisms of the overall ranking by rating law schools based on specializations, including clinical programs, environmental law, intellectual property, international law, and legal writing and by developing a diversity scorecard. A school that is not highly ranked may be rated among the best schools in a particular area.

The ABA Section of Legal Education and Admissions to the Bar compiles fairly accurate statistics on law schools. At last count, there were 111,561 law students in the United States, roughly 48 percent of whom are male and 51 percent of whom are female. Nine of the top twenty ranked law schools have more female than male students. In recent years, there has

been an alarming decrease in students attending law school. In 2011–2012, there were 146,268 students attending law school. This total declined to 128,695 in 2013–2014, and in 2015–2016 it had further decreased to roughly 113,000. The number of law students in 2017–2018 was 110,183, the lowest enrollment in forty years. The "Trump bump" has increased interest in law, and enrollments rose by 1.2 percent to 111,561 in 2018–2019. There were 44,518 first-year students in 2012–2013 and 37,107 first-year students in 2016–2017, and in 2018–2019 the number of first-year students increased to 38,390. At the same time, the number of applicants to law school in 2018–2019 was 60,401, an 8 percent increase, which is the greatest increase since 2010.

There has been an intense debate over whether law schools are lowering their standards and admitting unqualified students who, on graduation, will be ill equipped to provide competent legal representation. The question is whether LSAT scores are a meaningful measure of whether an individual can develop into a skilled attorney after three years of study. According to law professor Jerome Organ, in 2010, 12,177 individuals with the highest scores on the LSAT (165 and above with a maximum score of 180) applied to law school. Five years later, 6,667 people with the highest scores applied to law school. Organ also found that only a third of students admitted to law school in 2013 scored above 160 on the LSAT (Organ 2013, 2014). At thirty-seven law schools, half of the students admitted scored 150 on the LSAT (Hansen 2016; Kitroeff 2016). The trend seemingly has been reversed. The number of applicants who scored 175 to 180 on the LSAT, the highest score band on this test, increased by 60 percent when compared to 2016–2017. Roughly 14 percent more test takers scored 170 to 174, which is the second-highest score band. Twenty-seven percent more test takers scored 165 to 169. Nonetheless, these three bands only account for roughly fifteen thousand individuals (Law School Admissions Council 2018).

Law school is an expensive proposition. According to *U.S. News*, the most highly ranked private schools may cost over $60,000 a year with an average cost of $49,095 for tuition while even those private institutions that are ranked in the bottom fifty schools may cost more than $30,000 per year. The average tuition was $27,591 for in-state students. The average for out-of-state students was $40,775. Elite public institutions can charge as much as the best private schools.

In 2018, the average law school graduate had an indebtedness of $160,000, roughly 60 percent higher than the debt incurred by the average law graduate eight years earlier. Keep in mind that at a number of schools with high tuitions students graduate owing close to $250,000. A year following graduation, nearly 69 percent of law graduates were employed in full-time, long-term legal employment, and nearly 12 percent were employed in full-time, long-term employment in which a law degree was an "advantage." Almost 8 percent were unemployed. In 2017, the median starting salary for law graduates in private firms was $72,500, and starting median salaries at various law schools ranged between $48,000 and $180,000. The median starting salary in the public sector was $54,550, and the median at various law schools ranged between $40,000 and $90,500. Starting salaries were highly correlated with the ranking of the law school, and only 13.7 percent of law schools had students whose median starting salary was at least $150,000. The twenty-three schools whose graduates were paid the most in private sector jobs had a median salary of $180,000 (Kowarski 2019).

Law schools tend to be viewed as a "cash cow" by university administrators. Law schools have relatively high student-faculty ratios, and a legal program does not require expensive laboratories and equipment. Alumni and law firms provide a source of gifts and donations to the school. In the last few years, a number of private investors have established several freestanding law schools that are not affiliated with a college or university (Patrice 2015).

The average acceptance rate at law schools is 45.9 percent. At the leading law schools such as Yale, Harvard, and Stanford, the number of applicants accepted varies between 7 percent and 9 percent. The application process is based on an applicant's grade point average (GPA), score on the LSAT, letters of reference, personal statement, and personal background and activities.

Grades and the LSAT are the two most important factors. In 2018, the ABA decided to allow schools to accept the Graduate Record Exam (GRE) score rather than the LSAT so long as the school was able to demonstrate that the test is "valid and reliable." Preliminary data indicate that the GRE is a somewhat better predictor of student performance than the LSAT (Moody 2019).

LSAT scores range from 120 to 180. In other words, you receive a 120 merely for signing your name and taking the exam. Several leading law schools have responded to the decline in LSAT scores by limiting their enrollment. Individuals accepted at the top ten law schools have LSAT scores that range from roughly 170 to 180. The average score for the schools ranked outside the top fifty schools is between 156 and 169. The LSAT is a multiple-choice test that covers three primary areas: reading comprehension, analytical reasoning, and logical reasoning (Zaretsky 2016a).

In 1974, in *DeFunis v. Odegaard*, Supreme Court justice William O. Douglas questioned the University of Washington School of Law's reliance on the LSAT. He noted that the test was relied on by schools to exaggerate the difference between candidates. Justice Douglas argued that most students scoring in the bottom 20 percent on the test do much better in law school than predicted and that as many as one-third of these individuals will graduate in the top 20 percent of their law school class. The ultimate price is paid by those students whose score, for whatever unknown reason, does not reflect their ability, motivation, and determination and as a result they are not accepted to law school (*DeFunis* v. *Odegaard*, 416 U.S. 312 [1974]).

There continues to be an extensive debate on law schools relying so heavily on scores on the LSAT in admission decisions. William Henderson, professor at the Indiana University Maurer School of Law, has studied the LSAT and argues the LSAT is the best predictor of performance on law school examinations because law school examinations in the first year place a premium on speed. In the typical "race horse examination," students rapidly identify issues that are presented in a question and provide rapid-fire explanations. Henderson finds when students' grades are based on take-home examinations or papers, the LSAT no longer is as good a predictor of student performance as undergraduate GPA. The aptitude for rapidly responding to questions also was found to have little relationship to the important legal skill of oral argument (Henderson 2004).

Alexia Brunet Marks and Scott A. Moss conducted a longitudinal study of 1,400 students over a four-year period at two law schools and found that the LSAT has negligible predictive value of students' overall law school GPA. Their data indicate applicants with a low LSAT score can be predicted to succeed in law school based on a high GPA or a combination of other factors correlated with success in law school such as a student's major or the type or duration of a student's work experience. The authors conclude that the best approach to admissions decisions is to evaluate applicants "holistically" rather than based on a mechanical application of the LSAT and undergraduate GPA (Marks and Moss 2016).

Aaron Taylor writes that the data indicate that the LSAT predicts roughly 36 percent of the variance in performance in the first year of law school. In other words, two-thirds of students' performance in law school can be predicted based on other factors. Taylor argues that the LSAT is given "outsized" influence in law school admissions and references a statistical study that finds that a 6-point score difference between two LSAT scores translated into a 0.1 difference in law school GPA. Taylor also cites studies challenging the research that finds a correlation between the LSAT and success on the bar exam. He notes that the bottom line is that the "outsized" role of the LSAT disadvantages African American and Hispanic applicants who generally score lower than white and Asian applicants and therefore are admitted to lower-ranked law schools. Scholarship money is closely correlated with LSAT scores, and lower-ranked private law schools that admit students with lower LSAT scores often are as expensive as highly ranked schools. The end result is that individuals in 2015 with LSAT scores of 155 or lower were almost twice as likely to accumulate more than $120,000 in law school debt than individuals with higher scores. These individuals, in turn, are likely to obtain lower-paying employment when graduating from law school (A. Taylor 2016).

Jeffrey Evans Stake concludes that it is reasonable for a school to consider the LSAT as a factor in admissions. The LSAT is the best single factor that is a predictor of a student's first-year grades and is correlated with success on the bar exam and with a somewhat higher income during an individual's first years as a practicing attorney. At the same time, Stake recognizes that there are twenty-six factors identified as important to being an effective lawyer that are not identified by the LSAT and take on added importance as a student progresses in law school. These qualities include diligence, integrity, honesty, empathy, emotional intelligence, creativity, innovation, and ability to work with others, as well as a capacity for research and oral argumentation (Stake 2008).

Defenders of the existing approach to testing point out the practice of law is a fast-paced and tension-filled occupation. Others respond that the true test of a lawyer is the ability to put together a fully researched document with reasoned arguments. Encouraging lawyers to make rapid decisions does not serve the interests of clients in receiving thoughtful and well-reasoned advice. The great U.S. Supreme Court judgments were written based on numerous drafts and required months of work and were not the product of lawyers working under time constraints and pressure. In the final analysis, the test has little relationship to individuals' lifetime income, career satisfaction, or contribution to society (W. Kidder 2001).

The curriculum of American law schools is fairly standard. The first year typically includes courses on contracts, property, civil procedure, torts, legal research and writing, and constitutional law and criminal law and procedure. The ability of students to branch out and specialize in the second and third years is limited by the fact that students are encouraged to enroll in classes that are tested on the bar examination. Despite the vision of law school as preparation for a career fighting for freedom of speech, civil rights, and human rights, a significant portion of the curriculum at the average school is devoted to classes involving finance (tax) and business (corporations and sales). Several of the larger and more prestigious law schools offer students interesting electives on topics like "animal law" or "sports law." Most students understandably are practical and tend to enroll in classes with a direct application to the practice of law (e.g., family law and domestic relations).

Students who want to pursue a career in litigation (e.g., courtroom advocacy) typically will take clinical classes that provide students with "real world" experience in the courtroom. Law schools also increasingly are highlighting the ability of students to specialize in various areas and promoting their rankings in specialty areas. Second-tier law schools hope that this will enable them to attract students who are interested in specialty areas like environmental law, international law, cyberlaw, or other areas that traditionally have been a minor part of the law school curriculum. Law schools also typically offer a number of specialized legal clinics (e.g., minor criminal matters, immigration, landlord-tenant disputes, international human rights). In most states, law students are permitted to appear in court under the supervision of a licensed attorney.

An important measure of law school performance for ABA accreditation is the performance of graduates on the bar examination, as compared to the overall pass rate on the examination. Some schools have responded by offering bar preparation classes beginning in the second year of law school. The conventional wisdom, which has some empirical support, is that highly ranked schools emphasize problem solving and theory and that students at local schools that stress legal rules and practical procedures are better prepared for the bar examination. Accreditation is important because a loss of accreditation will result in students being ineligible for federal loan funds. As noted above, the ABA now requires that 75 percent of a school's graduates pass the bar within two years following graduation.

An advantage of attending a highly ranked school is that the big law firms tend to recruit students from these schools. The firms hire students during the summer between the second and third year of law school, "wine and dine" the students, and pay them "top dollar" in an effort to attract them to their firm. The firms then typically extend offers for full-time employment to the most impressive students. Top students are able to command six-figure salaries along

with perks such as affordable mortgages for students interested in purchasing a home. The number of students hired during the summer months has dropped significantly as a result of the economic downturn. Students at the top-tier schools also have an advantage in pursuing "clerkships" with respected and important judges or in being hired by the Department of Justice or other high-powered legal organizations.

Students' experience in law school influences the types of legal practice that are valued by law graduates and impacts the availability of legal services for the middle and working classes. We first take a brief detour and look at the issue of diversity and law school admissions.

Minority Admissions and Law School

The admission of minority students to law schools is a particularly controversial area. In 2011–2012, minorities comprised 24.5 percent of all law students and 26.2 percent of first-year students and received 24.2 percent of all degrees awarded. In 2013–2014, the percentage of minority students had risen to nearly 30 percent of all law students.

Barbara Grutter, a white Michigan resident with a 3.8 GPA and a 161 LSAT score, claimed that the University of Michigan's law school admissions policy discriminated against Caucasian applicants. Ms. Grutter was so upset about being turned down for admission to Michigan that she took her claim of discrimination all the way to the U.S. Supreme Court. Michigan is one of the leading law schools in the country and receives 3,500 applications for 350 places. U.S. Supreme Court justice Sandra Day O'Connor upheld the constitutionality of Michigan's admission program that sought to achieve a "critical mass" of diversity in the entering class. The Supreme Court majority recognized diversity is important for enhancing the classroom experience and that it was important for students to be exposed to people of different backgrounds as part of their preparation for the workplace and for leadership positions in society. There also was a need for a sufficient number of minority students to provide emotional support for one another. In 2000, a "race blind" admission policy at Michigan would have resulted in 4 percent, rather than 14 percent, of the entering class being members of minority groups. The University of Michigan stressed it did not use a quota system and broadly defined diversity, not limiting diversity to race. Diversity was broadly defined to include factors such as foreign travel and an ability to speak various languages. In the past, the policy had resulted in white applicants being admitted with scores lower than those of applicants from minority groups.

The Supreme Court opinion written by Justice O'Connor held it was constitutional for Michigan to consider race as a "plus" factor in admissions. Candidates under the program are evaluated as individuals, and race and other factors are considered in admitting a student to the law school. There is no quota or goals for admitting minorities. Justice O'Connor, in a statement that would later come to be cited by opponents of affirmative action, noted it had been twenty-five years since Justice Lewis Powell first approved the use of race to further an interest in student body diversity in public higher education. Since that time, the number of minority applicants with high grades and test scores had indeed increased. Justice O'Connor concluded that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (*Grutter v. Bollinger*, 539 U.S. 306 [2003]).

In 2014, in *Schuette v. Coalition to Defend Affirmative Action* (572 U.S. 291 [2014]), Justice Anthony Kennedy writing for the six-justice plurality upheld a 2006 referendum supported by 58 percent of Michigan voters amending the state constitution to prohibit affirmative action in university admissions. Kennedy stressed that the decision left the policy of affirmative action undisturbed in the forty-three states that, at the time, continued to follow the policy in university admissions. "This case is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. . . . Here, the principle that the consideration of race in admissions is permissible is not being challenged. Rather, the question concerns whether, and in what manner, voters in the States may choose to prohibit the consideration of such racial preferences."

In *Fisher v. UT Austin*, the Supreme Court by a vote of 4–3 affirmed the importance of a diverse student body and held that the University of Texas at Austin may consider race along with other factors in making undergraduate admission decisions. The University of Texas argued that the race-neutral policy in automatically admitting students in the top 10 percent of their high school classes across the state did not ensure sufficient diversity and that it was necessary to consider race as one factor among other factors in making admission decisions on other entering students. Justice Kennedy wrote that "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission . . . [b]ut still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity" (*Fisher v. UT Austin*, 579 U.S. ___ [2016]).

In 2004, UCLA law professor Richard Sander wrote a highly controversial article arguing that the decision in *Grutter*, in effect, allowed law schools to continue to pursue affirmative action admissions based on race under the claim that their admissions policy considered a variety of factors. Sander argued affirmative action in law schools was harming African American students. Sander explained that affirmative action resulted in the admission of students to schools to which they otherwise would not have been admitted based on their credentials (Sander 2004).

Sander's fundamental argument is that African American students are admitted to schools with LSAT scores below those of other students. There is a "cascade effect." As high-ranking schools admit African Americans whose credentials are equal to or greater than those of whites at lower-tier schools, low-ranking schools looking to recruit African Americans are forced to lower their admissions standards.

What are the consequences? The result is that African American students, along with other students admitted with weaker credentials, find themselves academically overwhelmed and rank near the bottom of the class after the first year. Half of African American students find themselves ranked in the bottom tenth of their class. These poor grades result in high attrition rates from law school. Sander cites data that 19 percent of African Americans failed to complete law school within five years as compared to 8 percent of Caucasians.

Sander argues African American students who fail to complete their degree at high-ranking schools likely would have graduated had they attended a less prestigious school where their credentials are equal to or better than those of the student body.

Much of Sander's analysis has been called into question. Grades and LSAT scores explain only a portion of a student's performance in the first year. Sander's analysis overlooks the impact of racism and stereotyping and economic and family stress on the performance of African American and other minority students, which moderates over the course of three years as minority students adjust to law school. His work stands in contrast to a series of studies documenting that affirmative action has created opportunities for minorities and that for African Americans at elite law schools the graduation and bar passage rates and career successes are comparable to those of white students. These top-tier schools open the door to partnerships in law firms, judgeships, and elected political office. Surveys of Harvard and Michigan African American law school graduates find that these graduates have careers and incomes comparable to other graduates of these two elite schools (Wilkins et al. 2002).

Commentators pointed out eliminating affirmative action would reduce African American lawyers by more than 25 percent rather than Sander's figure of 14 percent.

One study predicts that if affirmative action were ended African Americans would constitute 2.5 percent of the students at elite law schools rather than the 8 percent they presently represent. This would mean that a law school that has eight students in each of four first-year sections would have an average of two African American students in each section. The authors conclude that absent affirmative action the number of African American students at selective law schools and the number of African American lawyers would seriously decline (Chambers et al. 2005).

Sander's statistic is based on the assumption that an African American student would happily attend a second- or third-tier school rather than a top-ranked school. He also fails to consider that elite schools typically are able to offer scholarship funds for students that simply are not available at other schools. Sander's analysis makes little effort to focus on the value of a diverse educational environment for white students and the long-term contribution of African American graduates to their community and to the legal profession and to public service. He also overlooks that a legal career extends over a number of decades and that a dedicated individual has the opportunity to refine and to develop his or her legal skills.

Sander's critics argue that the real crisis in law school is not affirmative action but the shrinking number of minority students. John Nussbaumer, associate dean at Thomas M. Cooley Law School, observes that as the United States becomes more diverse, lawyers and judges remain "predominantly white." Dean Nussbaumer notes that schools are more concerned with how a student's LSAT score will affect his or her rankings than with asking whether a student has a reasonable chance of graduating from law school. He finds that while less than one-third of Caucasian students fail to gain acceptance from a single ABA-accredited law school, two-thirds of African American applicants, nearly half of all Hispanic applicants, 42 percent of American Indian applicants, and 37 percent of Asian American applicants, whose LSAT scores are similar to those of Caucasian applicants, fail to be accepted to a law school. Nussbaumer argues that these groups have been "shut out" of the legal profession for many years and that the continued failure to create an inclusive legal profession deprives minority communities of leadership and economic resources (Nussbaumer 2011).

Proposals to base affirmative action efforts on economic class rather than on race, however laudable, are criticized as failing to address racial inequality in the legal profession (Michaels 2007). Would you support an end to a consideration of diversity in law school admissions? How would you design a law school admissions policy?

Before we turn to a discussion of the experience of attending law school, it should be noted that according to ABA data 5 percent of white students in 2016 left law school as compared to 9 percent of Hispanic students and 11 percent of African American students. This pattern persisted in public and private schools and regardless of the median LSAT score of the school (K. Thomas and Cochran 2018).

THE LAW SCHOOL EXPERIENCE

Law schools in describing the value of a legal education will tell you that the study of law is a rigorous academic discipline that teaches students to "think like a lawyer." Barrels of ink have been spilled by educators and practitioners who have called for reform of the law school experience. These calls for reform date back at least to 1913 and have resulted in some significant changes in law schools. The general response, however, has been to resist educational reform, and attempts by schools to introduce radical innovations have fallen flat (Auerbach 1976: 110, 275–277).

Law school education places enormous importance on the first year (Gulati, Sander, and Sockloskie 2001). These are "high-stakes" grades. Law schools generally grade on the curve rather than adhering to what is called "criterion-referenced grading" in which grades are awarded based on an objective standard of competence. The "best students" are invited to be on the law review, are asked to serve as research assistants for professors, and are offered summer positions with major law firms. This has led to an arms race in which schools offer summer programs to introduce students to law school prior to their entry into law school and students view one another as competitors who stand in the way of their career aspirations (Bonsignore 1977). Tension is enhanced by the fact that grades in the first year generally are based on a single examination at the end of the semester. It is not uncommon for professors to return the exams months later with a limited number of comments. Students at times complain that they

are provided little sense of how to improve their performance on examinations. Individuals who fail to earn good grades may become discouraged and disinterested in school and turn their focus to work and other outside activities during the last two years of law school (W. Sullivan et al. 2007: 165–173).

Progressive-minded critics of legal education assert there is a perception among students at the top-tier law schools that the school encourages students to pursue positions in large corporate firms. Placing students in these firms enhances the school's prestige and standing in the legal community. Some critics contend that far too many law school faculty are recruited from individuals who were successful as students and who worked for several years in corporate firms and have limited experience as "hands-on" legal practitioners. These faculty members tend to send the message that corporate work is the type of legal practice students should pursue. The message is that legal careers in areas ranging from criminal law to domestic relations are "second-rate" and "dead-end" career choices. In other words, top-tier law schools are criticized for tending to "reproduce" a legal profession that serves powerful interests.

This criticism may be overstated because it assumes that students are easily influenced and overlooks that most schools offer a variety of clinical programs that encourage students to work on behalf of individuals in need of assistance. The changing job market and the corporate firm cutbacks in hiring have forced students to consider a range of alternative careers. Critics also overlook that lawyers have a responsibility to represent every client and that lawyers who choose to represent corporate interests play an important role in ensuring that corporations comply with the law in areas such as environmental law and worker health and safety (D. Kennedy 1998).

The Socratic classroom method is viewed by critics as the primary vehicle for the "reproduction" of the legal profession. Critics assert students are made to feel inadequate and humiliated and aspire to emulate the tough and insensitive approach of their instructors when they enter the ranks of practicing attorneys. Whatever the merits are of the notion of reproduction of hierarchy, there is evidence that law school can be a difficult, demanding, and emotionally challenging experience for students. Scott Turow, in his account of his first year at Harvard Law School, relates how a professor humiliated a student who was unprepared for class by requiring the student to read the case aloud while the professor asked the student questions (Turow 1977). The evidence is that first-year law students suffer a greater degree of distress, anxiety, and depression than do medical students and that these "walking wounded" are more likely to engage in substance abuse and suffer from anxiety, depression, and emotional difficulties that linger throughout their three years of law school (T. Peterson and Peterson 2008; Shelton and Krieger 2004).

Studies find that law students, as they become absorbed in legal principles and rules, may lose the sense of idealism that motivated them to enter law school. The first-year class on property, for example, typically avoids addressing environmental law or affordable housing and gentrification and instead focuses primarily on the conveyance of land and the complex formulas used in common law England for transferring land (Schauer 2004: 124–147).

The Socratic method may not be as prevalent a method of teaching as commentators assume (Mertz 2007: 142–143). Instructors who continue to rely on the Socratic method argue it has the merits of facilitating interaction between a single instructor and eighty or ninety students, trains students to "think like a lawyer," and emulates the type of interaction that lawyers experience in the practice of law. Knowing they may be called on to talk at any moment, students are motivated to prepare for class, and even when not called on by the instructor, they are thinking about the answer to a question (Vitiello 2005).

Law graduates generally respond that their legal education taught them to think like a lawyer (Zemans and Rosenblum 1981: 136). It may simply be inevitable that when you put a large number of "high-flying" students in a classroom and pit them against one another in the pursuit of grades, the result is a high degree of stress and anxiety. The reality is that "if you cannot stand the heat, you should stay out of the kitchen." It is questionable whether the

law school experience is so powerful that it can transform idealistic young people into greedy, self-interested corporate lawyers. The fact is that most students arrive at law school with an ambition to pursue a prestigious corporate career (Corsi 1984: 32–33).

Although there is disagreement over the educational impact of the Socratic method, studies strongly indicate that minorities and women participate at a significantly lower rate in law school classes than do white male students. African American students tend to participate at a rate equal to other students when a class is taught by an African American instructor and when there is a "critical" number of African American students in a class.

Beth Mertz in her study of law school found that students appreciate the benefits of a diverse classroom and that these benefits can be fully realized only in a fully integrated classroom in which all students feel comfortable participating. A similar pattern emerges with regard to women. Despite the fact there is no difference in the academic achievement of female and male students, studies indicate women volunteer to talk less frequently than do men and are called on to speak less frequently than men (Mertz 2007: 176–197).

In several early studies, including a well-cited study at the University of Pennsylvania Law School, researchers found the grades of women suffer during what women describe as a three-year "alienating experience" that includes their "silencing" in the classroom. Women perceive that men are called on to talk more frequently and that male professors favor male students. Women feel disregarded and overlooked in the classroom, and this contributes to their expressing less overall satisfaction than men with their law school educational experience. Women also suffer from a greater degree of stress and anxiety than male students. Feminist scholars question whether there is true educational diversity and equality of opportunity in the law school classroom (Guinier, Fine, and Balin 1997).

Meera E. Deo describes the difficulty of women of color being hired and succeeding as law professors. She writes that females of color persevere in a generally unfriendly environment because they realize that their presence will benefit students of color. ABA data details that there are 10,232 full-time and 17,021 non-full-time faculty. Women and men of color constitute roughly 16 percent of legal faculty, 80 percent of whom are white and 61.7 percent of whom are male (Deo 2019).

The 2007 Carnegie Foundation report on law school education notes law schools are successful in helping students to develop their capacity for logical analysis and reasoning. The report argues the emphasis on developing logical analysis should be balanced by an attention to the ethical and moral aspects of the law. Students in the first year of law school quickly begin to see the world through the window of the law and learn to strictly separate the realm of law from the realm of morality. Students learn, for example, that an individual who makes no effort to rescue a child whom he or she spots on a railroad track is not criminally liable in the event the child is killed by an oncoming train. The Carnegie report argues that legal education should be infused with an ethical sensitivity in which teachers question whether a better rule might require an individual to assist another so long as he or she can do so without endangering himself or herself. The important point is that law schools should be devoted to producing legal professionals rather than mere technicians and that students should be given a sense that lawyers are devoted to what is right and not merely to what is legal.

A related criticism is that legal rules should be placed in a social context. An example would be to ask why minorities are disproportionately singled out for stop and frisks by the police or whether the right to counsel at trial is meaningful given the underfunding of state public defender services. On the other hand, law school is intended to teach people to practice law, and these types of concerns are best left to undergraduate teachers who possess expertise in philosophy and in public policy (W. Sullivan et al. 2007: 142–144).

Meera E. Deo, Lazarus-Black, and Elizabeth Mertz in an edited collection of essays also raise issues regarding how the culture of law schools perpetuates a stratified legal profession that lacks economic and racial diversity. The law school curriculum sends the message to students that they should aspire to work on behalf powerful and privileged economic interests. The schools are

committed to producing legal technicians rather than producing intellectually alive lawyers who question the prevailing legal system and who are open to transforming society (Barton 2019; Deo, Lazarus-Black, and Mertz 2020; Tamanaha 2012).

In a controversial essay titled "Law Schools Are Bad for Democracy," Yale professor and historian Samuel Moyn argues that law schools discourage student idealism and direct the students into corporate firms. The schools rather than focusing so heavily in the classroom on the legal decisions of judges and the functioning of courts according to Moyn should encourage students to appreciate how the law can be used creatively to promote social transformation. Moyn might endorse, for example, devoting more time to helping students understand how legal tools may be used to help people establish alternative businesses and nonprofit institutions and file innovative legal actions to reform the educational and corporate system and how the law may be employed creatively to protect the environment and the rights of workers and to eradicate poverty (Moyn 2018a).

The Carnegie Foundation report in contrast to the traditional criticisms set forth in a series of ABA reports states that law schools do not teach the "nuts and bolts" of legal practice. Law students read legal judgments in which the judge summarizes the facts and devotes the bulk of the opinion to a discussion of the law. Students are not provided with experience in gathering and making sense of facts, in interviewing clients, or in negotiating with other lawyers or in drafting documents. Some law students enroll in clinical programs, but these programs tend to have a limited number of slots and typically are treated as the "stepchild" of legal education. A persistent complaint of law graduates is that they were unprepared to practice law (Corsi 1984: 41–42; Rhode 2000: 196–199).

Turow observes in his account of his student years at Harvard Law School that "there is little effort to teach students, while they are in law school, what it means to practice law." Defenders of the current approach argue law school cannot prepare students to practice law because these skills only can be learned "on the job." A law degree is not limited to developing practitioners and is designed to equip students to pursue a number of occupations, including business and public service (Turow 1977: 280).

Reform advocates also have urged making law school two years rather than the current three years of study. This would reduce the cost of law school and enable students to graduate without borrowing large amounts of money.

A student who manages to graduate from law school must then surmount the barrier of passing the state bar examination.

Admission to the Bar

The democratic impulse of Americans during the eighteenth and nineteenth centuries ensured that there were few barriers to individuals pursuing a legal career. A legal career was open to anyone who was able to apprentice in a law office. Efforts in Massachusetts and in New York to require lengthy periods of training to enter the legal profession were abandoned in response to popular pressure. In 1860, only nine of thirty-nine states required some period of preparation prior to applying for entry to the practice of law. Abraham Lincoln reminisced that he was admitted to the bar after talking for a few uneasy moments to the bar examiner and defining a "contract" (Rhode 2000: 180). State statutes provided general standards for admission to the legal profession in the initial decades of the nineteenth century, and admission to the bar tended to be within the jurisdiction of local courts. Admission before one court in a state did not necessarily authorize the applicant to practice before the courts in other local jurisdictions. By the early twentieth century, uniform state standards for admission to the bar were introduced when admission decisions were centralized in a state board of bar examiners. The board typically is under the direction of the state supreme court, which has the authority to admit individuals to practice before state courts. The board determines whether an applicant meets the state's educational requirements for the bar, administers the bar exam, reviews the

good character of applicants, and issues licenses to individuals to practice in the state (Hurst 1950: 277–280).

Requirements for entry into state bars have tightened in two respects. First, the educational requirements have been instituted, and individuals, in general, are no longer able to qualify for entry to the bar by apprenticing in a law office. A second aspect of the tightening of legal requirements has been increasing the difficulty of the bar examination.

In 1921, only ten states required at least the equivalent of graduation from high school as a prerequisite for admission to the bar. The ABA responded by passing a resolution calling for states to institute more restrictive standards for admission to the bar. Nineteen years later, two-thirds of the states required at least two years of college, or its equivalent, as a prerequisite for admission to the bar. An individual at this point could attend law school or qualify for practice through an apprenticeship. The resulting change in the character of the bar is illustrated by the fact that the average educational level of an individual entering the bar in 1921 was a year short of grammar school and six to fourteen months training in law. Ten years later, the average educational level had reached one year in college and twenty-eight months in law school or in legal apprenticeship training (Hurst 1950: 281). By 1984, the standard requirement for taking the bar was graduation from an ABA-accredited law program (Abel 1989: 249).

In 1944, forty-four states continued to permit an individual who had spent three or four years as an apprentice to take the bar exam. Six states in 1951 continued to allow preparation for law study through the apprenticeship system. Ten states permitted an individual to prepare for the bar exam through a correspondence school. At present, California has a state bar Law Office Study Program that allows individuals to study for the bar exam under the mentorship of a practicing lawyer and has accredited an online law school. Vermont, Virginia, and Washington also allow individuals to take the bar after apprenticing with a lawyer. Maine, New York, and under certain limited circumstances West Virginia permit a combination of law school and an apprenticeship. A modest number of individuals taking the bar pursue these alternatives to law school. In California in 2005, thirty-seven people who apprenticed took the bar exam, and five passed. As previously noted, California also allows graduates from non-ABA-accredited law schools to take the bar exam. In 2004, the pass rate for the 2,160 graduates of non-accredited schools was 16 percent. In contrast, 8,230 graduates of ABA-accredited schools had a pass rate of 54 percent (A. Morris and Henderson 2008: 823–824).

In 2014, 83,969 individuals took state bar exams. Sixty of these individuals had "read the law," and seventeen passed. This pass rate of 28 percent compares to the pass rate of 73 percent for individuals who attended an ABA-approved law school. Looking at the pass rate between 1996 and 2014, 71.1 percent of individuals who attended law school passed the bar. This compares to a pass rate of 26.7 percent for individuals who "read the law" as well as the same percentage pass rate for individuals who attended non-ABA-approved schools and a 17.2 percent pass rate for individuals in states that authorize online legal study (Crockett 2015). California Bar Exam statistics are that between 2007 and 2013, 64 percent of the 45,011 individuals taking the California bar who attended an ABA-accredited law school passed the state bar. Fifty-four individuals who apprenticed in a law office took the bar, 28 percent of whom passed the bar. Twenty percent of the 9,555 individuals who graduated from a law school accredited in California rather than by the ABA passed the bar exam.

The primary requirement for entrance into the practice of law is passing the state bar examination (National Conference of Bar Examiners and ABA Section of Legal Education and Admission to the Bar 2016). In virtually every state during the eighteenth and nineteenth centuries, this was an oral examination that was so easy that Lawrence Friedman described the test as a "joke." In 1900, state boards of bar examiners began to introduce written exams, and by 1940, every state had a formal system of examination. There was an obvious concern with ensuring that newly admitted lawyers were knowledgeable in the law and that the public perceived that lawyers had passed a demanding examination. There also was the interest in restricting access to the profession. Commentators note that the examination ultimately did not succeed

in restricting access to the legal profession (Hurst 1950: 282–284). The pass rate on an exam in the 1930s averaged 50 percent. States permitted individuals to retake the exam, and 90 percent of applicants eventually passed the examination (K. Hall 1989: 258).

There is a concern that the marking of a written essay examination inevitably introduces some measure of subjectivity into the grading process. A California study indicated that one-third of bar examiners disagreed on whether an answer passed or failed and that a quarter of examiners reversed their decision whether to pass or fail an exam when presented with the paper a second time (Rhode 2000: 150–151).

In an effort to ensure uniformity and to tighten standards for admission to the bar, the National Conference of Bar Examiners (NCBE) developed a national, multiple-choice "multistate examination." In most states, this is administered on the day before the state essay examination. States differ on the score required to pass the multistate exam and differ on how the state and multistate components of the exam are weighted in determining an applicant's total score. There is some question whether legal aptitude can be tested on a multiple-choice examination.

An additional requirement for admission to the bar is a demonstration of "good moral character." A candidate for admission to the bar is required to submit letters of reference from employers, teachers, and friends and also to reveal any "warts" in his or her background. This involves sworn statements that the individual has not been arrested or convicted of a felony and is honest and ethical. In some instances, a felony will bar an individual from the practice of law, and in other states, this creates a presumption against admission to the practice of law. Candidates with criminal felony convictions continue to have a particularly difficult time gaining admission to the state bar (Levin 2015: 284).

The character test is criticized for being applied in an inconsistent fashion. In Michigan, an applicant who was convicted of fishing without a license was denied a law license while individuals convicted of child molestation and of conspiracy to bomb a public building were admitted. Deborah Rhode indicates that Ivy League graduates may receive less scrutiny, whereas minority candidates may receive more intense examination. She also raises the question whether a criminal conviction as a juvenile is related to the likelihood that an individual will commit an ethical violation in the practice of law (Rhode 2000: 154).

Law schools place a great deal of emphasis on the pass rate of their students on the bar. A low pass rate may result in the loss of ABA accreditation and may discourage students from attending the school. Most states require that an individual graduate from an ABA-accredited law school. Graduates of state-accredited law schools can take the exam in the state in which the school is located.

Individuals who pass then can take the bar in another state that recognizes the results of the first state's examination. As a global financial center, New York allows certain categories of foreign lawyers to take the bar examination. Four other states provide this opportunity to a narrow group of applicants.

The written examination now entails two or three days in either February or July. Preparation for the bar typically involves a streamlined study of the classes a student has taken in law school. Most people prepare by enrolling in one of several bar review courses offered by private firms. The first day of the exam involves the multistate, multiple-choice examination. The second day typically requires written essays on state law. In forty-nine states and in the District of Columbia, individuals also must pass a multistate ethics examination (the Multistate Professional Responsibility Examination), which is administered at different times during the year. In the past few years, two additional components have been required in several states. The Multistate Essay Examination introduced a writing component on subjects tested on the multistate exam, and the Multistate Performance Test asks applicants to complete various practical tasks related to the practice of law. A relatively new development is a uniform multistate bar examination to replace state-specific exams. Roughly thirty-three states and the District of Columbia have adopted the Uniform Bar Examination (UBE). According to the NCBE, the test is intended to "test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law." States that have adopted the UBE provide reciprocity to lawyers from

other states adopting the UBE providing that they get the requisite score on the tests, which is a significant advantage. Wisconsin is the only state that continues to offer a **diploma privilege**. This permits individuals to practice law in Wisconsin if they graduate from a law school within the state and have taken and passed a number of designated classes in law school. Nationally, 75 percent of individuals taking the bar for the first time in 2018 passed the bar. The pass rate significantly differs between states. The ABA Section of Legal Education in 2019 released a comprehensive set of statistics on bar passage rates. Ninety-seven percent of individuals who graduated in 2016 who took the bar passed within two years of graduation. The pass rate in 2018 varied in states. Ten states had pass rates at or above 70 percent although roughly fourteen states had pass rates at or below 60 percent. Most states had pass rates of between 60 and 69 percent, including Maine (63 percent); Michigan, Ohio, and Texas (each at 64 percent); and Virginia (66 percent). The general trend is toward declining passage rates across the country The expense of the preparatory course and the expense of registering to take the examination may result in it being somewhat more difficult for students lacking economic resources to retake the examination (Rhode 2000: 152). Passage of a state bar examination does not mean that a lawyer is able to practice in other states. This is a complicated area. In some states, individuals can apply for membership so long as they are a member of a state bar that grants reciprocity (the right to practice) to members of the other state's bar. In other states, an individual who has continuously practiced in another state for five years may apply for membership. In roughly half of the states, an individual licensed in another state must pass all or part of the state's bar examination in order to practice in the state. An attorney also may ask permission of the court to appear in a specific case as an outside counsel and typically must appear with a lawyer licensed to practice in the state. In other words, we have a system in which lawyers "protect their turf" by making it difficult for lawyers from other states to practice. Much of this would change with the adoption of a uniform multistate bar examination. There is no evidence that performance on the bar exam predicts success in the practice of law. The most that studies have established is that law school grades are correlated with scores on the bar exam and class rank rather than with the classes an individual has taken in law school (Rhode 2000: 150–151).

Rhode makes the troubling observation that the pass rate in states tends to be inversely related to the number of lawyers in the state. The fewer lawyers there are in a state, the higher the pass rate is; the more lawyers there are in a state, the lower the pass rate is. In other words, the bar exam reflects a desire to limit the number of lawyers in a state. Rhode asserts that pass rates do not reflect the quality of the applicants' responses and that most individuals failing to pass the bar exam in a state with a low pass rate would have passed the exam in a "permissive state" (Rhode 2000: 151–152). Of lawyers, 80 to 90 percent question whether the bar exam measures competence. Two-thirds of lawyers nevertheless want to keep the exam because they believe that it is effective in controlling the number of lawyers (Rhode 2000: 154). The federal courts have their own licensing system. A lawyer who is authorized to practice in a state within the jurisdiction of the federal court generally is authorized to practice in the federal court. Some federal courts also require lawyers to possess experience for a designated period of years. Lawyers from states outside of the jurisdiction of the federal court may be admitted to practice in a federal court in a specific case. A lawyer must be admitted to practice before the U.S. Supreme Court before appearing before the Court. In the mid-1970s in an effort to ensure lawyers were ethical and competent, most state bars introduced continuing legal education (CLE) requirements. This coursework may require ten or twelve hours a year, a portion of which must focus on ethics. The research indicates that CLE does not have a measurable impact on the competence of lawyers. It often is difficult to find a CLE class at a convenient time and place that fits a lawyer's specialization, and a lawyer may end up taking a class that has limited relevance to his or her interests. Wealthier lawyers can afford to "mix business with pleasure" and have the option of attending an expensive CLE class at a luxurious resort. CLE courses increasingly are offered online with little quality control. CLE has become a big business, and law schools have become one of the biggest providers of CLE classes and credits (Rhode 2000: 156–158).

A.1 You Decide

In August 2017, Amy Wax, the Robert Mundheim Professor of Law at the University of Pennsylvania Law School, co-authored an Op-Ed in which she argued that while the causes of problems ranging from the opioid crisis, to violence, to out-of-wedlock births, to the lack of academic performance were complex, underlying these and other concerns was the "breakdown of the country's bourgeois culture." The norms of this "bourgeois culture" mandated that individuals be prepared to serve the country, get an education, marry and remain married, have children, work in a loyal and dedicated fashion, and conduct themselves in a respectful fashion toward others. She contended that these norms were undermined in the worship of "sex, drugs and rock and roll" during the 1960s, lowering the standards of higher education, and a civil rights movement that had abandoned a claim for equality and instead began to demand a claim for "special treatment."

Professor Wax contended that in recent years, new cultural patterns had emerged that were ill suited to a modern, capitalist economy and to a unified society. These patterns included a single-parent, anti-social working-class culture of "some working-class whites," the "rap culture" of inner-city African Americans, and the "anti-assimilation" ideas propagated by some Hispanic immigrants.

Cultures according to Professor Wax are "not equal," and much of what has plagued the United States could be cured if the upper middle classes and Hollywood and the media, which largely continued to embrace "bourgeois culture," began to preach the type of bourgeois values outlined earlier.

Wax added in an interview with the University of Pennsylvania student newspaper that "everyone wants to go to countries ruled by white Europeans" because their cultural norms were superior. "I don't shrink from the word 'superior.'"

In reaction to Wax's statements, fifty-four Penn students and alumni requested that the university denounce what they viewed as Wax's statements, which they claimed were "steeped in anti-blackness" and "white supremacy." Thirty-three Penn Law faculty members followed with an open letter stating that while Wax had every right to express her opinions she was not immune from criticism and that they "categorically reject" her claims. Wax in an hourlong university lecture before the conservative Federalist Society responded that some of her colleagues were engaged in an intolerant effort to limit her academic freedom of speech.

Wax subsequently appeared in a video interview with Brown University professor Glenn Loury titled the "The Downside to Social Uplift" in which she stated, "Here's a very inconvenient fact . . . : I don't think I've ever seen a black student graduate in the top quarter of the class, and rarely . . . in the top half . . . I can think of one or two students who scored in the top half of my required first-year course." Wax went on to suggest that these students might be better suited for a different law school: "You're putting in front of this person a real uphill battle. And if they were better matched, it might be a better environment for them. . . . We're not saying they shouldn't go to college—we're not saying that." In the interview, Wax also claimed that there was a diversity mandate in selecting students for the prestigious *University of Pennsylvania Law Review.*

In response to a petition calling for the university to discipline Wax, she told the University of Pennsylvania school newspaper that "student performance is a matter of fact, not opinion. It is what it is."

In March, Dean Theodore Ruger announced that Wax would continue to teach elective classes in her field of experience although she would no longer teach first-year required classes. Ruger explained that "Black students assigned to her class in their first week at Penn Law may reasonably wonder whether their professor has already come to a conclusion about their presence, performance and potential for success in law school and thereafter."

Ruger also stated that Wax spoke "disparagingly and inaccurately" in claiming that she had "rarely" seen a black student finish in the top half of his or her class. Ruger explained, "It is imperative for me as dean to state that these claims are false. . . . Black students have graduated in the top of the class at Penn Law. . . . And contrary to any suggestion otherwise, black students at Penn Law are extremely

successful both inside and outside the classroom, in the job market, and in their careers." Ruger added that "the *Law Review* does not have a diversity mandate. Rather, its editors are selected based on a competitive process."

Wax responded that "somewhere deep in a file drawer, or on a computer server humming away in a basement, are thousands upon thousands of numbers, with names and identities attached. . . . They're called grades. They represent an objective reality, which exists independent of what people want reality to be. They sit silently, completely indifferent to indignation, angry petitions, irritable gestures, teachers' removal from classrooms—all the furor and clamor of institutional politics. . . . They are jealously guarded, protected by cloaks of confidentiality and secrecy. But they are what they are. Hiding facts is not the same as changing them."

Richard Levy in reaction to the furor surrounding Wax resigned from the board that oversees the law school. He wrote in a letter to Penn president Amy Gutmann posted to the student newspaper website that he considered Ruger's decision to remove Wax from teaching first-year classes a "serious error" and that the treatment of Wax was "unacceptable." Levy noted that "preventing Wax from teaching first-year students doesn't right academic or social wrongs . . . [R]ather, you are suppressing what is crucial to the liberal educational project: open, robust and critical debate over differing views of important social issues."

Levy later wrote that "Penn Law has entered the world of micro-aggressions and 'snowflakes' and that is not a world I choose to be a part of." In light of Wax's "teaching stature and litigation experience," he argued that she should not be barred from teaching the required first-year class just because some students might be uncomfortable in her class.

During the confirmation hearings for Supreme Court nominee Bret Kavanaugh, Wax, in another video interview with Glenn Loury, commented on the allegations by Christine Blasey Ford that Kavanaugh had sexually assaulted her in high school: "I think she should have held her tongue—if I were her, I would have. I think basic dignity and fairness dictate that, you know, it's too late, Ms. Ford, even if there would have been consequences to bitching about it at the time." According to press reports, Wax stated that even if Kavanaugh did engage in a "momentary act of recklessness," it "didn't create any permanent harm, except through this manufactured idea that this is such a horrible, traumatic thing."

More than four thousand people signed a petition sponsored by the advocacy organization Care2 calling for Wax's termination from Penn Law School. Wax, writing in the *Wall Street Journal*, responded that there was threatening effort to "suppress inconvenient and uncomfortable facts" and to "refuse to debate various important social issues."

In July 2019, Wax at a conference stated that the United States should embrace "cultural distance nationalism," which means taking the position that the nation will be "better off with more whites than non-whites." Dean Ruger termed the comments at best "bigoted" and at worst "racist" and announced that Wax would not be teaching any classes during the upcoming academic year.

Wax herself is the daughter of immigrants who overcame significant barriers. She has an outstanding academic record and is a graduate of Yale, Oxford, Harvard Medical School, and Columbia Law School and as a lawyer worked in the office of the Solicitor General of the United States in which she argued numerous cases before the U.S. Supreme Court. Wax prior to being hired at the University of Pennsylvania taught at the University of Virginia Law School. Wax is the recipient of several prestigious teaching awards.

Should Professor Wax have been removed from teaching a required first-year class at the University of Pennsylvania Law School based on her controversial comments? How would you feel as a student enrolled in Professor Wax's class on civil procedure?

TERMINOLOGY

Bar examination

Diploma privilege

LSAT