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. Today, this is 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 two hundred and five American Bar Association (ABA)–accredited law schools in the United States. Three of these schools have received provisional acceptance, which means that they are making progress toward accreditation. 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 threatened to remove accreditation from schools with low rates of passage on the bar exam. Critics complain that the "stranglehold" of the ABA over legal education prevents innovative approaches to legal education (ABA Section of Legal Education and Admission to the Bar n.d.).

It is important to distinguish between types of law schools. Everyone is familiar with the rankings published by *U.S. News & World Report*, which ranks the top hundred law schools. The other schools are not ranked and are listed in alphabetical order. 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 & World Report 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 110,951 law students in the United States, roughly 52 percent of whom are male and 48 percent of whom are women. Projected enrollment trends indicate that women will be a majority of law students in the next few years, and in 2015, eight-five law schools had more women enrolled than men.

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. There were 44,518 first-year students in 2012–2013 and 37,107 first-year students in 2016–2017. The ABA reports that since 2011, the number of applicants to law schools ranked in the top twenty by *U.S. News & World Report* has dropped by a median figure of 18 percent.

There is 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).

Law school is an expensive proposition. The most highly ranked private schools may cost over $60,000 a year 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 $25,890 for in-state students at eighty ranked public schools that submitted data to *U.S. News & World Report*. The average for out-of-state students was $38,885. Elite public institutions can charge as much as the best private schools (Barrow 2016).

In 2012, the average law school graduate had an indebtedness of $140,000, 59 percent higher than the debt incurred by the average law graduate eight years earlier. 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 free-standing law schools that are not affiliated with a college or university (Patrice 2015).

Between 55 and 60 percent of applicants are admitted to at least one law school although in recent years nearly 80 percent of applicants were admitted to at least one school. 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.

The LSAT scores range from 120 to 180. In other words, you receive a 120 merely for signing your name and taking the exam. The top law schools have responded to the decline in LSAT scores by limiting their enrolment. 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 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 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, did not reflect their ability, motivation, and determination and as a result are not accepted to law school (*DeFunis v. Odegaard*, 416 U.S. 312 [1974]).

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).

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.

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.

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,

life experience, 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. ___ [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 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 bar passage rates for African Americans at elite law schools 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. 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. 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 America 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 Native American 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?

■ 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-reference 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 (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 emotional difficulties that linger throughout their three years of law school (T. Peterson and Peterson 2008).

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).

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 (Sullivan et al. 2007: 142–144).

The Carnegie Foundation report is in contrast to the traditional criticism in a series of ABA reports 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, Mississippi, and New York 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. 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).

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

accredited. 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-eight states, 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 twenty-four 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, 73 percent of individuals passed the bar in 2014. The pass rate significantly differs between states. The pass rate between 1996 and 2014 varied from 54 percent in California, 62 percent in Delaware, and 63 percent in Nevada to roughly an 87 percent pass rate in Montana, Minnesota, and Utah. The data indicate that by retaking the exam, most law graduates eventually pass the exam (Crockett 2015). 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 course work 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

Anna Alaburda in 2008 graduated in the top tier of her class at Thomas Jefferson School of Law in San Diego, California; passed the demanding California bar exam; and was poised to translate her law degree, which resulted in an indebtedness of between $150,000 and $170,000, into a successful legal career. After failing to obtain a satisfactory full-time salaried position as a lawyer eight years after graduation, Alaburda filed a legal action seeking monetary damages against Thomas Jefferson alleging that when she applied to Thomas Jefferson, the school falsely represented its employment figures. At the time that Alaburda decided to apply to Thomas Jefferson in 2005, the school provided data to *U.S. News & World Report* representing that 54 percent of the school's graduates were employed in law firms and an additional 22 percent were working the legal field and that the overall employment rate was 84.1 percent. Alaburda claimed that the school failed to disclose that its employment figures included a pool cleaner, waitress, and sales clerk and was based on a limited sample of students. She alleged that she would not have applied to Thomas Jefferson had the school truthfully reported its job placement statistics. At the time of Alaburda's lawsuit, she reportedly was employed by a legal publishing firm at a salary of $70,000 per year and had turned down a $60,000 job with a law firm following graduation.

Thomas Jefferson is a lower-tier law school that achieved ABA accreditation in 2001 and enrolls over four hundred students. The average student graduates from Thomas Jefferson owing $137,000, which is comparable to the amount owed by graduates of the prestigious Stanford Law School and is one of the highest levels of indebtedness among law schools in the country. The bar passage rate of Thomas Jefferson students at the time of Alaburda's legal action was lower than 50 percent, which is far below that of most law schools.

Thomas Jefferson claimed that the school had more than seven thousand successful graduates working nationally and internationally and stood by its employment data. The school also noted that Alaburda and other graduates were aware that a law degree does not guarantee professional "success" or "professional riches."

Alaburda was the first law student whose case against a law school survived the legal obstacle course and reached a trial before a jury. Sixteen other cases filed by graduates of lower-ranked law schools based on an alleged misrepresentation of placement statistics previously had been dismissed before trial.

In 2012, New York justice Melvin L. Schweitzer dismissed a lawsuit by former students of New York Law School alleging that the school falsely represented employment figures. Justice Schweitzer noted that a prospective student would have to be wearing "blinders" to fail to see that a significant number of law graduates fail to have successful careers.

A jury voted 6–3 to reject Alaburda's claim. Jurors following the trial indicated that students should be aware that they are paying tuition for a law degree and that there is no guarantee of a job. As a result of Alaburda's case and other legal actions, the ABA now requires schools to provide employment information on whether graduates are employed in a law or non-law field and whether graduates are working full-time or part-time (Olson 2016c; Tamanaha 2012).

Seventy percent of individuals graduating from law school in 2015 obtained law jobs or jobs in which employers "preferred" a law degree. In 2015, there were four thousand fewer law graduates than 2014, a year in which 69 percent of law graduates obtained employment. The job placement for graduates from the top twenty schools in 2015 was between 80 and 100 percent. In 2014, 17 percent of law graduates, most of whom were graduates of top-ranking law school, started at a salary of $160,000. The median starting salary for law graduates was between $40,000 and $60,000 (Solomon 2016).

As a juror, how would you vote for or against law graduates like Anna Alaburda who sue law schools for misrepresenting their employment figures?

TERMINOLOGY

bar examination

diploma privilege

LSAT