The Legal Profession: Bar Admission, History, and Diversity

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Chapter 1  ●  The Legal Profession: Bar Admission, History, and Diversity

The history of admission to the American legal profession is partly one of exclusion. American lawyers and their newly organized bar associations initially regulated who could practice law as a way to establish and maintain high professional standards. Prominent lawyers and bar organizations sought to protect clients from unscrupulous lawyers and to ensure that admitted lawyers were qualified. But the history of these early regulatory efforts is replete with evidence of bias against women, people of color, immigrants, Catholics, Jews, and others who were not white Protestant men. The regulators also sought to protect their turf and to limit competition.

In this chapter, we begin with a look at contemporary standards for admission to the bar. This has practical importance for current law students, who will soon encounter the licensing process.

The second part of the chapter summarizes the history of the American legal profession and of legal education. The third part of the chapter focuses on the initial exclusion of various groups from law practice. We look at the process by which members of these groups challenged and overcame barriers to entry. We also report on the growing diversity of the profession and on persistent problems of employment discrimination in the legal profession.

A. Admission to the bar

1. Bar admission in the nineteenth and twentieth centuries

Starting in the nineteenth century, the state bars gradually increased the educational requirements for those seeking licenses to practice law.¹ In the colonial era, law schools didn’t exist. A person who wished to become a lawyer first had to apprentice with another lawyer. In the middle of the nineteenth century, many law schools were established, and legal education took root in American legal culture.² By 1860, all but two states had established bar examinations, but the questions were administered orally and the process was fairly informal.³ The states did not require graduation from law school as a condition of admission. Only nine states required a defined period of apprenticeship as a precondition of admission to the bar.⁴

In the late nineteenth and early twentieth centuries, one could practice law without law school training. During this period, many states began to require

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¹. See generally Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983).
². Id. at 20–22.
³. Id. at 25.
⁴. Id.
applicants to take written bar examinations.\textsuperscript{5} As of 1900, 80 to 90 percent of lawyers had never attended college or law school.\textsuperscript{6} Neither was college a prerequisite to law school. Some law students never even finished high school.\textsuperscript{7} The majority of lawyers qualified for bar admission simply by completing a three-year apprenticeship.\textsuperscript{8} Between 1870 and 1920, the legal education curriculum expanded in many universities from one year to three years. Only later did law become a course of graduate study.\textsuperscript{9} From 1890 to 1930, the number of law schools tripled.\textsuperscript{10} The ABA urged that a law school degree should be mandatory for bar admission.\textsuperscript{11} By 1941, graduation from an ABA-accredited law school was a prerequisite to sitting for the bar exam in all but a few states. This requirement is now imposed by nearly every state.\textsuperscript{12}

2. Contemporary bar admission requirements

In most states, the rules for admission to the bar are established by the state’s highest court. The licensing process is organized by state, so that a lawyer who wishes to practice law in New York and New Jersey must seek two separate bar admissions. In most states, the basic requirements for bar admission are

- graduation from an accredited undergraduate college (usually required for admission to law school);
- graduation from a law school that meets the state’s educational standards (this usually means one accredited by the ABA);
- submission of an application for admission to the bar;
- a finding that the applicant is of good moral character and is fit for the practice of law; and
- a passing score on the bar examination administered by the state.\textsuperscript{13}

\textsuperscript{5} Id.
\textsuperscript{6} Robert Stevens, Democracy and the Legal Profession: Cautionary Notes, Learning & L., Fall 1976, at 15.
\textsuperscript{7} Id. at 38.
\textsuperscript{8} Lawrence M. Friedman, A History of American Law 238 (3d ed. 2005).
\textsuperscript{9} Stevens, supra n. 1, at 36-37.
\textsuperscript{10} Herb D. Vest, Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America, 50 J. Legal Educ. 494, 496 (2000).
\textsuperscript{11} The ABA pushed the states to require attendance at law school as a prerequisite to bar membership. Records of ABA meetings show that the organization’s goals were (1) to raise standards; (2) to restrict numbers of lawyers; and (3) to keep out blacks, Jews, and other immigrants. Stevens, supra n. 1, at 16.
\textsuperscript{12} The few states that do not require graduation from an ABA-accredited law school to take the bar exam usually have additional, difficult-to-meet requirements, such as prior passage of another state’s bar exam combined with practice as a lawyer in that other state for a number of years. See Vest, supra n. 10, at 497.
\textsuperscript{13} See ABA, Section on Legal Educ. & Admissions to the Bar, Overview on Bar Admissions, https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/ (last visited Aug. 18, 2019).
In addition, New York State requires applicants for admission to the bar (other than those admitted in other states) to have performed at least 50 hours of pro bono legal service.\(^\text{14}\)

In most states, an applicant for admission to the bar must be a U.S. citizen or lawful permanent resident. In recent years, however, at least six states — California, Florida, Illinois, Nebraska, New York, and Wyoming — have changed their rules to allow some immigrants who are not fully documented to be admitted to the bar.\(^\text{15}\)

Once admitted to the bar of a state, a lawyer must fulfill various requirements to maintain his admission. These may include a certain number of hours of continuing legal education every year, payment of annual dues, membership in a state bar association, and compliance with any requirements to maintain or submit records relating to the operation of a law office. Most states now recognize that law practice does not require physical presence, but a few states still require that each member maintain an office in the state.\(^\text{16}\)

If a lawyer has been admitted to practice in one state, the lawyer may gain admission in some other states without taking their bar examinations, sometimes only after a specified number of years of practice. A lawyer who seeks admission to litigate only one case may be admitted pro hac vice by association with a lawyer admitted in the state. Most federal courts admit any licensed lawyers who apply for admission to appear before them.\(^\text{17}\)

3. The bar examination

Each state administers a bar examination to applicants for admission, though some states allow candidates to “waive in” to the bar if they pay a fee, have practiced for a specified number of years in another state, and satisfy character and fitness requirements.\(^\text{18}\)

The state bar exams generally include the Multistate Bar Examination (MBE), the Multistate Professional Responsibility Examination (MPRE), and

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17. Restatement § 2, comment b.

A. Admission to the bar

a set of essay questions on identified subjects. The MBE and the MPRE consist of multiple-choice questions. As of 2018, the MBE is required in all states and territories except Louisiana and Puerto Rico. As of 2019, the MPRE is required in all states and territories except for Puerto Rico and Wisconsin. Connecticut and New Jersey do not require the MPRE for applicants who have completed a law school course in professional responsibility.

Some states prepare and grade their own essay questions, but a majority of states now use the Uniform Bar Exam (UBE), which is prepared and graded by the National Conference of Bar Examiners. The UBE includes the MBE (mentioned above), a Multistate Essay Exam, and a Multistate Performance Exam. Most candidates prepare for the bar exam by taking a multiweek cram course from one of a few dozen private companies.

19. This and other information about the multistate exams, including lists of which jurisdictions administer each one, is available at the National Conference of Bar Examiners, http://www.ncbex.org/ (last visited Aug. 18, 2019).

Critics charge that the bar examination favors those who can afford the time and money for a bar review course, tests nothing that has not already been tested by the law schools, and discriminates against minorities and disabled persons.21 Professor Deborah Jones Merritt observes:

The bar exam is broken: it tests too much and too little. . . . [T]he exam forces applicants to memorize hundreds of black-letter rules that they will never use in practice . . . [but] licenses lawyers who don’t know how to interview a client, compose an engagement letter, or negotiate with an adversary. . . . We haven’t shown that the exam measures the quality (minimal competence to practice law) that we want to measure.22

States continue to require the examination. Each state devotes substantial resources to administering the bar examinations and reviewing applicants for admission. The ABA links law school accreditation to rates of bar passage by graduates of each school. One proposal in 2019 would raise the required bar passage rate to maintain accreditation. Critics of such proposals, including those who advocate for people of color and people with disabilities, argue that this move would reduce diversity in the legal profession.23

4. The character and fitness inquiry

How does a bar admissions authority evaluate the character and fitness of an applicant for admission to the bar? The point, obviously, is to try to assess whether the applicant will practice law in an honest and competent manner. This is a difficult exercise in prediction. If someone did something dishonest last year, will she do something dishonest next year? What should be the scope of the inquiry? What is relevant to the assessment of the “moral character” of a lawyer? Suppose the person has radical political views, an unusual lifestyle, or peculiar personal habits? What if the applicant has had trouble repaying debts, plagiarized an article while in college, was arrested in a political protest, pled guilty to shoplifting, or has a history of mental illness? The character committee members’ political or moral biases might unfairly deny admission to an applicant. Some character and fitness questionnaires ask broad questions that require

disclosure of sensitive personal information that is not relevant to the individual's qualifications for admission to the bar.

a. Criteria for evaluation

Most states require bar applicants to fill out an application. Applicants may need to assemble and submit a wide range of information, including residence and employment history, criminal records, traffic records, credit history, records of any litigation in which they have been parties, and other information. The National Conference of Bar Examiners’ standard moral character application form, which is used in many states and which runs 34 pages, asks for the following information, among many other things.

List every permanent and temporary physical address where you resided for a period of one month or longer for the last ten years.

Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline from any college or university (including law school), or otherwise subjected to discipline by any such institution or requested or advised by any such institution to discontinue your studies there?

List your employment and unemployment information for the last ten years. Employment encompasses all part-time and full-time employment, including self-employment, externships, internships (paid and unpaid), clerkships, military service, volunteer work, and temporary employment. . . . Provide a brief, but specific description of your activities while unemployed.

Have you ever been a named party to any civil action? Note: Family law matters (including continuing orders for child support) should be included here. Have you ever been cited for, charged with, or convicted of any violation of law other than a case that was resolved in juvenile court? Include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside.

Have you ever been cited for, arrested for, charged with, or convicted of any moving traffic violation during the past ten years? Include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside.

Have you had a debt of $500 or more that has been more than 90 days past due within the past three years that was not resolved in bankruptcy?

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Most states ask some questions about abuse of drugs or alcohol and/or treatment for substance abuse. All states ask questions about past criminal conduct. Some states ask not only about criminal convictions but also about arrests or citations. Some states include broad requests to reveal any moral indiscretions. The South Carolina questionnaire, for example, asks:

Are there any other facts not disclosed . . . concerning your background, history, experience, or activities which in your opinion may have a bearing on your character, moral fitness, or eligibility to practice law in South Carolina and which should be placed at the disposal or brought to the attention of the examining authorities? If yes, explain fully.

Some states ask applicants to have lawyers write them letters of recommendation for admission. Most states require that the dean of the law school attended by an applicant attest to the moral character of that person. Some state bars conduct personal interviews with every applicant, while others interview only those whose applications raise questions. An application that raises significant problems of moral character may trigger a bar investigation and a formal hearing on the applicant’s qualifications for admission.

**Is the current system for evaluating character and fitness fair, or does it work to exclude certain groups from bar admission?**

Some have criticized the moral character inquiry as an overly broad fishing expedition into the background of applicants. Historically, the process was used to restrict admission of immigrants, people of color, and other “undesirable” applicants, such as those with radical political views. Some states have made efforts to make the inquiry more fair. Even so, most states do not publish which types of conduct give rise to inquiries or work to make their systems consistent with those of other states. The nature of the inquiry gives unfettered discretion to the biases of the examiners. The bar admissions authorities are asked to assess applicants’ mental health even

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25. Stephanie Denzel, Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories, 43 Conn. L. Rev. 889, 908 & n. 27 (2011) (“thirty-nine states ask specifically about a diagnosis of or treatment for substance abuse,” but many of those limit the inquiry about substance abuse currently affecting the applicant).

26. The Florida bar, for example, asks applicants for “information about arrests, charges or accusations of violation of a law or ordinance (including traffic violations), reporting dates, law enforcement agency, explanation of event, and final disposition. If your arrest records are sealed, you must petition the appropriate court to unseal those records.” Fla. Bd. of Bar Examiners, Checklist to File a Bar Application, https://www.floridabarexam.org/__52286ae9ad5d845185257c07005c3fe1/0c7a2e6a8a1cc31285257c0c0066c0e (last visited Aug. 18, 2019).


without any training in the mental health professions. The questionnaires tend to ask numerous questions that may be burdensome to answer but that usually do not lead to investigation.

The character and fitness inquiry is predicated on a mostly untested assumption that the bar can protect the public from dishonest or otherwise untrustworthy lawyers by examining the past behavior of applicants. It used to be thought that people had stable moral traits from which one could predict future conduct. In the last 50 years, however, many studies have concluded that situational factors have a greater impact than character traits in determining how people respond to a particular situation. One study of students at Princeton’s Theological Seminary, for example, showed that when people walked by a person slumped over in a doorway, two-thirds of those not in a hurry would try to help. But 90 percent of subjects who were in a hurry walked by the distressed person without trying to help. Being in a rush was apparently more important than any preexisting character trait in determining conduct. These days, most experts see behavior as a product of both character traits and the particular situation. But the character and fitness bar inquiry remains focused on the elusive notion of stable character traits.

A study by Professor Leslie Levin and others examined the character and fitness questionnaires of more than 1,300 applicants to the Connecticut bar and then studied their subsequent disciplinary records. The authors noted that the overall risk of discipline was very low (only 2.5 percent), but found a “slight” increase in the risk of later discipline of lawyers who had reported “having delinquent credit accounts, having been a party to civil litigation (excluding divorce), higher student loan debt, more traffic violations, and a history of a diagnosis or treatment for psychological disorders.” They found a lesser risk of discipline among lawyers who had higher law school grades, had attended prestigious law schools, or were female.

Much scholarship criticizes the character and fitness process as subjective, sometimes discriminatory, and very unpredictable. The absence of clear

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31. Levin et al., supra n. 28, at 54. Disciplinary action generally occurs only if someone files a complaint, so conduct that could be a basis for discipline may never come to the attention of the disciplinary authorities. Also, many disciplinary agencies pursue only a small percentage of the complaints filed because of staffing and funding limitations.
standards for fitness to practice results in a strikingly idiosyncratic body of case law. For example, five states prohibit all felons from being admitted to the bar, while others have no such rule. No greater consistency is evident in treatment of past misdemeanor offenses. In this era of mass incarceration, when 700,000 people are released from prison each year, rules restricting admission of people with criminal records burden a large segment of the population and impact people of color disproportionately. Professor Deborah Rhode points out that the character screening process is both too early (before candidates have encountered the pressures of practice) and too late (after they have borrowed and spent hundreds of thousands of dollars on legal education).

The table on the next page gives examples of cases that decided whether particular applicants satisfied the moral character requirement. Some of the facts most relevant to the court’s decision appear in italics, and judgments are shown in boldface. The table provides a sample of the issues that come up in moral character inquiries. This is not a random or a representative sample, but a selection of interesting cases. Several of the cases summarized resulted in denial of admission; these are very atypical.

The vast majority of bar admission cases, even those in which the application presents some issue—a criminal conviction, a poor credit history, a law school discipline incident—conclude with the admission of the applicant to the bar. In Connecticut, for example, David Stamm, former Executive Director of the Connecticut Bar Examining Committee, estimated that admission was usually denied to only one or two applicants per year.

Consider that the bar admissions authorities, members of the bar, and the applicants all devote a substantial amount of time and energy to a process that screens out almost no one. Perhaps the process has other benefits, such as deterring some “unsuitable” persons (whatever that means) from applying or causing some applicants to curb behaviors that could cause problems. Even so, one might wonder whether all this time and energy might better be directed elsewhere—ethics education, or law firm management training, or other risk reduction efforts. However, bar committees sometimes delay a decision on an application that raises such issues for months or longer, and they may require the applicant to submit additional documentation to prove good character or rehabilitation. The cases that are litigated are the exceptional cases, but they illustrate the kinds of conduct that raise questions for bar examiners about character and fitness.

33. Rhode, supra n. 30, at 1033, 1037.
34. Id. at 1039.
35. Even a random sample of litigated cases would be unrepresentative because in most cases in which an application raises issues, either a bar committee eventually admits the applicant or the applicant gives up on her effort to be admitted. Those un-litigated cases are not reported anywhere and therefore are unavailable for study by scholars.
36. Levin et al., supra n. 28, at 54, n. 3.
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<th>Bar admission issue and citation</th>
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<td><strong>Manslaughter:</strong> In re Manville, 538 A.2d 1128 (D.C. 1988)</td>
<td>While in college, Manville “agreed to assist another student in recovering drugs and money believed to have been stolen” by [another student named Edgar. They entered Edgar’s apartment and] threatened him with a gun and a knife. When two visitors arrived unexpectedly, Manville used chloroform to render Edgar and the visitors unconscious. One of the visitors died from an unusual reaction to the chloroform.” Manville evaded arrest for four months. Charged with murder, he pled to manslaughter and was sentenced to serve from 54 months to 15 years in prison. “He became a ‘jailhouse lawyer,’ completed his college education, and helped other inmates as [a tutor]. After his release on parole [he] . . . went to Antioch Law School [and later was] . . . employed by the American Civil Liberties Union’s National Prison Project.” He also published a prisoner’s litigation manual. The court granted admission to the bar, finding that he had sufficiently rehabilitated himself.</td>
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<td><strong>Sexual relations with minors:</strong> In re Pilie, Supreme Court of Louisiana, No. 12-OB-1846 (2012)</td>
<td>Pilie graduated from law school in Georgia in 2007. During the month before he was to take the bar, he made contact on the Internet with a person he believed to be a 15-year-old girl. He told her that “he wanted to meet her at home and have sex.” His contact was in fact a police officer posing as a juvenile. When he got to their agreed meeting place, he was arrested and charged with two felonies, “computer-aided solicitation of a minor and attempted indecent behavior with a juvenile.” He amended his application to disclose the arrest and was precluded from sitting for the bar. During the next year, he completed a pretrial diversion program in Jefferson Parish, Louisiana, after which the criminal charges were dropped. He was allowed to sit for the bar exam in 2009, but the court denied bar admission and imposed a lifetime bar against his seeking admission. It cited the gravity of the charges of attempted sexual exploitation of a minor.</td>
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<td><strong>Shoplifting and misrepresentation of debt:</strong> In re Tobiga, 791 P.2d 830 (Or. 1990)</td>
<td>Tobiga, a graduate of the law school at Lewis and Clark College, was arrested for shoplifting after leaving a store with a <em>package of meat in his coat pocket</em>. The charge was dismissed upon his agreement to pay $100. Tobiga also <em>had failed to disclose unpaid loans on his bar application</em>; he claimed confusion. There were many positive character witnesses. <strong>He was admitted</strong>, found to have proven moral character. Tobiga said he didn't know how much he owed. Several debts were owed to the bar itself for educational loans. The court wrote, “[T]he Bar’s records are unclear; the collection agency’s are worse.”</td>
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<td><strong>Declaration of bankruptcy:</strong> Fla. Bd. of B. Examiners re S.M.D., 609 So. 2d 1309 (Fla. 1992)</td>
<td>S.M.D. lived on student loans and charged a wedding, a move, and other expenses to credit cards during law school. She filed for bankruptcy during her last semester of law school because of $109,000 of accumulated debt, most of which was non-dischargeable student loans. The state supreme court overturned a board recommendation to deny admission; <strong>she was admitted</strong>. The court stated, “The Board is rightly concerned over the morality of a person who continues to incur large debts with little or no prospect of repayment.” But “we cannot agree that the evidence sufficiently demonstrates financial irresponsibility. . . .”</td>
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<td><strong>Cheating on law school exam:</strong> Friedman v. Conn. B. Examining Comm., 77 Conn. App. 526 (2003)</td>
<td>Two students at Quinnipiac reported that Friedman had <em>concealed a one-page outline on his desk during a closed-book exam</em>. Before a student disciplinary committee, Friedman denied he cheated and claimed he wrote the outline during the exam. The students testified that they had seen Friedman retain a written page on his desk under a blank sheet before the exam was distributed. The committee proposed to reduce Friedman’s grade and to reprimand him. The law dean reversed the committee’s reprimand because of delays in the school’s adjudication of the charge. <strong>The court denied admission</strong>, noting that in a dispute of fact, the bar examining committee could decide that the student who reported the applicant’s conduct was more credible than the applicant, and that cheating on a law school exam was sufficient evidence that the applicant lacked good moral character.</td>
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### Bar admission issue and citation  

#### Synopsis

**Criticism of the bar:** Lawrence v. Welch, 531 F.3d 364 (6th Cir. 2008) (denying review of Mich. Supreme Court decision)

Lawrence, who attended an accredited law school in Michigan, had *unsuccessfully sued the Board of Law Examiners and the state bar, alleging that some state bar rules were unconstitutional.* He also operated a website called StateBarWatch criticizing those bodies for alleged dishonesty in the lawyer licensing system. He reaffirmed his opinions in his interview with the character committee, which concluded that “[w]e are concerned about providing a law license to someone who, even before he has handled his first case as a member of the bar, has effectively written off such a huge component of the justice system.” 

**Debt:** In re Application of Griffin, 128 Ohio St. 3d 300, 2011-Ohio-20 (2011)

After he graduated from law school at Ohio State University, Hassan Jonathan Griffin had $170,000 of student loan debt, $20,000 from college and $150,000 from law school. He also had $16,500 of credit card debt. He earned $12/hour working 24 to 32 hours a week for the public defender’s office. He lived with his nine-year-old daughter and the child’s mother in her home. He contributed as he could to their living expenses.

He had not been able to begin loan repayment in the year since graduating from law school. Admission was denied. The court concluded that Griffin had “neglected his personal financial obligations by electing to maintain his part-time employment with the Public Defender's Office in the hope that it will lead to a full-time position upon passage of the bar exam, rather than seeking full-time employment.” It did not discuss whether full-time, higher-paying jobs were actually available during the recession. It permitted him to start over with a new bar examination.38

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### b. Filling out the character questionnaire

Once you become a member of the bar, you might seek to participate in much-needed reform of the moral character inquiry process. In the coming year or

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38. It is not unusual for current law school graduates to accumulate substantial student loan debt. It is arguably unfair to deny admission to the bar on the basis of a law student's financial hardship, especially a student who seeks a career in public service. See Annie Legomsky, Law Student Debt + Public Interest Career = Character and Fitness Fail, 46 Wash. U. J.L. & Pol'y 305 (2015).
two, however, your interest in this arena may focus on your own admission to the bar. Completing the character and fitness questionnaire can be a complex and time-consuming process, so it is helpful to start early. Obtain a copy of the application forms and make a list of the information and records that you need to collect. Especially if you anticipate any questions, it is worthwhile to begin work on this process during your second year of law school.

Is it risky to be too candid with the bar examiners? If you tell them too much, are you setting yourself up for rejection?

Bar admissions committees, courts, and the Model Rules take the position that, in filling out the questionnaire, you should be scrupulously honest in writing your answers, even if your disclosures could delay or prevent your admission to the bar. Bar examiners particularly dislike having applicants lie to them or conceal information.

You would be surprised how many law students have small skeletons in their closets — minor brushes with the criminal justice system, academic or disciplinary problems during college, or other mishaps that could raise the eyebrow of a character and fitness official. Such facts must be disclosed if the questionnaire or bar officials ask questions that call for the information at issue. Most of these disclosures do not lead to character and fitness inquiries. If you are worried about something, get a copy of the character questionnaire from the state where you will apply for admission and read the questions carefully to see whether the questionnaire requires you to disclose the past event. Draft a possible answer to help you think about what you may need to disclose.

Many law students get very worried about fairly trivial past problems. Use your common sense. Bar examiners tend to be more concerned about problems that are serious, recent, or recurrent.

- **Serious:** A minor misdemeanor charge during college or earlier is unlikely to raise eyebrows, but if you have a felony conviction on your record, you should seek legal advice from a lawyer who represents clients seeking bar admission.
- **Recent:** Admissions officials look more closely at events that took place in the last several years and are less concerned about events that took place longer ago.
- **Recurrent:** The character committees care more about patterns of misconduct than about single instances. A speeding ticket will not hold up

39. Rule 8.1 requires that applicants for bar admission be honest and forthright with bar admissions authorities.

40. The character and fitness committees will want to know about any conduct that led to discipline during law school. See, e.g., In re Mustafa, 631 A.2d 45 (D.C. 1993). An excerpt of this opinion and supplemental materials on the case are available on the companion website for this textbook.
A. Admission to the bar

your bar admission, but a series of DUIs or a portfolio of unpaid parking
tickets might.

If you are not sure about whether you need to seek legal advice, ask your profes-
sional responsibility teacher for some informal advice. Some professors prefer
not to give such advice to students, but many are willing to do so.

Might bar admission officials look at your social media pages?

The Florida bar has an announced policy of examining the social media posts
of candidates whose applications disclose conduct of concern such as substance
abuse or an inclination to overthrow the government. Other character and fit-
ness officials may well do likewise, joining the rest of the world in perusing
social media to learn about other people.41

41. See Jessica Belle, Social Media Policies for Character and Fitness Evaluations, 8 Wash. J.L. Tech.
& Arts 107 (2012); Dina Epstein, Have I Been Googled? Character and Fitness in the Age of Google,
Facebook, and YouTube, 21 Geo. J. Legal Ethics 715 (2008); Jan Pudlow, On Facebook? FBBE May Be
FOR EXAMPLE: Otion Gjini was denied admission to the bar by the Maryland Court of Appeals in 2016. The decision was based primarily on his failure to disclose a state enforcement action alleging that he had failed to complete an alcohol treatment program following a DUI charge. However, the court opined at length about Gjini’s unsavory comments on the Internet. The lawyer assigned to review his character and fitness application had “discovered, rather serendipitously, several statements which Mr. Gjini had posted to various chat-rooms on the internet as recently as his last semester in law-school [sic].” These comments included: “The both fight like hoes [sic]. . . . That girl is hot as f * * *. . . . Who is the faggot that made this video?” While the court did not deny admission based on these and other comments, the opinion noted that these postings “continued a hideous practice of relegating certain persons within our community — in this instance, women and homosexuals — to second-class status and subjecting them to derision and exclusion.”

You should avoid posting offensive comments or potentially embarrassing material on social media pages, even in jest. It is an important step in your professional development to abandon less mature conduct and to behave in a manner that will engender the trust and respect of colleagues and clients. This kind of mindfulness has its own rewards, but it also may avoid problems with bar officials or prospective employers.

What if an issue that might trouble the bar examiners is something that you should have disclosed on your law school application?

The information you disclose on your bar application must be consistent with the information you disclosed on your law school application. The law school dean’s office is asked to fill out a questionnaire on each applicant for admission to the bar. The questionnaire asks various questions, such as whether the student has a criminal record, so an omission on your law school application could lead the dean’s office to provide information that does not match the account that you provide.

If you need to disclose some adverse information on your character questionnaire, review your law school application to see whether the law school asked a question that should have elicited the information at issue. Examine your answer. (If you don’t have a copy of your law school application, ask your law school registrar for a copy.) If your earlier answer was incomplete, consider making a belated disclosure to the law school of the same information. You can

42. While acknowledging First Amendment concerns, the court noted that comments such as Gjini’s would “breed disrespect for the courts and for the legal profession” whether or not they were “uttered in a professional setting.” In re Gjini, 448 Md. 524, 545 (2016).
write a letter to the relevant administrator explaining that in preparing your application for admission to the bar, you realized that you had omitted a piece of information on your law school application. If the information is so serious that it might have led to your being denied admission to law school (such as a homicide conviction), it would be prudent to seek legal advice before writing a letter. If, as is more common, the disclosure is of something minor (such as a citation for a college dorm party), the late disclosure probably won’t lead to disciplinary action. Even if a late disclosure to the law school seems risky, it is probably less professionally hazardous to correct the record than not to do so.

PROBLEM 1-1

ADDERALL

This problem is based on a real question from the application form for admission to the Iowa state bar.

You are a third-year law student. In a few months, you plan to apply for admission to the Iowa bar. You have just received a copy of the application form, which begins with this statement:

OFFICE OF PROFESSIONAL REGULATION, APPLICATION FOR THE IOWA BAR EXAMINATION

The contents of this application will be public information subject to the limitations of Iowa Code section 602.10141 [which provides that a member of the five-person Board of Law Examiners shall not disclose information relating to the criminal history or prior misconduct of the applicant].

[Question 41 reads as follows:]

41. Are you currently, or have you been in the last three years, engaged in the illegal use of drugs? If yes, give complete details below (or on an attached sheet).

“Illegal Use of Drugs” means the use of controlled substances obtained illegally as well as the use of controlled substances which

are not obtained pursuant to a valid prescription or taken in the accordance [sic] with the directions of a licensed health care practitioner. “Currently” does not mean on the day of, or even the weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact.

You have a right to elect not to answer those portions of the above questions which inquire as to the illegal use of controlled substances or activity if you have reasonable cause to believe that answering may expose you to the possibility of criminal prosecution. In that event, you may assert the Fifth Amendment privilege against self-incrimination. . . . If you choose to assert the Fifth Amendment privilege, you must do so in writing. . . . Your application for licensure will be processed if you claim the Fifth Amendment privilege against self incrimination.

Release

. . . I . . . authorize and request every person . . . having . . . information pertaining to me . . . to furnish to the Iowa Board of Law Examiners or their agents or representatives, any such information. . . . I, ________________, being first duly sworn, deposes and states: . . . [m]y answers to the foregoing questions are full, true, and correct to the best of my knowledge and belief. [Applicant’s signature must be notarized.]

During your three years of law school, you have taken Adderall, a stimulant drug used to treat attention-deficit/hyperactivity disorder (ADHD). You don’t have ADHD, but you took Adderall to help you to stay awake and focus when you were studying for finals or finishing a paper. You did not have a prescription; instead, like lots of your friends, you purchased Adderall from one of your classmates. The last time you did this was three weeks ago. You checked to see whether Adderall is a controlled substance and found that the Drug Enforcement Administration does classify it that way.44 In your state, possession of Adderall without a prescription is a misdemeanor punishable by a fine of up to $1,800, imprisonment for up to one year, or

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44. Adderall is listed under Schedule II, which includes “drugs, substances, or chemicals . . . with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous.” U.S. Drug Enforcement Admin., Drug Scheduling, https://www.dea.gov/drug-scheduling (last visited Aug. 18, 2019).
both. Now that you have learned this, you certainly won’t take any more Adderall, at least not before you are admitted to the bar.

Last year, a rumor circulated on campus that a member of the bar admissions committee was asked what would happen to applicants who answered question 41 affirmatively, and he reportedly said that they would be denied admission to the bar. How will you answer the question?

c. Mental health questions about applicants

Should bar admissions authorities ask questions about the mental health of applicants?

It used to be thought that only a small percentage of the population suffered from mental health problems. More recently, we have learned that these issues are commonplace. The American Psychiatric Association reports that one in six people experience depression at some point in their lives.\(^\text{45}\) Anxiety disorders are increasingly common also. A smaller segment of the population suffers from more serious mental illnesses such as bipolar disorder and paranoid schizophrenia. Concerns about the impact of mental illness on client service have led bar examiners to ask a variety of mental health-related questions of applicants. Until the 1980s and 1990s, many states asked very detailed and intrusive questions. Most states have now narrowed their inquiries, but some still ask questions that are ambiguous, intrusive, or inappropriate. In 2014, the Department of Justice found that assessing fitness to practice based on mental health questions may violate the Americans with Disabilities Act. In 2015, the ABA adopted a resolution urging that fitness to practice should be based on assessment of an applicant’s past conduct rather than based on diagnoses.\(^\text{46}\)

The National Conference of Bar Examiners (NCBE) conducts the character and fitness evaluation for about half the U.S. states and territories.\(^\text{47}\) Applicants for admission to the bar of those states fill out an NCBE questionnaire to initiate this process. NCBE publishes a model character and fitness questionnaire that

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may be used in states that do not use NCBE to conduct their character and fitness evaluations. The mental health questions on this form are reprinted below.

29. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner? ☐ Yes ☐ No

Explanation

30. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? Note: In this context, “currently” means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer. ☐ Yes ☐ No

Are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program? ☐ Yes ☐ No

[The form then asks for dates of service provided, for a description of the condition or impairment, for a description of “any treatment, or any program that includes monitoring or support,” and, if applicable, for the name and contact information for an “attending physician or counselor” and for a hospital or institution.48]

Notes and Questions about the NCBE’s mental health questions

1. One study of depression among law students in Arizona showed that 32 percent were depressed by the end of their first year, 40 percent were depressed by the end of their third year, and 17 percent were depressed two years after graduation.49 A significant proportion of applicants, then, would be required to disclose highly personal information in response to this questionnaire.

2. Are the NCBE mental health questions sufficiently clear? Suppose you have been diagnosed with mild depression, are taking prescribed medication, and are passing your law school courses but think you would perform better if you were not depressed. Would you know how to answer the questions?

3. If the purpose of the questions is to assess present ability to practice, is it fair to ask, in Question 29, for disclosure of problematic conduct or behavior up to five years in the past?

4. Should the bar examiners be asking applicants any mental health questions? If so, what should they ask?

In recent years, at least 26 states and territories have created systems through which applicants with histories of emotional trouble or substance abuse can be admitted to the bar conditionally for a probationary period. During this time, they must comply with specified conditions, such as participating in mental health care, mentoring, or random drug tests. The purpose of these rules is to encourage law students who have such problems to seek counseling without fear that doing so would create an obstacle to bar admission. In 2009, the ABA adopted a Model Rule on Conditional Admission to Practice Law, which could provide a model for states that have not yet established a conditional admission procedure. One author criticizes conditional admission, urging that this structure violates the Americans with Disabilities Act, and that it may stigmatize applicants with disabilities as potential second-class lawyers.

d. Law school discipline: A preliminary screening process

Most law schools have established internal disciplinary processes to evaluate student misconduct allegations and to impose sanctions. Sanctions range from asking the offending student to write a letter of apology to suspension or expulsion from law school. Sometimes the law school’s sanctions include a transcript notation that bar examiners are certain to see. In other cases, the sanction is noted only in the student’s confidential record, which the law school may report to the bar. The bar examiners often ask applicants to disclose any sanctions imposed by a law school, whether or not the law school considered them “confidential.”

Some law school disciplinary boards are staffed entirely by students, others by students and faculty, and still others by faculty only. Likewise, some schools ask student or faculty volunteers to prosecute these cases, while a few have professional staff handle the prosecution of students. Student respondents are permitted to have counsel in these proceedings. Some schools allow nonlawyer advocates to assist respondents, and some allow or require faculty to represent the respondents. A student respondent may be represented by an outside lawyer of her choosing, but generally must pay the lawyer’s fee herself. The law school disciplinary systems

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51. ABA, Model Rule on Conditional Admission to Practice Law (2009).
52. Denzel, supra n. 25.
tend to be structured like microcosms of the lawyer disciplinary system. The law schools perform a prescreening process for the bar examiners with respect to students who engage in misconduct while in law school.

PROBLEM 1-2

THE DOCTORED RESUME

The following problem is based on a true story, though some facts have been changed to protect the identity of the individual involved.

You are a member of your law school Honor Board, a judicial body that does fact-finding and recommends disposition of allegations of misconduct by law students. The Board has the authority to recommend reprimand, suspension from law school, expulsion from law school, community service, or other sanctions. The law school administration generally adopts the Honor Board’s recommendations. Any finding of violation of the law school Honor Code is reported to the bar to which a respondent applies for admission. The following matter has been presented to the Board for review.

Jan Kass, a third-year law student, is charged with violating the Honor Code by including false information on a resume and then submitting the resume to law firms recruiting through the law school placement office. The law school Honor Code specifically prohibits students from “providing false or misleading information about their academic credentials, employment history, or other matters, to the law school, to prospective employers, or to anyone else.”

Jan came to the United States from Estonia a year before beginning law school. Her father is a diplomat and was sent to the United States. Jan’s undergraduate degree is from Tartu University. She listed the undergraduate degree as having been awarded “magna cum laude.” Upon investigation, the Honor Board learned that Tartu University has never conferred Latin honors upon graduation — to Jan or to anyone else. Also, Jan is in the bottom quarter of the law school class. But she listed class rank as “top third.” Jan used computer software to make some corresponding changes to her grades on her copy of her law school transcript. Finally, during the year before enrolling in law school, Jan worked at the Estonian Embassy in Washington. On the resume, she listed her position as cultural attaché. Jan’s former employer informed an Honor Board investigator that her position at the embassy was as a file clerk.

A hearing was held, at which Jan admitted that all three of the alleged falsehoods on the resume were in fact false and that she put them on her resume in the hope of obtaining a good job in a law firm.
“I was new to the U.S., so even though I studied very hard, I didn’t do very well on my exams. It seemed unfair to me that my grades were not good even though I worked harder than most of the other students. My normal English was pretty good by the time I started law school, but the technical language was very difficult for me.

“I have very high student loans — by the time I finish, it will be above $200,000. My family is not wealthy — they cannot help me pay for this. Also the family is watching me to see whether I will succeed in the U.S. — I felt I must get a good position or else they would be ashamed of me.

“I tried applying for jobs but I wasn’t getting any interviews. I talked with one of my American friends. He’s another law student, I’d rather not say his name. He looked at my resume for me, and said I just needed to fix it up a little bit. He made some suggestions — I think the changes were all his ideas.

“At first I thought he was crazy — he was telling me to lie. He said they were just little white lies, and that if I wanted to succeed in America, I had to stop being such a Pollyanna. He said at his college, students never wrote their own papers — they just copied over someone else’s paper from the year before or downloaded one from the Internet. It’s a free country, he said. I knew it wasn’t right, but also I knew I needed to get a job, so I decided to take his advice. Obviously, it was a mistake.”

What sanction, if any, should the law school impose on Jan? Options include expulsion, suspension, reprimand with notice to the bar, or a private reprimand. Should the alleged conduct preclude her admission to the bar?

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B. History and development of the U.S. legal profession

1. Pre-revolutionary America

There were very few lawyers in the colonies. Colonial America was an “era of law without lawyers, a time when law was shaped by theologians, politicians,
farmers, fishermen, and merchants. Especially in New England, the primary lawmakers were members of the clergy. One of the first English-trained lawyers in the Massachusetts Bay colony, Thomas Lechford, was caught tampering with a jury and was tossed out of the colony very soon after he had hung up his shingle. The colony’s leaders decided that they could get along just fine without lawyers. In 1641, they passed a law prohibiting the collection of money for legal services.

Massachusetts Bay’s attitude toward lawyers was by no means unique. At around the same time, both Virginia and Connecticut passed laws barring lawyers from appearing in courtrooms. The Fundamental Constitutions of the Carolinas declared that it was “a base and vile thing to plead for money or reward.” As Professor Lawrence Friedman succinctly concludes, “the lawyer was unloved in the seventeenth century.”

The colonial public didn’t trust lawyers and saw no need for them, except sometimes for courtroom advocacy. Many people believed that justice was best served when parties to legal disputes presented their cases themselves. Many people thought that lawyers made disputes more complicated than they needed to be, swelling their wallets in the process. Of Pennsylvania, it was said, “They have no lawyers. Everyone is to tell his own case. . . . ’Tis a happy country.”

2. The nineteenth and twentieth centuries

Between 1800 and 1830, manufacturing and transportation grew dramatically. By 1860, 30,000 miles of railroad track had been laid, a tenfold increase in only 20 years. Soon thereafter, the telegraph revolutionized communications. These advances transformed the American economy and society. Agricultural goods suddenly could be sold wherever the railroad went, and previously remote lands could be developed as farms and towns.

As industry developed, so did the law. To facilitate the development of railroads, for example, state legislatures and courts had to deal with issues involving rights of way and railway accidents. One historian notes that the revolution in American technology “could not have occurred had there not been equally revolutionary changes in American business law.” Major upheavals occurred in

56. Friedman, supra n. 8, at 53.
57. Id. at 54.
58. Id. at 53.
59. Ballam, supra n. 54, at 582.
contracts, corporations, property, and government regulation of business. As commerce grew, lawyers became more necessary.

Eventually, lawyers were accepted grudgingly as “a necessary evil.” Before the Civil War, a typical lawyer was a courtroom lawyer, and a showman at that. The most famous lawyers of the time were those who delivered dramatic performances at trial or appellate arguments. Judges expected and allowed a level of oratorical flamboyance that is seldom seen today. Attorneys arguing before the U.S. Supreme Court in 1824 were often “heard in silence for hours, without being stopped or interrupted.” For example, in Dartmouth College v. Woodward, lawyer Daniel Webster delivered an emotionally charged four-hour-long argument before the Supreme Court. His oration was so moving that, at its end, Chief Justice John Marshall’s eyes were filled with tears.

The rapid growth of enormous railroad projects, large financial trusts, and industrial corporations in the latter half of the nineteenth century led to the birth of the “Wall Street” transactional lawyer who never appeared in a courtroom and yet “made more money and had more prestige than any courtroom lawyer could.” The work of these lawyers was no longer primarily to try lawsuits but to prevent them altogether.

The new corporate lawyers formed partnerships with other lawyers to handle the greater volume of business. By 1914 in New York City, 85 law firms had four or more lawyers, an increase from only 10 such firms in 1872. These partnerships also allowed lawyers to share the growing overhead expenses now associated with legal practice: paid staff, new technology such as typewriters and telephones, and expanding libraries, to name just a few.

During the latter years of the nineteenth century, many cities established bar associations, partly as a response by white Protestant lawyers to growing numbers of immigrants and others seeking to enter the profession. These associations “were not open to everybody . . . [they] sent out feelers to a select group, the ‘decent part’ of the bar.”

By the 1920s, the bar had begun to stratify, with a small number of law firms that were “large by standards of the day” serving Wall Street corporations having

60. Friedman, supra n. 8, at 327, 329-349, 350-366, 390-403, 409-411.
61. Id. at 54.
62. Id. at 233.
63. 4 Wheat. 518 (1819).
64. Friedman, supra n. 8, at 234.
65. Id. at 483.
67. Friedman, supra n. 8, at 497.
a “significance and influence beyond their mere numbers.” These firms consisted of lawyers who were “solid Republican, conservative in outlook, standard Protestant in faith, old English in heritage.”  

Along with the growth of law firms and bar associations, the structure for employing lawyers changed. In 1948, 82 percent of lawyers practiced alone or in law firms; of this group, the majority were solo practitioners. By 1980, the percentage of lawyers in private practice dropped to 68 percent; of these, only 33 percent practiced alone. Corporations began to hire salaried full-time lawyers, and as local, state, and federal governments expanded, a growing number of lawyers worked for governmental agencies. 

Between 1850 and 1900, the population of lawyers in the United States grew by more than 500 percent, significantly outpacing general population growth. During the twentieth century, the profession continued to grow rapidly. By 1970, 355,242 lawyers were practicing in the United States. By 2018, that number had risen to more than 1.3 million. Large law firms have flourished since the 1970s. In 1975, only four U.S. law firms had more than 200 lawyers. At first, “they were viewed with great skepticism.” As of 2017, there were more than 200 law firms that employed at least 200 lawyers, many with offices across the globe. Twenty-three of those firms employed more than 1,000 lawyers.

### 3. History of American legal education

Until the twentieth century, most American lawyers entered the profession by paying to apprentice with a practicing lawyer. Few law schools existed in the eighteenth and early nineteenth centuries. In theory, the apprentice learned the law on the job while receiving guidance from a more experienced practitioner. In fact, however, apprenticeships often proved grueling and unrewarding. Apprentices frequently performed countless hours of thankless grunt work (such as copying documents by hand) and had little time to study legal skills or substantive law.

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68. Id. at 487-489.
69. Id. at 495.
74. We drew from the following sources (in addition to those cited below) in drafting this section: Friedman, supra n. 8; George B. Shepherd & William G. Shepherd, Scholarly Restraints? ABA Accreditation and Legal Education, 19 Cardozo L. Rev. 2091, 2111 (1998); Stevens, supra n. 1; Stevens, supra n. 6, at 18; Vest, supra n. 10, at 496-497.
Slowly, the apprenticeship system gave way to formal legal education. The first American law schools were freestanding institutions. Many of them eventually affiliated with universities. Many law schools opened and then closed during the first half of the nineteenth century, but they gained a more stable foothold during the latter part of the century. By 1860, the nation had 21 law schools or university law departments. During the latter part of the nineteenth century, law was taught by the Dwight method, a combination of lecture, recitation, and drill named after a professor at Columbia. Students prepared for class by reading “treatises,” dense textbooks that interpreted the law and summarized the best thinking in the various fields. They were then tested, orally and in front of their peers. Students were asked to recite what they had read and memorized. They learned legal practice skills later, during apprenticeships or actual practice.

**When did law schools begin to use the Socratic method?**

During the second half of the nineteenth century, academic law schools became more respected due in no small part to Dean Christopher Columbus Langdell of Harvard Law School. Langdell revolutionized legal education, and many of his reforms have survived into the twenty-first century. Langdell expanded the then-standard one-year curriculum into a three-year law school program. He required that students pass final exams before they advanced to the next level of courses. He pioneered the use of “casebooks” in place of the treatises. Finally, he replaced the then-pervasive use of lectures in class with an early version of the Socratic method.

Langdell advocated a number of views that have since gone out of fashion. He believed that common law possessed elegance and wisdom that resulted from hundreds of years of slow, careful sculpting at the hands of skilled and sagacious judges. Statutory and other lesser forms of law, he urged, were the hurried work of easily swayed politicians and were therefore unworthy of study in a law classroom. Langdell opposed the teaching of constitutional law because he felt it had more in common with the vulgarity of statutes than with the beauty of common law. He insisted that “the law” (meaning, of course, common law) was a science. He believed that legal education should focus on the internal logic of the law, not on the relationship between law and society. Social, economic, and political issues were excluded from the classroom.

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75. Stevens, supra n. 6, at 21.  
77. In fact, the field of political science originated from the generally unsuccessful attempts of early law professors to introduce lessons in politics, government, and society into law classrooms. Lawrence M. Friedman, A History of American Law 611 (2d ed. 1985).
Initially students and professors reacted negatively to Langdell’s reforms. Students cut Langdell’s classes in unprecedented numbers. When word of Langdell’s wacky new teaching style got out, the enrollment at Harvard significantly declined. Boston University Law School was founded in 1872 partly “as an alternative to Harvard’s insanity.”

In the end, Langdell’s philosophy and approach won out. Some of his better students were hired as instructors at other schools. They brought Langdell’s “insanity” with them. Eventually, however, law professors evolved Langdell’s methods to teach critical analysis of law. For example, they began to assign cases with inconsistent outcomes to allow students to examine conflicting values in society and to question whether law is objective or scientific.

A modified version of Langdell’s case method of teaching remains the dominant mode of legal education more than a century later. Not until the 1970s, when clinical legal education was introduced into the curricula of most law schools, did any other approach to law teaching become a significant part of most law schools’ curricula. Clinical education started when the Ford Foundation offered American law schools $11 million to experiment with student representation of live clients. Ford’s principal purpose was to improve legal education by connecting students’ learning with reality, but an additional benefit was to provide more legal assistance for poor people.

When did law schools introduce a required course in professional responsibility, and why?

In 1974, the ABA adopted a requirement that students take courses in professional responsibility. This move was a reaction to the Watergate scandal, in which some of the most powerful lawyers in the federal government, including President Richard Nixon, engaged in a complex criminal conspiracy. During the Nixon administration, a large number of federal officials participated in an astonishing array of clandestine and often illegal activities designed to help Nixon’s reelection campaign and to investigate people whom Nixon viewed as enemies. These activities came to light in 1972 after a group of burglars were caught breaking into the headquarters of the Democratic National Committee at the Watergate complex to obtain documents for Nixon’s Committee to Re-Elect the President (CREEP). One of them was carrying the business card of a White House official to whom the burglars were reporting.

78. Id. at 615.
81. President Nixon had used the same burglars to break into the office of the psychiatrist of Daniel Ellsberg, a former government analyst who had leaked Vietnam War documents to the press. Michael Pay, Daniel Ellsberg, American Military Analyst and Researcher, Encyclopedia Britannica https://www.britannica.com/biography/Daniel.Ellsberg
What followed was an elaborate cover-up to conceal the administration’s role in the illegal activities. Congress began to investigate and learned that White House meetings had been tape-recorded. A special prosecutor, Archibald Cox, was appointed to investigate also. Cox subpoenaed the Oval Office tapes. In an episode that came to be known as the “Saturday Night Massacre,” the President tried to block the investigation by ordering the U.S. Attorney General, Eliot Richardson, to fire Cox. Richardson said no and resigned. Then Nixon directed Deputy Attorney General William Ruckleshaus, to fire Cox. He also resigned. Robert Bork was the third in line at the Department of Justice. He fired Cox as directed, but the resulting outcry led to the appointment of a new special prosecutor. Eventually, Congress initiated an impeachment proceeding. In August 1974, Nixon resigned.

The investigation of the Watergate scandal led to the indictment of dozens of government officials, including many lawyers. Most were convicted or pleaded guilty. The charges included perjury, fraud, obstruction of justice, campaign law violations, and conspiracy. Among the 29 lawyers who went to prison were two Attorneys General of the United States, John Mitchell and Richard Kleindienst; the White House Counsel, John Dean; Nixon’s Assistant for Domestic Affairs, John Ehrlichman; and the General Counsel for CREEP, G. Gordon Liddy. Nixon himself was eventually named as an unindicted co-conspirator. President Gerald Ford pardoned Nixon after taking office. The nation was horrified to find that so many elite lawyers had facilitated massive corruption in government. One effort to prevent another such shameful episode was to require all law students to study legal ethics.

C. Diversity and discrimination in the legal profession

Until the second half of the twentieth century, most American lawyers were Caucasian Protestant men from prosperous families. They mostly refused to allow immigrants, Jews, Catholics, people of color, or women to become lawyers.86

When you look around your law school classrooms, you may see men and women, people of all races and many nationalities, people with diverse religious affiliations (or with no affiliation), gay and straight people, old and young people, and people with disabilities. It has not always been so.

Why did the legal profession initially exclude women, Catholics, Jews, and members of minority groups?

The exclusion of so many people from the legal profession may have been rooted in economic self-interest, social elitism, and bias against women, people of color, and immigrants. Competition from more lawyers would produce lower fees for everyone. In addition, many of the Christian white males who dominated the profession until after World War II believed that only people like themselves had the proper “character” to be lawyers.

As a practical matter, most people could be excluded from the legal profession in its early years because admission to the bar depended on personal connections. When apprenticeship was the primary method of becoming a lawyer, it was nearly impossible for people from disfavored groups to find established lawyers willing to apprentice them. As law schools and other advances opened the bar to a greater number of people, other barriers were imposed. Some laws prohibited admission of members of certain groups.87

**FOR EXAMPLE:** California in the 1800s barred noncitizen immigrants from becoming lawyers. In 1890, the California Supreme Court denied admission to Hong Yen Chang, a Columbia Law graduate who had already been admitted in New York, making him the first Chinese American lawyer in the United States. California refused his admission because he was not a U.S. citizen, and, as a member of the “Mongolian race,” he was not legally eligible to become a citizen.88

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86. In the first third of the twentieth century, corporate and patent law were “the exclusive domains of white Christian males. Lawyers who were Jewish essentially were confined to practicing real estate and negligence law.” Jerome Hornbliss, The Jewish Lawyer, 14 Cardozo L. Rev. 1639, 1641 (1993).


88. In re Hong Yen Chang, 24 P.156 (Cal. 1890). Chang was posthumously admitted to the California bar in 2015. Gabriel Chin, Hong Yen Chang, Lawyer and Symbol, 21 UCLA Asian Pac. Am. L.J. 1 (2016).
Even after the overtly exclusionary laws were repealed, bar associations in the late nineteenth and early twentieth centuries took steps that they claimed would raise the standards of the profession. Bar associations sought to protect the public from unscrupulous or incompetent practitioners by requiring graduation from law school as a condition of bar admission, by requiring some college study as a condition of law school admission, or by imposing character and fitness requirements. These measures often resulted in exclusion of applicants from marginalized groups.

Some law schools imposed further barriers to entry. Thomas Swan, dean of Yale Law School in the 1920s, believed that law schools should not base admissions on college grades because that practice could result in the admission of students who had “foreign” rather than “old American” lineage and result in an “inferior student body ethically and socially.” Harvard Law School admitted only men until 1950. While the stated purpose of many restrictive policies was to protect the public, practicing lawyers may have been motivated also by economic and social self-interest, and by racism, sexism, and other forms of bias. Some lawyers probably viewed the resulting exclusion of women and minorities from the profession as a beneficial side effect of what they claimed was a form of consumer protection. As Professor Richard Abel explains,

At the beginning of [the twentieth] century, the professional elite were quite open about their desire to exclude Jewish and Catholic Eastern and Southern European immigrants and their sons, whose entry into the profession had been greatly facilitated by the shift from apprenticeship to academic training. The introduction of prelegal educational requirements, the attack on unapproved and part-time law schools, the requirement of citizenship, and the introduction of “character” tests were all directed toward this end, in whole or part.

1. Women lawyers

The first woman lawyer in America was Margaret Brent, who practiced law in the 1630s and 1640s. Born in England to a wealthy and powerful family, Brent received an education in the law at a time when education was denied to most

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90. Stevens, supra n. 1, at 101.
93. We drew from the following sources (and those cited below) in writing the historical material in this section: Clara N. Carson, The Lawyer Statistical Report (1999); Deborah L. Rhode, ABA Commission on Women in the Profession, The Unfinished Agenda: Women and the Legal Profession (2001); Rhode & Luban, supra n. 54; Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics — II The Modern Era, 15 Geo. J. Legal Ethics 205 n. 62 (2002).
women. She arrived in America in 1638 and set up what became a thriving litigation practice. Brent was involved in more than 100 court cases between 1638 and 1646, including many jury trials, and reportedly never lost a single one. Her skill caught the attention of Governor Leonard Calvert of Maryland, who appointed her to be his legal counsel. After the governor died, Brent served as the executor of his estate. Her skillful handling of the estate earned her a public commendation from the Maryland Assembly. Many judges at the time apparently could not fathom the concept of a female attorney. Many addressed her as “Gentleman” Margaret Brent. However, there is little evidence that Brent suffered much discrimination as a result of her sex. She was regarded as an anomaly, not as a threat, to the patriarchal organization of society. After Brent, not a single woman was permitted to practice law in America for more than 200 years.⁹⁴

When did more than a few women begin seeking entry to the bar?

During the last half of the nineteenth century, a growing number of women tried to enter the profession. During this period, judges, law school administrators, and others saw female lawyers as a threat to the social order. In 1875, the chief justice of the Wisconsin Supreme Court wrote that any woman who attempted to become a lawyer was committing “treason” against “the order of nature.”⁹⁵ The courts refused admission to women who sought entry at this time.

**FOR EXAMPLE:** Myra Bradwell, a pioneer in seeking a place for women in the legal profession, applied for a license to practice law. She met all the requirements, but the Illinois court denied her application. Although state law did not explicitly preclude women from becoming lawyers, the court concluded that legislators could not have contemplated their admission to the bar. The court said: “that God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded [when the statutes were passed] as an almost axiomatic truth.”⁹⁶

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⁹⁴. This paragraph is primarily based on the account of the life of Margaret Brent in Dawn B. Berry, The 50 Most Influential Women in American Law (1996); see also Karen B. Morello, The Invisible Bar: The Woman Lawyer in America: 1638 to the Present 3-9 (1986).
⁹⁵. In re Goodell, 39 Wis. 232, 245 (1875).
⁹⁶. Application of Bradwell, 55 Ill. 535, 539 (1869).
The Supreme Court affirmed the denial on the ground that the Privileges and Immunities Clauses of the Constitution did not give Bradwell the right to practice. Three concurring justices added:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.97

Three women applied to Columbia University Law School in 1868. Trustee and law school founder George Templeton Strong wrote in his diary, “No woman shall degrade herself by practicing law, in N.Y. especially, if I can save her.”98 All three were denied entry.99

Some of those who supported admission of women to law school offered peculiar justifications. In 1872, attorney George C. Sill wrote a letter to Yale Law School recommending that it admit women, but with this curious endorsement: “Are you far advanced enough to admit young women to your school? . . . I am in favor of their studying & practicing law, provided they are ugly.”100 Perhaps he thought that the presence of “attractive” women would distract male students from their study. Yale, apparently, was not as “far advanced” as the progressive Mr. Sill and continued to refuse law school admission to women until 1918.101

Many nineteenth-century experts opposed all professional activity and even higher education for women. In 1873, for example, Harvard University physician Dr. Edward H. Clarke published a book warning that women who pursued higher education might experience health problems as a result. He wrote that female reproductive physiology made it dangerous for women to engage in strenuous intellectual activity. He urged that such activity would divert energy from female reproductive organs to the brain, harming the health of women and

99. One of the three women denied entry was Lemma Barkeloo, who later became the first American woman to formally study at a law school when admitted to Washington University in 1869. She completed one year of legal education at the top of her class and then passed the state’s bar exam. After she died, a biographical publication reported that the cause of her death was “overmental exertion.” (She actually died of typhoid only a few months after beginning her legal career, but not before she became “the first female attorney of official record to try a case in court.”) Berry, supra n. 94, at 53-54.
100. Drachman, supra n. 98, at 43, quoting from Frederick C. Hicks, Yale Law School: 1869-1894, Including the County Court House Period 72 (1937).
101. Id.
their children. This, he warned ominously, could cause irreparable harm to the future of America.\footnote{Dr. Clarke’s writings were very influential at the time and spawned criticism of women’s colleges, even from within the colleges. One president of a women’s college wondered when the college opened “whether woman’s health could stand the strain of education.” \textit{Id.} at 39, quoting M. Carey Thomas, \textit{Present Tendencies in Women’s Colleges and University Education}, 25 \textit{Educ. Rev.} 68 (1908).}

Despite the controversy, some law schools opened their doors to women. The University of Iowa and Washington University admitted women in the late 1860s. Most other schools continued to deny admission to women. In the late 1800s, New York University, Cornell, and Boston University began to admit women. By the end of the 1920s, Yale and Columbia also admitted a few. Larger numbers of women attended part-time law programs for women only. During World War II, some schools increased the number of women admitted because of a wartime decline in enrollment. But until the 1970s, the number of female enrollees in any given law school class remained very small, sometimes because of explicit quotas. During the 1970s, women began to agitate, and sometimes to file lawsuits, to demand an end to discrimination against them in the legal profession.\footnote{Cynthia Grant Bowman, \textit{Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?} (Cornell Law Faculty Publ’ns, Paper 12, 2009), \url{http://scholarship.law.cornell.edu/facpub/12}.} This caused a major change. In 1964, only 4 percent of law students were female. By the late 1970s, many law schools enrolled 40 percent women students. By 2016, the majority of law students were women.\footnote{ABA, \textit{Enrollment and Degrees Awarded 1963-2012}, \url{http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf} (last visited Aug. 18, 2019); Elizabeth Olson, \textit{Women Make Up Majority of U.S. Law Students for First Time}, \textit{N.Y. Times}, Dec. 16, 2016.}

**Are women and men treated equally in the contemporary legal profession?**

Yes and no. While the status of women in the profession has been improving for decades, problems remain. The representation of women in positions of authority in the legal profession has grown, but men still predominate. By 2018, 35 percent of practicing American lawyers and 47 percent of people graduating from law school were women. Forty-seven percent of associates in law firms, but only 19 percent of law firm equity partners, were women. Twenty-six percent of general counsels of Fortune 500 companies and 32 percent of law school deans were women. Among federal and state court judges, 27 percent were female. Women lawyers continue to be paid less than men; the average weekly salary of women lawyers in 2016 was 77.6 percent of that earned by male lawyers.\footnote{ABA Comm’n on Women in the Legal Profession, \textit{A Current Glance at Women in the Law} (Jan. 2018). These statistics are based on analysis by the Bureau of Labor Statistics at the U.S. Department of Labor and on a calculation of the average weekly wages of male and female lawyers.} Women still experience discriminatory treatment and sexual harassment by judges, adversaries, and others in the profession. Many studies have demonstrated that gender
discrimination in legal workplaces remains commonplace, often finding that as many as half of women surveyed report problems.106

**Do some law firms ask discriminatory questions of women candidates during interviews?**

Yes. Federal and state law prohibits employers from asking questions that would elicit information that could lead to biased hiring decisions. The law forbids asking a person’s age, marital and parenthood status, national origin, race, sexual orientation, religion, or disability.107

Despite lots of policymaking and training, improper queries during interviews are still common. Here are some comments from an “anonymous recruitment director” at a law firm about what goes on and how law students and young lawyers could respond if they are asked improper questions.

Despite . . . efforts to educate interviewers about the types of questions that are inappropriate, [human resources staff] receive feedback from candidates that they have been asked questions about their age, their intention to have children, and whether or not their romantic relationships were solid enough to withstand the strain of long working hours. Yes, these questions are inappropriate. If you are asked a question of this nature, please respond by telling the interviewer that you are not comfortable answering the question. Please do your best to then move the interview forward. If this happens to you, please let the director of recruitment know by email right after the interview that you were asked an inappropriate question. If we have this information in hand, we can do our best to ensure that you are not penalized for being put in this position when your interview feedback is reviewed.108

This may be solid advice for a candidate interviewing at a large law firm that has a good human resources department. Smaller firms and other organizations often lack this infrastructure, which makes it more difficult for a candidate to know what to do. If the likely cost of confronting the problem so directly is loss of opportunity, it may be useful to deflect the question with a smile or a joke and change the subject. However, improper questions during an interview can be a red flag that there are problems in the work environment.

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Are many women lawyers subjected to sexual harassment and bullying in the workplace?

Yes. Sexual harassment of women in law practice is unfortunately commonplace, despite decades of federal and state legislation and public education aimed at prevention. The “me too” movement has brought needed attention to a longstanding pattern of misconduct. A 2018 survey of more than 5,800 people in several industries found that 26 percent of the women lawyers surveyed reported being subjected to sexual harassment at work in the last five years.\(^\text{109}\) Another study in Florida found that one in seven of the women surveyed had experienced harassment or bullying related to gender during the past three years, and most of those who complained did not get a satisfactory response.\(^\text{110}\)

A women's bar study of all Utah lawyers admitted between 1985 and 2005 found that 37 percent of female lawyers in firms experienced verbal or physical behavior that created an unpleasant or offensive environment.\(^\text{111}\) Almost a third of those felt that the level of that behavior amounted to harassment. In contrast, approximately one percent of men in firms described experiencing harassing behavior.\(^\text{112}\)

Is it common for more senior lawyers in law firms to engage in bullying of younger lawyers?

Unfortunately, bullying in law firms is also common. Like sexual harassment, bullying involves an abuse of power by a senior person over a less senior employee. Both men and women get bullied. One survey listed the following bullying behaviors, among others:

- Shouting and swearing or otherwise verbally abusing someone more junior; one person being singled out for unjustified criticism or blame;
- an employee being excluded from company activities or having his or her work or contributions purposefully ignored; language or actions that embarrass or humiliate; practical jokes, especially if they happen repeatedly to the same person.\(^\text{113}\)

A survey of 124 managing partners found that 93 percent of respondents reported bullying at their firms. The bullies generally are senior lawyers who

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\(^{109}\) Kathryn Rubino, #MeToo in the Legal Industry: Over a Third of Senior Women in the Law Say They’ve Been Sexually Harassed, Above the Law, Oct. 19, 2018.


\(^{111}\) Women Lawyers of Utah, The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms (Oct. 2010). There were 2,668 responses, and the response rate exceeded 50 percent. The margin of error of the survey was 1.3 percent. Id at 14.

\(^{112}\) Id. at 10.

are high earners. Because of this, 40 percent of the managers surveyed said that they are unable or unwilling to stop the bad behavior. And many firms don't have good procedures to discipline partners who engage in abusive behavior.\textsuperscript{114}

**Are women (and men) who work in large law firms able to successfully balance their work and personal lives?**

Often not. We talk further about law firm culture and professional satisfaction issues in Chapter 13, but here we consider this question as part of a conversation about treatment of women in the profession.

Professor Eli Wald is not optimistic about improving the work/life balance for female lawyers in large firms. He suggests that large firms are driven by a new, “hypercompetitive” ideology that “puts greater emphasis [than in the past] on around-the-clock commitment” and that, because of new competitive pressures, firms are increasingly hostile to part-time work or parental leaves. He suggests that while some individual women lawyers will advance in large firms, “the progress of women lawyers as a group” will be “more difficult than it used to be.”\textsuperscript{115}

The pressure to work long hours seems to be highest in large firms. Some small firms demand long hours also, but others do not. Many women start their careers focused on achievement and status within their workplaces. At some point, some experience a shift in priorities and want work environments that support an improved work/life balance. For many women, this shift occurs because of the demands of rearing children. While some large firms try to accommodate these lawyers, large firms tend to impose relentless time demands. Some women find greater professional satisfaction working in small firms, government, corporations, nonprofit organizations, or higher education, although these settings can present problems and tensions as well.\textsuperscript{116}

**Are law firms making efforts to improve the treatment of women?**

Some firms have made serious commitments to improving the work environment for women lawyers. One firm partner, Lynne Anderson, told the *ABA Journal* that to change the culture, one needs “more than just the trappings”; the

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\textsuperscript{114} Kathryn Rubino, ‘The Bullying in Biglaw is Off the Charts — And Managing Partners are Too Scared to Stop It,’ Above the Law, Oct. 26, 2016.

\textsuperscript{115} Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 Fordham L. Rev. 2245, 2286-2287 (2010).

firm needs “a roll-up-your-sleeves commitment to the advancement of women in the firm,” including “compensation transparency, a 12-week paid parental leave policy, flex-time and reduced-hours work options, and a strong women’s leadership committee that includes the firm chairman.”

2. Lawyers who are people of color\textsuperscript{118}

Like women, African Americans and members of other minority groups were largely excluded from the practice of law for a long time. When lawyers were trained through apprenticeship, few African Americans could find established lawyers willing to train them, and few could afford the fees even if a lawyer was willing. Until the late nineteenth century, law school doors were largely closed to black people as well. Because African American students could not enroll in “white” law schools, law schools were set up to serve students of color. About a dozen black law schools were established before 1900.\textsuperscript{119} Of those, only Howard University’s law school raised enough funds to stay open. Many Howard law graduates became prominent in private practice, government, and public interest law.

One of them was Thurgood Marshall, who grew up in Baltimore and wanted to attend the University of Maryland Law School but was barred from admission there because of racial segregation. In 1936, his first significant court victory, Marshall forced the desegregation of the school.\textsuperscript{120} He went on to become one of the lawyers who argued \textit{Brown v. Board of Education} before the U.S. Supreme Court.\textsuperscript{121} Marshall was appointed by President Lyndon Johnson to the Supreme Court as its first black Justice.

Efforts to “raise standards” for admission to the practice of law in the first third of the twentieth century made it more difficult for African Americans to enter the profession. Because black Americans experienced disproportionately high levels of poverty and lack of access to quality education, they often could

\begin{itemize}
\item \textsuperscript{117} Liane Jackson, Minority Women Are Disappearing from BigLaw—and Here’s Why, ABA J., Mar. 1, 2016.
\item \textsuperscript{118} We relied on the following historical sources, in addition to those cited below, in writing this section: ABA Task Force Report on Minorities in the Legal Profession (Jan. 1986); Auerbach, supra n. 54; Berry, supra n. 94, at 55-58; Rhode & Luban, supra n. 54; Geraldine R. Segal, Blacks in the Law: Philadelphia and the Nation 1-17 (1983).
\item \textsuperscript{120} The case was \textit{Pearson v. Murray} (before correction in 1961, reported as \textit{University of Maryland v. Murray}), 182 A. 590 (Md. 1936). The story is told in Randall Kennedy, Schoolings in Equality, New Republic, July 5, 2004.
\item \textsuperscript{121} 347 U.S. 483 (1954).
\end{itemize}
C. Diversity and discrimination in the legal profession

not satisfy requirements for entry to the bar or to law school. From 1937 to 1947, Alexander Pierre Tureaud was the only black lawyer practicing in Louisiana.\footnote{122} Even in 1960, only three black lawyers (out of more than 2,500 lawyers) practiced in Mississippi, even though the population was 42 percent black.\footnote{123}

What was the attitude of the ABA, the state courts, and the law schools toward admission of African Americans before the civil rights movement?

Bar associations often were hostile to aspiring black lawyers. In 1912, three black lawyers were accidentally given memberships in the ABA. After much controversy, they were allowed to retain their memberships, but the ABA amended its application form to ask applicants to state their race and sex. Only in 1943 did the ABA declare that membership did not depend on these factors.\footnote{124}

During the second half of the nineteenth century, some state courts admitted black lawyers, but others did not. In 1847 and again in 1868, the Pennsylvania Supreme Court rejected the bar application of George B. Vashon because he was black. The court was apparently unmoved by the fact that Vashon had both a bachelor’s degree and a master’s degree from Oberlin College; had studied Greek, Latin, and Sanskrit; and had clerked for a Pennsylvania judge. Though Pennsylvania denied admission to Vashon, he was admitted to the bars of New York, Mississippi, and the U.S. Supreme Court. In 2010, Pennsylvania admitted him posthumously.\footnote{125}

Starting in 1896, some law schools relied on the Supreme Court’s “separate but equal” ruling in \textit{Plessy v. Ferguson} to justify discrimination.\footnote{126} For example, an African American applied for admission to the University of Texas Law School after the \textit{Plessy} decision. Rather than admit the student, the state of Texas added law classes at a nearby “impoverished black institution,” which offered college credit for “mattress and broom-making” and other vocational training for menial jobs.\footnote{127} Two of the three law classrooms “lacked chairs and desks.”\footnote{128} In 1948, an appellate court in Texas held that this hastily created “law school” was “substantially equal” to the University of Texas Law School.\footnote{129}

\begin{figure}[h]
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\caption{George B. Vashon}
\end{figure}

\begin{footnotes}
123. Abel, supra n. 92, at 100.
124. Segal, supra n. 118, at 17-18.
126. 163 U.S. 537 (1896).
127. Rhode & Luban, supra n. 54, at 1016.
128. Id.
\end{footnotes}
Court reversed this decision in 1950, with Thurgood Marshall arguing on behalf of the black students who were seeking admission.\(^{130}\)

**What happened to African American women who sought admission to the bar?**

Black women suffered double discrimination. Those not excluded because of race were often excluded because of sex. Before 1960, only a small number of black women were admitted to the bar in the United States. The first was Charlotte Ray, who applied to Howard University Law School in the late nineteenth century when the university still excluded women. She used the name C. E. Ray to disguise her sex. Ray’s appearance on the first day of class caused some commotion and debate, but the school ultimately allowed her to stay. She graduated with honors. In 1872, she became the first black woman to practice law in the United States.\(^{131}\)

**When and how did law schools end policies of discrimination against applicants for admission?**

As a result of the work of numerous lawyers, including Thurgood Marshall, then Chief Counsel at the National Association for the Advancement of Colored People (NAACP), law school admissions barriers across the country were declared to be unconstitutional. *Brown v. Board of Education*, decided in 1954, overturned the “separate but equal” doctrine of *Plessy*. In *Brown*, the Supreme Court strongly proclaimed “separate” education to be “inherently unequal.”\(^{132}\) Most schools ended their exclusion policies, but many were slow to admit more than a token number of black students.\(^{133}\)

In fact, by 1970, most law schools had established programs to recruit and retain minority students. But the legal struggle over admission policies did not end then. Organizations opposed to affirmative action supported lawsuits challenging affirmative action policies, particularly by public law schools. In 2003, the U.S. Supreme Court sustained the affirmative action plan of University of Michigan Law School, holding the creation of a diverse educational community was a compelling state interest.\(^{134}\) In 2019, a federal court found that Harvard University had not discriminated against Asian American students compared to other students of color but litigation of this issue will continue.\(^{135}\)

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\(^{132}\) 347 U.S. 483, 495 (1954).


\(^{135}\) Grace Huang Lynch, Harvard affirmative action case far from over as plans for appeal begin, PRI’s The World, Oct. 2, 2019.
African Americans and other people of color surmounted a major hurdle in gaining admission to law school, but many nonwhite law students experience various forms of discrimination during law school. For example, some professors and students make remarks in or out of class that reflect race bias. Students of color are sometimes excluded from study groups and journals. While there has been progress over the years, these and other problems of race discrimination in law schools persist.  

Are African Americans and other people of color still underrepresented in the legal profession?

Yes. Nationally, African Americans now constitute 13.4 percent of the U.S. population but only 5 percent of the bar. Latinos are 18.1 percent of the population but only 5 percent of the bar. Asian Americans are 5.8 percent of the population but only 3 percent of the bar. Eighty-five percent of American lawyers are white. Professor Deborah Rhode deems law “one of the least racially diverse professions in the nation.”

Barriers related to socioeconomic status have disproportionately impacted people of color. However, the social, legal, and economic progress of people of color has resulted in significant increases in the number who are joining the legal profession. The percentage of first-year African American law students jumped from approximately 1 percent in 1964 to 8 percent by 2001. After that, the proportion leveled off. In 2018, 7.9 percent of first-year law students were African American.

Is there still racial discrimination in law firms and corporate general counsels’ offices?

Although the civil rights movement took place decades ago, with lawyers playing many leading roles, discrimination persists in the American legal profession, although its manifestations have become subtler. Some recent research examines contemporary discrimination in large firms.

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141. Most research tends to focus on large firms, so we know less about discrimination in small firms. However, discriminatory behavior may be as prevalent or even more prevalent at small firms. Small firms may be less likely, for example, to have articulated diversity policies or to follow such policies when hiring.
African American and Latino lawyers are well-represented in the summer law clerk and first-year associate ranks of large firms, but they are seriously underrepresented at the partnership level. In 2009, about 30 percent of the largest firms had no partners who were members of minority groups. As of 2013, people of color accounted for less than 6 percent of the equity partners at the nation’s largest firms. Members of minority groups and women tend to leave large firms sooner than other lawyers do. In some cases, their departures may be unrelated to the firms’ treatment of them, but Professor Richard Sander notes that “their opportunities to learn and perform once inside the firm are, in some ways, distinctly inferior,” and, as a result, their “attrition at corporate firms is devastatingly high, with blacks from their first year onwards leaving firms at two or three times the rate of whites. By the time partnership decisions roll around, black and Hispanic pools at corporate firms are tiny.” According to Sander, the “most influential theory” accounting for the attrition is stereotyping:

[F]ew minorities are classified as potential “stars” — young lawyers who should be cultivated as future firm leaders — in the firm, and therefore few minorities get the careful mentorship, challenging assignments, and other opportunities that allow them to prove their value to the firm. Minority associates therefore tend to be stuck with routine work leading nowhere, and most leave the firm long before being formally passed over for partnerships.

Professor Sander found that black associates at firms of more than 100 lawyers are “one-fourth as likely as comparable whites in the same cohort of associates to become partners at large firms.”

Implicit or explicit bias may account for some of the problems faced by African American lawyers.

**FOR EXAMPLE:** One study by lawyer and sociologist Arin Reeves found that law firm partners gave a more negative evaluation of the written work product of an African American associate than a white associate. Sixty partners at 22 law firms were asked to review a research memo written by a third-year associate. Of the partners, 23 were women and

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146. Id. at 1766, 1806.
C. Diversity and discrimination in the legal profession

21 were people of color. Half the partners were told that the associate was African American; the others were told that the author was white. The memo contained 22 deliberate grammatical, factual, and legal errors. The partners were asked to rate the memo on a scale of 1 to 5. Partners who were told the author was white gave an average rating of 4.1. Those who were told the author was African American assigned an average score of 3.2. Female partners identified more errors and wrote longer comments, but women and minority evaluators showed the same unconscious bias as the white and male evaluators.147

In the second report of the “After the JD” study surveying lawyers who had graduated from school in 2000, 18 percent of African Americans reported that they experienced discrimination in their work, and 22 percent reported having received “demeaning comments” because of their race. African American lawyers planned to leave their current jobs at much higher rates than lawyers in other ethnic groups.148 The follow-up survey of the same lawyers in 2012 apparently did not ask questions about their experience of discrimination, but African American lawyers continued to report lower levels of satisfaction than lawyers of other ethnicities. In addition, black lawyers were paid less than white, Asian American, or Latino lawyers. In fact, the median income differential between the African American and the white lawyers had increased from about $2,000 to about $9,000 between 2007 and 2012.149

Do women of color face extra challenges in private law practice?

They do. The most “studied” sector of the profession is large law firms. There, the data show that although overt discrimination is far less than some decades ago, subtle discrimination persists at most large firms. Eighty-five percent of minority women lawyers at big firms quit within seven years. A major study in 2007 found that

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The *ABA Journal* reports that women of color exit from firms “not because they want to leave, or because they ‘can’t cut it.’ It’s because they feel they have no choice.” One fifth-year associate explained:

> When you find ways to exclude and make people feel invisible in their environment, it’s hostile. . . . It’s very silent, very subtle, and you, as a woman of color — people will say you’re too sensitive. So you learn not to say anything because you know that could be a complete career killer. You make it as well as you can until you decide to leave.\(^1\)

**3. Lesbian, gay, bisexual, transgender, and queer lawyers**

American society has made huge progress in accepting lesbian, gay, bisexual, transgender, and queer (LGBTQ) people.\(^2\) The sweeping changes in recent years to recognize gay marriages and to allow many but not all LGBTQ people to serve openly in the armed forces are both cause and effect of growing acceptance of LGBTQ people in American society. As with other civil rights movements, much work remains to be done to address problems of discrimination even after significant progress has occurred.

Only a few research studies address how LGBTQ people have fared in the legal profession. Law firms are more welcoming to LGBTQ lawyers than in the past, although the percentages of such lawyers in most firms are still small. A 2006 survey of LGBTQ California lawyers by the California state bar reported the following forms of discrimination:

- 26 percent of lesbian, gay, or bisexual lawyers reported that they had been denied a promotion,
- 19 percent said they had been denied good assignments or had received unequal benefits,
- 15 percent reported having received unequal pay, and
- 25 percent believed they lost a potential or actual client because of their sexual orientation.

None of the LGBTQ lawyers reported discussing their concerns about their negative treatment with their supervisors. In contrast, half of the female attorneys or attorneys of color surveyed who experienced discrimination discussed their concerns with their supervisors. The LGBTQ lawyers may have hesitated to report discrimination because of worries that firms would not take the complaints seriously or because they were not “out” at work. Many reported not being out in their workplaces because they were unsure of how they would

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1. Jackson, supra n. 117.
be treated.\textsuperscript{153} Some of these problems may be less prevalent now than in 2006 because of the rapid progress of the gay rights movement, but these problems persist in many environments.

A more recent study by the Minority Corporate Counsel Association indicates greater acceptance by law firms of LGBTQ lawyers. This study found that LGBTQ lawyers believe that tolerance by law firms has improved considerably but that these lawyers still face several unique challenges, including having to decide whether to “pass” or come out. The same study found that 12 percent of LGBTQ lawyers believed that their sexual orientation would hinder their advancement at their firms.\textsuperscript{154}

Surveys by NALP (formerly the National Association of Law Placement) show that the percentage of openly gay lawyers at private law firms has increased steadily, from 1 percent in 2002-2003 to about 2.2 percent in 2014.\textsuperscript{155} One way to find law firms that offer a friendlier environment for LGBTQ lawyers is to look at the Corporate Equality Index produced by the Human Rights Campaign.\textsuperscript{156}

\section*{4. Lawyers with disabilities}

Lawyers, like other humans, suffer from a wide range of conditions that limit their abilities in various ways. Some have physical problems that impair mobility, coordination, sight, or hearing. Some have chronic illnesses, mental or emotional problems, or learning issues. In times past, many people with disabilities were excluded from becoming lawyers, but in recent decades, the law has offered some protection from discrimination for people with disabilities. Countless individuals have surmounted a wide range of challenges to join the legal profession.\textsuperscript{157}

In 1990, Congress passed the Americans with Disabilities Act (ADA), thereby making a commitment to combat discrimination against people who have physical or mental disabilities. According to the U.S. Equal Opportunity Employment Commission, the ADA applies to persons who have impairments [that] substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing

\textsuperscript{153} State Bar of Cal., Center for Access and Fairness, Challenges to Employment and the Practice of Law Facing Attorneys from Diverse Backgrounds (Aug. 2006). That survey noted, however, that the small sample size “limits the statistical significance of this survey.”


\textsuperscript{155} At the largest law firms — more than 700 lawyers — the figures were 3.2 percent for associates, 2 percent for partners, and 4.4 percent for summer associates. But 60 percent of the openly gay lawyers were in just four cities (New York, Washington, Los Angeles, and San Francisco). NALP, LGBT Representation Up Again in 2013, NALP Bull., Jan. 2014.


manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered. . . .

The law requires employers with 15 or more employees to make reasonable accommodations for those who have covered disabilities unless doing so would impose unreasonable hardship on the employer. Enormous progress has been made in recognizing and respecting people who have a range of disabilities. However, the full inclusion of people with disabilities remains a work in progress.

5. Lawyers from low-income families

Socioeconomic background has an enormous impact on who enters the legal profession. People from lower-income families are far less likely to become lawyers than those whose families have higher income. One study found that only 5 percent of law students come from families whose income is in the bottom quartile in the United States, while 67 percent are from the top quartile. The situation at elite schools is even more extreme: only one percent of students are from the bottom quartile, while 82 percent are from the top quartile, with 57 percent coming from the top 10 percent.

These figures mirror the increasing income inequality and lack of social mobility in the United States. Law schools work to increase financial aid to make attendance more affordable. Chapter 14 explores these issues in greater detail.

6. Other bases of discrimination in the legal profession

The legal profession aspires to judge people based on knowledge and skills, but it still has some way to go to eliminate prejudice and discrimination. For example, despite laws prohibiting employers from discriminating against older people, many law firms still maintain mandatory retirement policies or otherwise make older lawyers feel less welcome. Also, many lawyers experience discrimination based on other criteria. One study of law firms, for example, found that lawyers with easy-to-pronounce last names rose to partnership faster than those with

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158. U.S. Equal Emp’t Opportunity Comm’n, Americans with Disabilities Act, Questions and Answers, https://www.eeoc.gov/eeoc/publications/adaqa1.cfm (last visited Sept. 17, 2019). The explanation also explains that “but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered.” Id.


difficult-to-pronounce names; this was true even when only lawyers with Anglo-Saxon names were included in the study. The author, a professor of marketing, observes that “people generally prefer not to think more than necessary [and] prefer objects, people, products and words that are simple to pronounce and understand.”\(^\text{162}\) This discrimination based on names occurs throughout society, of course. Would Robert Zimmerman have been as much beloved as Bob Dylan? Would Judy Garland’s career have soared as it did if she had been called by her real name, which was Frances Ethel Gumm? Apparently, neither thought so.

The issue of easy-to-pronounce names provides but one example of other bases of discrimination that are not yet recognized as prohibited categories of discrimination. Others may include height (tall people are preferred),\(^\text{163}\) weight (thin people are preferred),\(^\text{164}\) hairstyle,\(^\text{165}\) and attractiveness,\(^\text{166}\) where those characteristics are not relevant to job performance. What about family background? Part of the work of making the legal profession more inclusive is to take seriously concerns about unfair treatment even if the categories are not yet recognized by discrimination law.\(^\text{167}\)

**What steps is the organized bar taking to stop discrimination and sexual harassment in the workplace?**

In recognition of the continuing evidence of discrimination in the legal profession, the ABA in 2016 adopted a new Rule 8.4(g):

> It is professional misconduct for a lawyer to . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or

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\(^\text{164}\) “Data suggest that every additional inch in height is associated with a 1.8 to 2.2 percent increase in wages, or roughly $789 per inch per year.” Id., citing Nicola Persico et al., *The Effect of Adolescent Experience on Labor Market Outcomes: The Case of Height*, 112 J. Pol. Econ. 1019, 1021 (2004); see also Adam Alter, *People with Easy-to-Pronounce Names Are Favored*, NYU Experience: Faculty and Research (Feb. 7, 2012), http://www.stern.nyu.edu/experience- stern/faculty-research/adam-alter-names-study.


\(^\text{166}\) In 2019, the New York City Commission on Human Rights issued guidelines prohibiting discrimination based on hairstyle, which is now recognized as one form of race discrimination. The guidelines recognize the right of people to wear “natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state.” Stacy Stowe, *New York City to Ban Discrimination Based on Hair*, N.Y. Times, Feb. 18, 2019.

\(^\text{167}\) See Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment and the Law*, 14 Asian Am. L.J. 165 (2007) (reporting that “[e]mpirical evidence suggests that in the context of employment decision-making, the more attractive a person, the more likely she is to be hired and the more highly she will be paid,” citing Lucy M. Watkins & Lucy Johnston, *Screening Job Applicants: The Impact of Physical Attractiveness and Application Quality*, 8 Int’l J. of Selection & Assessment 76 (2000)).

\(^\text{168}\) Lerman recalls a conversation in the 1980s with a male law professor colleague. She was seeking approval of academic credit for a project to assist victims of sexual harassment on campus. This colleague became agitated and exclaimed that “sexual harassment is not a legal issue.”
discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

As of 2017, 24 states and the District of Columbia had rules prohibiting lawyers from engaging in harassment and discrimination, but none was as broad as the new rule adopted by the ABA. To implement its new rule with respect to sexual harassment, the ABA House of Delegates adopted a resolution in 2018 that all employers in the legal profession [should] adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

169. ABA, supra n. 106, at n. 10.