

# The Sisyphean Struggle for Secure Employment

James Fetter

In Greek mythology, a heroic figure named Sisyphus was condemned to repeat for eternity the same meaningless task of rolling a boulder up a mountain, only to see it roll down again. This myth has always resonated with me, because it mirrored my own seemingly never-ending struggle as a person with a visible disability to obtain secure employment.

I am in my late thirties. I have a Ph.D. and a J.D., both from highly ranked programs at elite universities. I have published a peer-reviewed article in an academic journal, graduated in the top ten percent of my law school class, and have clerked on the Fourth Circuit. I recite these accomplishments not to brag or dazzle the reader but to perform the kind of credentialing that has been constantly demanded of me in my search for employment, and that is still never enough. This is because I am also blind and thus all too frequently presumed incompetent, even as blind judges sit on both the Michigan Supreme Court<sup>1</sup> and, until recently, on the United States Court of Appeals for the D.C. Circuit.<sup>2</sup>

In light of my credentials, it may be surprising to hear that I have yet to hold the same position for more than two years, though not for lack of trying. While in graduate school and during my subsequent postdoctoral fellowship, I applied for dozens of tenure-track positions, visiting assistant professorships, postdocs, and even part-time adjunct positions. But the only job offer I received was for a noncompetitive postdoc in the department from

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1 See Justice Richard Bernstein, MICHIGAN SUPREME COURT, <https://www.courts.michigan.gov/courts/supreme-court/justices/justice-richard-bernstein/> (last visited Apr. 11, 2022).

2 See David S. Tatel, U.S. COURT OF APPEALS - D.C. CIRCUIT, <https://www.cadc.uscourts.gov/internet/home.nsf/content/vl+-+judges+-+dst> (last visited Sept. 17, 2020).

which I earned my Ph.D. A few years into the disheartening process of seeking employment in academia, I asked my advisor to level with me and tell me whether, or how, my blindness was affecting my job search. To his credit, he did so, explaining to me that, in a market awash with talented, newly minted Ph.Ds., most departments did not want to deal with what they perceived to be the added headache of providing accommodations for an employee with a disability, since they had their pick of qualified potential hires who did not need any such accommodations. He compared it with similar biases against candidates who would have had to obtain a visa to work in the United States, biases that he had directly observed while serving on hiring committees. He further informed me that, to have any realistic chance of landing an academic position, I would have to be “head and shoulders” (his exact phrase) above all of the, in most cases, several hundred candidates who applied for each tenure-track position or somewhat prestigious postdoc.

Eventually, I decided enough was enough and transitioned to law. As an undergrad, I had considered law school, either instead of or jointly with my Ph.D., so the decision to change careers was not a difficult one. I also hoped that, as a lawyer, I would have access to far more job opportunities and would be in a better position to change the negative misconceptions and unwarranted fears surrounding disability, either by having a greater cultural impact or by directly litigating against institutions that had previously violated federal anti-discrimination laws, such as the Americans with Disabilities Act, with impunity. Whether either hope is warranted is yet to be determined.

Once I decided to become a lawyer, attending a Tier One law school became my immediate priority. Although I did not expect to have to be “head and shoulders” above every candidate for a legal job as well—the legal job market, though tight and extremely competitive, was not nearly as tight as the job market for tenure-track positions in academia—I assumed that I would, at a minimum, have to obtain credentials placing me firmly in the top ten percent of job candidates to have a realistic chance of securing full-time employment as an attorney. To gain admission to a law school I would consider attending, I needed to take, and do well on, the LSAT. I knew that I would have to face the annoyance of proving, yet again, that I was still blind, had previously received accommodations on standardized tests and other educational settings, and was thus entitled to certain accommodations on the LSAT.<sup>3</sup>

But I did not anticipate any serious difficulty obtaining a score in the high 170s on the LSAT—a score good enough to get me into Yale and obtain a full

3 When I took the LSAT, LSAC required proof that I had received accommodations on all standardized tests I had previously taken, including in high school, and copious other evidence of accommodations I had received throughout my education, up to and including individualized education programs (“IEPs”) from as far back as middle school. I thus had to obtain, *inter alia*, reports of accommodations I received on the SAT, a test I had last taken in the late 1990s, IEPs from high school, an accommodations letter from my undergraduate institution (I had graduated in 2005), and, of course, much more recent proof from an ophthalmologist that I was, in fact, blind. I have been blind since birth, and I have no other disabilities or need for accommodations not related to my blindness.

ride at other Top Fourteen law schools. I knew that a score in the mid- to high 170s should be in reach for me, because I had previously obtained near-perfect SAT and GRE scores, and I assumed that all of these tests measured the same set of skills. I also knew that obtaining a score outside of this range would effectively bar me from attending a Top Fourteen school, notwithstanding my other credentials and accomplishments. Though I appreciated the absurdity of allowing a single test score to operate as a mechanism for sorting the wheat from the chaff, so to speak, and though I recognized that a system that depended so heavily on one imperfect test discriminated against low-income and numerous disabled students, I also knew that my own professional success depended on obtaining as high a score as possible.

As soon as I began preparing, however, I recognized that I faced a serious problem, namely, completing the logic games section of the exam accurately and quickly. As everyone who has taken the LSAT knows, it is virtually impossible to complete this section in the time allotted without drawing diagrams. And as a blind person, I do not have an option of drawing diagrams. Though there are methods for doing the games using Microsoft Excel and other accessible tools, none of these methods appears in any study book or prep course. It is thus up to individual blind people to attempt to invent a method on their own and from scratch for doing the games under intense time pressure, while all other test-takers who make the effort to study for the LSAT are given various visual methods in any decent test preparation book. This creates an unnecessary accessibility barrier, and one that will disappear as of 2023, as required by a consent decree.<sup>4</sup>

A few days before I was scheduled to take the LSAT, I discovered by accident while corresponding with the testing center that I would be expected to dictate the essay portion of the test to a human scribe, who would then handwrite the response. I had requested, and LSAC had never expressly denied, the accommodation of writing the essay on my computer and printing it. My sole mistake was not noticing the absence of this accommodation in my accommodations letter from LSAC. When I brought the issue to LSAC's attention, I was initially told that my time to appeal any accommodation denials had expired, and I had no choice but to live with LSAC's decision. I refused to accept this response and demanded an explanation of why this accommodation was denied. In lieu of an explanation, LSAC granted the accommodation as a "one-time courtesy," most likely because there was no rationale for denying it, and the denial itself was probably a clerical error, since this section is unscored anyway. I thus learned a valuable lesson about legal negotiations well before entering law school, namely, to look out for omissions of key terms from a contract, settlement agreement, or other binding document drafted by the other side. I also learned that forceful advocacy gets results. I

4 See Nyman Turkish PC, *Statement on the amicable resolution of Binno v. LSAC lawsuit*, CISION PR NEWSWIRE (Oct. 7, 2019), <https://www.prnewswire.com/news-releases/statement-on-the-amicable-resolution-of-binno-v-lsac-lawsuit-300931402.html>.

would, however, have preferred to learn these lessons some time other than a few days before a high-stakes test.

When I arrived at the testing site, I encountered two significant access barriers: being prohibited from using headphones with my computer, on which I would be taking the test using a screen reader, and having two proctors assigned just to me who shuffled papers constantly and had difficulties operating a timer. While using a computer with a screen reader was listed on LSAC's accommodation request form, headphones or earbuds were not. Instead, blind test-takers just had to know that if they wanted to be able to clearly hear their computer and filter out distractions during one of the most high-stakes, high-pressure tests they would ever take, they had to expressly request the ability to bring their own headphones along with their own computer and screen reader. I also had no reason to expect the additional distraction of paper shuffling or, in one instance, helping a proctor to keep time and avoid inadvertently giving me an extra hour to complete one of the sections. In no small part because of these various barriers, I obtained a score of 165, a score that I knew that many students who went on to become successful attorneys would have found satisfactory, but a score that would be unlikely to get me into a Top Fourteen school and did not reflect my demonstrated ability to ace comparable standardized tests.

I then had a decision to make. Since I took the LSAT in December of 2014, I could either take it again but delay applying to law schools or apply with the score I had and hope for the best. I was unemployed by that point, having struck out on the academic job market and being unable to pick up the types of odd jobs (e.g., Uber driver) that nondisabled people can use to fill in an unexpected gap in employment. So, I decided to take my chances and apply with the score I had.

Perhaps because of my previous grades and work experience, I received multiple offers of admission, including several full-tuition scholarships, from respectable law schools, such as Indiana, Minnesota, and the one I ultimately chose, Ohio State. To a degree, being barred from the Top Fourteen and landing at Ohio State was a blessing in disguise; my wife was from, and wanted to stay in, Ohio, and I was more than happy to oblige, especially if I could attend law school free of charge at the state's flagship institution—and, I wrongly assumed, easily find employment in Ohio afterward. Although not attending a Top Fourteen school all but ensured that certain positions, such as a Supreme Court clerkship, would either be completely or nearly out of reach, how much difference could it really make in obtaining a solid job at a respectable law firm in Ohio or somewhere in the Midwest, where we both hoped to live? In what world would I have difficulty landing a position at either a strong regional or even an Am Law 100 firm, if I graduated in the top twenty percent or certainly the top ten percent of my class? Little did I know just how difficult these seemingly reasonable goals would be to achieve. Indeed, I still have not achieved them and have no idea if I ever will.

My law school experience itself was, though not free of accessibility glitches, roughly equivalent to those faced by nondisabled law students. I obtained all my textbooks on time and in accessible format, a wondrous novelty to me, since I had been required to scan, or independently find a sighted person willing to scan, most of my textbooks and other materials in both college and graduate school. I did not have a single fight about accommodations with any of my professors or the administration.

My only struggle with obtaining necessary accommodations concerned my work on law review. As everyone who has served as a staff editor on a law journal knows, the bulk of the work consists of checking many hundreds of citations for accuracy and proper Bluebooking. In principle, this did not present a problem, except that I often had to convert the PDF version of whatever article the author had cited to an accessible format before performing the cite check. This is because many machine-readable PDF files are not properly encoded to interact with a screen reader, which means that I often had no way of reading the page numbers in the documents on which the cites were based, unless I first converted them to Microsoft Word or another accessible format.

Converting numerous articles to alternative formats added some time to the cite-checking process. Nevertheless, when I requested a two-day extension on a particularly long and dense article, I was rudely rebuffed. But a brief e-mail to the assistant dean solved the problem, and I never again faced any blowback when requesting minor time extensions or other accommodations.

Even so, this comparatively minor bump in the road illustrated the depth of misunderstanding among my peers concerning the whole point of reasonable accommodations. They are not a courtesy afforded to students and professionals with disabilities at our convenience, so that we can pretend that the disabled are equal to the rest of us and give ourselves a pat on the back for including them. Instead, they are the means by which society makes up for its broader systemic failure to design an environment in which the disabled could, in most cases, easily compete with few or no accommodations. In this case, for instance, I may not have required any extra time for the cite-checking process if all PDFs of law review articles were fully accessible in their native format. Likewise, it makes no sense for law journals to edit, and expect write-on and student Note submissions in, hard-copy paper in the second (and now third) decade of the twenty-first century. Although I thankfully had no difficulty having this requirement waived in my case, this and similar antiquated norms put law students with disabilities in the unenviable position of requesting accommodations before they even apply for journal membership. And finally, law schools must find a way to integrate some sort of diversity training into their curricula, and that training must somehow include disability and send the message that accommodations for disabled students and professionals are both necessary to level the playing field and required by federal law.

I also faced another barrier of sorts in the form of exclusion from a pipeline program designed to assist minority law students in landing positions with law firms during their 1L summer. I expressed interest in participating in this

program because, after all, I am a member of a minority who face systemic discrimination in employment.<sup>5</sup> Thus, I reasoned, it would make sense for me, and other disabled law students, to be included in a pipeline program whose *raison d'être* was to improve employment outcomes for minorities.

But as I was politely informed, I did not qualify, because I was not the right kind of minority. I did not press the issue, in part because I believed—naively, as it turned out—that my grades and other credentials would eliminate any need for special treatment, and in part because I recognized that, whatever discrimination I would face, I benefited to some extent from the unearned privileges associated with being a white male in American society. In retrospect, I wish that I had raised more of a ruckus. The exclusion of disability from diversity, especially in higher education, is a pervasive problem of which the exclusion of law students with disabilities from a minority pipeline program at a particular law school is but one of many symptoms.<sup>6</sup> More concretely, my exclusion from this program limited my choices for 1L summer employment, and though I had a wonderful, albeit unpaid, experience at Disability Rights Ohio, I unwittingly pigeonholed myself as the disabled disability rights activist who couldn't hang with the elite lawyers in Big Law. This is not idle speculation on my part; I was frequently questioned during job interviews about whether I wanted to work at a large law firm that did little to no civil rights litigation.

In the fall of my 2L year, I, like so many of my colleagues, competed for a limited number of coveted summer associate positions with national and strong regional law firms through the on-campus interviewing process. I was firmly within the top ten percent of my class, had graded onto law review, and had far more prior work experience than most of my colleagues.

Initially, things seemed to be going about as one would expect based on my credentials. Out of twenty or so applications, I received thirteen interviews and six callback interviews, including an in-person interview with a powerhouse Wall Street firm in New York to which I applied on a whim. But I received

5 See, e.g., *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LABOR STATISTICS (Feb. 24, 2022), <https://www.bls.gov/news.release/disabl.nro.htm>. In 2021, the unemployment rate for people with disabilities was 10.1 percent, nearly double that of people without disabilities at 5.1 percent. In addition, the unemployment rate for people with disabilities was higher across all age and educational attainment groups. And whereas 63.7 percent of people without a disability were employed, only 19.1 percent of people with a disability were employed. In sum, people with disabilities are always in a recession, as it were, even when the labor market for non-disabled workers is booming.

6 See Lennard J. Davis, *Why Is Disability Missing From the Discourse on Diversity?*, CHRON. OF HIGHER EDUC. (Sept. 25, 2011), <https://www.chronicle.com/article/why-is-disability-missing-from-the-discourse-on-diversity/>. “The rather limited underlying concept behind the idea of diversity in the university is laid out in the philosophy: ‘We are all different—therefore we are all the same.’ But if difference is being equated with sameness, then how can being different mean anything? That contradiction is resolved by finding some ‘other’ to repress (an other whose existence is barely acknowledged). That other is disability. What diversity is really saying, if we read between the lines, is, ‘We are different and yet all the same precisely because there is a deeper difference that we, the diverse, are not.’”



only one offer for a summer associate position, with the Columbus office of a national law firm, well after candidates with lower grades were snapped up by better firms.

Nevertheless, I was glad to have this offer, because I knew by this time that grades and credentials alone would not overcome the persistent skepticism facing job candidates with disabilities in law and numerous other industries. I knew that I would have to work twice as hard to ensure that my prospective employer would believe that I could add value to its practice and thrive in the fast-paced world of high-stakes litigation, in which there is precious little room for error. But when I began my summer associate position, I quickly learned that working twice as hard would be only half the battle.

This firm, like many others, had a document management system to help keep track of its extensive caseload. And, like much proprietary or enterprise software, its document system was largely inaccessible to me, because it had not been designed to allow a screen reader to interact properly with it. I could not, for instance, read the titles of most of the edit fields used for searching for a case or type of document. The firm's technical staff reached out to the vendor and tried, for about half a day, to develop a patch that would allow my screen reader to work with the system. When this effort failed, they informed me that they had been instructed to wait to take further action until the firm decided whether to hire me as a full-time associate. In other words, the firm wouldn't spend another dime to fix a serious accessibility barrier until it determined whether to extend me, a highly qualified disabled law student, an offer of full-time employment. And in the meantime, I would have to prove myself with one hand tied behind my back, so to speak.

Even so, I received high praise during my midsummer review. Notwithstanding the accessibility barriers, I had completed more assignments than any of the other summer associates, and all the feedback about the quality of my work was positive. I thus thought that I was well on my way to receiving an offer of full-time, long-term employment and that the firm would have plenty of time to address its inaccessible document system before my first day as a real associate.

I learned just how wrong I was during my exit interview during the last day of my summer position. For the first time, my seriousness as an aspiring lawyer was called into question. I was grilled about whether I even wanted to work at a large firm, in light of my academic background and my supposed desire to specialize in constitutional law, a desire that I was neither aware of nor had expressed to anyone at the firm. I was even accused of focusing too much on having a good time for asking, during a summer associate event, whether the bar was still open, something that I, as a blind person, could know only if someone told me. For context, my associate mentor, a nondisabled white male, regaled the female hiring partner with a popular love song while extremely inebriated at an event during his term as a summer associate, behavior that caused him no difficulty in being hired.

Of course, the partner interviewing me never brought up blindness or the expense of fixing an inaccessible document management system. But one does not need a Ph.D. to recognize the alternative facts and sudden questions about my background for what they were: the thinnest of pretexts for disability discrimination and the most transparent of excuses for not spending money to remedy a problem that should never have existed to begin with. Indeed, according to the same partner who conducted my exit interview, the firm would advise its clients facing potential litigation over their inaccessible websites to fix the problem if and only if it was cheap to do so and otherwise to wait to be sued. Apparently, the firm took a similar approach toward its own internal accessibility barriers.

I also knew that several attorneys at the firm questioned my basic abilities as an aspiring lawyer. A few attorneys expressed amazement that my assignments were perfectly formatted, indicating that they expected a subpar work product from a blind person. My associate mentor had also told me the evening before my exit interview that, though I could not handle “visual evidence,” he thought that I could still do the advocacy portion of the job. In two years of practice and the first months of my clerkship, I have yet to encounter a case in which handling “visual evidence” was an issue. To be fair, however, he was half right; I have since presented an oral argument in federal district court in support of a portion of a motion on which my client was unambiguously victorious.

Because I was not offered a full-time position by a well-respected firm in the Columbus market, I was in the unenviable position of seeking employment during my 3L year with the double stigma of blindness and a no-offer. Again, I applied widely, and again, I got a handful of first and second interviews. But somehow I was never quite good enough to receive an offer of full-time employment, while, as before, my colleagues with much lower grades had no problem obtaining multiple offers.

As my options in Ohio dwindled, I applied for a one-to-two-year fellowship set aside for law students with disabilities at a prestigious but small firm specializing in disability law and civil rights in Baltimore, Maryland. Since I had already been questioned about my ability to thrive in a large law firm, I was concerned about being pigeonholed as a blind attorney who could handle only ADA litigation. I also wanted to earn every job based on merit rather than having disability be a factor, either positive or negative, in the evaluation of my credentials. But when I received an offer from this firm, I knew that I had no real choice but to accept. It was either make this move and hope that I could find something once the fellowship ended or have yet another “gap year” between law school and a second career change in less than four years.

I finally got a break in my favor, when I obtained a clerkship on the Fourth Circuit. Finally, for the first time in my life, all thanks to an enlightened federal judge who chose to let my resume speak for itself, I had a realistic shot at long-term, fulfilling employment in the legal field. After several nerve-wracking months of searching in the middle of the pandemic, this shot paid off when I



was offered a position as an associate at an AmLaw100 firm, where I hope, at long last, to start my career.

But until I received this offer, I had every reason to ponder the following questions. Will firms be satisfied that I can handle whatever curveballs litigation throws at me, or will they still question my capacity to perform under pressure? Or no matter how impressive my credentials may be, will many firms decide a priori that there is simply no way that a blind person can possibly handle their extremely hectic, high-pressure practice? Will a firm extend an offer of employment, only to withdraw it as soon as it discovers that it must spend money to retrofit an inaccessible system? And what does it say about the continued prevalence of discrimination against aspiring lawyers with disabilities that such questions even need be asked more than thirty years after the passage of the ADA?

Though my ability to obtain accommodations with little to no resistance while in law school demonstrated that the legal profession has made progress in integrating people with disabilities into its ranks, my seemingly never-ending search for long-term employment shows how many unnecessary barriers still remain between young lawyers with disabilities and their dreams. As my and the other first-person narratives in this issue make crystal clear, those of us with disabilities striving for a meaningful career in the law will continue to do more than our part. We will continue to work twice as hard as everyone else, to relocate wherever we must to take that one job that gives us a chance, and tirelessly advocate for ourselves whenever we face access barriers, low expectations, or the placing of question marks next to our credentials, much as testing companies once placed asterisks next to our standardized test scores.<sup>7</sup>

But for us to reach anything resembling our full potential both as lawyers and as human beings, we need the legal industry to meet us halfway. We need employers to evaluate the accessibility of their workplaces before they hire a disabled employee. If accessibility, whether of physical or virtual spaces, remains an afterthought until a disabled candidate shows up for an interview, employers have an economic incentive to find or invent a pretext for eliminating that candidate from consideration, especially if the employer has other qualified candidates from which to choose.

We also need our resumes to be taken at face value. When we excel in law school, we should not be forced to prove, before taking the bar let alone a deposition, that our academic success will translate into success in law practice, while other nondisabled candidates with solid credentials are assumed competent until proved otherwise. Because I know that my resume may never be taken at face value, I have done everything in my power to ensure that my credentials and accomplishments appear to be more impressive than those of most of my nondisabled peers. And yet, I still question whether I am quite

7 See, e.g., Stephen G. Sireci, *Unlabeling the Disabled: A Perspective on Flagging Scores From Accommodated Test Administrations*, 34 EDUC. RES. 3-12 (Jan. 2005), [https://www.researchgate.net/publication/242531560\\_Unlabeling\\_the\\_Disabled\\_A\\_Perspective\\_on\\_Flagging\\_Scores\\_From\\_Accommodated\\_Test\\_Administrations](https://www.researchgate.net/publication/242531560_Unlabeling_the_Disabled_A_Perspective_on_Flagging_Scores_From_Accommodated_Test_Administrations).

good enough. Did I fall short by failing to crack the top five percent of my law school class? Should I not expect to be taken seriously, unless I obtain a Supreme Court clerkship in addition to my current appellate clerkship? What if I had waited a year, obtained a higher LSAT score, and gone to Yale? Such double standards are discrimination, pure and simple, and their effects on aspiring disabled lawyers go well beyond the merely professional.

Until these changes take root, my efforts, and those of so many other highly qualified people with disabilities, to ascend to the heights of the legal profession or even just to hold down a job for more than a few years will be about as fruitful as those of Sisyphus, as he rolls the same boulder up the same mountain over and over again only to watch it roll back to the bottom, as if he had done nothing at all. We will continue to roll our respective boulders to the summits of our respective mountains, because we do not believe in giving up. But we need help to keep them there.